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THE PACIFIC REPORTER

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VOLUME 130
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING
UTAH, NEW MEXICO, OKLAHOMA, COURTS OF APPEAL
OF CALIFORNIA AND COLORADO, AND CRIMINAL
COURT OF APPEALS OF OKLAHOMA

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

MARCH 17 — APRIL 28, 1913

126

135

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¹⁰ Assigned to Department 1 January 13, 1913.

¹¹ Became Chief Justice January 13, 1913.

AMENDMENTS TO RULES

SUPREME COURT OF COLORADO¹

Additional Rules

WRITS, OF ERROR TO COURT OF AP- PEALS.

Rule No. 50. A writ of error to review a judgment of the Court of Appeals shall be brought within sixty days after its rendition, and not thereafter: Provided, that a writ of error shall not be prosecuted in any case unless the aggrieved party shall first petition the Court of Appeals for a rehearing within the time limited by the rules of that court. The time within which the writ of error from this court shall be sued out shall begin to run from the date such petition for rehearing is denied, and the errors assigned shall be limited to those raised by such petition.

Rule No. 51. In cases so brought to this court, a transcript of the record and copy of the opinion of the Court of Appeals shall

be lodged, together with the original transcript and abstracts, and a new assignment of errors. Briefs shall be filed, and, in general, the procedure shall be as provided by the rules of this court and the code in other cases. No additional abstracts shall be required unless by special order in particular cases.

Rule No. 52. The docket fees shall be the same as now provided by the rules of this court, and the fees of the clerk of the Court of Appeals shall be limited to the services rendered in making a transcript of the record of the Court of Appeals and the copy of the opinion in the case brought here for review, which fees shall be collected and paid into the state treasury.

Announced January 6th, A. D. 1912.

¹ For all other rules and amendments thereto, see 80 Pac. vii, and 100 Pac. vi.
130 P. (ix)*

CASES REPORTED

	Page		Page
Acorn Gold Min. Co., Hendrie v. (Colo. App.)	74	Barker, Brown v. (Okl.)	155
Adams v. Board of Com'rs of Garvin County (Okl.)	148	Barrows v. Harter (Cal.)	1050
Addington v. State (Okl. Cr. App.)	311	Barthelet, In re (Cal.)	805
Adelberg, Smith v. (Wash.)	494	Basham v. State (Okl. Cr. App.)	287
Ætna Mill & Elevator Co. v. Atchison, T. & S. F. R. Co. (Kan.)	686	Baugh v. State (Okl. Cr. App.)	1164
Albany College v. Monteith (Or.)	633	Bauweraerts, People v. (Cal.)	717
Albion Lumber Co. v. Lowell (Cal.)	864	Bayless v. State (Okl. Cr. App.)	520
Albion Lumber Co. v. Lowell (Cal. App.)	858	Beaty v. State (Okl.)	956
Allen, Monahan v. (Mont.)	768	Beaulieu Vineyard, Rossi v. (Cal. App.)	201
Allen v. State (Ariz.)	1114	Beckham, McDowell v. (Wash.)	350
Allnut, Perkins v. (Mont.)	1	Belcher v. State (Okl. Cr. App.)	515
Alameda Oil Co. v. Kelley (Okl.)	931	Belford & Stump, Collins v. (Kan.)	662
Alva State Bank, Smith v. (Okl.)	916	Belknap Glass Co. v. Kelleher (Wash.)	1123
Amberson v. Candler (N. M.)	255	Bell, City of Winfield v. (Kan.)	680
Anderson v. Chrisman (Okl.)	539	Bell v. Martin (Or.)	1126
Anderson, Edwards v. (Idaho)	1001	Bell-Wayland Co. v. Miller-Mitscher Co. (Okl.)	593
Anderson, Harrington v. (Colo. App.)	616	Bellah, City of Oxnard v. (Cal. App.)	701
Anderson v. Mutual Life Ins. Co. of New York (Cal.)	726	Bellus v. Peters (Cal.)	1186
Andrew Peterson & Co., Farrar v. (Wash.)	753	Bengoechea v. Elmore County (Idaho)	459
Annis, Board of Com'rs of Larimer County v. (Colo.)	1019	Bentel, Hayt v. (Cal.)	432
Antlers Hotel Co., Burchmore v. (Colo.)	846	Bentley, Firebaugh v. (Or.)	1129
Arant, Harpold v. (Or.)	737	Bernard, People v. (Cal. App.)	1063
Architectural Decorating Co. v. Nicklason (Wash.)	506	Berry v. Second Baptist Church of Stillwater (Okl.)	585
Arctic Ice Cream Supply Co., McTigue v. (Cal. App.)	165	Berry v. Summers (Okl.)	152
Aronson, Whitney v. (Cal. App.)	700	Bilby, St. Louis & S. F. R. Co. v. (Okl.)	1089
Ashton, Naylor v. (Cal. App.)	181	Billy v. State (Okl. Cr. App.)	308
Assessment of Western Union Tel. Co., 1911, 1912, In re (Okl.)	565	Billy v. Unknown Heirs of Gray (Okl.)	533
Atchison, T. & S. F. R. Co., Ætna Mill & Elevator Co. v. (Kan.)	686	Bishop v. State (Okl. Cr. App.)	1173
Atchison, T. & S. F. R. Co. v. Baker (Okl.)	577	Blevins, Ft. Smith & W. R. Co. v. (Okl.)	525
Atchison, T. & S. F. R. Co., Gault Lumber Co. v. (Okl.)	291	Block v. Patrick (Okl.)	588
Atchison, T. & S. F. R. Co. v. State (Okl.)	940	Blumauer v. Mann (Wash.)	491
Atchison, T. & S. F. R. Co., Vosburg v. (Kan.)	667	Board of Com'rs of Columbia County, State v. (Wash.)	749
Atkeson v. Jackson Estate (Wash.)	102	Board of Com'rs of Garfield County v. Huett (Okl.)	927
Ault v. Roberts (Okl.)	532	Board of Com'rs of Garvin County, Adams v. (Okl.)	148
Aultman & Taylor Machinery Co. v. Forest (Colo. App.)	1086	Board of Com'rs of Larimer County v. Annis (Colo.)	1019
Ayers, Sherman v. (Cal. App.)	163	Board of Com'rs of Leavenworth County, Union Pac. R. Co. v., two cases (Kan.)	855
Bailey v. Lindsey (Okl.)	279	Board of Com'rs of Lincoln County v. Robertson (Okl.)	947
Bailey v. People (Colo.)	832	Board of Com'rs of Neosho County v. Spearman (Kan.)	677
Baker, Atchison, T. & S. F. R. Co. v. (Okl.)	577	Board of Com'rs of Shawnee County, City of Topeka v. (Kan.)	692
Baker, Southwest Nat. Bank of Kansas City v. (Idaho)	799	Board of Education of City of Perry, In re (Okl.)	951
Baker v. State (Okl. Cr. App.)	524	Board of Trustees of Albany College v. Monteith (Or.)	633
Baker v. State (Okl. Cr. App.)	820	Bogart v. Pitchless Lumber Co. (Wash.)	490
Baker v. Van Ness (Okl.)	536	Bond v. Watson (Okl.)	933
Bal, Bull v. (N. M.)	251	Bonds of City of Guthrie, In re (Okl.)	265
Baldwin, Saeger v. (Wash.)	114	Borgwardt v. McKittrick Oil Co. (Cal.)	417
Baldwin v. Trahern (Cal. App.)	1068	Bosserman, Vorenberg v. (N. M.)	438
Ballen & Friedman v. Bank of Krenlin (Okl.)	539	Bowlegs v. State (Okl. Cr. App.)	824
Bank of Ames v. Lehr (Okl.)	288	Boyd v. Pratt (Wash.)	371
Bank of Carrollton, Miss., v. Latting (Okl.)	144	Bradford v. State (Okl. Cr. App.)	865
Bank of Commerce, Clingan v. (Okl.)	537	Brand v. Lienkaemper (Wash.)	1147
Bank of Commerce of Albuquerque, N. M., v. Dillon (Okl.)	538	Brand, Schumacher v. (Wash.)	1145
Bank of Krenlin, Ballen & Friedman v. (Okl.)	539	Brandt v. McIntosh (Mont.)	413
Barber Asphalt Pav. Co. v. Crist (Cal. App.)	435	Branner, Friedman v. (Wash.)	360
Barbour, Merchant Land Co. v. (Or.)	976	Breedlove, Hargadine-McKittrick Dry Goods Co. v. (Okl.)	267
Bardshar v. Seattle Electric Co. (Wash.)	101	Brochers v. Nickel (Okl.)	138
		Brooks, Wright v. (Mont.)	968
		Brown v. Barker (Okl.)	155
		Brown v. First Nat. Bank (Okl.)	140
		Brown v. Grubb (Idaho)	1073
		Brown, McGill v. (Wash.)	1142
		Brown, Ohio Inv. Co. v. (Kan.)	665
		Brown, Shipman v. (Okl.)	603

	Page		Page
Brown, State v. (Or.).....	985	City of Seattle, Vitucci Importing Co. v. (Wash.).....	109
Browning v. Browning (Kan.).....	852	City of Shawnee v. Cottoral (Okla.).....	548
Bruggemann, Parker v. (Wash.).....	358	City of Shawnee v. Hewett (Okla.).....	546
Bruner Oil Co., Deming Inv. Co. v. (Okla.).....	1157	City of Spokane, Johnson v. (Wash.).....	341
Bull v. Bal (N. M.).....	251	City of Topeka v. Board of Com'rs of Shawnee County (Kan.).....	692
Bullock v. Stanley (Wash.).....	95	City of Winfield v. Bell (Kan.).....	680
Burchmore v. Antlers Hotel Co. (Colo.).....	846	City Retail Lumber Co. v. Title Guaranty & Surety Co. (Wash.).....	345
Burnham v. Washington Machinery Depot (Wash.).....	337	City Street Imp. Co., Meyer v. (Cal.).....	215
Burns v. Malone (Okla.).....	278	Clapp v. Churchill (Cal.).....	1081
Burns v. National Mining, Tunnel & Land Co. (Colo. App.).....	1037	Clark v. Mitchell (Nev.).....	760
Burton, Turman v. (Okla.).....	149	Clark v. Mitchell (Nev.).....	764
Bushard, Coffman v. (Cal.).....	425	Clausen, State v. (Wash.).....	479
Butler v. Corey (Okla.).....	137	Clayton, Colorado Nat. Life Assur. Co. v. (Colo.).....	330
Butler, Foster v. (Cal.).....	6	Cline v. State (Okla. Cr. App.).....	510
Butte-Balaklava Copper Co., Melville v. (Mont.).....	441	Clingan v. Bank of Commerce (Okla.).....	537
Cadwalader, Gordon v. (Cal.).....	18	Coates, McVey v. (Kan.).....	661
Caffrey v. Superior Court of King County (Wash.).....	747	Coffman v. Bushard (Cal.).....	425
Cake v. Los Angeles (Cal.).....	723	Colburn v. Wilson (Idaho).....	381
Caldwell v. Modern Woodmen of America (Kan.).....	642	Cole, Lowery v. (Mont.).....	410
California Cotton Mills Co., Petersen v. (Cal. App.).....	169	Collins v. Belford & Stump (Kan.).....	662
California Trona Co. v. Wilkinson (Cal. App.).....	190	Colorado City v. Worley (Colo. App.).....	826
Canal Lumber Co. v. Kong Yick Inv. Co. (Wash.).....	492	Colorado Fuel & Iron Co. v. Hawkins (Colo. App.).....	70
Canavan, Ex parte (N. M.).....	248	Colorado Nat. Life Assur. Co. v. Clayton (Colo.).....	330
Candler, Amberson v. (N. M.).....	255	Commercial State Bank, Ladd & Tilton Bank v. (Or.).....	975
Carey, Davies v. (Wash.).....	1137	Commercial Union Assur. Co. of London, England, v. Shults (Okla.).....	572
Carlisle Fish Co., State v. (Wash.).....	490	Conelly Const. Co. v. Royce (Okla.).....	146
Carlson, State v. (Idaho).....	463	Connecticut Fire Ins. Co., Cue v. (Kan.).....	664
Carson v. Cook County Liquor Co. (Okla.).....	303	Conwell v. Varain (Cal. App.).....	23
Carson v. Vance (Okla.).....	946	Conwill v. Eldridge (Okla.).....	912
Qasner v. Hoskins (Or.).....	55	Cook v. Fuller (Okla.).....	140
Catron v. Deep Fork Drainage Dist. No. 1 (Okla.).....	263	Cook v. State (Okla.).....	300
Caudill v. State (Okla. Cr. App.).....	812	Cook County Liquor Co., Carson v. (Okla.).....	303
C. C. Belknap Glass Co. v. Kelleher (Wash.).....	1123	Cooke, Willison v. (Colo.).....	828
Chanute Brick & Tile Co. v. Gas Belt Fuel Co. (Kan.).....	649	Cooper, Farmers' Reservoir & Irrigation Co. v. (Colo.).....	1004
Chapman, Young v. (Okla.).....	289	Cooper, McMahon v. (Idaho).....	456
Chappell, Sexsmith v. (Okla.).....	282	Cooper v. Miller (Cal.).....	1048
Chas. K. Spaulding Logging Co., Portland Hardwood Floor Co. v. (Or.).....	52	Corbin v. Gleason (Cal.).....	872
Checote, Potter v. (Okla.).....	1164	Corey, Butler v. (Okla.).....	137
Cheney v. King County (Wash.).....	893	Corporation Commission of Oklahoma, Shawnee Gas & Electric Co. v. (Okla. Cr. App.).....	127
Cherry Point Fish Co., State v. (Wash.).....	499	Coryell v. Fawcett (Colo.).....	838
Cheyenne Cement, Stone & Brick Co., Evans v. (Wyo.).....	849	Cottoral, City of Shawnee v. (Okla.).....	548
Chicago, M. & St. P. R. Co. v. Swindlehurst (Mont.).....	966	Cowell's Estate, In re (Cal.).....	209
Chicago, R. I. & P. R. Co., Hughes v. (Okla.).....	591	Coyle, State v. (Okla. Cr. App.).....	316
Chicago, R. I. & P. R. Co., McClain v. (Kan.).....	646	Craig, Johnson v. (Okla.).....	581
Chick, Seidel v. (Or.).....	53	Cramer v. Walker (Idaho).....	1002
Chickasha Building & Loan Ass'n, Lindsay v. (Okla.).....	570	Crandall Realty & Securities Co. v. Tanquary (Colo. App.).....	1084
Choctaw, O. & G. R. Co. v. Drew (Okla.).....	1149	Crane v. Ferrier-Brock Development Co. (Cal.).....	429
Chrisman, Anderson v. (Okla.).....	539	Crane Co., Vesper v. (Cal.).....	876
Churchill, Clapp v. (Cal.).....	1061	Crist, Barber Asphalt Pav. Co. v. (Cal. App.).....	435
City of Albuquerque v. Garcia (N. M.).....	118	Crooker, Saylor v. (Kan.).....	689
City of Ardmore, Turner v. (Okla.).....	1156	Cue v. Connecticut Fire Ins. Co. (Kan.).....	664
City of Caldwell, Jones v. (Idaho).....	995	Culmer Paint & Glass Co. v. Gleason (Utah).....	66
City of Ft. Collins v. Wallace (Colo. App.).....	69	Cunningham, First Nat. Bank v. (Wash.).....	1148
City of Golden, Western Lumber & Pole Co. v. (Colo. App.).....	1027	Curry v. State (Okla. Cr. App.).....	513
City of Helena, Helena Light & Ry. Co. v. (Mont.).....	446	Curtiss, Schmidt v. (Wash.).....	89
City of Lawton, Yale Theater Co. v. (Okla.).....	135	C. W. Raymond Co. v. Little Falls Fire Clay Co. (Wash.).....	93
City of Los Angeles, Cake v. (Cal.).....	723	Daily v. Fitzgerald (N. M.).....	247
City of Missoula, Missoula Street R. Co. v. (Mont.).....	771	Daniels v. Morris (Or.).....	397
City of Oxnard v. Bellah (Cal. App.).....	701	Daniels v. Stock (Colo. App.).....	1031
City of Pocatello v. Murray (Idaho).....	383	Danielson v. Neal (Cal.).....	716
City of Perry, Robinson v. (Okla.).....	276	Davidson, Smith v. (Idaho).....	1071
City of Portland v. Tigard (Or.).....	982	Davies v. Carey (Wash.).....	1137
City of Seattle, Seattle & Puget Sound Packing Co. v. (Wash.).....	493	Davis, Ex parte (Idaho).....	786
		Davis v. Parsons (Cal.).....	1055
		Davis, State v. (Okla. Cr. App.).....	962
		Davis, State v. (Wash.).....	95
		Davis, Tazwell v. (Or.).....	400

	Page		Page
Dealey v. East San Mateo Land Co. (Cal. App.)	1066	Flathers v. Flathers (Okl.)	184
Deatsman, Taylor Inv. Co. v. (Or.)	740	Fleming, Turner v. (Okl.)	551
Deckenbach v. Deckenbach (Or.)	729	Fletcher v. Murray Commercial Co. (Wash.)	1140
Deep Fork Drainage Dist. No. 1, Catron v. (Okl.)	263	Foley v. Northern California Power Co. (Cal.)	1183
Deming Inv. Co. v. Bruner Oil Co. (Okl.)	1157	Footo v. Watonga (Okl.)	597
Deming Inv. Co. v. Lanham (Okl.)	260	Forest, Aultman & Taylor Machinery Co. v. (Colo. App.)	1086
Denver & R. G. R. Co., Lawhorn v. (Utah)	470	Ft. Smith & W. R. Co. v. Blevins (Okl.)	525
Denver & R. G. R. Co., Smith v. (Colo.)	1009	Foster v. Butler (Cal.)	6
Devlin v. Moore (Or.)	35	Foster v. State (Okl. Cr. App.)	310
Devlin v. Moore (Or.)	46	Franklin, Lynch v. (Okl.)	599
Dickinson, Seattle Nat. Bank v. (Wash.)	372	Franz Lumber Co., Miles v. (Ariz.)	1112
Dicus v. Major (Wash.)	474	Fresno Planing Mill Co. v. Manning (Cal. App.)	196
Dieckmann v. Merkh (Cal. App.)	27	Frick v. Washington Water Power Co. (Wash.)	98
Dierksen, Nathan v. (Cal.)	12	Friedman v. Branner (Wash.)	360
Dillon, Bank of Commerce of Albuquerque, N. M., v. (Okl.)	538	Fullen v. Wunderlich (Colo.)	1007
Dingman, Kepley v. (Okl.)	284	Fuller, Cook v. (Okl.)	140
D. M. Osborne & Co., Huddleston v. (Okl.)	146	Gaffney Inv. Co., Shigeta v. (Wash.)	88
Dolan v. Puget Sound Traction, Light & Power Co. (Wash.)	353	Galbraith v. Oklahoma State Bank (Okl.)	541
Douglas County v. Grant County (Wash.)	368	Gallegos, Territory v. (N. M.)	245
Downing, State v. (Idaho)	461	Garcia, City of Albuquerque v. (N. M.)	118
Drew, Choctaw, O. & G. R. Co. v. (Okl.)	1149	Gas Belt Fuel Co., Chanute Brick & Tile Co. v. (Kan.)	649
Dreyfus v. Richardson (Cal. App.)	161	Gates v. Shaffer (Wash.)	896
Duke, Evinger v. (Okl.)	147	Gault, Schechinger v. (Okl.)	305
Duncan v. Johnson (Kan.)	655	Gault Lumber Co. v. Atchison, T. & S. F. R. Co. (Okl.)	291
Dunlap v. Lewis (Or.)	973	Gehrkens, Gugolz v. (Cal.)	8
Durst v. Haenni (Colo. App.)	77	Gennaux v. Northwestern Imp. Co. (Wash.)	495
Dyson, Tonkawa Nat. Bank v. (Okl.)	924	Gibson, Empire Ranch & Cattle Co. v. (Colo. App.)	615
Eastman & Co. v. Watson (Wash.)	1144	Gillett, Wilcox v. (Kan.)	692
East San Mateo Land Co., Dealey v. (Cal. App.)	1066	Gilliam v. Newland (Okl.)	133
Ebey v. Krause (Okl.)	1100	Gilmore & P. R. Co., Wheeler v. (Idaho)	801
Eddington v. Union Portland Cement Co. (Utah)	243	Glass, Miller v. (Cal.)	868
Edwards v. Anderson (Idaho)	1001	Glass' Estate, In re (Cal.)	868
Edwards v. Mt. Hood Const. Co. (Or.)	49	Gleason, Corbin v. (Cal.)	872
Ehret, Engel, v., two cases (Cal. App.)	1197	Gleason, Culmer Paint & Glass Co. v. (Utah)	66
Elder v. Wood (Colo.)	323	Gleason's Estate, In re (Cal.)	872
Eldridge, Conwill v. (Okl.)	912	Glendale Light & Power Co., Winslow v. (Cal.)	427
Eley, Ex parte (Okl. Cr. App.)	821	Godeau, Pouchan v. (Cal. App.)	865
Elliott v. McCrea (Idaho)	785	Goins v. State (Okl. Cr. App.)	513
Elmore County, Bengoechea v. (Idaho)	459	Gordon v. Cadwalader (Cal.)	18
Empire Ranch & Cattle Co. v. Gibson (Colo. App.)	615	Gottsegan Cigar Co. v. Levy (Utah)	780
Empire Steam Laundry v. Lozier (Cal.)	1180	Gourley, Ingersoll v. (Wash.)	743
Engel v. Ehret, two cases (Cal. App.)	1197	Grant County, Douglas County v. (Wash.)	366
Escob, Middleton v. (Okl.)	905	Graves, Ex parte (Okl. Cr. App.)	307
Evans, In re (Utah)	217	Graves v. Stone (Wash.)	369
Evans v. Cheyenne Cement, Stone & Brick Co. (Wyo.)	849	Graves v. Tacoma Ry. & Power Co. (Wash.)	476
Evans, Hughes v. (Or.)	639	Green, Story v. (Cal.)	870
Everhart v. People (Colo.)	1076	Greenlee County, Patty v. (Ariz.)	757
Evinger v. Duke (Okl.)	147	Grubb, Brown v. (Idaho)	1073
Ewers v. Kilgow (Okl.)	938	Grunne, State v. (Wash.)	751
Farmers' Reservoir & Irrigation Co. v. Cooper (Colo.)	1004	Gugolz v. Gehrkens (Cal.)	8
Farmers' & Merchants' Nat. Bank of Hobart v. School Dist. No. 56, Kiowa County (Okl.)	549	Gulf, C. & S. F. R. Co. v. Taylor (Okl.)	574
Farrar v. Andrew Peterson & Co. (Wash.)	753	Gunn v. Perseverence Min. & Mill Co. (Idaho)	458
Fawcett, Coryell v. (Colo.)	838	Gvozdanovic, Rader v. (Okl.)	159
Ferguson, Union Pac. Life Ins. Co. v. (Or.)	978	Haenni, Durst v. (Colo. App.)	77
Ferrier Brock Development Co., Crane v. (Cal.)	429	Hall v. Kansas City, L. & T. Electric R. Co. (Kan.)	664
Fick, Hillyard v. (Kan.)	675	Hallam, Yasul v. (Or.)	638
Firebaugh v. Bentley (Or.)	1129	Hamilton v. Havercamp (Okl.)	259
First Judicial Dist. Court, People v. (Colo.)	324	Hamilton, Merriam v. (Or.)	406
First Nat. Bank, Brown v. (Okl.)	140	Hamm, J. R. Watkins Medical Co. v. (Kan.)	650
First Nat. Bank v. Cunningham (Wash.)	1148	Hammons v. Setzer (Wash.)	1141
First Nat. Bank v. Harding (Okl.)	905	Hampton v. Thomas (Okl.)	961
First Nat. Bank, Honley v. (Okl.)	945	Hanlon, State v. (Wash.)	339
First Nat. Bank v. Wilcox (Wash.)	756	Harding, First Nat. Bank v. (Okl.)	905
Fisher v. Lockridge (Okl.)	136	Hargadine-McKittrick Dry Goods Co. v. Breedlove (Okl.)	267
Fitch, Murphy v. (Okl.)	298	Harpold v. Arant (Or.)	737
Fitzgerald, Daily v. (N. M.)	247	Harrel v. Paris (Kan.)	684
Flanagan Estate v. Marshfield Realty & Trading Co. (Or.)	1133	Harrington v. Anderson (Colo. App.)	616
Flash, Holland v. (Cal. App.)	32	Harris, Thorne v. (Okl.)	906

	Page		Page
Hart, Ex parte (Cal. App.)	704	Kelsey, Norris v. (Colo. App.)	1088
Hart, Sanders v. (Okla.)	284	Kennett v. Kidd (Kan.)	691
Harter, Barrows v. (Cal.)	1050	Kepley v. Dingman (Okla.)	284
Havercamp, Hamilton v. (Okla.)	259	Kern River Co. v. Los Angeles County (Cal.)	714
Hawkins, Colorado Fuel & Iron Co. v. (Colo. App.)	70	Keyser v. Morehead (Idaho)	992
Hawkins v. Hawkins (Okla.)	926	Kidd, Kennett v. (Kan.)	691
Hayes, Silford v. (Colo.)	330	Kilborn, Sharp v. (Or.)	735
Hayt v. Bentel (Cal.)	432	Kilgore, Ewers v. (Okla.)	938
Helena Light & Ry. Co. v. Helena (Mont.)	446	Kimble, Turner v. (Okla.)	563
Hendrie v. Acorn Gold Min. Co. (Colo. App.)	74	Kinard v. Ward (Cal. App.)	1194
Henthorn, Osincup v. (Kan.)	652	Kinard v. Ward (Cal. App.)	1196
Hewett, City of Shawnee v. (Okla.)	546	King County, Cheney v. (Wash.)	893
High, State v. (Ariz.)	611	Kirkendall, Quong Wing v. (Mont.)	2
Higson v. Hughes (Wash.)	478	Kitchin v. Oregon Nursery Co. (Or.)	408, 1133
Hildebrandt v. State (Okla. Cr. App.)	121	Knight v. State (Okla.)	282
Hillyard v. Fick (Kan.)	675	Knutson v. Moe Bros. (Wash.)	347
Hirschfeld v. McCullagh (Or.)	1131	Kong Yick Inv. Co., Canal Lumber Co. v. (Wash.)	492
Hitchcock, Turner v. (Cal.)	1190	Koogler, Phillips v. (Okla.)	137
Hodges, Walters v. (Okla.)	532	Krause, Ebey v. (Okla.)	1100
Hoffman v. Tooele City (Utah)	61	Ladd & Tilton Bank v. Commercial State Bank (Or.)	975
Hofreiter v. Schwabland (Wash.)	364	Lander, State v. (Kan.)	692
Holland v. Flash (Cal. App.)	32	Lane v. Word (Or.)	741
Honley v. First Nat. Bank (Okla.)	945	Langham, Deming Inv. Co. v. (Okla.)	260
Hopkins v. State (Okla. Cr. App.)	1101	Lankford v. Oklahoma Engraving & Printing Co. (Okla.)	278
Hornung v. Sedgwick (Cal.)	212	Latting, Bank of Carrollton, Miss., v. (Okla.)	144
Horton v. Oregon-Washington R. & Nav. Co. (Wash.)	897	Lauterbach, Suhr v. (Cal.)	2
Hoskins, Casner v. (Or.)	55	Lawhorn v. Denver & R. G. R. Co. (Utah)	470
Hubatka, Oklahoma City v. (Okla.)	1163	Lawrence, State v. (Okla. Cr. App.)	508
Huddleston v. D. M. Osborne & Co. (Okla.)	146	Lawton v. Shepard (Okla.)	135
Hudgel, Nelson v. (Idaho)	85	Lee v. Summers (Okla.)	268
Hudson v. Moon (Utah)	774	Lehr, Bank of Ames v. (Okla.)	288
Huett, Board of Com'rs of Garfield County v. (Okla.)	927	Levy, Gottsegen Cigar Co. v. (Utah)	780
Hughes v. Chicago, R. I. & P. R. Co. (Okla.)	591	Lewis County v. Monfort (Wash.)	115
Hughes v. Evans (Or.)	639	Lewis, Dunlap v. (Or.)	973
Hughes, Higson v. (Wash.)	478	Lewis v. Seattle Taxicab Co. (Wash.)	341
Hulquist, Scherer v. (Okla.)	544	Lienkaemper, Brand v. (Wash.)	1147
Hulse v. Northern Pac. R. Co. (Mont.)	415	Lincoln County v. Twin Falls North Side Land & Water Co. (Idaho)	788
Hunt v. Sharkey (Cal. App.)	21	Lindsay v. Chickasha Building & Loan Ass'n (Okla.)	570
Hurley-Mason Co., Samardege v. (Wash.)	755	Lindsey, Bailey v. (Okla.)	279
Hurst v. Wheeler (Okla.)	934	Lindsey, Wall v. (Okla.)	280
Indian Land & Trust Co. v. Widner (Okla.)	551	Lisle v. Quinlan (Wash.)	902
Ingersoll v. Gourley (Wash.)	743	Little v. Little (Colo. App.)	1022
Innes, State v. (Kan.)	677	Little Falls Fire Clay Co., C. W. Raymond Co. v. (Wash.)	93
Ivanhoff v. Teale (Mont.)	972	Lobsitz, Perry Public Library Ass'n v. (Okla.)	919
Jackson Estate, Atkeson v. (Wash.)	102	Lockridge, Fisher v. (Okla.)	136
Jackson Estate v. Suydam (Wash.)	360	Long v. Shepard (Okla.)	131
Jamieson v. State Board of Medical Examiners (Okla.)	923	Lookeba State Bank, St. Louis Carbonating & Mfg. Co. v. (Okla.)	280
Jarrett v. Prosser (Idaho)	376	Los Angeles County, Kern River Co. v. (Cal.)	714
Johns v. Louthan (Okla.)	139	Los Angeles Dock & Terminal Co., Stevens v. (Cal. App.)	197
Johnson v. Craig (Okla.)	581	Lott v. Oregon Short Line R. Co. (Idaho)	88
Johnson, Duncan v. (Kan.)	655	Louthan, Johns v. (Okla.)	139
Johnson, Routt County Development Co. v. (Colo. App.)	1081	Lowe, Spaulding Mfg. Co. v. (Okla.)	959
Johnson v. Spokane (Wash.)	341	Lowell, Albion Lumber Co. v. (Cal.)	864
Johnson v. State (Okla. Cr. App.)	1163	Lowell, Albion Lumber Co. v. (Cal. App.)	858
Johnson, Sweeney v. (Idaho)	997	Lowery v. Cole (Mont.)	410
Johnson-Larimer Dry Goods Co., Powell v. (Okla.)	945	Lozier, Empire Steam Laundry v. (Cal.)	1180
Jones v. Caldwell (Idaho)	995	Lynch v. Franklin (Okla.)	599
Jones v. Jones (Okla.)	139	Lynde-Bowman-Darby Co., Meyer v. (Okla.)	548
Jones v. Jones (Wash.)	1125	Lyons, Quan Quock Fong v. (Cal. App.)	83
Jones v. State (Okla. Cr. App.)	1178	McBride, State v. (Wash.)	486
Jones, Young v. (Wash.)	90	McClain v. Chicago, R. I. & P. R. Co. (Kan.)	646
Jordan, Tognazzini v. (Cal.)	879	McClain, Union Savings, Building & Trust Co. v. (Idaho)	84
Jose Realty Co. v. Pavlicevich (Cal.)	15	McClellan, Missouri, O. & G. R. Co. v. (Okla.)	916
Joyce v. Rubin (Idaho)	793	McCormick v. Smith (Idaho)	999
J. R. Watkins Medical Co. v. Hamm (Kan.)	650	McCrea, Elliott v. (Idaho)	785
Kaler v. Puget Sound Bridge & Dredging Co. (Wash.)	894	McCullagh, Hirschfeld v. (Or.)	1131
Kansas City, L. & T. Electric R. Co., Hall v. (Kan.)	664	McDougall v. O'Connell (Wash.)	362
Keeler v. Parks (Wash.)	111	McDowell v. Beckham (Wash.)	350
Kelleher, C. C. Belknap Glass Co. v. (Wash.)	1123		
Kelley, Alameda Oil Co. v. (Okla.)	931		
Kelley v. Sakai (Wash.)	503		

	Page		Page
McGill v. Brown (Wash.).....	1142	Moon, Hudson v. (Utah).....	774
McGlasen v. State (Okl. Cr. App.).....	1174	Moore, Devlin v. (Or.).....	35
McIntosh, Brandt v. (Mont.).....	413	Moore, Devlin v. (Or.).....	46
McIntosh, Welch v. (Kan.).....	641	Moore v. State (Okl. Cr. App.).....	517
McKendrick v. Western Zinc Min. Co. (Cal.).....	865	Moore v. United Elkhorn Mines (Or.).....	640
McKinnon v. Second Judicial Dist. Court in and for Washoe County (Nev.).....	465	Morehead, Keyser v. (Idaho).....	992
McKittrick Oil Co., Borgwardt v. (Cal.).....	417	Morgan v. State (Okl. Cr. App.).....	522
McMahon v. Cooper (Idaho).....	456	Morris, Daniels v. (Or.).....	397
McNary, Spaulding v. (Or.).....	391, 1128	Morrison, Raiche v. (Mont.).....	1074
McPherson, State v. (Wash.).....	481	Mt. Hood Const. Co., Edwards v. (Or.).....	49
McTigue v. Arctic Ice Cream Supply Co. (Cal. App.).....	165	Murphy v. Fitch (Okl.).....	298
McVey v. Coates (Kan.).....	661	Murphy v. Nett (Mont.).....	451
Madeira v. Sonoma Magnesite Co. (Cal. App.).....	175	Murphy v. Tillson (Or.).....	637
Maier Brewing Co., Pitzel v. (Cal.).....	706	Murray, City of Pocatello v. (Idaho).....	383
Maier Brewing Co., Pitzel v. (Cal. App.).....	705	Murray Commercial Co., Fletcher v. (Wash.).....	1140
Major, Dicus v. (Wash.).....	474	Muskogee Electric Traction Co. v. Reed (Okl.).....	157
Malone, Burns v. (Okl.).....	278	Mutual Life Ins. Co. of New York, Anderson v. (Cal.).....	726
Mammoth Min. & Mill. Co., Olson v. (Colo. App.).....	70	Mystic Tilers, Witherow v. (Utah).....	58
Mann, Blumauer v. (Wash.).....	491	Nakagawa v. Okamoto (Cal.).....	707
Manning, Fresno Planning Mill Co. v. (Cal. App.).....	196	Nassano v. Tuolumne County Bank (Cal. App.).....	29
Manuel v. Smith (Okl.).....	1159	Nathan v. Dierssen (Cal.).....	12
Maples v. Smythe (Okl.).....	145	National Hardwood Co. v. Sherwood (Cal.).....	881
Marcucci v. Vowinkel (Cal.).....	430	National Mining, Tunnel & Land Co., Burns v. (Colo. App.).....	1037
Marshfield Realty & Trading Co., Flanagan Estate v. (Or.).....	1133	National Surety Co. v. People (Colo.).....	843
Martin, Bell v. (Or.).....	1126	Naylor v. Ashton (Cal. App.).....	181
Martinson, Nilsson v. (Wash.).....	106	Neal, Danielson v. (Cal.).....	716
Mason v. Melhase (Or.).....	1134	Nellis, Wurzbarger v. (Cal.).....	1052
Mathis v. Western Furniture Mfg. Co. (Wash.).....	94	Nelson v. Hudgel (Idaho).....	85
Matthews v. State (Okl. Cr. App.).....	125	Nelson v. Steele (Cal.).....	886
Mayhew v. Yakima Power Co. (Wash.).....	485	Nett, Murphy v. (Mont.).....	451
Mcgrath, Northwestern Marble & Tile Co. v. (Wash.).....	484	Newland, Gilliam v. (Okl.).....	133
Melhase, Mason v. (Or.).....	1134	Nickel, Brochers v. (Okl.).....	138
Melville v. Butte-Balaklava Copper Co. (Mont.).....	441	Nicklason, Architectural Decorating Co. v. (Wash.).....	506
Merchant Land Co. v. Barbour (Or.).....	976	Nilsson v. Martinson (Wash.).....	106
Merkh, Dieckmann v. (Cal. App.).....	27	Norris v. Kelsey (Colo. App.).....	1088
Merriam v. Hamilton (Or.).....	406	North Coast Dry Kiln Co. v. Wilcox (Wash.).....	756
Metropolitan Motor Car Co., Worley v. (Wash.).....	107	Northern California Power Co., Foley v. (Cal.).....	1183
Metz v. Washington Water Power Co. (Wash.).....	843	Northern Pac. R. Co., Hulse v. (Mont.).....	415
Metzler, People v. (Cal. App.).....	1192	Northwestern Imp. Co., Gennaux v. (Wash.).....	495
Meyer v. City Street Imp. Co. (Cal.).....	215	Northwestern Marble & Tile Co. v. Mcgrath (Wash.).....	484
Meyer v. Lynde-Bowman-Darby Co. (Okl.).....	548	Oakland Gas, Light & Heat Co., Ryan v. (Cal. App.).....	603
Meyer v. Perkins (Cal.).....	208	O'Bryan, People v. (Cal.).....	1042
Meyer v. Perkins (Cal. App.).....	206	Ochoa v. Territory (Ariz.).....	610
Miami Copper Co. v. Strohl (Ariz.).....	605	O'Connell, McDougall v. (Wash.).....	362
Middleton v. Escoc (Okl.).....	905	O'Donovan, Porter v. (Or.).....	393
Midland Val. R. Co. v. State (Okl.).....	803	Ohio Inv. Co. v. Brown (Kan.).....	665
Miles v. Franz Lumber Co. (Ariz.).....	1112	Okamoto, Nakagawa v. (Cal.).....	707
Miller, Cooper v. (Cal.).....	1048	Oklahoma City v. Hubatka (Okl.).....	1163
Miller v. Glass (Cal.).....	868	Oklahoma Engraving & Printing Co., Lankford v. (Okl.).....	278
Miller, State v. (Ariz.).....	891	Oklahoma R. Co. v. State (Okl.).....	151
Miller v. State (Okl. Cr. App.).....	813	Oklahoma State Bank, Galbraith v. (Okl.).....	541
Miller, State v. (Wash.).....	356	Olson v. Mammoth Min. & Mill. Co. (Colo. App.).....	70
Co. (Okl.).....	574	O'Neil, Pacific Mut. Life Ins. Co. of California v. (Okl.).....	270
Miller v. Miller (Kan.).....	681	Oregon Nursery Co., Kitchin v. (Or.).....	408, 1133
Miller v. Waymire (Kan.).....	681	Oregon Short Line R. Co., Lott v. (Idaho).....	88
Miller Lumber Co. v. Swink Mercantile Co. (Okl.).....	574	Oregon-Washington R. & Nav. Co., Horton v. (Wash.).....	897
Miller-Mitscher Co., Bell-Wayland Co. v. (Okl.).....	593	Osborne & Co., Huddleston v. (Okl.).....	146
Mircovich, State v. (Nev.).....	765	Osincup v. Henthorn (Kan.).....	652
Missoula Street R. Co. v. Missoula (Mont.).....	771	Pacific Monthly Co., Putnam v. (Or.).....	986
Missouri, O. & G. R. Co. v. McClellan (Okl.).....	916	Pacific Mut. Life Ins. Co. of California v. O'Neil (Okl.).....	270
Mitchell, Clark v. (Nev.).....	760	Paris, Harreld v. (Kan.).....	684
Mitchell, Clark v. (Nev.).....	764	Parker v. Bruggemann (Wash.).....	358
Mitchell v. State (Okl. Cr. App.).....	1175	Parks, Keeler v. (Wash.).....	111
Modern Woodmen of America, Caldwell v. (Kan.).....	642	Parsons, Davis v. (Cal.).....	1055
Moe Bros., Knutson v. (Wash.).....	347	Patrick, Block v. (Okl.).....	583
Monahan v. Allen (Mont.).....	768	Patterson v. People (Colo. App.).....	618
Monfort, Lewis County v. (Wash.).....	115		
Monteith, Board of Trustees of Albany College v. (Or.).....	633		

	Page		Page
Patty v. Greenlee County (Ariz.).....	757	Rossi v. Beaulieu Vineyard (Cal. App.)..	201
Pavlicevich, Jose Realty Co. v. (Cal.)....	15	Routt County Development Co. v. Johnson	
Pearson v. Willapa Const. Co. (Wash.)....	903	(Colo. App.).....	1081
Peck, St. Paul Fire & Marine Ins. Co. v.		Royce, Conelly Const. Co. v. (Okl.).....	146
(Okl.)	805	R. P. Smith Sons & Co. v. Raines Dry	
Peck v. Stephens (Okl.).....	276	Goods Co. (Okl.).....	133
People, Bailey v. (Colo.).....	832	Rubin, Joyce v. (Idaho).....	793
People v. Bauwerarts (Cal.).....	717	Ruse v. Williams (Ariz.).....	887
People v. Bernard (Cal. App.).....	1063	Ryan v. Oakland Gas, Light & Heat Co.	
People, Everhart v. (Colo.).....	1076	(Cal. App.)	693
People v. First Judicial Dist. Court (Colo.)	324		
People v. Metzler (Cal. App.).....	1192	Sacramento County v. Pfund (Cal.).....	1041
People, National Surety Co. v. (Colo.)....	843	Saddler, In re (Okl.).....	906
People v. O'Bryan (Cal.).....	1042	Saeger v. Baldwin (Wash.).....	114
People, Patterson v. (Colo. App.).....	618	St. Louis Carbonating & Mfg. Co. v. Look-	
People v. Sitz (Cal. App.).....	858	eba State Bank (Okl.).....	280
People v. Tomsky (Cal. App.).....	184	St. Louis & S. F. R. Co. v. Bilby (Okl.)..	1089
People, Young v. (Colo.).....	1011	St. Louis & S. F. R. Co. v. Sparks (Okl.)	865
People v. Zobel (Colo.).....	837	St. Louis & S. F. R. Co. v. Tate (Okl.)..	941
Perkins v. Allnut (Mont.).....	1	St. Louis & S. F. R. Co. v. Young (Okl.)	911
Perkins, Meyer v. (Cal.).....	208	St. Paul Fire & Marine Ins. Co. v. Peck	
Perkins, Meyer v. (Cal. App.).....	206	(Okl.)	805
Perry Public Library Ass'n v. Lobsitz		Sakai, Kelley v. (Wash.).....	503
(Okl.)	919	Samardege v. Hurley-Mason Co. (Wash.)..	755
Perseverance Min. & Mill. Co., Gunn v.		Sanders v. Hart (Okl.).....	284
(Idaho)	458	San Luis Obispo County v. Smith (Cal.	
Peters, Bellus v. (Cal.).....	1186	App.)	858
Petersen v. California Cotton Mills Co.		Sayer, State v. (Idaho).....	458
(Cal. App.).....	169	Saylor v. Crooker (Kan.).....	689
Peterson v. Peterson (Utah).....	241	Schechinger v. Gault (Okl.).....	305
Peterson v. Smith (Wash.).....	338	Scherer v. Hulquist (Okl.)	544
Peterson & Co., Farrar v. (Wash.).....	753	Schmidt v. Curtiss (Wash.).....	89
Petterson, Peterson v. (Utah).....	241	Schollmeyer v. Van Buskirk (Okl.).....	138
Pfund, Sacramento County v. (Cal.).....	1041	School Dist. No. 56, Kiowa County,	
Phillips v. Koogler (Okl.).....	137	Farmers' & Merchants' Nat. Bank of	
Pioneer Irr. Dist. v. Stone (Idaho).....	382	Hobart v. (Okl.).....	549
Pitchford, State v. (Okl.).....	285	Schumacher v. Brand (Wash.).....	1145
Pitchless Lumber Co., Bogart v. (Wash.)..	490	Schwabland, Hofreiter v. (Wash.).....	364
Pitzel v. Maier Brewing Co. (Cal.).....	706	Sears v. Willard (Cal.).....	809
Pitzel v. Maier Brewing Co. (Cal. App.)...	705	Seattle Electric Co., Bardshar v. (Wash.)	101
Poloke v. Poloke (Okl.).....	535	Seattle Nat. Bank v. Dickinson (Wash.)..	372
Poos v. Shawnee Fire Ins. Co. (Okl.).....	153	Seattle Taxicab Co., Lewis v. (Wash.)...	341
Porter v. O'Donovan (Or.).....	393	Seattle & Puget Sound Packing Co. v.	
Portland Hardwood Floor Co. v. Chas. K.		Seattle (Wash.).....	493
Spaulding Logging Co. (Or.).....	52	Second Baptist Church of Stillwater,	
Potter, Ex parte (Cal.).....	721	Berry v. (Okl.).....	585
Potter v. Checote (Okl.).....	1164	Second Judicial Dist. Court in and for	
Pouchan v. Godeau (Cal. App.).....	865	Washoe County, McKinnon v. (Nev.)....	465
Powell v. Johnson-Larimer Dry Goods Co.		Sedgwick, Hornung v. (Cal.).....	212
(Okl.)	945	Seidel v. Chick (Or.).....	53
Pratt, Boyd v. (Wash.).....	371	Seidel's Estate, In re (Or.).....	53
Proctor v. State (Okl. Cr. App.).....	819	Seminole Townsite Co. v. Seminole (Okl.)	1098
Proebstel, White v. (Or.).....	732	Seminole Townsite Co. v. Seminole (Okl.)	1100
Progress Spinning & Knitting Mills Co. v.		Senate Resolution No. 4, In re (Colo.)...	333
Southern Nat. Ins. Co. (Utah).....	68	Setzer, Hammons v. (Wash.).....	1141
Prosser, Jarrett v. (Idaho).....	376	Sexsmith v. Chappell (Okl.).....	282
Puget Sound Bridge & Dredging Co., Ka-		Shaffer, Gates v. (Wash.).....	896
ler v. (Wash.).....	894	Sharkey, Hunt v. (Cal. App.).....	21
Puget Sound Traction, Light & Power Co.,		Sharp v. Kilborn (Or.).....	735
Dolan v. (Wash.).....	353	Shawnee Fire Ins. Co., Poos v. (Okl.)....	153
Putnam v. Pacific Monthly Co. (Or.).....	986	Shawnee Gas & Electric Co. v. Corpora-	
Pyle v. Starbird (Wash.).....	477	tion Commission of Oklahoma (Okl.)....	127
		Shepard, Lawton v. (Okl.).....	135
Quan Quock Fong v. Lyons (Cal. App.)...	33	Shepard, Long v. (Okl.).....	131
Quinlan, Lisle v. (Wash.).....	902	Sherman v. Ayers (Cal. App.).....	163
Quirk v. Sunderlin (Idaho).....	374	Sherwood, National Hardwood Co. v.	
Quong Wing v. Kirkendall (Mont.).....	2	(Cal.)	881
		Shigeta v. W. B. Gaffney Inv. Co. (Wash.)	88
Rader v. Gvozdanovic (Okl.).....	159	Shipman v. Brown (Okl.)	603
Raiche v. Morrison (Mont.).....	1074	Shippey, Wyoming Nat. Bank v. (Colo.	
Raines Dry Goods Co., R. P. Smith Sons		App.)	1021
& Co. v. (Okl.).....	133	Shull v. State (Okl.).....	910
Rawdon, West & Russell v. (Okl.).....	1160	Shults, Commercial Union Assur. Co. of	
Raymond Co. v. Little Falls Fire Clay Co.		London, England, v. (Okl.).....	572
(Wash.)	93	Silford v. Hayes (Colo.).....	330
Reed, Muskogee Electric Traction Co. v.		Silford v. Stratton (Colo.).....	327
(Okl.)	157	Simerson v. State (Okl. Cr. App.).....	1112
Reynolds v. York Syndicate Oil Co. (Cal.		Simmons v. Simmons (Idaho).....	784
App.)	183	Sitz, People v. (Cal. App.).....	858
Richardson, Dreyfus v. (Cal. App.).....	161	Skelton v. Standard Inv. Co. (Okl.).....	562
Roberts, Ault v. (Okl.).....	532	Skinner, Willis v. (Kan.).....	673
Robertson, Board of Com'rs of Lincoln		Smith v. Adelberg (Wash.).....	494
County v. (Okl.).....	947	Smith v. Alva State Bank (Okl.).....	916
Robinson v. Perry (Okl.).....	276	Smith v. Davidson (Idaho).....	1071
Robinson v. State (Okl. Cr. App.).....	121	Smith v. Denver & R. G. R. Co. (Colo.)..	1009

	Page		Page
Smith, McCormick v. (Idaho).....	999	State, Proctor v. (Okl. Cr. App.).....	819
Smith, Manuel v. (Okl.).....	1159	State, Robinson v. (Okl. Cr. App.).....	121
Smith, Peterson v. (Wash.).....	338	State v. Sayer (Idaho).....	458
Smith, San Luis Obispo County v. (Cal. App.).....	858	State, Shull v. (Okl.).....	910
Smith v. State (Okl. Cr. App.).....	517	State, Simerson v. (Okl. Cr. App.).....	1112
Smith Sons & Co. v. Raines Dry Goods Co. (Okl.).....	133	State, Smith v. (Okl. Cr. App.).....	517
Smythe, Maples v. (Okl.).....	145	State, Starr v. (Okl. Cr. App.).....	1176
Sonoma Magnesite Co., Madeira v. (Cal. App.).....	175	State, Stout v. (Okl.).....	553
Southern Nat. Ins. Co., Progress Spinning & Knitting Mills Co. v. (Utah).....	63	State v. Superior Court of King County (Wash.).....	753
Southwest Nat. Bank of Kansas City v. Baker (Idaho).....	799	State v. Superior Court for King County (Wash.).....	1139
Southwestern Interurban R. Co., Wiley v. (Kan.).....	659	State v. Superior Court of Lewis County (Wash.).....	752
Sparks, St. Louis & S. F. R. Co. v. (Okl.).....	865	State, Tegeler v. (Okl. Cr. App.).....	1104
Spaulding v. McNary (Or.).....	391, 1128	State, Thomson v. (Wyo.).....	850
Spaulding Logging Co., Portland Hardwood Floor Co. v. (Or.).....	52	State v. University Club (Nev.).....	468
Spaulding Mfg. Co. v. Lowe (Okl.).....	959	State, Updike v. (Okl. Cr. App.).....	1107
Spearman, Board of Com'rs of Neosho County v. (Kan.).....	677	State, Vaughn v. (Okl. Cr. App.).....	1100
Spokane, P. & S. R. Co., Taylor v. (Wash.).....	506	State, Wadsworth v. (Okl. Cr. App.).....	808
Standard Inv. Co., Skelton v. (Okl.).....	562	State, Watson v. (Okl. Cr. App.).....	816
Stanley, Bullock v. (Wash.).....	95	State, Welch v. (Okl. Cr. App.).....	514
Starbird, Pyle v. (Wash.).....	477	State v. Wells Fargo & Co. (Or.).....	983
Starr v. State (Okl. Cr. App.).....	1176	State v. Wheeler (Kan.).....	656
State, Addington v. (Okl. Cr. App.).....	311	State, Williams v. (Okl. Cr. App.).....	1177
State, Allen v. (Ariz.).....	1114	State v. Zanger (Okl. Cr. App.).....	1107
State, Atchison, T. & S. F. R. Co. v. (Okl.).....	940	State Board of Medical Examiners, Jamieson v. (Okl.).....	923
State, Baker v. (Okl. Cr. App.).....	524	Steele, Nelson v. (Cal.).....	888
State, Baker v. (Okl. Cr. App.).....	820	Stephens, Peck v. (Okl.).....	276
State, Basham v. (Okl. Cr. App.).....	287	Stevens v. Los Angeles Dock & Terminal Co. (Cal. App.).....	197
State, Baugh v. (Okl. Cr. App.).....	1164	Stock, Daniels v. (Colo. App.).....	1031
State, Bayless v. (Okl. Cr. App.).....	520	Stone, Graves v. (Wash.).....	369
State, Beaty v. (Okl.).....	956	Stone, Pioneer Irr. Dist. v. (Idaho).....	382
State, Belcher v. (Okl. Cr. App.).....	515	Stone, Tate v. (Okl.).....	296
State, Billy v. (Okl. Cr. App.).....	308	Story v. Green (Cal.).....	870
State, Bishop v. (Okl. Cr. App.).....	1173	Stout v. State (Okl.).....	553
State v. Board of Com'rs of Columbia County (Wash.).....	749	Stratton, Silford v. (Colo.).....	327
State, Bowles v. (Okl. Cr. App.).....	824	Strohl, Miami Copper Co. v. (Ariz.).....	605
State, Bradford v. (Okl. Cr. App.).....	865	Suhr v. Lauterbach (Cal.).....	2
State v. Brown (Or.).....	985	Summers, Berry v. (Okl.).....	152
State v. Carlisle Fish Co. (Wash.).....	499	Summers, Lee v. (Okl.).....	268
State v. Carlson (Idaho).....	463	Sunderlin, Quirk v. (Idaho).....	374
State, Caudill v. (Okl. Cr. App.).....	812	Superior Court for King County, State v. (Wash.).....	1139
State v. Cherry Point Fish Co. (Wash.).....	499	Superior Court in and for Los Angeles County, Zumbusch v. (Cal. App.).....	1070
State v. Clausen (Wash.).....	479	Superior Court of King County, Caffrey v. (Wash.).....	747
State, Cline v. (Okl. Cr. App.).....	510	Superior Court of King County, State v. (Wash.).....	753
State, Cook v. (Okl.).....	300	Superior Court of Lewis County, State v. (Wash.).....	752
State v. Coyle (Okl. Cr. App.).....	316	Suydam, Jackson Estate v. (Wash.).....	360
State, Curry v. (Okl. Cr. App.).....	513	Sweeney v. Johnson (Idaho).....	997
State v. Davis (Okl. Cr. App.).....	962	Sweeney, Triphonoff v. (Or.).....	979
State v. Davis (Wash.).....	95	Swindlehurst, Chicago, M. & St. P. R. Co. v. (Mont.).....	968
State v. Downing (Idaho).....	461	Swink Mercantile Co., Miller Lumber Co. v. (Okl.).....	574
State, Foster v. (Okl. Cr. App.).....	310		
State, Goins v. (Okl. Cr. App.).....	513	Tacoma Ry. & Power Co., Graves v. (Wash.).....	476
State v. Grune (Wash.).....	751	Tanquary, Crandall Realty & Securities Co. v. (Colo. App.).....	1084
State v. Hanlon (Wash.).....	339	Tate, St. Louis & S. F. R. Co. v. (Okl.).....	941
State v. High (Ariz.).....	611	Tate v. Stone (Okl.).....	296
State, Hildebrandt v. (Okl. Cr. App.).....	121	Taylor, Gulf, C. & S. F. R. Co. v. (Okl.).....	574
State, Hopkins v. (Okl. Cr. App.).....	1101	Taylor v. Spokane, P. & S. R. Co. (Wash.).....	506
State v. Innes (Kan.).....	677	Taylor Inv. Co. v. Deatsman (Or.).....	740
State, Johnson v. (Okl. Cr. App.).....	1163	Tazwell v. Davis (Or.).....	400
State, Jones v. (Okl. Cr. App.).....	1178	Teale, Ivanhoff v. (Mont.).....	972
State, Knight v. (Okl.).....	282	Tegeler v. State (Okl. Cr. App.).....	1164
State v. Lander (Kan.).....	692	Territory v. Gallegos (N. M.).....	245
State v. Lawrence (Okl. Cr. App.).....	508	Territory, Ochoa v. (Ariz.).....	610
State v. McBride (Wash.).....	486	Territory v. Woolsey (Okl.).....	934
State, McGlassen v. (Okl. Cr. App.).....	1174	Thomas, Hampton v. (Okl.).....	961
State v. McPherson (Wash.).....	481	Thomson v. State (Wyo.).....	850
State, Matthews v. (Okl. Cr. App.).....	125	Thorne v. Harris (Okl.).....	906
State, Midland Val. R. Co. v. (Okl.).....	803	Tigard, City of Portland v. (Or.).....	982
State v. Miller (Ariz.).....	891	Tillson, Murphy v. (Or.).....	637
State, Miller v. (Okl. Cr. App.).....	813	Title Guaranty & Surety Co., City Retail Lumber Co. v. (Wash.).....	345
State v. Miller (Wash.).....	356	Tognazzini v. Jordan (Cal.).....	879
State v. Mircovich (Nev.).....	765		
State, Mitchell v. (Okl. Cr. App.).....	1175		
State, Moore v. (Okl. Cr. App.).....	517		
State, Morgan v. (Okl. Cr. App.).....	522		
State, Oklahoma R. Co. v. (Okl.).....	151		
State v. Pitchford (Okl.).....	285		

	Page		Page
Tomsky, People v. (Cal. App.).....	184	Webber v. Wichita Water Co. (Kan.).....	661
Tonkawa Nat. Bank v. Dyson (Okl.).....	924	Welch v. McIntosh (Kan.).....	641
Tooele City, Hoffman v. (Utah).....	61	Welch v. State (Okl. Cr. App.).....	514
Town of Seminole, Seminole Townsite Co. v. (Okl.).....	1098	Wells Fargo & Co., State v. (Or.).....	983
Town of Seminole, Seminole Townsite Co. v. (Okl.).....	1100	Weniger, Widenmann v. (Cal.).....	421
Town of Watonga, Foote v. (Okl.).....	597	West & Russell v. Rawdon (Okl.).....	1160
Trahern, Baldwin v. (Cal. App.).....	1068	Western Furniture Mfg. Co., Mathis v. (Wash.).....	94
Treadwell, Van Horne v. (Cal.).....	5	Western Lumber & Pole Co. v. Golden (Colo. App.).....	1027
Triphonoff v. Sweeney (Or.).....	979	Western Zinc Min. Co., McKendrick v. (Cal.).....	805
Tuolumne County Bank, Nassano v. (Cal. App.).....	29	Wheeler v. Gilmore & P. R. Co. (Idaho)...	801
Turner v. Ardmore (Okl.).....	1156	Wheeler, Hurst v. (Okl.).....	934
Turman v. Burton (Okl.).....	149	Wheeler, State v. (Kan.).....	656
Turner v. Fleming (Okl.).....	551	Whinnery v. Whinnery (Cal. App.).....	1065
Turner v. Hitchcock (Cal.).....	1190	White v. Proebstel (Or.).....	732
Turner v. Kimble (Okl.).....	563	Whitney v. Aronson (Cal. App.).....	700
Twin Falls North Side Land & Water Co., Lincoln County v. (Idaho.).....	788	Wichita Water Co., Webber v. (Kan.).....	661
Union Pac. Life Ins. Co. v. Ferguson (Or.)	978	Widenmann v. Weniger (Cal.).....	421
Union Pac. R. Co. v. Board of Com'rs of Leavenworth County, two cases (Kan.)	855	Widner, Indian Land & Trust Co. v (Okl.)	551
Union Portland Cement Co., Eddington v. (Utah).....	243	Wilcox, First Nat. Bank v. (Wash.).....	756
Union Savings, Building & Trust Co. v. McClain (Idaho).....	84	Wilcox v. Gillett (Kan.).....	692
United Elkhorn Mines, Moore v. (Or.).....	640	Wilcox, North Coast Dry Kiln Co. v. (Wash.).....	756
University Club, State v. (Nev.).....	468	Wiley v. Southwestern Interurban R. Co. (Kan.).....	659
Unknown Heirs of Gray, Billy v. (Okl.)..	533	Wilkinson, California Trona Co. v. (Cal. App.).....	190
Updike v. State (Okl. Cr. App.).....	1107	Willapa Const. Co., Pearson v. (Wash.)...	903
Van Buskirk, Schollmeyer v. (Okl.).....	138	Willard, Sears v. (Cal.).....	869
Vance, Carson v. (Okl.).....	946	William A. Eastman & Co. v. Watson (Wash.).....	1144
Van Horne v. Treadwell (Cal.).....	5	Williams, Ruse v. (Ariz.).....	887
Van Ness, Baker v. (Okl.).....	536	Williams v. State (Okl. Cr. App.).....	1177
Varain, Conwell v. (Cal. App.).....	23	Willis v. Skinner (Kan.).....	673
Vaughn v. State (Okl. Cr. App.).....	1100	Willison v. Cooke (Colo.).....	828
Vesper v. Crane Co. (Cal.).....	876	Wilson, Colburn v. (Idaho).....	381
Vitucci Importing Co. v. Seattle (Wash.)..	109	Winslow v. Glendale Light & Power Co. (Cal.).....	427
Vorenberg v. Bosserman (N. M.).....	438	Witherow v. Mystic Toolers (Utah).....	58
Vosburg v. Atchison, T. & S. F. R. Co. (Kan.).....	667	Wood, Elder v. (Colo.).....	323
Vowinckel, Marcucci v. (Cal.).....	430	Woolsey, Territory v. (Okl.).....	954
Wadsworth v. State (Okl. Cr. App.).....	808	Word, Lane v. (Or.).....	741
Walker, Cramer v. (Idaho).....	1002	Worley v. Metropolitan Motor Car Co. (Wash.).....	107
Walker v. Warring (Or.).....	629	Worley, Colorado City v. (Colo. App.)....	826
Wall v. Lindsey (Okl.).....	280	Wright v. Brooks (Mont.).....	968
Wallace, City of Ft. Collins v. (Colo. App.)	69	Wunderlich, Fullen v. (Colo.).....	1007
Walters v. Hodges (Okl.).....	532	Wurzbarger v. Nellis (Cal.).....	1052
Ward, Kinard v. (Cal. App.).....	1194	Wyoming Nat. Bank v. Shippey (Colo. App.).....	1021
Ward, Kinard v. (Cal. App.).....	1196	Yakima Power Co., Mayhew v. (Wash.)..	485
Warring, Walker v. (Or.).....	629	Yale Theater Co. v. Lawton (Okl.).....	135
Washington Machinery Depot, Burnham v. (Wash.).....	337	Yasui v. Hallam (Or.).....	638
Washington Water Power Co., Frick v. (Wash.).....	98	York Syndicate Oil Co., Reynolds v. (Cal. App.).....	183
Washington Water Power Co., Metz v. (Wash.).....	343	Young v. Chapman (Okl.).....	289
Watkins Medical Co. v. Hamm (Kan.)....	650	Young v. Jones (Wash.).....	90
Watson, Bond v. (Okl.).....	933	Young v. People (Colo.).....	1011
Watson v. State (Okl. Cr. App.).....	816	Young, St. Louis & S. F. R. Co. v. (Okl.)..	911
Watson, William A. Eastman & Co. v. (Wash.).....	1144	Zanger, State v. (Okl. Cr. App.).....	1107
Waymire, Miller v. (Kan.).....	681	Zany, Ex parte (Cal.).....	710
W. B. Gaffney Inv. Co., Shigeta v. (Wash.)	88	Zobel, People v. (Colo.).....	837
		Zumbusch v. Superior Court in and for Los Angeles County (Cal. App.).....	1070

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

ARIZONA.

Logia Suprema De La Alianza Hispano-Americana v. De Aguirre, 129 P. 503.

KANSAS.

Erath v. Glenn, 129 P. 830.

OKLAHOMA.

Hall v. Bruner, 127 P. 255.

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(47 Mont. 13)

PERKINS v. ALLNUT.

(Supreme Court of Montana. Feb. 10, 1913.)

1. FRAUDS, STATUTE OF (§ 119*)—EVIDENCE OF CONTRACT WITHIN STATUTE OF FRAUDS AS DEFENSE.

Where a complaint for the recovery of money alleged that money given the defendant was a loan, defendant was properly allowed to show that it was no loan, but payment of an installment upon an agreement to purchase real estate, although such contract was unenforceable under the statute of frauds, since even void agreements may be testified to to show that the nature of an agreement was not as contended by a plaintiff.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 113, 268, 270; Dec. Dig. § 119.*]

2. FRAUDS, STATUTE OF (§ 138*)—ORAL CONTRACTS—TERMINATION OF CONTRACT—RECOVERY OF PARTIAL PAYMENT.

One making a partial payment under an oral agreement to purchase real estate, and voluntarily terminating such contract, cannot recover the same in the absence of a showing that the vendor is unable or unwilling to carry out the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 327-333; Dec. Dig. § 138.*]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by R. L. Perkins against John J. Allnut. Judgment for defendant, and plaintiff appeals. Affirmed.

Raker & Kurtz, of Hamilton, for appellant. Edward D. Noonan, of Hamilton, for respondent.

HOLLOWAY, J. The defendant recovered judgment in the court below, and from that judgment and an order denying a new trial plaintiff appealed.

The action was instituted to recover \$837.64, alleged to be due to the plaintiff upon an express contract. According to the theory of the complaint, the transaction between the plaintiff and the defendant constituted, in effect, a demand loan. The answer denies the material allegations of the complaint and sets forth the defendant's version of the transaction, which is that the money advanced by plaintiff to defendant was a partial payment upon the purchase price of a piece of real estate which plaintiff agreed to

purchase from defendant for \$2,500. Upon the trial, after plaintiff had made out a prima facie case according to his theory and had rested, the defendant, over objection, introduced oral evidence of the agreement under which he contended the plaintiff advanced the money. Upon cross-examination it was developed that the agreement upon which defendant relied was in parol, and counsel for plaintiff then moved to strike out all the evidence relating to such contract. The court denied the motion, and this ruling presents the only question for our determination.

[1] Counsel for appellant contend that, since the contract relied upon by the defendant is invalid under the statute of frauds (Rev. Codes, §§ 5017, 5091), it cannot be appealed to by him unless he shows himself entitled to equitable relief. Counsel err, however, in failing to distinguish between facts necessary to entitle one to affirmative relief, and facts sufficient to constitute a defense. The parol agreement for the sale of land was not illegal or absolutely void; it was voidable—that is, it was unenforceable. *Ducie v. Ford*, 8 Mont. 233, 19 Pac. 414; *Browne on the Statute of Frauds*, § 135; 20 Cyc. 279; 9 Ency. Pl. & Pr. 706. And for this reason defendant would not be heard to insist upon a demand for the balance due him on the contract, but this rule does not preclude him from disclosing what the facts actually were, as a defense to the plaintiff's claim that the money was advanced as a loan. The general verdict of the jury is a finding that defendant's version of the transaction is the correct one and that the money was not advanced as a loan.

[2] The verdict is not attacked upon the ground of the insufficiency of the evidence to support it, indeed, such an attack could not well be made; and therefore, for the purposes of this appeal, it is established that the money which plaintiff advanced was a partial payment upon the purchase price of real estate under a parol agreement, and that plaintiff voluntarily terminated such contract. Under this state of facts, the rule that plaintiff cannot recover back such partial payment, in the absence of a showing that defendant is unable or unwilling to car-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—1

ry out the contract, is recognized quite uniformly. *Riley v. Williams*, 123 Mass. 506; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Plummer v. Bucknam*, 55 Me. 105; *Improvement Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952; *York v. Washburn* (O. C.) 118 Fed. 316, affirmed by Circuit Court of Appeals 129 Fed. 564, 64 C. C. A. 132; *Veneble v. Brown*, 31 Ark. 564; *McKinney v. Harvie*, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; *Cobb v. Hall*, 29 Vt. 510, 70 Am. Dec. 432; *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867; *Browne on Statute or Frauds*, § 122.

To test the correctness of the trial court's ruling, it is only necessary, with the facts before us, as established by the jury's verdict, to inquire what the result would have been had the defendant's evidence been excluded. The plaintiff would have recovered for money advanced as a loan, when in fact such a transaction never occurred between the parties.

Plaintiff pleaded and relied upon a particular contract, and the defendant was at liberty to prove anything tending to show that the allegations of the complaint were not true. This he could do by showing that there was not any contract whatever entered into, or by showing that the contract actually made was altogether different from the one asserted by the plaintiff, and this, too, even though in doing so he disclosed a contract unenforceable or even void. *Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 1020; 9 Cyc. 73; 4 Ency. Pl. & Pr. 941.

The trial court's ruling was correct, and the judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 16)

QUONG WING v. KIRKENDALL, County Treasurer.

(Supreme Court of Montana. Feb. 10, 1913.)

COURTS (§ 97*) — UNITED STATES SUPREME COURT—DECISIONS—CONCLUSIVENESS.

The decision of the United States Supreme Court on a federal question is conclusive upon a state Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 829-334; Dec. Dig. § 97.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by Quong Wing against Thomas B. Kirkendall, as treasurer of the county of Lewis and Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for appellant. Wight & Pew, of Helena, for respondent.

HOLLOWAY, J. This cause was heretofore before this court. *Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250. On writ of error it was removed to the Supreme Court of the

United States, where the judgment of this court was affirmed. *Quong Wing v. Kirkendall*, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350. In disposing of the case upon the pleadings as then drawn, the federal court, however, intimated strongly that, if in its operations section 2776, Revised Codes, applies only to persons of the Chinese race, it would be held invalid as contravening the provisions of the fourteenth amendment to the Constitution of the United States. Upon the return of the remittitur to the district court, counsel for plaintiff amended the complaint to meet the views of the Supreme Court of the United States, and to bring the case within the rule announced in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. To this amended complaint, a general demurrer was interposed. The trial court overruled the demurrer, and the county attorney, electing to stand upon his pleading, suffered judgment to be entered against the defendant, and appealed.

The controversy now presents a federal question upon the decision of which the judgment of the Supreme Court of the United States is conclusive. However reluctant we may be to subscribe to the doctrine announced in *Yick Wo v. Hopkins*, above, the decision in that case is binding upon us. Upon the authority of the former decision of this case by the Supreme Court of the United States, and the case of *Yick Wo v. Hopkins*, above, the judgment is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(164 Cal. 501)

SUHR et al. v. LAUTERBACH.

(S. F. 6,094.)

(Supreme Court of California. Jan. 24, 1913.)

1. EQUITY (§ 88*)—LACHES—PLEADING—NECESSITY.

Defendant may avail himself of the defense of laches without having pleaded it, as where shown by the evidence the court will deny relief sua sponte.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 245, 395; Dec. Dig. § 88.*]

2. TRIAL (§ 397*)—FAILURE TO FIND ON AN ISSUE—LACHES.

In an action to cancel a deed, the denial of defendant's motion for judgment on the ground of laches amounted to a finding that plaintiff was not guilty of laches.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

3. CANCELLATION OF INSTRUMENTS (§ 47*)—EVIDENCE—LACHES.

Evidence in an action to cancel a deed for duress and undue influence, which action was commenced one year and nine and a half months after delivery of the deed, held to sustain a finding that plaintiff was not guilty of laches.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. § 47.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. EQUITY (§ 72*)—LACHES—OPERATION TO BAR RELIEF.

Relief in equity is barred by laches where a plaintiff has slept upon his rights for so long a time and under such circumstances as to make the granting of relief inequitable, but for delay to bar a remedy the circumstances must be such that prejudice to some one may be reasonably supposed if the remedy be allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210-220, 225, 226; Dec. Dig. § 72.*]

5. APPEAL AND ERROR (§ 1009*)—FINDINGS OF TRIAL COURT—LACHES—CONCLUSIVE-NESS.

Whether a plaintiff's delay in suing has been of such long standing and under such circumstances that it would be inequitable to allow the remedy sought is a question for the trial court in the first instance, and its conclusion thereon, if reasonably supported by the evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

6. DEEDS (§ 75*)—VALIDITY—DURESS—RATIFICATION.

That the grantee of a deed which was procured by duress and undue influence contemporaneously with the execution of the deed and as part of the same transaction agreed, as a "further consideration for the conveyance," to execute a note as security for a loan in conjunction with the grantor, was not a ratification of the deed by the grantor, though the agreement stated that it was signed "after" the deed, and was marked "recorded at request of L." the grantor, where no such note was ever given or requested by the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 206-208; Dec. Dig. § 75.*]

Department 1. Appeal from Superior Court, Alameda County; N. A. Hawkins, Judge.

Action by Louise Lauterbach, for whom after her death H. F. Suhr and another as her executors were substituted, against George Lauterbach. From judgment for plaintiffs, defendant appeals. Affirmed.

Robert Edgar and Oliver Youngs, both of Berkeley, for appellant. Frank V. Kingston, of San Francisco, for respondents.

ANGELLOTTI, J. This is an action initiated by Louise Lauterbach to obtain a decree adjudging a deed executed by her to defendant, the brother of her deceased husband, on November 24, 1906, to be null and void, and quieting her title to the land described therein as against said defendant, on the ground that the execution of the same was procured by defendant by means of duress and undue influence exercised by him upon her. This deed reserved to Mrs. Lauterbach a life estate in the property conveyed. The action was commenced on September 16, 1908. The findings and judgment were in favor of plaintiff. This is an appeal by defendant from such judgment. Since the taking of the appeal, Louise Lauterbach died, and the executors of her will have been substituted as plaintiffs.

1. No claim is made in the briefs that the

evidence is insufficient to support any of the findings of the trial court.

2. It is claimed that Mrs. Lauterbach's right of action was "barred by reason of her laches in bringing suit." As we have seen, the date of the execution of the deed, as alleged in the complaint, was November 24, 1906, while the action was not commenced until September 16, 1908. The complaint was treated in the lower court by all the parties as sufficiently stating a cause of action; no objection by demurrer being made and the defendant answering upon the merits. Nothing was said about laches in the lower court until the very close of the trial, when all of the evidence on both sides had been received. Defendant then moved for judgment "on the ground of plaintiff's laches in commencing the action." Although the record does not show that the court formally ruled upon this motion, the judge saying only "Very well, the case is submitted," in view of the findings and the judgment the motion must be deemed to have been denied. We do not think that the allegations of the complaint were such in so far as the question of laches is concerned, as to warrant us in holding, after answer, trial and judgment, that the complaint failed to state a cause of action. The only question then is whether the evidence was such as to support the conclusion of the trial court that there was no such unreasonable delay on the part of Mrs. Lauterbach in asserting her right to avoid this deed as would bar her action.

[1] "It is well settled that the defense of laches need not be pleaded but that when it appears from the evidence that the seeker of relief in equity has been guilty of laches the court will deny such relief sua sponte without any pleading."

[2] The denial of defendant's motion for judgment on the ground of laches amounted to a declaration and finding to the effect that the plaintiff was not guilty of laches. *Stevinson v. San Joaquin, etc., Co.*, 162 Cal. 141, 121 Pac. 398.

[3] The evidence indicates that the deed, although dated November 24, 1906, was not delivered until December 1, 1906. The time between the delivery of the deed and the commencement of the action was thus one year and nine and one-half months.

[4] This was much less than the period prescribed by our statute of limitation within which such an action may be brought. But, of course, that fact does not bar the defense of laches, which is based entirely on equitable principles. It is well settled that, "entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof." *Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516. "Where such is the condition, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

demand is, in a court of equity, barred by laches." *Id.* "As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. Each case as it arises must necessarily be determined by its own circumstances." *Id.* "In order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed." *Cahill v. Superior Court*, 145 Cal. 42, 47, 78 Pac. 467.

[5] The plaintiff is not to be held barred from his remedy for the wrong alleged to have been done him, on the ground that he has been guilty of laches, unless his delay in bringing action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim or to allow such remedy. Whether such is the situation is a question in the first instance for the trial court, and, if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith.

The evidence in this case was such as to amply support a conclusion by the trial court to the effect that defendant could not have been prejudiced in the slightest degree by plaintiff's delay in commencing this action. The only matter suggested by counsel for defendant as to which such prejudice was or might be caused was that he (defendant) had a claim for \$3,680.75 against plaintiff for services rendered and board, at the time of the delivery of the deed, which he claimed on the trial was the real consideration for the execution of the deed, that relying upon the deed he had failed to take any proceeding for the enforcement of his claim, and that at the time of the commencement of the action this claim had become barred by the statute of limitations. Of this alleged claim, as was shown by the account furnished by defendant on the trial, \$3,217 was already barred by such statute at the date of the delivery of the deed, and of the remaining \$463.75 at least \$98 was not barred at the time of the commencement of this action, leaving only \$365.75 of the \$3,680.75 as to which defendant could have possibly lost any right by reason of the statute of limitations on account of defendant's delay. His additional charges, aggregating \$576.25, for alleged services, etc., subsequent to the delivery of the deed, were, of course, in no way imperiled by any statute of limitations by reason of the delay. The evidence was such as to support a conclusion that, regardless of the statute of limitations, defendant had no legal claim whatever against plaintiff at the time of the delivery of the deed, and had never asserted any such claim except for board for a short time, for which Mrs.

Lauterbach testified he had been fully paid. The account presented by him on the trial, when for the first time apparently Mrs. Lauterbach was made acquainted with the fact that he asserted any claim against her for money on account of services rendered, was of such a character, when considered in connection with the other evidence, as to warrant the learned judge of the trial court in entirely disregarding it, as is apparent from his opinion he did. There was also sufficient support in the evidence for the conclusion that there was no understanding on the part of plaintiff that she was deeding this property to defendant on account of any claim for money due him, and that the only thing in the way of consideration suggested to her was that he would see that she did not want anything during her lifetime. From what we have said it is clear that the court below was warranted in concluding that even as to the small portion of the asserted claim as to which the statute of limitations intervened as a bar between the time of the delivery of the deed and the date of the commencement of the action, defendant suffered no prejudice by reason of the delay.

It is further to be noted that there was evidence sufficient to support a conclusion that plaintiff made known to defendant very shortly after the delivery of the deed that she was not satisfied and wished to have the property back, and several times made a request of defendant to that effect. The evidence was also such as to support a conclusion that for a long time after the delivery of the deed plaintiff was to a great extent under the same influence that existed at the time of the execution thereof.

We are satisfied that it cannot be held that the conclusion of the lower court that plaintiff was not guilty of laches was not sufficiently supported by the evidence.

3. The other points made for reversal require but little notice.

[6] There was no subsequent ratification by plaintiff of the deed. The instrument signed by defendant, dated November 23, 1906, but signed "after" the deed, and marked "Recorded at request of L. Lauterbach," relied on as showing such a ratification, was practically contemporaneous with the deed and part of the same transaction. This instrument was simply an undertaking on the part of defendant, "as a further consideration for the conveyance," to execute a note secured by mortgage on the property conveyed, in conjunction with the grantor, to enable the grantor to obtain a loan thereon for her own use, if it became absolutely necessary to raise money in that way for her support. No such note or mortgage was ever given, or requested by plaintiff.

There is nothing at all in the claim that Mrs. Lauterbach was not damaged by the loss of her property.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(161 Cal. 620)

VAN HORNE v. TREADWELL et al.
(S. F. 6,101.)

(Supreme Court of California. Jan. 27, 1913.)

JUDGMENT (§ 592*)—BAR—SPLITTING CAUSES OF ACTION.

After a judgment in an action brought by a pledgor against the pledgee for the recovery of the pledged property, he could not bring a new action for the depreciation in the value of the property between the date of the tender of the amount of the secured debt and the return of the property, or for attorney's fees expended in recovering the property, since all the damages arising from the pledgee's wrongful refusal to redeliver the property should have been recovered in the first action, whether that action was one in claim and delivery, or was a suit in equity for specific performance of the agreement to return the property, and whether or not the elements of damage sought to be subsequently recovered were then known or ascertainable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. § 592.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. H. Van Horne against Ivan G. Treadwell and another. From a judgment for defendants, plaintiff appeals. Affirmed.

L. S. Melsted and Edwin H. Williams, both of San Francisco, for appellant. H. H. McPike, of Los Angeles, and Crittenden Thornton, of San Francisco, for respondents.

SLOSS, J. The court below sustained demurrers to the complaint, granting plaintiff leave to amend. No amendment having been filed within the time allowed, judgment was entered in favor of the defendants. The plaintiff appeals.

The complaint alleges the following facts: On June 30, 1910, plaintiff, who was then and has ever since been the owner of 3,500 shares of the capital stock of the Sutter Hotel Company, pledged said shares to defendant Reese to secure the payment of a loan of \$2,000. In February, 1911, plaintiff, with Reese's consent, pledged said shares to defendant Treadwell to secure an advance of \$4,350 made by Treadwell to plaintiff. It was agreed that out of the sum so advanced, Reese's loan should be repaid. This was done; plaintiff executing a note to Treadwell for \$4,350, and Reese turning over the stock to Treadwell upon receiving from the latter repayment of the \$2,000 loan, with interest. On March 26, 1911, plaintiff tendered to Treadwell payment of the full amount due upon the note, but Treadwell refused to accept said payment, or to deliver the pledged stock. On March 31, 1911, plaintiff brought an action against the defendants to recover said stock and tendered into court the sum of \$4,500 in payment of all indebtedness due from plaintiff to Treadwell. On June 16, 1911, plaintiff recovered judgment in said action against defendants for the return of said 3,500 shares of stock, and on

June 19, 1911, Treadwell actually delivered the stock to plaintiff.

It is further alleged that on March 26, 1911, the day of the tender to Treadwell, plaintiff had received an offer of \$7,500 for said stock, "and was ready, able, and willing to sell said stock for said sum of \$7,500." On the 19th day of June, 1911, and at all times subsequent to the 16th day of June, 1911, the value of the stock was \$4,500, and no more. In the action to recover possession of the stock plaintiff was compelled to and did expend \$1,500 in the pursuit of the property; i. e., in payment of attorney's fees. The complaint prays judgment for \$4,500.

So far as the plaintiff's demand is based upon the depreciation in the value of the stock, it is apparent that the action seeks to claim damages for the wrongful act of the defendants in withholding possession of the property, which had already been regained by means of the former action. Such damages cannot be recovered, for the simple reason that the plaintiff's right to them should have been litigated in the former action. The judgment there rendered was a conclusive adjudication of all matters, arising out of the withholding of the stock, which might have been presented to the court for determination. Whether we regard the first action as one in claim and delivery, or as a suit in equity for specific performance of the agreement to return pledged property on payment of the debt (in other words, a bill to redeem), there can be no question that in that action plaintiff was entitled to recover all damages sustained through the wrongful refusal of the defendants to redeliver the property. There was a total breach of a single and entire obligation, and the plaintiff could not split his demand for relief on account of such breach, so as to entitle him to recover a part of such relief in one action, and the remainder in another. The rule thus stated is applicable, even if we assume, contrary to what we consider the fair construction of the pleading, that the complaint shows that the elements of damage now sought to be recovered were not known or ascertainable at the date of the former judgment. The principle involved has been fully considered and discussed in the recent case of *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 118 Pac. 425, and it is unnecessary to repeat the arguments there elaborated. It will suffice to quote from the opinion a single sentence, applying directly to the precise case before us: "In accord with the views we have stated," says Angellotti, J., "It has been held that the continued withholding of stocks or bonds after the bringing of action to enforce their delivery, pending the litigation and up to the time of the enforcement of the decree, is not a new wrong redressible by a new action, but is simply a continuation of the original wrong, for which the only redress given by the law must be had in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

original action; and that consequently, a second action would not lie for the damage due to depreciation in the value of the stocks or bonds occurring between the time of the commencement of the first action and the determination of such action on appeal. See *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510 [60 N. E. 772, 82 Am. St. Rep. 731]; *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132 [25 N. E. 208]."

The demand for repayment of attorney's fees in the former action stands upon no different ground. If this was a proper element of damage at all, it was a damage which flowed from the single wrongful act of withholding redelivery of the stock. Plaintiff's right to reimbursement was therefore adjudicated against him by the judgment in the action to enforce such redelivery.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 623)

FOSTER v. BUTLER et al. (L. A. 2,929.)

(Supreme Court of California. Jan. 29, 1913.

Rehearing Denied Feb. 28, 1913.)

1. LIMITATION OF ACTIONS (§ 84*)—MORTGAGES—ABSENCE FROM STATE.

Although under Code Civ. Proc. § 351, providing that the time during which a person sued is absent from the state is not a "part of the time limited for the commencement of the action," a nonresident mortgagor cannot plead the two-year limitations of section 339, subd. 1, if he has not been in the state; it is otherwise as to one who has acquired the interest of the mortgagor through an execution sale.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 199, 200; Dec. Dig. § 84.*]

2. TRIAL (§ 368*)—AGREED STATEMENT—CONSTRUCTION—ABSENCE FROM STATE.

A statement in an agreed statement of facts that one has never been a resident of the state does not preclude his physical presence under Pol. Code, § 52, relating to residence, so as to save the right to sue him as against a plea of limitations; it not being the purpose of Code Civ. Proc. § 351, providing that the time during which a person sued is absent from the state is not a "part of the time limited for the commencement of the action," to deprive nonresidents of the benefits of the statute of limitations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 880; Dec. Dig. § 368.*]

3. APPEAL AND ERROR (§ 1015*)—REVIEW—APPEAL FROM MOTION FOR NEW TRIAL—JUDGMENT.

On appeal from an order denying a new trial, the question whether the findings support the judgment cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3870; Dec. Dig. § 1015.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Nathaniel C. Foster against Phoebe M. Butler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. H. Sweet and Sam Ferry Smith, both of San Diego, for appellants. W. J. Moss-holder and Marks P. Mossholder, both of San Diego, for respondent.

SLOSS, J. This action was brought by Nathaniel C. Foster against the personal representative and the heirs at law of Andrew O. Butler, deceased, to quiet plaintiff's title to a tract of land in San Diego county. The heirs answered, asserting an interest under a mortgage executed by Charles G. Wheeler, Foster's predecessor in interest, to Andrew O. Butler. The administrator with the will annexed of Butler's estate answered, denying plaintiff's title. The court gave judgment in favor of plaintiff. The defendant heirs moved for a new trial, which was denied, and they now appeal from the order denying their said motion.

The cause was presented upon an agreed statement of facts. Upon this statement the court below found that the mortgage from Wheeler to Butler did not constitute a lien upon the premises, for the reason that the mortgage and the note secured by it were barred by limitation. The principal question raised by this appeal is whether this finding properly resulted from the stipulated facts which are as follows:

On July 3, 1899, Charles G. Wheeler, who was then the owner of the land in question, executed to Andrew O. Butler his promissory note for \$3,000, with interest, payable six months after date, together with a mortgage of the land to secure said note. Both Wheeler and Butler were residents of Chicago, and the note and mortgage were executed and delivered in that city. Neither of them, as we construe the statement, has since been in the state of California, "except that Wheeler was temporarily in the county of San Diego for about three weeks in March and April, 1902." No part of the principal or interest on said note has been paid. On March 2, 1901, Foster, the plaintiff herein, commenced an action in the superior court of San Diego county against Wheeler, and on the same day a writ of attachment was duly issued in said action and levied upon the land in controversy as Wheeler's property. Wheeler appeared and answered. On March 21, 1902, a personal judgment was entered in said action in favor of Foster and against Wheeler for some \$14,000. On March 22, 1902, a writ of execution was issued and levied upon said land, and on April 24, 1902, the interest of Wheeler therein was sold by the sheriff at execution sale to the plaintiff Foster. A certificate of sale was duly issued to the purchaser, and a duplicate filed in the office of the county recorder on the same day. No redemption was made, and on June 18, 1903, the sheriff executed and delivered to Foster a deed of said property. The sheriff's deed was recorded on June 19, 1903. Foster has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

never parted with his title, and has, ever since, been in constructive possession of the premises.

Andrew O. Butler died at Chicago on the 15th day of January, 1902, leaving a will, which was admitted to probate by the superior court of San Diego county on July 1, 1904. Butler's only heirs were his widow and three sons, all of whom are defendants herein. The widow is sole legatee and devisee under the will. The plaintiff has never been a resident of the state of California.

[1] The complaint in this action was filed on the 18th day of June, 1908. The answer of appellants, asserting the mortgage lien, was filed November 25, 1908. The mortgage debt was payable on February 3, 1900, and, since the note and mortgage were executed out of the state, the time within which an action of foreclosure could have been brought was that declared by subdivision 1 of section 339 of the Code of Civil Procedure; i. e., two years. Under section 351 of the same Code, the time during which a person sued is absent from the state is not "part of the time limited for the commencement of the action." So far, then, as Wheeler, the original mortgagor, is concerned, his absence from the state would have debarred him of the right to set up the statute of limitations in defense to an action brought against him on the note and mortgage.

But the plaintiff, as successor to the interest of the mortgagor, stands in a different position. It is settled by a series of decisions, extending over many years, that the mortgagor cannot, by waiving the bar of the statute, affect the right of a subsequent purchaser or incumbrancer of the mortgaged premises to insist as to himself that the action was not brought in time. The rule was applied at an early date to cases where the waiver had been by express agreement. *Lord v. Morris*, 18 Cal. 462; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754. And no different question arises where the original mortgagor has lost his right to plead the statute by absenting himself from the state. *Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Filipini v. Trobeck*, 134 Cal. 441, 62 Pac. 1066, 66 Pac. 587; *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744; *Cal. Title Ins. & T. Co. v. Miller*, 3 Cal. App. 55, 84 Pac. 453. "When third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver and one caused by his voluntary act in absenting himself from the state." *Wood v. Goodfellow*, supra, "The law as to this point," said *McFarland, J.*, in *Brandenstein v. Johnson*, supra, "has been settled by former decisions of this

court, * * * and there seems to be no necessity for discussing it as if the question were still an open one."

[2] If the statutory period of limitation did not commence to run in favor of Foster, the respondent, as early as March 2, 1901, when, by virtue of the levy of his writ of attachment, he became the owner of a lien appearing of record (Code Civ. Proc. § 542), the statute was certainly set in operation, at the latest, on June 19, 1903, when the sheriff's deed to him was recorded. In either view, the time for enforcing any rights under the mortgage against Foster's interest in the property had long expired when this action was brought. It is argued that the agreed statement shows that not only the original mortgagor, but the plaintiff himself, was, by reason of absence from the state, precluded from setting up the bar of the statute. See *Com. Sav. Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625. But the facts do not support this contention. There is no stipulation that Foster was out of the state for a period sufficient to save the mortgagee's right to sue him, or, in fact, that he was absent at all. It is declared in the agreed statement that plaintiff has never been a resident of California, but, of course, the fact that one is not a resident of a place is in nowise inconsistent with his physical presence there. *Pol. Code*, § 52. To bring the plaintiff within the exception of section 351, it would have been necessary to show that he was not in fact within the state for periods aggregating two years between the accrual of a cause of action against him and the commencement of the action. The section does not assume to deprive nonresidents of the benefits of the statute of limitations. What it does is to exclude from computation the time during which any defendant, resident or nonresident, may have been out of the state. The force of this distinction was evidently recognized by the defendants themselves, for in their answer they do not content themselves with alleging that Foster was a nonresident, but aver, in addition, that he had been absent from the state since the 28th day of March, 1901. The latter averment, however, did not find its way into the agreed statement of facts.

For these reasons, the finding that the note and mortgage were barred by the statute of limitations cannot be held to be unsupported.

[3] The appellants make the further contention that the plaintiff should not be permitted to quiet his title against the appellants without paying or offering to pay the mortgage debt, even though an action to foreclose the mortgage be barred. On the record before us, this point cannot be presented otherwise than by a claim that the findings do not support the judgment. Such claim might properly be made on an appeal from the judgment, but is not involved, and cannot be considered on an appeal from an

order denying a new trial (*Great Western, etc., Co. v. Chambers*, 153 Cal. 307, 310, 95 Pac. 151, and cases cited), which is all that we have before us here.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 596)

GUGOLZ v. GEHRKENS et al. (L. A. 2,799.)
(Supreme Court of California. Jan. 24, 1913.)

1. CONTRACTS (§ 113*)—WILLS—AGREEMENT TO SET ASIDE—VALIDITY.

Plaintiff was devised one quarter of an estate and made an executor, and, with the devisee of another quarter, who was also an executor, agreed with testator's widow, who had a life interest in the whole estate, that if she would promise to devise each of them a quarter of her estate they would help her to have the will set aside. The executors, after filing application for probate, which was resisted by the widow, represented by the partner of their own attorney, made no effort to sustain the will; and it was denied probate and the property distributed to the widow as sole heir. The devisees of the other half of the estate knew nothing of the proceedings. Testator was competent to execute the will, and it was valid, as known to plaintiff. *Held*, in an action against the executor of the deceased widow, that the agreement was unenforceable, as opposed to public policy and based upon an illegal consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 521-541; Dec. Dig. § 113.*]

2. CONTRACTS (§ 129*)—WILLS—PROBATE—AGREEMENT BETWEEN PARTIES—VALIDITY.

While an agreement between all the parties interested in the probate of a will that some course be followed as to contesting the will, or as to the property involved, in the absence of contemplated fraud or violation of law, is valid, yet an agreement to resist the probate of a will and procure it to be set aside, so as to cut off the interest of one who was not a party to the agreement, tends to thwart justice, and is against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 616-632; Dec. Dig. § 129.*]

3. CONTRACTS (§ 139*)—ILLEGALITY OF CONSIDERATION—EFFECT—PARTIES NOT IN PARI DELICTO.

An agreement between testator's widow and an executor and devisee under the will, whereby the executor helped the widow, who had a life interest in the whole estate, to have the will set aside and the estate distributed to her as sole heir, in consideration of her promise that she would devise him a quarter of her estate, though made without duress or undue influence, but void in equity on the grounds of public policy and illegality of consideration, was not enforceable against the widow's estate, on the ground that such executor was not in pari delicto.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 684-700; Dec. Dig. § 139.*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Emil S. Gugolz against C. M. Gehrken, executor of Marie Gugolz, deceased, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Mott & Dillon and Louis W. Myers, all of Los Angeles, for appellants. R. L. Horton, of Los Angeles, for respondent.

ANGELLOTTI, J. Plaintiff had judgment, from which, and from an order denying their motion for a new trial, defendants appeal. The action is one to enforce an alleged oral agreement, made in 1881, by which Marie Gugolz, the deceased, agreed to make a will in favor of plaintiff to the extent of one-fourth of all the property that she should die possessed of. She died testate in January, 1907, leaving an estate of the value of about \$37,000. By her will she bequeathed to various persons other than plaintiff sums aggregating about \$22,000. To plaintiff she left \$5, and no more. The defendants, other than the executor of the will, are all either legatees thereunder, or heirs of the deceased. The trial court found in accord with the allegations of the complaint, and concluded that plaintiff was entitled to a one-fourth interest in the entire estate, subject to administration thereof, and that defendants are constructive trustees of such interest therein for the benefit or use of plaintiff.

Plaintiff was a nephew of the deceased husband of Marie Gugolz, Caspar Gugolz, being the son of a brother of said Caspar Gugolz. He lived with and was maintained and cared for by said Caspar and Marie Gugolz from 1871, when he was about 10 years of age, to the time of death of Caspar, which occurred in December, 1881, in Denver, Colo., where Caspar resided. He continued to live with deceased after the death of Caspar until some time in 1890, when he married, after which he lived in Denver, and deceased lived in Los Angeles, Cal. He was never legally adopted by either Caspar or Marie. Notwithstanding many allegations and findings as to matters of this character, there is no contention that there is anything alleged or found that would entitle plaintiff to any relief, other than the alleged agreement hereinbefore referred to, and no such contention could reasonably be made. Plaintiff bases his claim, as he must, solely on such agreement.

The facts relating to the agreement, as alleged in the complaint, were substantially as follows: Caspar died testate, leaving an estate amounting in value to about \$30,000. By his will he gave to plaintiff a one-fourth interest in all his property and estate. Marie Gugolz informed plaintiff that she was dissatisfied with the terms of said will and would contest it, asked plaintiff not to make any objection to such contest, and promised him that if he made no such objection she would make a will in his favor, leaving him a one-fourth interest in all of the property that she should die possessed of, and that he would lose nothing by refraining from making such opposition. He, having perfect confidence and trust in said aunt and her promise, consented and agreed. She did contest the will, plaintiff made no opposition to said contest, and the will was set aside and denied probate by the court. "If he had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made opposition to the contest, * * * he believes that the same would have been sustained," and he would have opposed it but for her promise. The contest went by default, by reason of his failure to oppose the same. It was alleged that such promise was based upon a good, valid, and adequate consideration.

The findings of the trial court show, in addition to the above, the following: By the will of Caspar a life interest in all his property was given to said Marie Gugolz. Subject to such life interest, plaintiff was given one-fourth of the estate, a brother, Edward, in Switzerland, was given one-fourth, one Adolph Aeppli was given one-fourth, and the six children of Gottlieb Aeppli were given one-fourth. Plaintiff and Adolph Aeppli were, by the terms of the will, made the executors thereof. At the time of the agreement plaintiff had not quite attained the age of majority, but was of full age on the day when the hearing on the application for probate was had. The findings as to the terms of the agreement and the matter of consideration were in accord with the allegations of the complaint.

The answers of defendants sufficiently deny the allegations of the complaint as to the terms of the agreement and the matter of a good, valid, and adequate consideration; and the findings on these matters are sufficiently attacked by specifications of insufficiency.

The evidence as to the terms of the agreement, in so far as they refer to what plaintiff was to do in consideration of the promised act of Marie Gugolz, shows a very different case from that presented by either complaint or findings, and one, we believe, that presents a materially different legal question. Of course, it is naturally to be expected that there would ordinarily be some difficulty in proving just what an oral agreement, made more than 25 years before, was, where there is no written memorandum of any kind to show the conversation relied upon as stating the terms. But here, in the light of the testimony of the plaintiff himself, who gave the only evidence there was as to the terms of the agreement, and the evidence as to what was actually done by him in pursuance of the agreement, there can be no question as to just what, in substance, the agreement was.

On the evening of the day on which Caspar Gugolz was buried, December 29, or 30, 1881, Marie Gugolz and plaintiff and Adolph Aeppli, who had come from Chicago for the funeral, were together at the residence of Mrs. Gugolz. They read the will, and Mrs. Gugolz expressed her dissatisfaction therewith. She said to them: "If you agree to make no opposition *and to have this will set aside, you and Adolph*, I will, right after it is defeated, make my will giving you each your quarter after my death. Emil, you can have your quarter, and Adolph shall have your quarter,

and the will will be made in the same division as Uncle had it." They both agreed, saying: "Yes; we will help you out; and if you will fulfill your promise and make your will the same as Uncle had it *we will help you out in every shape and form.*" The next day they all three went to the office of the lawyer who had drawn the will, and who had acted as one of the subscribing witnesses when it was executed December 18, 1881. This lawyer was told by them that "all three of us agreed together to have it [the will] set aside, and if it can be done to have it done." He told them it would be a "pretty hard matter to do it," but that, "of course, with a little scheming * * * it can be accomplished." He directed them to return in a few days. On their return, January 4, 1882, they were taken by the lawyer before the probate judge, where plaintiff and Adolph Aeppli signed a petition for the admission to probate of Caspar's will and the issuance to them of letters testamentary, and were sworn as to the truth of the allegations of the petition by said judge. A few days later the three went to the lawyer's office again, and Marie Gugolz signed a written opposition to the application for probate. On January 25, 1882, the three went with the lawyer to court, together with the lawyer's partner, who acted on the hearing as the attorney for Marie Gugolz. The two subscribing witnesses testified, being questioned only by the attorney appearing for Marie Gugolz. The deposition of the attorney who drew the will shows that the petitioning executors had no attorney on such hearing, did nothing after filing their petition to sustain the will, simply remained quiet at such hearing "and kept close to Mrs. Gugolz," and that "all went the other way by the persuasions, promises, and inducements of Mrs. Gugolz." This was in no way contradicted. When the hearing was completed, the attorney who drew the will, according to the testimony of plaintiff, came over to the three and said to the executors, "I have defeated that will in favor of your aunt." The deposition of this lawyer further shows that Caspar Gugolz was not mentally incompetent to execute a will, and that it was not true that the subscribing witnesses did not subscribe their names in the presence of the testator. Plaintiff himself testified that he was present at the execution of such will; that Caspar Gugolz signed the will in the presence of the subscribing witnesses, and that both subscribing witnesses attached their signature at the request and in the presence of the deceased; and that he stated it was his will. This uncontradicted testimony covers all the grounds of the contest made. There appears to be no reason to doubt that the will was in fact valid, and that plaintiff knew it to be valid. The record sufficiently shows that none of the other beneficiaries under the will were in Colorado at the time, or knew anything about the proceedings. On January 25, 1882, the alleged

will was denied probate, and, as a result, all of the property of Caspar Gugolz was subsequently distributed to Marie Gugolz, as sole heir.

Going back to the language used by plaintiff in his testimony as to the terms of the contract, we see that the proposition made by Marie Gugolz to the two executors was to leave them each one-fourth of her estate if they would agree, not only to make no opposition to her contest, but also "to have this will set aside"; and that they in response said that if she would make such a disposition of her property "we will help you out in every shape and form." This implied not only passive acquiescence in anything she might do in the matter of a contest, but also such active participation on their part, even as executors, as might be essential to bring about the setting aside of the will; and the conduct of the executors thenceforth to the time of the making of the order denying probate of the will clearly shows their understanding that such was the nature of their undertaking. We may concede that the contract as alleged and found cannot be held, in view of the authorities, to be void as against public policy, or to be based upon an illegal consideration.

[1] But the contract shown by the evidence is a very different contract from the one alleged and found. The contract shown was one between the executors named in the will, on the one hand, and the sole heir of deceased, on the other, by which its executors agreed to actually join with such heir in having the will set aside, regardless of its validity, and in violation of the rights of the legatees other than themselves, who were entitled, under the will, to one-half of the estate, subject to the life interest of Marie Gugolz, to use the office to which they were appointed by the will to accomplish this result, as executors named in the will to institute a proceeding for its probate and the issuance of letters testamentary to themselves, for the sole purpose of enabling the heir to contest the same, and to allow such contest to prevail by default on their part, regardless of the merits thereof, all in consideration of the promise on the part of the heir to bequeath to each of them by her last will one-fourth of her estate. This, of course, was, as said by counsel for appellants, not a mere agreement "for the relinquishment of a valid right," or "a matter which concerns the parties only." It appears to us that a mere statement of the terms of the real contract is enough to clearly show that the contract is opposed to public policy, and is based upon an illegal consideration.

[2] The absence of sound objection on this ground to a contract having for its sole purpose the disposition of property in a manner different from that proposed by a testator, even where the contract contemplates the rejection of the will when offered for pro-

bate or its setting aside when admitted to probate, when it is entirely free from fraud, and is made by all the parties in interest, may be freely conceded. As has often been substantially said, the public generally has no interest in the matter of the probate of a will; and only those interested in the estate under the will or otherwise are affected by such a contract. If they all agree upon some course to be followed, and their contract is otherwise free from contemplated fraud or violation of any law, no one else has any such interest as warrants complaint. Such was the character of contract involved in *Spangenberg v. Spangenberg* (App.) 126 Pac. 379, especially relied on by plaintiff here, where the contract purported to affect only such property of the deceased as should in fact be received by the parties thereto. In *Estate of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, another case much relied on by plaintiff, a contract by an heir to refrain from contesting a will was involved. It was said that the contract was one that concerned the parties alone, and one that did not appear to be against public policy. The contract here involved concerned, not only the parties thereto, but also all the other legatees under the will of Caspar Gugolz, none of whom, the record sufficiently shows, were present, or had any actual notice of what was being done. Such other legatees were all entitled, if the will stood, to receive the amounts given them, subject to the life interest given to Marie Gugolz. This interest given them was free from any power of disposition on the part of said Marie Gugolz. The setting aside of the will involved the absolute destruction of this right conferred on them thereby, and the vesting of the whole of their interest in Marie Gugolz, to do with as she saw fit. The purpose and effect of the contract were to accomplish this very result, to prevent the probate of the will in order to defeat the rights of the legatees thereunder, not, it may be conceded, merely to so deprive such legatees of their rights, but for the purpose of enabling Marie Gugolz to have all of the property, with absolute power of disposition. The only undertaking of Marie Gugolz was to leave such property as she possessed at the time of her death to the legatees named in her husband's will, in the proportions specified therein. In addition to this, the contract contemplated, and in its execution involved, not the mere omission of the executors named in the will to take any step looking to the defense thereof, but their active co-operation as executors in so presenting the matter to the court as to bring about the invalidation of the will, regardless of whether or not there was any legal objection thereto. We think no case can be found in which such a contract has been held to be valid. It has been expressly held that an agreement to resist the probate of a will and procure it

to be set aside, so as to cut off the interest of one who is not a party to the agreement, is against public policy; it being said that the object of such a contract was against public policy, as tending to thwart justice. See *Gray v. McReynolds*, 65 Iowa, 461, 21 N. W. 777, 54 Am. Rep. 16.

In *Cochran v. Zachery*, 137 Iowa, 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307, 15 Ann. Cas. 297, the heirs of the testator, who were given a life interest by the will, with remainder over to their issue, in order to obtain a fee-simple title, agreed with the person named as executor to pay him \$2,000, in lieu of the compensation he would be entitled to as executor and trustee if the provisions of the will should be carried out, if he, acting in conjunction with them, should secure the setting aside of the will of deceased. The executor did not even petition for the probate of the will; such petition being presented by the guardian of one of the heirs. The will was denied probate on the contest made thereto. The question of the executor's right to recover the \$2,000 agreed to be paid him was presented, and the contract was held to be against public policy, and recovery thereon was denied. It was said that by the contemplated adjudication that the will was not valid the rights of the issue entitled to the remainder were to be absolutely defeated, and, citing *Gray v. McReynolds*, supra, that such an agreement to cut off the interest of one who is not a party is against public policy. It was further held that the agreement there involved was against public policy, in that it contemplated the violation by defendant of the trust reposed in him by his father in naming him as an executor to carry out the provisions of the will, although he had not assumed any obligation as such; the court saying that it believed it to be in violation of public policy that he should speculate on the advantages which would accrue to him, as executor and trustee, should the will be admitted to probate, and make the relinquishment of those advantages the consideration for an agreement to secure a pecuniary consideration. It was further said that any contract which involves a fraud on the rights of others is against public policy.

In *Ridenbaugh v. Young*, 145 Mo. 274, 46 S. W. 959, the agreement of one heir to pay another \$10,000, if a proceeding for the setting aside of the will of the deceased, instituted by the promisor, should be successful and the will set aside, was involved. The effect of such a conclusion of the proceeding was to cut off the rights of a devisee who was not a party to the agreement. It was said that under the facts appearing the contract was entered into by two apparent adversary parties, without the consent of a codefendant of one of them; and that the participating defendant was to be paid a

money consideration by the contestant if he was successful. It was said by the court that the contract showed that it was entered into for the purpose of defrauding the devisee not a party to the agreement, and of imposing upon the court, under the pretense by the promisee that she was acting in concert with her codefendant in resisting the suit to set aside the will, while at the same time she was conniving with the plaintiff to bring about a different result, for all of which she was to receive a consideration.

It is to be noted that by the agreement there involved the contestant agreed with the promisee to transfer to the devisee who was not a party all his interest in certain lands devised by the will to such devisee, thus making a promise for his benefit, just as, in the case at bar, Marie Gugolz made such a promise for the benefit of those not parties to the agreement between herself and the executors. What was said by the Supreme Court of Missouri as to the contract involved in the case referred to, as stated above, is applicable here. The contract here, by the very terms, was a fraud upon the other legatees, and must be held to have been entered into for the purpose of defrauding them. It further must be held to have contemplated an imposition upon the probate court, the inauguration of a proceeding in which the parties appearing were to be apparently adversary, while in fact they were all actively engaged in seeking the same result—the setting aside of the will of deceased, as invalid, absolutely without regard to the merits of the contest. Of the agreement involved in the case referred to, the Supreme Court of Missouri said: "If such an agreement is not inconsistent with the full and impartial course of justice, then we are at a loss to know what is. It was not only a fraud upon one of the parties to the suit, but it was an imposition on the court, its general tendencies fraudulent and against public policy. No such contract can or should be enforced; it is at war with honesty of purpose and the correct and fair administration of justice. In such circumstances the law will leave the parties where it finds them." It is said in the note to *Cochran v. Zachery*, 16 L. R. A. (N. S.) 237, that, where the contract is not made by all the parties in interest, and the purpose and effect of it are to prevent or defeat the probate of a will, thereby to defeat the rights of certain legatees or devisees therein, not parties thereto, the courts passing upon the question are unanimous in holding it violative of public policy and void. We have found no reason to doubt the correctness of this statement. So far as the obligation of one named as executor in a will to oppose a contest is concerned, the statements in *Estate of Hite*, 155 Cal. 455, 101 Pac. 448, and *Estate of Higgins*, 158 Cal. 353, 111 Pac. 8, relied upon by learned counsel for plaintiff, correctly declare the law as it

exists in this state. But there is nothing in either of these cases which countenances the willful use by such person of the rights accruing from the fact that he is named as executor to carry out the provisions of the will, for the purpose of overthrowing it and having it declared null and void. As suggested in a somewhat similar case, to approve such action would be to approve a continuance in his trust by an executor, for the very purpose apparently of better betraying it. See *Miller's Appeal*, *Wilhelm's Appeal*, 30 Pa. 478, 495. We are satisfied that such a contract as is shown by the evidence should be held to be against public policy and based on an unlawful consideration.

It appears from what we have said that the difference between the contract shown by the evidence and the contract found by the trial court is material to such an extent as to require the conclusion that the findings in regard to the terms of the contract are not sustained by the evidence. It also appears from what we have said that the finding of the trial court, to the effect that the promise of Marie Gugolz to plaintiff was based upon a good, valid, and adequate consideration, is not supported by the evidence.

[3] It is earnestly urged that the parties to this agreement were not in *pari delicto*, and that the plaintiff should be allowed to enforce the same in equity, notwithstanding there may be well-founded objections there-to on the ground of public policy and illegality of consideration. Of course, the complaint was not drawn upon any such theory. The theory of the complaint was that the contract was in all respects valid, and no attempt was made to allege facts showing that plaintiff was entitled to relief upon any other theory. It was incidentally alleged that plaintiff was then a minor, and that Marie Gugolz was as a mother to him, and had a mother's influence over him. But it was alleged that, "if he had made opposition to the contest, * * * he believes that the same would have been sustained; and * * * that if it had not been for the promise of his said aunt that she would provide for him in the same manner in her will that he would have opposed the said contest on her part of the said last will of the said Caspar Gugolz;" and "that the said contest went by default on the part of plaintiff, by reason of the said promise made to him by his said aunt." The trial court found, outside of any issue made by the pleadings, that at the date of said promise and agreement said plaintiff was inexperienced and ignorant as to the law, law courts, and court procedure, and in making said promise said plaintiff was controlled and influenced by his said aunt. There is nothing in the evidence contained in the record now before us to indicate on the part of Marie Gugolz anything in the nature of op-

pression, duress, threats, undue influence, or the taking advantage of necessities, weaknesses, and the like, as a means of inducing plaintiff to enter into this contract. Apparently what he did was done in all respects freely and voluntarily. He was 21 years of age on the day the hearing was had in the Colorado probate court, and, so far as appears, was fully as conversant with law, law courts, and court procedure as was Marie Gugolz, if not a great deal more so. Eliminating the finding that may be claimed to tend to show undue influence on the part of Marie Gugolz, namely, the finding that plaintiff was controlled and influenced by his said aunt, and the further finding as to plaintiff's ignorance of the law, etc., it is manifest that the judgment cannot be sustained upon the theory that the contract, although void as being against public policy and based upon an illegal consideration, may nevertheless be enforced by plaintiff, or that some relief may be granted on account thereof, because he was not in *pari delicto* with Marie Gugolz. The findings, in so far as they are sufficiently sustained by evidence, obviously do not present such a case as may properly be held to be within any exception to the general rule that neither party to such a contract will be granted relief by the courts; and that the law leaves such parties where it finds them. The exceptions to such rule, based on the theory that the parties are not in *pari delicto*, are well stated in a general way in section 942 of *Pomeroy's Equity Jurisprudence* (3d Ed.). Certainly such findings in the case at bar as are sufficiently sustained by the evidence do not bring this case within any of the exceptions to the general rule.

The fact that certain material findings are not sufficiently sustained by the evidence makes a reversal necessary.

The judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; MELVIN, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

(104 Cal. 607)

NATHAN v. DIERSSEN. (Sac. 1,979.)

(Supreme Court of California. Jan. 25, 1913.
Rehearing Denied Feb. 24, 1913.)

1. EJECTMENT (§ 128*)—MESNE PROFITS—RECOVERY—NECESSITY OF POSSESSION.

At common law, an action for mesne profits could not be maintained against a wrongful disseisor, except by a plaintiff who had regained actual possession of the premises.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 438-440, 442, 443, 454, 456; Dec. Dig. § 128.*]

2. EJECTMENT (§ 17*)—GROUNDS OF ACTION—DISPOSSESSION.

Ejectment can be maintained by an owner who has been wrongfully dispossessed and is still kept out of possession.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 63, 64; Dec. Dig. § 17.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. JUDGMENT (§ 252*)—PRAYER FOR RELIEF—STATUTORY PROVISIONS—MESNE PROFITS.

Under Code Civ. Proc. § 427, authorizing a plaintiff, unlawfully dispossessed, to unite a claim to recover real property and for damages for its withholding and for the rents and profits, and section 580 empowering the court, on answer filed and issues raised, to grant plaintiff any relief consistent by the complaint and within the issue, the court, in an action in which the complaint charged that defendant dispossessed plaintiff and still withheld possession, after answer filed, could render a judgment for possession, with recovery of rents and profits, though there was no prayer for restitution of possession in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

4. EJECTMENT (§ 128*) — POSSESSION BY PLAINTIFF—JUDGMENT FOR MESNE PROFITS.

In an action where a judgment for restitution and for rents and profits might have been rendered under the issues, the fact that plaintiff came into possession of the premises after the commencement of the action, so that the judgment did award restitution, did not deprive him of his right to a judgment for mesne profits.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438-440, 442, 443, 454, 456; Dec. Dig. § 128.*]

5. EJECTMENT (§ 130*)—JUDGMENT FOR RENTS AND PROFITS—INTEREST.

Interest upon the rents and profits recovered may be allowed when necessary to a complete indemnity.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 448; Dec. Dig. § 130.*]

6. EJECTMENT (§ 135*)—RENTS AND PROFITS—EVIDENCE AS TO RENTS.

In an action for the rents and profits of land, damages may be established either by showing the rents and profits actually received, or by proving the annual rental value of the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 459, 460; Dec. Dig. § 135.*]

7. DISMISSAL AND NONSUIT (§ 60*)—DELAY—STATUTORY PROVISIONS.

Code Civ. Proc. § 583, which directs a dismissal where there has been a delay of five years after filing of answer, expressly excepts cases where the parties have stipulated in writing that the time may be extended.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.*]

8. EXECUTORS AND ADMINISTRATORS (§ 453*)—ACTION AGAINST EXECUTRIX — FORM OF JUDGMENT.

Under Code Civ. Proc. § 1504, a judgment against an executrix, upon a demand against the estate of her testator, should be stated to be only payable in due course of the administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1884-1908; Dec. Dig. § 453.*]

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Charles P. Nathan against George E. Dierssen, continued after his death against Eda B. Dierssen, as executrix. Judgment for plaintiff, and defendant appeals. Judgment modified and affirmed.

Devlin & Devlin, of Sacramento, for appellant. D. E. Alexander, of San Francisco, and White, Miller & McLaughlin, of Sacramento, for respondent.

SLOSS, J. The action was brought by Charles P. Nathan against George E. Dierssen to recover the rents, issues, and profits of a tract of land in Yolo county, alleged to have been unlawfully withheld from plaintiff by defendant. Pending the action, the original defendant died, and Eda B. Dierssen, as executrix of his last will, was substituted in his stead. A supplemental complaint alleged the presentation of a claim by the plaintiff to the executrix. Upon a trial without a jury, the court rendered judgment in favor of the plaintiff for \$2,592.75, and from this judgment, and an order denying her motion for a new trial, the defendant appeals.

The present action was commenced in May, 1902. It appears from the bill of exceptions that in July, 1898, the plaintiff Nathan had commenced a former action against Dierssen and another to quiet his title to the land in question, and for restitution of the possession thereof, and that on April 22, 1902, a judgment in accordance with plaintiff's prayer had been entered in said action. An appeal was taken to this court, and the judgment was affirmed on the 23d day of February, 1905. Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739. It appeared, further, that pending said appeal, to wit, on November 1, 1902, Dierssen surrendered possession of the premises to the plaintiff. Such surrender, it will be noted, took place after the commencement of the present action. The appellant contends that, under this state of facts, the plaintiff was not entitled to maintain an action for rents and profits, for the reason that he was not, at the date of the filing of his complaint, in possession of the land.

[1] It was without doubt the established rule at common law that an action against a wrongful dispossessor, for mesne profits, could not be maintained except by a plaintiff who had regained actual possession of the premises (15 Cyc. 213, 215; Stancill v. Calvert, 63 N. C. 616; Caldwell v. Walters, 22 Pa. 378; Ainslie v. Mayor of New York, 1 Barb. [N. Y.] 168; Alt v. Gray, 55 App. Div. 563, 67 N. Y. Supp. 411; Young v. Downey, 145 Mo. 261, 46 S. W. 962), or, at least, had recovered a judgment in ejectment. Shipley v. Alexander, 3 Har. & J. (Md.) 84, 5 Am. Dec. 421; Brewer v. Beckwith, 35 Miss. 467; Winkley v. Hill, 6 N. H. 391. See Locke v. Peters, 65 Cal. 161, 3 Pac. 657. As we have seen, the plaintiff did not have actual possession. And even a holding that the rule is satisfied by a prior recovery of judgment for possession would not avail plaintiff here, since the complaint falls to allege, and the findings to state, that there had been any recovery in ejectment. The position of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. series & Rep.'s Indexes

respondent is, however, that the doctrine requiring a plaintiff, before suing for mesne profits, to retake possession, or to establish his right of possession by a judgment in ejectment, has been abolished by the provisions of our Codes, and that in this state the action may be maintained by any one who has wrongfully been kept out of a possession to which he was entitled. It is unnecessary to pass upon the merits of this broad contention.

[2, 3] Whatever may be the right of one out of possession to sue for mesne profits alone, without setting up possession or the recovery of judgment in ejectment, section 427 of the Code of Civil Procedure unquestionably authorizes a plaintiff, unlawfully dispossessed, to unite in one and the same action a claim "to recover specific real property" with one for "damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same." The appellant concedes that, under this section, a demand for mesne profits may be enforced without prior possession or judgment in ejectment, when the demand is made in the very action of ejectment itself.

We think the present action may properly be regarded as one for the recovery of possession, as well as for rents and profits, and that it therefore comes within the permissive provision of section 427. The complaint contains every allegation necessary in an action of ejectment. It alleges ownership in plaintiff; that defendant wrongfully entered and dispossessed him; and that he still keeps him out of possession. No further averment was required. *Payne v. Treadwell*, 16 Cal. 220; *Salmon v. Symonds*, 24 Cal. 261; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214. There was therefore a statement of every fact necessary to entitle the plaintiff to a judgment for possession of the premises, together with the facts essential to a demand for rents and profits. It is true that the complaint contains no prayer for the restitution of the premises. If the defendant had defaulted, judgment for such possession could not properly have been rendered. But when an answer has been filed and issues raised, the court may grant plaintiff any relief "consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580; *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908; *Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 527; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786. The moment the answer was filed, therefore, the case became one in which the court, regardless of the prayer of the complaint, would have been authorized to grant any relief consistent with the plaintiff's averments. Such relief could properly have included a judgment for the restitution of the possession with the recovery of the rents and prof-

its. *Evans v. Schafer*, 119 Ind. 49, 21 N. E. 448. The fact that no judgment for restitution was in fact given is of no consequence. There was no occasion for any such judgment, in view of the fact that, during the pendency of the action, possession had been restored to the plaintiff. For the same reason, the court was not required to make findings establishing the plaintiff's right to a restitution of possession.

[4] If the action was one in which, under the issues framed, a judgment for restitution and rents and profits might properly have been rendered, the fact that the plaintiff came into possession of the premises after the commencement of the action did not deprive him of his right to a judgment for mesne profits. *Crispen v. Hannovan*, 86 Mo. 160; *McChesney v. Wainwright*, 5 Hammond (5 Ohio) 452; *Venner v. Underwood*, 1 Root (Conn.) 73; *Price v. Sanderson*, 18 N. J. Law, 426.

[5] The findings declared that the value of the rents, issues, and profits of the premises during the period of the withholding was \$1,733.33. The court further found that the plaintiff was entitled to interest on this amount from the 1st day of November, 1902, the date of the restitution of the possession, to the date of judgment. The appellant contends that the allowance of interest was not justified. But the contrary has been directly held by this court. In *Furlong v. Cooney*, 72 Cal. 322, 14 Pac. 12, the court, in defining the measure of damages in a case like this, states that "interest also may be allowed when necessary to a complete indemnity."

[6] We see no error in allowing evidence to show the rental value of the property. The appellant concedes that the damage, in cases of this kind, may be established either by showing the rents and profits actually received or by proving the annual rental value of the land. The latter course was the one followed here, and we think the testimony offered by plaintiff fairly tended to show the reasonable rental value. The answers of some witnesses, with respect to this point, are criticised; but the objections go rather to the weight of their testimony than to its admissibility.

[7] The answer was filed June 19, 1902. The case was not tried until June 15, 1909. The defendant moved to dismiss the action upon the ground that five years had elapsed after the filing of defendant's answer. But section 583 of the Code of Civil Procedure, which directs a dismissal where there has been such delay, makes an exception of cases where "the parties have stipulated, in writing, that the time may be extended." There was ample evidence here to justify the court in holding that stipulations to this effect had been made. There was no error in denying the motion.

[8] Finally the appellant contends that the judgment, being against the executrix upon

a demand against the estate of her testator, should have been made payable in due course of administration. Code Civ. Proc. § 1504. This contention seems to be well founded, and the judgment will be modified accordingly. The judgment is modified by adding thereto, after the words, "as executrix of the last will and testament of George E. Dierssen," the words, "the same to be paid in due course of administration of the estate of said decedent"; and, as so modified, the judgment is affirmed.

The order denying a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 613)

JOSE REALTY CO. v. PAVLICEVICH.
(S. F. 5,971.)

(Supreme Court of California. Jan. 27, 1918.
Rehearing Denied Feb. 26, 1918.)

1. QUIETING TITLE (§ 43*)—EVIDENCE—ADMISSIBILITY UNDER PLEADINGS.

In an action to quiet title, where defendant claimed title under a sale by the trustee under a deed of trust, proof of fraud sufficient to avoid the trustee's sale and deed was admissible in avoidance of the defense, although fraud was not pleaded in the complaint.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84-87; Dec. Dig. § 43.*]

2. NEW TRIAL (§ 130*) — SPECIFICATION OF ERRORS—INSUFFICIENCY OF EVIDENCE.

In an action to quiet title against a purchaser from a trustee under a deed of trust, where the court found that interest on the secured note was not paid, but that the payor of the note had sufficient funds at the place of payment for the purpose of paying the interest, and that the mortgagee never demanded payment of the interest, and on this finding concluded that there was no default, and that the declaration by the mortgagee that the principal was due because of a default, and the sale and deed in pursuance thereof were fraudulent and void, and also found that plaintiff was the owner of the land, subject to the deed of trust, and that the interest claimed by defendant, in addition to his rights under the deed of trust, were without right, a notice of motion for a new trial, specifying that the evidence was insufficient to justify the findings that plaintiff was the owner, that defendant's interest was without right, and that the money for the payment of the interest on the note was at all times ready at the place of payment, although not in the customary form for such specifications, sufficiently presented the question whether the finding on the subject of default was sustained by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 130.*]

3. MORTGAGES (§ 374*)—SALE UNDER POWER—DEED—CONCLUSIVENESS.

Where a deed of trust, containing a power of sale, provided that the recital in the trustee's deed, under the power of any matter of fact, including the fact that default had been made in the payment of interest, should be conclusive proof thereof against the mortgagor, his heirs and assigns, such a recital was conclusive in the absence of fraud of which the purchaser at the trustee's sale had notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1118-1123; Dec. Dig. § 374.*]

4. MORTGAGES (§ 369*)—SALE UNDER POWER—FRAUD.

Proof that a mortgagee under a deed of trust, knowing that there had been no default in the payment of interest, declared the whole amount due, and caused the trustee to make a sale under the power of sale by falsely informing him that there had been a default, and purchased the property himself at the trustee's sale, the owners of the property, not having been informed of the sale, given notice, or having any knowledge thereof, was sufficient to set aside the trustee's sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

5. MORTGAGES (§ 300*)—PAYMENT—TENDER.

Where a mortgagee, under a deed of trust providing that the interest was payable monthly at the office of B., testified that he demanded payment from B. in his office, and went repeatedly to the office to collect the interest, but failed to get it, and that B. never offered to pay it, B.'s testimony that he or some other person in the office had money to pay the interest if it had been demanded, without any showing that the money belonged to the debtor, that it had been provided or placed there by him or any other person for the purpose of paying the interest, or that B. or any person in the office was willing to pay it on the interest, or had been authorized or instructed or intended to do so if the interest had been demanded, did not show that the debtor was able and willing to pay it at B.'s office within Civ. Code, § 3130, providing that, if the maker of a negotiable instrument is able and willing to pay it at the place of payment at maturity, such ability and willingness are equivalent to an offer of payment.

[Ed. Note.—For other cases, see Mortgages Cent. Dig. §§ 876-883; Dec. Dig. § 300.*]

6. TENDER (§ 13*) — PROVIDING FUNDS AT PLACE OF PAYMENT.

Under Civ. Code, § 3130, providing that it is not necessary to make a demand of payment on the principal debtor in a negotiable instrument in order to charge him, but that if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to the offer of payment, mere passive ability and willingness are insufficient, but such ability must be manifested by providing funds at the place of payment in the hands of some person authorized to pay such funds on the debt and willing to do so.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29-32; Dec. Dig. § 13.*]

Department 1. Appeal from Superior Court, Santa Clara County; John B. Richards, Judge.

Action by the Jose Realty Company against V. Pavlicevich. From a judgment for plaintiff, and orders refusing to vacate the judgment and denying a new trial, defendant appeals. Judgment vacated and order denying new trial reversed.

W. B. Hardy and Chas. Clark, both of San Jose, for appellant. Will M. Beggs and R. O. McComish, both of San Jose, for respondent.

SHAW, J. The defendant presents three appeals: One from the judgment; a second from a ruling refusing to vacate the judgment for plaintiff and enter judgment for defendant on the findings; and a third from an order denying defendant's motion for a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

new trial. It will be necessary to consider only the appeal from the order denying a new trial.

The plaintiff's action was to quiet its alleged title to a parcel of land; the complaint being in the usual form, alleging ownership in plaintiff and an unfounded claim by the defendant. The proof showed that on November 30, 1909, one J. A. Cottle, being then the owner of the land subject to a deed of trust by him previously made, conveyed it to one A. E. House, and that on September 21, 1910, said House executed a deed purporting to convey the land to the plaintiff. The defendant for answer alleged that on November 30, 1909, Cottle executed a deed conveying the land to a trustee, with power of sale, to hold the same as security for the payment of a note from Cottle to Pavlicevich, dated October 18, 1909, payable one year after date, for \$3,300, with interest at 7 per cent. per year, payable monthly, and providing that, if the interest was not so paid, the payee might declare the whole sum due, of which declaration the maker waived notice; that no interest was paid for the months of May, June, July, or August, 1910, whereupon the defendant declared the whole sum due, and the trustee, at defendant's written request, and in the manner prescribed by the terms of the power of sale, offered the land for sale for nonpayment of debt, sold it to Pavlicevich, and in pursuance thereof, on September 20, 1910, conveyed the land to Pavlicevich by deed, which was duly recorded on the same day, whereby defendant became the owner of the premises.

The note declared that it was payable at the office of Will M. Beggs, in San Jose. The deed to the trustee provided that, in any deed made by the trustee under the power of sale, the recital in such deed of any matter of fact, including the fact that default had been made in the payment of the note or interest thereon, when due, should be conclusive proof of such fact against Cottle, his heirs and assigns. The deed executed by the trustee to Pavlicevich recited that the interest on said note was on August 24, 1910, overdue and unpaid, and that Pavlicevich had elected to consider the principal as immediately due and payable, and had directed the trustee to proceed, and that the first publication of the notice of sale was on August 25, 1910. The plaintiff, on the trial, did not controvert any of these statements, except the statement that the interest on the note, or any part of it, was overdue at or prior to the giving of said notice of sale. Its contention is that it had bought the title of Cottle, and had assumed the payment of the note; that it was able and willing to pay it at the office of Beggs at the time the respective monthly payments became due; and consequently that, under the provisions of section 3130 of the Civil Code, it was not in default. It also claimed that the trustee's sale was fraudulently procured by Pavlice-

vich; the fraud consisting of his conduct in giving the direction to the trustee to sell the land for default in payment of interest, when, by reason of plaintiff's ability and willingness to pay the interest at the time it fell due at the place of payment, there was no default.

[1] It was not necessary for plaintiff to plead fraud in its complaint. The trustee's sale was set up by the defendant as a defense to the action of the plaintiff. In such a case, proof of fraud, sufficient to avoid the trustee's sale and deed, was admissible without further pleading; it being matter in avoidance of the defense set up in the answer. *Moore v. Copp*, 119 Cal. 433, 51 Pac. 630; *Brooks v. Johnson*, 122 Cal. 570, 55 Pac. 423; *White v. Stevenson*, 144 Cal. 112, 77 Pac. 828; *Wendling Co. v. Glenwood Co.*, 153 Cal. 415, 95 Pac. 1029; *Peck v. Noee*, 154 Cal. 354, 97 Pac. 865.

[2] The court found that no interest was ever paid on the note for any month after April, 1910, but that, at all times since that date, "the payor of said note has had sufficient funds at said office for the purpose of paying said interest," and that the defendant had never demanded the payment of said interest. Upon this finding, it made a conclusion of law that there was no default in the payment of interest, and that the declaration by Pavlicevich that the principal was due, and the sale and deed made in pursuance thereof, were fraudulent and void. There was also a general finding that the plaintiff was the owner of the land, subject to the deed of trust executed by Cottle, and that the interest which the defendant claims, in addition to the rights conferred by said deed of trust, is without right. The defendant gave notice of intention to move for a new trial, stating that the motion was to be made on the minutes of the court. The notice in effect specified that the evidence was insufficient to justify the following findings: (1) That plaintiff is the owner of the premises; (2) "that the interest which defendant has in the premises is without right;" (3) "that the money for the payment of the interest on said note was at all times ready at the place of payment." Although these are not in the customary form for such specifications of insufficiency, we think they are sufficient to present the question whether or not the finding on the subject of the default in the interest payments is sustained by the evidence.

[3] If the recital in the trustee's deed is conclusive on Cottle and his successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this court. *Simson v. Eckstein*, 22 Cal. 593; *Carey v. Brown*, 62 Cal. 374; *Mersfelder v. Spring*, 139 Cal. 595, 73 Pac. 452.

[4] Respondent, however, claims that by showing that Pavlicevich, knowing that there had been no such default, declared the principal and interest due, and caused the trustee to make a sale under the power by falsely informing him that the payor was in default, and that Pavlicevich himself bought the property at the trustee's sale, and that the owners of the property were not informed of the sale or of the notice given thereof, and had no knowledge of it, it has established the proposition that the sale and deed were procured by fraud, and that this is sufficient to let in proof of the falsity of the recital in the deed of the trustee, and set aside the sale made by him. We are of the opinion that, if these facts were shown, the fraud claimed would be sufficiently established. But we think the proof was lacking so far as the facts of there having been no default in payment of interest and of knowledge by Pavlicevich are concerned.

[5] It is admitted that the interest for the four months above specified has never been paid. It is not claimed that Pavlicevich knew, or ever was informed, that the plaintiff, or any other person, had funds in the hands of Beggs, or with any other person at his office or elsewhere, with which to pay the interest, or that any money had been placed there for that purpose. Pavlicevich testified that the loan to Cottle was made for him through the agency of Beggs, to whom he had intrusted the money for that purpose; that he demanded from Beggs in his office, about the 1st of June, 1910, the payment of the interest due on May 18, 1910; and that during the months of May, June, July, and August, 1910, he went repeatedly to Beggs' office to collect the interest, but failed to get it, and that Beggs never offered to pay it. This, clearly, was ample evidence of the existence of a default. In rebuttal, Beggs testified that he was the president of the Jose Realty Company, and that in February, 1910, he told Pavlicevich that said company had succeeded to the interest of Cottle in the property, and was to look after the payment of the note and interest. He further testified that he had advanced \$8.50 for Pavlicevich to pay costs in a justice court suit, in which he was attorney for Pavlicevich, and that Pavlicevich, in January, 1910, agreed that this advance might be adjusted the next time the interest fell due on the note; that no interest was paid from that time until May 5th, when he paid to Pavlicevich \$57.75, being interest for three months ending April 18th; that the \$8.50 was not then adjusted or deducted; that Pavlicevich, shortly afterwards, asked Beggs to find a purchaser for the note, saying that he needed the money; that Beggs tried to do this, and that there were several conversations between them about it; and that Pavlicevich never demanded payment of the interest from him, or from anybody else in his pres-

ence, or to his knowledge. There is no testimony that any person ever offered to pay such interest. Beggs was then asked the question, "Did you have funds at your office, or had any of the persons in charge of your office, sufficient to pay the interest at any time had it been demanded?" to which he answered, "Yes, sir." This was all the evidence tending to show that the plaintiff was able and willing to pay the interest at the office of Beggs.

[6] The purpose of this evidence was to bring the case within the provisions of section 3130 of the Civil Code, which reads as follows: "It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part." Under this section, no demand was necessary in order to create a default in payment. The latter clause of the section manifestly refers to section 1500 of the Civil Code, which provides that: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor." Under this section it has been uniformly held that although such an offer, when not followed by an immediate deposit, does not pay the debt, or extinguish the obligation to pay it, yet, if the mere offer is duly made, the effect is that there is at that time no breach of the promise to pay. *Randol v. Tatum*, 98 Cal. 399, 33 Pac. 433; *O'Connor v. Braly*, 112 Cal. 37, 44 Pac. 305, 53 Am. St. Rep. 155; *Knowles v. Murphy*, 107 Cal. 115, 40 Pac. 111; *Wolff v. Canadian Co.*, 123 Cal. 543, 56 Pac. 453; *Montgomery v. Tutt*, 11 Cal. 318, 327. Section 3130, of course, cannot be complied with by a mere passive ability and willingness. There must be an ability to pay, manifested by providing funds at the place of payment in the hands of some person there present, who is authorized to pay it on the debt and is willing to do so. If, therefore, the plaintiff had placed sufficient money in the office of Beggs, to be applied to the payment of this interest, in charge of some person there who was authorized and directed to use it for that purpose, when demand was there made, or if it had been in attendance there by its agent, with sufficient money and authority to pay such interest, and had been able and willing thereafter to pay it on demand, it would not have been in default for nonpayment of interest, although the obligation to pay it would remain. *Montgomery v. Tutt*, supra, 11 Cal. 318.

But the evidence does not show this to be the case. It merely shows that Beggs, or

some other person in his office, had money enough to pay the interest at any time, had it been demanded. It does not show that the money belonged to the plaintiff, or that it had been provided or placed there by the plaintiff, or any other person, for the purpose of paying this interest, or that Beggs, or that any other person in his office, was willing to pay it out on the interest, or had been authorized or instructed to do so, or that any of them intended to do so if the interest had been demanded. There was therefore no proof that "the payor of said note has had sufficient funds at said office" to pay the interest, or that the payor had sufficient or any funds there "for the purpose of paying said interest" as the findings declare, or that the payor was "able and willing to pay it there," in the sense necessary to constitute the equivalent of an offer to pay under section 3130, aforesaid. The proof in rebuttal was not sufficient to overcome the positive proof of the defendant that the interest was not paid when due.

The judgment is vacated, and the order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(164 Cal. 509)

GORDON v. CADWALADER et al.
(SOUTHERN PAC. R. CO., Intervener). (Sac. 1,955.)

(Supreme Court of California. Jan. 15, 1913.
Rehearing Denied Feb. 14, 1913.)

1. DEEDS (§ 128*)—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE.

A deed to land in this state executed June 3, 1872, is subject to the rule in Shelley's Case, which was abolished by Civ. Code, § 779, effective January 1, 1873.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.*]

2. DEEDS (§ 128*)—ESTATES CREATED—APPLICATION OF "RULE IN SHELLEY'S CASE."

The rule in Shelley's Case is that where land is devised or granted to a person for life, with remainder after his death to his heirs or the heirs of his body, whether these words, or words having the same legal effect, are used, the first grantee takes a fee simple absolute, or qualified fee, dependent on whether the conveyance is to him and his heirs or to the heirs of his body, and the heirs take no estate or interest, and therefore the first grantee may dispose of the land as if the deed or will contained no words purporting to transfer less than a fee to him, or, as it is usually stated, the words "heirs" or "heirs of his body" are words of limitation, and not of purchase.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6272, 6273.]

3. DEEDS (§ 128*)—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE—"HEIRS."

The reason for the rule in Shelley's Case is that it was considered that the words, "and

to his heirs" or "to the heirs of his body," following a grant purporting to be of an estate for life, implied that the heirs should take by inheritance, and not directly from the grantor, which they could not do unless the grantee took an estate of inheritance, and that the word "heirs" was used to denote the whole inheritable blood of the life tenant, the life tenant and not those being his heirs at his death being the original stock of inheritance, and where the deed contains modifying or qualifying words indicating that the grantor did not intend to describe the whole inheritable blood of the life tenant, but intended to point out the proper persons who should take the estate upon his death, and to make of them a new root of inheritance, the rule does not apply.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

4. DEEDS (§ 128*)—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE—"DESCEND."

A deed granted to the party of the second part certain land "for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever," and recited, after the description, that it was conveyed to the grantee for and during his natural life for the final use and benefit and behoof of the children or other lawful heirs of his body who might survive him. The habendum clause read, "to have and to hold unto the said party of the second part, his heirs and assigns forever," and the warranty, "to the said party of the second part, his heirs and assigns." Following the attestation clause was a clause explaining an interlineation and erasure in the granting clause, showing that, as first written, it granted the land to the grantee "and to his heirs and assigns forever," and had been changed by the interlineation and erasure to read as first quoted. *Held*, that the rule in Shelley's Case did not apply, and the grantee took only a life estate, since, while the interlineation in the granting clause would not have avoided the effect of that rule, the recital was manifestly inserted to state the intent more accurately than it had been previously expressed, was the significant part of the deed, and showed that the intention was to give a remainder to the surviving children or grandchildren directly by the deed, and not by inheritance, they to constitute the new stock of inheritance, the granting clause, notwithstanding the use of the word "descend," which, although literally denoting a passing by inheritance, is often used as a word of transfer, contained a sufficient grant of the remainder, and the defendant's intention was not defeated by the habendum and warranty clauses, the conflict between which and the granting clause and recital had apparently not been observed, and not been changed because of inadvertence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2012-2014.]

Beatty, C. J., dissenting in part.

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Joseph Gordon against George Cadwalader and others, in which the Southern Pacific Railroad Company intervened. From a judgment in favor of plaintiff and the intervener, defendants appeal. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

Geo. Clark, of San Francisco, W. A. Anderson, of Sacramento, and Black & Clark, of San Francisco, for appellants. Hudson Grant, of Woodland, for respondent. D. V. Cowden, Frank Thunen, and Wm. Singer, all of San Francisco, for intervener and respondent.

SHAW, J. The defendants' appeal from the judgment was taken within 60 days after its rendition. The evidence is brought up in the record.

[1] The plaintiff sued to quiet title to land. All the parties claim under a certain deed conveying the land, executed by William Gordon to John Gordon on June 3, 1872. The rule in Shelley's Case was in force in this state until January 1, 1873, when it was abolished by section 779 of the Civil Code. The said deed was therefore subject to that rule, and the sole question is whether or not it comes within the rule.

[2] The rule is that where a will devises or a deed grants land to A. for life and the remainder after his death to his heirs, or to the heirs of his body, using these words or words having the same legal effect, the effect is to vest in A. a fee simple absolute if the remainder is to his "heirs" or a qualified fee, if it is to the "heirs of his body." The heirs of A. in such a case take no estate or interest in the land during the life of A. and he may dispose of it as if the deed or will contained no words purporting to transfer to him less than a fee. As it is usually stated, the words "heirs" or "heirs of his body," or whatever other words of like effect are used, "are words of limitation and not of purchase." The plaintiff claims one-sixth of the land as an heir of John Gordon, upon the theory that said deed vested the fee in John. Upon the same theory the intervener claims a part of the land under a conveyance from John in his lifetime. The defendants claim the plaintiff's interest under and by virtue of an execution sale and sheriff's deed upon a judgment against the plaintiff; the sale and deed having been made during the lifetime of John Gordon and upon the theory that said deed to John vested in John a life estate only and vested in Joseph at its date, as one of his six children, a present one-sixth interest in the remainder in the land in fee after the death of John. It will be observed, therefore, that if the rule in Shelley's Case controls the effect of the deed of William Gordon to John, thereby vesting the fee in John, there would be no interest vested in Joseph at the time of the sale on execution against him and the defendants obtained none thereby.

It is not necessary to state the Gordon deed in full. It names William Gordon as grantor and John Gordon as grantee. The clauses which it is necessary to consider are the granting clause, a recital following the description of the land, the habendum, the warranty, and the final clause following the

attestation clause and explaining an interlineation and erasure. These are as follows:

Granting clause: "Does grant (etc.) unto the said party of the second part for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever."

Recital: "The said land being conveyed to the said John Gordon for and during his natural life, for the final use, benefit and behoof of the children or other lawful heirs of his body, who may survive him."

Habendum: "To have and to hold * * * unto the said party of the second part, his heirs and assigns forever."

Warranty: To " * * * the said party of the second part, his heirs and assigns."

Final clause: "The words 'for and during the term of his natural life, and after his death then to descend to' interlined, and the words 'and to' erased, before the execution of these presents."

The final clause evidently refers to changes in the granting clause. It shows that the granting clause was first written thus, "unto the said party of the second part and to his heirs and assigns forever," making an unequivocal grant of the fee, and that, when this was perceived and the repugnancy between it and the subsequent recital noticed, the words "and to" were erased, and the words referring to a life estate substituted therefor.

[3] The fundamental reason for the rule in Shelley's Case is that at common law it was considered that the words "and to his heirs," or "and to the heirs of his body," following a grant purporting to be of an estate for life, necessarily implied that the heirs mentioned should take by inheritance from the life tenant, and not directly by the deed, or directly from the grantor, and, as this could not be so unless the life tenant had an estate of inheritance to pass at his death, it followed as a necessary conclusion that the deed must be understood to pass the fee to him as well as the life estate. In the phrases quoted, when the rule in Shelley's Case applies, the word "heirs" is used in the broad sense, to signify the persons who take the estate by succession from generation to generation forever, or, as it is sometimes expressed, the whole inheritable blood of the life tenant, so that such life tenant, and not those who may be his heirs at his death, is the original stock of inheritance. It is a rule of positive law, and defeats even the declared contrary intent if, notwithstanding such declaration, it appears that the words "heirs" was used in this technical sense. *Norris v. Hensley*, 27 Cal. 446. But the primary question is always the one whether or not it was so used.

The rule being founded upon these reasons, it is plain that if the deed contains words which modify or qualify these phrases to such an extent that a reasonable interpretation of the grant is that the grantor did not use the words to describe the whole line of

succession from the life tenant, or his whole inheritable blood, but on the contrary, intended thereby to point out and designate the particular persons who should take the estate upon the death of the life tenant and to describe them as the persons then to take the estate direct from the grantor and by virtue of the grant, constituting of them a new root of inheritance, the implication as to the meaning of said phrases, upon which the rule is founded, would not exist and the rule would not govern the grant. This distinction is thoroughly established, and it is recognized by all the authorities. 2 Wash. Real Prop. §§ 1614, 1615, 1616; 1 Jones, Real Prop. § 617; 2 Devlin, Real Prop. §§ 846a-846c; 2 Pingree, Real Prop. § 1019; Note to Carpenter v. Van Olinder, 11 Am. St. Rep. 102; Norris v. Hensley, *supra*. Many illustrations could be given. A few will serve to illustrate the application and effect of the distinction. The words, "and upon his demise to the heirs of *him surviving, share and share alike*," show that the word "heirs" was used to describe particular persons, and not the line of succession and the rule was held inapplicable. *Burges v. Thompson*, 13 R. I. 714. A deed to a husband and wife as joint tenants, for their lives, and to the survivor during the life of the survivor, with remainder to the issue and heirs of their two bodies *and the heirs of such issue forever*, creates only estates for life in the husband and wife and gives to their issue, upon their death, the fee. The addition of the words, "and the heirs of such issue forever," was held sufficient to make the distinction, and take the deed out of the rule. *Montgomery v. Sturdivant*, 41 Cal. 297. So, also, of the words: "And at her death to be equally divided among her children or legal heirs" (*Hall v. Gradwohl*, 113 Md. 297, 300, 77 Atl. 483, 29 L. R. A. [N. S.] 954); "to the children and lawful heirs" (*Relly v. Bristow*, 105 Md. 326, 66 Atl. 262); "shall be inherited by the surviving issue of my said niece, *share and share alike*" (*Hill v. Giles*, 201 Pa. 215, 50 Atl. 758); "and at her death to the issue of her body then living" (*Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706); "heirs at law and next of kin" (*Martling v. Martling*, 55 N. J. Eq. 790, 39 Atl. 208); "to the heirs of his body begotten if there be any such heirs *him surviving*" (*Granger v. Granger*, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190); "heirs of his body living at the time of his death" (*Moore v. Parker*, 34 N. C. 127); "to the heirs of her body begotten" (*Ault v. Hillyard*, 138 Iowa, 242, 115 N. W. 1030). In these decisions it was conceded that the word "issue" alone would be considered as the equivalent of "heirs," and would not take the case out of the rule. The words we have italicized were those which were held to have that effect.

[4] The deed here involved contains modifying words of like effect to those above

mentioned. The recital and the granting clause are parts of the same sentence, and both must be considered in determining the true meaning. The grant as a whole must be understood as if it read: "To John, for and during his natural life, and after his death to the children or other lawful heirs of his body, who may survive him, for their final use, benefit and behoof." The deed was evidently drafted upon a form in common use for a conveyance in fee simple, and the granting clause, as it first stood, granted such an estate. The interlineation described John's estate as for his life only, but it would have been ineffectual to escape the rule in *Shelley's Case*, if not further qualified. The words added by the recital were manifestly inserted for the purpose of stating the intent more accurately than it was expressed in the first part of the sentence. The recital is therefore the significant part of the deed, and it should control the interpretation as far as possible. Under the decisions above cited, it is clear that the word, "children," and the words, "who may survive him," qualifying the phrase, "lawful heirs of his body," and in connection with the declaration that the conveyance is for the "final use, benefit and behoof" of such survivors, were intended and used to show that the grant to John was for his life only, and that the remainder was to go to the surviving children, or grandchildren, directly by the deed, and not by inheritance, and that they, and not John, were to constitute the new stock or root of inheritance of the estate. The use of the expression "who may survive him" or similar terms shows that the mind of the grantor was directed to the particular persons surviving at the death of John and not to his posterity generally. The words, "or other lawful heirs of his body," make it plain that grandchildren would take, in the event that any of John's children should die before his death and leave children surviving. They were evidently inserted for that purpose and were not used in the technical sense above stated.

It is further contended by the respondents that the granting clause itself is devoid of words constituting a grant of the remainder. If the words "descend to" were omitted therefrom, the intent to grant the remainder would be clear, although, under the authorities, in the absence of the recital, the operation of the rule in *Shelley's Case* would override and defeat that intent. *Norris v. Hensley*, *supra*; 2 Devlin on Deeds (3d Ed.) §§ 846, 846c. The clause declares a life estate in John, "and after his death then to descend to his heirs and assigns." The word "descend," although literally denoting a passing by inheritance, is often used as a word of transfer. In the connection in which it here occurs this is its usual signification. *Doren v. Gillum*, 136 Ind. 139, 35 N. E. 1101; *Taney v. Fahnley*, 126 Ind. 91, 25 N. E. 882; *Aydlett v. Swope* (Tenn.) 17 S. W. 209; *Stratton*

v. McKinnie (Tenn. Ch. App.) 62 S. W. 640; Tate v. Townsend, 61 Miss. 319; Kelm's Appeal, 125, Pa. 487, 17 Atl. 463; Halstead v. Hall, 60 Md. 213; Dennett v. Dennett, 40 N. H. 501; Harrington v. Gibson, 109 Ky. 752, 60 S. W. 915. Under these authorities, this passage is to be read as if it declared that after John's death the land should "go to," or "vest in" his heirs, the latter word being used, as before stated, as a description of the persons to whom the remainder is transferred, and not to indicate a taking by the law of inheritance.

The habendum and warranty clause are of little importance. They are in the usual form, and were evidently printed, if a printed form was used, or copied mechanically, if a form book was used. The incongruity between them and the granting clause, as changed, and as modified by the recital, was apparently not observed when the changes were made, and the failure to change them also may reasonably be attributed to inadvertence.

The conclusion is that the decision of the court below that the deed conveyed the fee to John was erroneous.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and from the judgment.

In this state the rule in Shelley's Case governs the construction of all deeds of conveyance made prior to January 1, 1873. Norris v. Hensley, 27 Cal. 439; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. It is, as to such deeds, a rule of property. I cannot distinguish this case from Norris v. Hensley, where the terms of a devise were held to bring it within the rule. I think it can be distinguished from Montgomery v. Sturdivant, 41 Cal. 297. These are our only authorities. The decisions in other states are conflicting. We should follow our own, however questionable, when essential to the protection of vested rights.

(20 Cal. App. 690)

HUNT v. SHARKEY. (Civ. 1,207.)

(District Court of Appeal, Second District, California. Dec. 20, 1912. Rehearing Denied by Supreme Court Feb. 18, 1913.)

1. BANKRUPTCY (§ 284*)—CORPORATIONS—STOCKHOLDERS' LIABILITY—PLEADING AND PROOF.

Where a corporation becomes bankrupt, payment upon unpaid subscriptions for capital stock cannot be enforced, unless an assessment has been made by the proper court, or under its direction, ratably distributing the liability of the bankrupt estate among the subscribers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 284.*]

2. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—DISMISSAL—STATUTES.

The granting of a nonsuit for "insufficiency of the complaint," instead of "failure to

prove a sufficient case," as prescribed by Code Civ. Proc. § 581, subd. 5, providing that an action could be dismissed for failure to prove a sufficient case for the jury, was not prejudicial error under Code Civ. Proc. § 475, providing that no judgment should be reversed except for errors whereby substantial injury was suffered, where no facts existed which would enable plaintiff to amend or supply the evidence entitling him to recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by F. W. Hunt against E. Sharkey. Judgment for defendant, and plaintiff appeals. Affirmed.

Murphey & Poplin, of Los Angeles, for appellant. Grant Jackson, of Los Angeles, for respondent.

SHAW, J. This is an appeal by plaintiff from a judgment of dismissal, entered in favor of defendant upon an order granting his motion for nonsuit, and also from an order denying his motion for a new trial.

It appears from the complaint that on February 4, 1908, defendant in writing subscribed for 20 shares of the capital stock of a corporation known as the Duquesne Brewing Company, for which he agreed to pay the sum of \$1,000 as follows: One hundred dollars on February 4th, and one hundred dollars on the 4th day of each month thereafter until the whole sum was paid. On October 5, 1909, at which time defendant had paid the sum of \$300 on account of his contract, the corporation was, in accordance with the laws of Congress, adjudged a bankrupt by the United States District Court. A trustee of the estate of the bankrupt was duly appointed, and the referee to whom the matter was referred authorized him to sell at public auction the assets of said bankrupt. Thereupon the trustee proceeded as directed to sell the property of said bankrupt estate, which consisted of certain real estate, promissory notes, and contracts of subscription whereby the subscribers had agreed to purchase and pay for the shares of the capital stock of said corporation, among which was the contract of defendant, which was designated as: "Parcel 13. E. Sharkey, balance stock subscription, dated February 4, 1908, face amount, \$700"—and which contract the trustee, prior to the bringing of the suit, by deed of conveyance, assigned and transferred to plaintiff as the purchaser thereof for the sum of \$40. By his answer defendant admits the making of the contract of subscription, admits that only \$300 had been paid thereon, but denies that \$700 or any sum was due on account thereof.

At the close of plaintiff's evidence, defendant's motion for nonsuit, upon the ground

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the complaint did not state a cause of action, was granted, followed by judgment of dismissal. Two questions are presented for solution: First, whether or not an unpaid balance due upon a subscription for shares of capital stock of a corporation adjudged a bankrupt is, in the absence of a proceeding wherein the equitable liability of the subscriber is fixed, a subject of sale and assignment, collection of which can be enforced by the assignee; and, second, whether the fact that the complaint failed to state a cause of action was, under the circumstances presented, a ground for granting the motion for a nonsuit.

[1] Defendant's agreement to take and pay for stock in the corporation was based upon an implied consideration that the money so contributed should be used in conducting the business for which it was incorporated. By reason of the adjudication in bankruptcy the corporation wholly abandoned its business. Hence, being unable to perform its implied obligation to defendant as a subscriber for its stock, and having no use for such capital other than for the winding up of its business, the extent to which the contract for the purchase of stock could be enforced was the pro rata share of the amount required for such purpose after exhausting the tangible assets of the bankrupt's estate. Vol. 1, *Morawetz on Corporations*, § 152. As a prerequisite to maintaining an action to enforce such obligation among those liable upon subscriptions to stock, it must be made to appear, by appropriate allegations and proof, that the court had jurisdiction of the proceedings in bankruptcy, or that by its order or direction the amount necessary to be raised to pay any deficiency in the sum required has been ratably and equitably distributed among them. Vol. 2, *Morawetz on Corporations*, § 822; *Remington on Bankruptcy*, vol. 1, § 977; *Burke v. Maze*, 10 Cal. App. 209, 101 Pac. 438, 440; *In re Crystal Spring B. Co.* (D. C.) 96 Fed. 945; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Perkins v. Cowles*, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158. In *Covell v. Fowler* (C. C.) 144 Fed. 535, the court, in discussing a similar question, says: "A stockholder might have an ultimate liability of only a few dollars, and at the same time be made to rest under a decree sufficient to wipe out his entire fortune, thus working great injury and perhaps ruin to him." It may be noted that in the case at bar the aggregate liability of the stockholders was \$30,050, an assessment of less than 50 per cent. of which, if collected, would have been sufficient to liquidate the indebtedness of the bankrupt, yet it appears that plaintiff purchased the entire amount for the nominal sum of \$630. Where a

corporation is adjudged a bankrupt the trustee of the bankrupt estate cannot enforce payment of the stockholders' liability upon unpaid subscriptions for capital stock, unless it be made to appear by both allegation and proof that an assessment has been made by the proper court, or under its direction, ratably distributing the liability of the bankrupt estate among the subscribers to its stock. In the case at bar such fact is neither alleged nor proven. On the contrary, it is clear that no such action was ever had, and hence the complaint did not state facts upon which to base a judgment for plaintiff, as assignee of the contract.

[2] The motion for nonsuit specified as the grounds therefor the insufficiency of the complaint, in that it did not appear therefrom that the assessment required as a prerequisite to the bringing of the suit had been made. Subdivision 5 of section 581 of the Code of Civil Procedure provides that an action may be dismissed "upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." Conceding the form in which the motion was made failed to comply strictly with the provisions of the statute, in that it did not specify failure of proof rather than insufficiency of the complaint to state a cause of action, nevertheless, the want of proof is disclosed by the record, from which it is apparent that no facts existed which could enable plaintiff to amend his complaint or supply the evidence entitling him to recover. Hence, had the motion been denied, judgment upon the merits must necessarily have followed for defendant. This being the case, plaintiff was not prejudiced by the judgment of dismissal. "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed." Section 475, Code Civ. Proc. No good purpose could be subserved by reversing the case for the alleged technical error of which appellant complains, when it clearly appears that further proceedings therein must necessarily result in a like disposition of the case.

There is no merit in appellant's contention that the court erred in adjudging defendant entitled to his costs expended in the trial.

The judgment and order denying plaintiff's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

30 Cal. App. 521)

CONWELL v. VARAIN. (Civ. 975.)

(District Court of Appeal, Third District, California. Dec. 5, 1912. Rehearing Denied by Supreme Court Feb. 3, 1913.)

1. STIPULATIONS (§ 18*)—ISSUES—NEW TRIAL—GROUNDS.

Where parties by stipulation agreed that only a single issue of fact should be submitted, the question whether the evidence was sufficient to show the other facts material to recovery could not be considered on motion for new trial.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 979*)—NEW TRIAL—DISCRETION OF COURT.

An order granting a new trial on the ground of the insufficiency of the evidence will not be disturbed, unless it clearly appears that the trial court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

3. NEW TRIAL (§ 72*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The trial court should grant a new trial where it believes that the preponderance of the evidence is opposed to the findings.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 148-148; Dec. Dig. § 72.*]

4. APPEAL AND ERROR (§ 979*)—NEW TRIAL—DISCRETION.

Where the parties to an action for commission for selling mining property stipulated by their attorneys that the action should be submitted for decision on the single question whether the contract had been altered by the insertion of a word, and that the court should have the aid of a handwriting expert of its own choice, the granting of a new trial on the ground of the insufficiency of the evidence to support the findings, based on the opinion of the expert, was an exercise of the trial court's discretion, which the appellate court will not disturb, even conceding that the stipulation was within the general authority of the attorneys within Code Civ. Proc. § 283, subd. 1.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

5. STIPULATIONS (§ 18*)—STATEMENT OF GROUNDS—INSUFFICIENCY OF EVIDENCE.

Where the parties by their attorneys stipulated that the decision of the case should be determined by the decision of a single question, a statement for a new trial on the ground of the insufficiency of the evidence to sustain the findings, which sets forth even an accurate résumé of the evidence on other issues, should be stricken out.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

6. EVIDENCE (§ 570*)—OPINION EVIDENCE—WEIGHT OF EXPERT TESTIMONY.

The testimony of experts is entitled to such weight as it appears in each case to be justly entitled to.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.*]

7. STIPULATIONS (§ 11*)—AGREEMENTS BY COUNSEL—VALIDITY.

A stipulation by the attorneys of the parties that an action involving valuable property rights, or a large sum of money, should be submitted to the court for decision on a single question involving an issue of alteration of an instrument, and that the court in passing on the issue shall have the aid of a handwriting

expert of its own choice, whose evidence and photographs should be conclusive, should not be tolerated.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 23; Dec. Dig. § 11.*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by F. H. Conwell against Mary E. Varain. From an order granting a new trial after judgment for plaintiff, he appeals. Affirmed.

John A. Wall, of Mariposa, for appellant. R. B. Stolder, of Mariposa, and J. B. Curtin, of Sonora, for respondent.

HART, J. This action was brought by the plaintiff to recover the sum of \$2,000, alleged to be due the plaintiff from the defendant under a contract whereby, it is alleged, the latter employed the first named to procure for her a purchaser of certain mining property, situated in Mariposa county. Judgment passed for the plaintiff in the sum sued for. In due time, the defendant moved for a new trial, and the court granted the motion. This appeal is by the plaintiff from the order granting said motion.

The grounds upon which the motion for a new trial was pressed were (1) that the evidence was insufficient to justify the decision, findings, and judgment; (2) that the decision and judgment are against law; and (3) errors of law occurring during the trial and excepted to by the defendant.

The instrument upon which the plaintiff declares is in the form of a power of attorney, and it purports to confer upon one S. Carlon full power "to grant, bargain, sell, remise, release, convey and quitclaim to whom and upon such terms as our attorney may deem best, all of our right, title and interest, estate, claim and demand, both in law and equity, as well in possession as in expectancy of, in or to" the following mines: The Big Bonanza, the Gillett mine, Maunella gulch, and No. 2 and the Blue Lead.

It appears that the defendant, although, as seen, purporting by said power of attorney to confer upon said S. Carlon the authority to act as her attorney in fact for the purpose of selling the mines designated in said instrument, in reality intended thereby to confer such authority upon the plaintiff, but it seems the latter, being the notary public before whom the acknowledgment of the execution of the power was to be taken, entertained serious doubt whether such an instrument would be valid where it is acknowledged before the person as a notary public in whom rights thereunder are thereby to be vested. It is, however, further made to appear that said instrument was delivered by the defendant to the plaintiff, and that no objection was raised at the trial that the contract or power of attorney was not to vest in the latter the authority of an attorney in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fact for the purposes specified in said instrument. To the contrary, as we shall presently see, the trial was conducted by both sides upon the assumption or the theory that the contract was between the plaintiff and the defendant, and that said Carlon was in no way connected therewith.

The power of attorney does not itself provide for compensation to be paid to the plaintiff for his services in selling the property described therein, but the complaint alleges that the defendant agreed to allow and pay to plaintiff, as his compensation for procuring a purchaser of the Big Bonanza mine, any sum of money for which he might be able to sell said mine over and above the sum of \$8,000, and that plaintiff succeeded in finding, in the person of one George E. Stayton, a purchaser of said mine able, ready, and willing to pay the sum of \$10,000 therefor, and that Stayton did, in fact, purchase said mine at said price. But it appears that the defendant claimed at the trial that the Big Bonanza mine was not mentioned or written in the power of attorney at the time of the execution and delivery thereof to the plaintiff, but that, after the execution and delivery of the power, some one, without her authority, sanction, or consent, inserted the name of said mine therein. And this contention, it seems, involved the sole and only point of controversy between the parties at the trial. In other words, the single point upon which the parties were widely divergent was whether the plaintiff was in truth and in fact authorized by the defendant, under the terms of said instrument as it was signed and delivered by the latter to him, to find a purchaser of the Big Bonanza mine.

The plaintiff testified that the words, "Big Bonanza Mine" were written in the instrument, just above the words, "The Gillett Mine," at the time the defendant signed and delivered it to him; that no change whatsoever was made in the writing contained in said instrument after it was so signed and delivered into his possession. Mrs. Varain, the defendant, testified, as above indicated, that the words "Big Bonanza Mine," were not written or contained in the power of attorney when she signed and delivered that instrument to the plaintiff, and that said words were not therein inserted upon authority from her or with her consent. She further testified that the instrument did contain the name of the Gillett mine when she delivered the document to the possession of the plaintiff.

The foregoing constituted, in substance, all the direct testimony upon that point, and manifestly there thus arose thereon a sharp conflict between the witnesses. It was therefore conceived by the court and counsel to be the more satisfactory course to invoke the services of a professional expert in handwriting, and to his opinion submit the question whether there was evidence on the face of

the instrument itself of the insertion therein of the words, "Big Bonanza Mine," after the power had been signed by the defendant.

"Whereupon," quoting from the record, "the respective counsel for the parties stipulated and agreed, in open court, that the cause he submitted to the court for decision upon the one single question of fact as to whether the loop in the 'z' in the name 'Big Bonanza Mine' in said Plaintiff's Exhibit A (the power of attorney) was above or beneath the line crossing the two 'ts' in the name 'Gillett Mine,' which is immediately under the name 'Big Bonanza Mine' in said 'Exhibit A,' thus:



"It was further stipulated and agreed that the court should have the assistance of a professional expert in handwriting, of the court's own choice, without the knowledge of either of the parties hereto. The written opinion and photographic exemplars made by said expert in handwriting to the court should be received in evidence in the cause on behalf of both the respective parties hereto. * * * It was further stipulated and agreed that, if it appeared by the expert's opinion that the loop of the 'z' in the word 'Bonanza' was under the line crossing the two 'ts' in the word 'Gillett,' this would be conclusive proof that the name, 'Big Bonanza Mine,' was in the paper at the time defendant signed the same and delivered it to plaintiff, and then that plaintiff had proven all the allegations of his complaint, and plaintiff was entitled to judgment against defendant for the sum of \$2,000 under either cause of action set forth in the complaint, and that judgment for plaintiff against defendant in the sum of \$2,000 should be awarded plaintiff, free and clear of any and all objections or exceptions of any kind or nature whatsoever by defendant or on behalf of any person."

In accordance with the foregoing stipulation, the court submitted the power of attorney to Theodore Kytka, a professional expert in handwriting, for examination, and a report of the result thereof as to the proposition with reference to said instrument as set forth in said stipulation. Kytka, having subjected the instrument, or that portion thereof pertinent to the terms of the stipulation, to an examination by means of the tests usually employed by experts in handwriting, in due time returned to the court a written report in which he expressed an unqualified opinion that the letter "z" in the word "Bonanza" lay underneath the line crossing the two "ts" in the word "Gillett." Thereafter, and acting upon the stipulation above referred to, the court rendered and entered its judgment in favor of the plaintiff for the

sum of \$2,000, as prayed for in the complaint. Upon the record as thus made up, the question presented here for decision is whether the court below abused its discretion in granting the order from which this appeal is prosecuted.

[1] The stipulation above referred to assumed, and, indeed, in effect conceded, that all the material allegations of the complaint, except in so far as they implied that the Bonanza mine was included in the contract with plaintiff and to which point the stipulation solely related, were satisfactorily proved. The effect of the stipulation, in other words, was to eliminate from the controversy the evidence as to all the material facts but the single one to which it related. It therefore follows that the specifications of the insufficiency of the evidence to support other material findings than the one deduced from the evidence resulting from said stipulation cannot be considered or reviewed.

[2] One of the grounds upon which a new trial was asked in this case is, as before shown, that the evidence is insufficient to support the findings, and it is well settled that, where a new trial is granted on such ground, the order will stand unless it is made clearly to appear that the trial court, in granting it, has abused its discretion.

[3] Indeed, where the court is of the opinion that the weight or preponderance of the evidence is opposed to the findings, it is its duty to grant a motion for a new trial. *Bledsoe v. Decrow*, 132 Cal. 313, 64 Pac. 397; *Clark v. Rauer*, 2 Cal. App. 259, 83 Pac. 291; *Central Trust Co. v. Stoddard*, 4 Cal. App. 648, 88 Pac. 806; *Thompson v. Wheeler*, 5 Cal. App. 196, 89 Pac. 1065; *Hughes Bros. v. Rawhide Mining Co.*, 16 Cal. App. 297, 116 Pac. 969; *Bjorman v. Fort Bragg Redwood Co.*, 92 Cal. 500, 28 Pac. 591.

[4] While upon the face of the record in the case at bar it might well be held that the court, in granting defendant's motion for a new trial, transcended the discretion committed to trial courts in such case, there are certain considerations presented here which inspire in this court a disinclination to interfere with the action of the court below in ordering a new trial. In his brief, counsel for the respondent, who was not at first connected with, and therefore did not participate in, the trial of the cause, states that, after the rendition and entry of judgment, he was employed by the defendant to prepare and press a motion for a new trial. He further declares that the testimony received at the trial was not taken down by a shorthand reporter or at all, and that, upon being retained as above stated, he procured from the clerk of the court in which the action was tried a statement of that official's recollection of the testimony as it was given. From the testimony so obtained, said attorney prepared a proposed statement for a new

trial, filed the same, and served a copy thereof on the attorney for the plaintiff. In due time the latter served a proposed amendment to said statement, which said amendment consisted in a motion to strike out the whole of the proposed statement, and to substitute in lieu thereof the statement of the testimony which now, so far as the evidence is concerned, constitutes the record upon which the order granting the new trial was predicated.

[5] It is claimed by counsel for the appellant that the proposed statement of plaintiff was stricken out because it involved an incorrect synopsis of the evidence. This may be true, but under the stipulation referred to above and which constitutes the most important part of this record, even if the proposed statement had contained a strictly accurate résumé of the evidence, it would have been the duty of the court to have stricken it out as wholly immaterial, so far as it related to points other than that upon which the stipulation provided that the decision of the cause should hinge. We have thus given briefly that part of the history of the trial which is de hors the record, but which is disclosed by the briefs of counsel, the verity of which, however, is not disputed, merely to illustrate the uniqueness of the situation presented here, and perhaps in discovering to some extent the precise motive influencing the judge of the court below, upon reflection, in the exercise of the discretion confided to trial courts in the matter of allowing or disallowing new trials, to order a retrial of the issues presented by the pleadings in this action.

Now, one of the points made by counsel for the respondent is that the stipulation into which the parties entered and upon which the decision of the issues was made to depend was void, or not binding upon the defendant, because it neither appears that the latter filed an agreement with the clerk authorizing his attorney to make such stipulation, nor that such an agreement was entered in the minutes of the court. Section 283, subd. 1, Code Civ. Proc. But we are not prepared either to affirm or deny, nor, for the purposes of this case, is it deemed necessary to decide, the proposition whether the stipulation referred to constitutes one of "the steps of an action or proceeding" in order to take which an attorney must first obtain from his client special authority evidenced in the manner prescribed by the section of the Code above cited, or whether it constitutes an act within the scope of the general authority of an attorney at law over his client's cause during the progress of the trial thereof; for, even assuming that the attorney had the authority to make the stipulation as one of the ordinary acts within the scope of his general agency or authority, we regard the stipulation as most unusual in its nature and so improvident in its scope

that it is manifest that the trial court, upon further consideration of it after the judgment was rendered and entered, reached the conclusion that it would be unjust to compel the defendant to be bound by its terms, and therefore, in the interest of justice, granted his application for a new trial.

It is not an unusual practice, nor one beyond the general authority of an attorney, to stipulate, during the progress of a trial, that a certain absent witness, if present at the trial, would give certain testimony essential to his adversary's case or defense, or to agree to the recitals of a deed or some public record which it might be impossible, for any reason, or inconvenient to produce in court; but it is, as before declared, and it should be, a most unusual practice for an attorney to stipulate that the unsworn statement of a person as to a fact without the proof of which the plaintiff could not sustain his action or the defendant his defense should be accepted as conclusive evidence of the truth of all the material allegations of the complaint or of the answer. And the more startling is such a stipulation where, as is true of the one in the case at bar, it involves an agreement that, as to the all-important fact to which it relates, the mere opinion of a person, although an expert on such subjects, shall be conclusive of its verity, provided such opinion coincides with the plaintiff's theory of the case.

[6] We have no disposition to indulge in a general animadversion upon opinion testimony. Such evidence often becomes absolutely necessary in the proof of an essential fact, and it is always to be given such weight as it appears in each case to be justly entitled to; but it ought not to be necessary to say that, when that character of testimony is relied upon or becomes necessary in the proof of a fact which goes to the very gist of the main point of controversy in an action at law, it should make its appearance in the record in the highest garb known to the law and under such circumstances as that it may be rebutted, if it can be, or its accuracy tested by the methods usually invoked for that purpose.

[7] Therefore, no such stipulation or agreement by counsel as the one involved here should be tolerated in any case, much less one involving valuable property rights, or, as here, a large sum of money. A trial thus conducted is in effect more in the nature of an arbitration than a trial, but even less satisfactory than the former method of settling disputed questions of fact. It is obviously the first duty of the courts to see that litigants shall have their rights judicially determined only after a fair and impartial trial according to the mode prescribed by law. To place a litigant's rights in a trial thereof at the mercy, so to speak, of the ex parte opinion of any person, however well qualified such person may be to speak on the

subject to which his opinion relates, is not to give such litigant's rights a fair and impartial trial according to the recognized or prescribed forms by which only issues of fact are authorized to be tried.

We doubt not that the court below, after that careful reflection which is afforded to trial courts by a motion for a new trial, reached the conclusion that the scope of the stipulation was entirely too far-reaching, and calculated to prevent a fair and proper consideration of the merits of the case. At all events, it is manifest that the judge regarded it as not involving the proper way in which to try important questions of fact, and considered it to be in the interest of justice to submit those questions to a retrial in the usual and proper mode. We have not been cited to, and are unable, after some independent investigation, to find any case in California, or from other jurisdictions, which, in its facts, is precisely similar to this, but in *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344, where the attorney for the defendants signed an agreement admitting certain material facts in the case, and from the consequences of which agreement the defendants succeeded in relieving themselves at the trial, the court said: "Conceding, so far as the present case is concerned, that attorneys may bind their clients by such admissions as were here made, it is only necessary to observe that, where they are made improvidently and by mistake, the court, by means of its coercive powers over its own officers, has authority to relieve against the consequences of the admission, regulating its action in this respect with a just regard for the rights of both parties, which it can do by setting aside the agreement upon terms which will meet the justice of the particular case"—citing 1 Greenl. on Ev. § 206. It is true that in that case the court was dealing with an objection to the action of the trial court in permitting the defendants to introduce evidence in opposition to their agreement or admissions; but upon the point under consideration we are unable to draw any distinction in principle between that case and this. The stipulation in the case here did not, and could not, have the effect of binding the trial court or concluding it in the exercise of its right to nullify the effect of the agreement by allowing the defendant to introduce proof in opposition thereto. And, had the court refused to accept as conclusive proof of the allegations of the complaint, the opinion of the expert and have allowed the defendant to introduce counter expert or other proof upon the question submitted to the arbitrament of the expert, such action on the part of the court could not upon any just reason be held to have constituted an abuse of its discretion in such case. It would be difficult to mark any reasonable line of distinction between the action of the trial court in that respect during the trial

and its action, bringing about exactly the same result, in granting a new trial after a review of the case upon a motion for that purpose.

Our conclusion is that the order granting a new trial was but the result of the exercise of that power over causes and the action of the parties thereto which it is intended that trial courts shall possess and judicially dispense on all proper occasions in order that fair and impartial trials of issues of fact may be had. In other words, it has not been made to appear that the granting of the order was in excess of a sound judicial discretion.

The order is, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 655)

DIECKMANN et al. v. MERKH et al.
(Civ. 1,013.)

(District Court of Appeal, Third District, California. Dec. 17, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913.)

1. APPEAL AND ERROR (§ 1040*)—PLEADING (§ 252*)—AMENDMENT—EFFECT—HARMLESS ERROR.

Where the complaint was amended to conform to the proof, the original complaint was superseded, and rulings on demurrers to it are immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040;* Pleading, Cent. Dig. §§ 736-743; Dec. Dig. § 252.*]

2. NEW TRIAL (§ 97*)—SURPRISE—AMENDMENTS—DILIGENCE.

Defendants, who did not ask for continuance on the ground of surprise, cannot afterwards complain that a trial amendment, permitting the plaintiff to conform his complaint to the proof, was allowed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. § 97.*]

3. TRUSTS (§ 44*)—ESTABLISHMENT—EVIDENCE—SUFFICIENCY.

In an action to establish an express trust by parol, under a conveyance absolute in its terms, evidence held sufficient, despite the rule that in such cases it must be clear, satisfactory, and convincing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

4. TRUSTS (§ 43*)—ESTABLISHMENT—EVIDENCE.

In an action to establish a trust by parol, under a conveyance absolute on its face, where the property had been transferred by a father to his daughter to be divided after his death, evidence of statements by the daughter that she would do right and share with the others equally, though made before the conveyance, is admissible.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

5. TRUSTS (§§ 17, 18*)—ESTABLISHMENT—PAROL TRUSTS.

Where a father conveyed property to his daughter with the parol agreement that she should divide it among his other children, the trust may be established, under Civ. Code, §§ 2216, 2224, despite sections 847, 852, and 857, providing that no trust in relation to real

property is valid unless created by writing or operation of law, and forbidding the creation of express trusts for the conveyance of land to third persons; the trust arising out of the personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

Appeal from Superior Court, City and County of San Francisco; C. W. Norton, Judge.

Action by Frederick H. Dieckmann and others against Marie E. Merkh and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Louis Ferrari, of San Francisco, for appellants. Fabius T. Finch and Paul F. Fratesa, both of San Francisco, for respondents.

CHIPMAN, P. J. It appears from the complaint that plaintiffs and defendant Marie E. Merkh are the children of Johann D. Dieckmann, who died on April 12, 1910, in the city and county of San Francisco; that on February 10, 1910, he was the owner of the premises in question and, on that day, executed and delivered to defendant Marie E. Merkh a deed conveying said property to her; that it was agreed between Johann and his daughter Marie at the time, that she should hold the title to said land during his life, and at his death "to divide said land and premises in equal shares between herself and said plaintiffs"; that, though frequently requested to convey to plaintiffs their share of said property, defendant Marie refused, and still refuses, to convey the same; that defendant Albert G. Merkh is the husband of Marie, and claims some interest in the land, but without right. The prayer is for judgment that defendant Marie be compelled to execute a conveyance to each of plaintiffs of a one-fourth interest in said land. A demurrer to the complaint was interposed for insufficient facts; also on the ground of misjoinder of parties defendant; also that the complaint is uncertain for the reason that it cannot be ascertained therefrom whether the agreement pleaded was oral or in writing. The demurrer was overruled, and defendants answered, admitting the facts set out in the complaint except as to the alleged agreement, which are denied. By way of cross-complaint, defendant Marie alleges ownership of the land, avers that plaintiffs, without right, claim some interest therein, and asks that her title be quieted. It appears from the transcript that the cause was brought to trial July 14, 1911, and findings and judgment entered July 23, 1911. On July 19, 1911, plaintiffs served notice of a motion to amend the complaint, which was heard and allowed on July 21, 1911, and on that day an amended complaint was filed, and on July 24, 1911, defendants filed their answer to said amended complaint, four days before findings and judgment were entered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and filed. The amendment to the complaint is found in paragraph 4 and is as follows: "That on February 10, 1910, said Johann D. Dieckmann was, and for more than one month prior thereto he had been sick in body and feeble in mind—he was then 68 years of age—and at the time of the execution and delivery of said deed he had and reposed in his said daughter Marie E. Merkh implicit confidence and trust. For the purpose and with the intention and desire of dividing equally between his said children (the plaintiffs and defendant Marie E. Merkh), and upon the advice and solicitation of defendant Marie E. Merkh, said Johann D. Dieckmann executed and delivered said deed to defendant Marie E. Merkh only because he did then and there rely upon and believed the statements and assurances of said Marie E. Merkh that she would hold said real property in trust as aforesaid, and convey an undivided one-fourth interest in said property to each of said plaintiffs herein without charge, upon the death of said Johann D. Dieckmann." The answer to the amendment is a denial of its averments. The motion stated, among other grounds for seeking to amend the complaint, that it was "to conform to the proofs on the trial of said action," from which we may assume that it was allowed after the testimony was submitted. The court found all of the allegations contained in the amended complaint to be true, and the averments of the answer to be untrue. Judgment went in favor of plaintiffs, directing defendant Marie to execute deeds as prayed for. Defendants appeal from the judgment; also from the order permitting plaintiffs to amend their complaint; also from the order overruling defendants' demurrer to the original complaint; also from the order denying defendants' motion for a nonsuit; also "from the orders refusing to sustain defendants' objections to testimony introduced at the trial." The Code makes no provision for appeals from the orders above mentioned, but as the appeal was taken within 60 days after the entry of the judgment, the alleged errors may be reviewed on appeal from the judgment accompanied by statement of the case or bill of exceptions.

[1] There was no demurrer to the amended complaint; issues were joined on it by answer. The original complaint was thus superseded, and the ruling on the original complaint is immaterial. *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523. This is equally true, we think, where the complaint is amended to conform to the proofs."

[2] It is urged that the court abused its discretion in allowing the amendment. Defendants say in their brief: "We do not challenge the right of the court to have permitted the amendment if the issues be retried, but we do challenge the right * * * to take away from appellant the right to try the new issues and to have his day in court upon them." The record is silent as to what

occurred upon granting the motion. All that appears is that defendants filed an answer to the amended complaint, traversing the new facts therein set out. We must assume that no objection was made to the motion, and that defendants were content to submit the issues thus presented on the evidence already before the court. If defendants desired further time to meet these issues by evidence, or were surprised in any way, entitling them to terms or to delay, it was their duty to make it known to the court. Certainly, the defendants were not entitled to have the entire cause retried. An examination of the record shows that there was evidence before the court on the very matters embraced in the amendment.

[3] It is contended that the findings are not sustained by the evidence. In brief: It appeared by the testimony that Johann Dieckmann, in January, 1910, was the owner of the property in question, then valued at \$1,600. His wife had previously died. He was 68 years old, and in failing health, bodily and mentally. There had been some estrangement between him and his said children, which was reconciled, and, in his then condition of mind, he desired to make disposition of the property. A conference was had between all of the parties, except his son Carl, at which he offered to deed the property to first one and then another, who declined to accept it for reasons given, and finally it was agreed that his daughter, defendant Marie, would take the title and hold it during his life, and at his death convey to the other children, plaintiffs, a one-fourth interest each. The testimony made it very plain that their father's intention was to carry out the object set forth in the amended complaint, and that his daughter Marie accepted the trust on the condition clearly stated by her father. During her father's life and for some time after his death she acknowledged her obligation to her brother and sisters to be as above stated, and her father died in the belief that he had made an equal division of the little property he owned. The children met, some time after their father's death, to adjust certain bills which had been paid by one of them, and to arrange for a disposition of the property. It was then agreed that plaintiff Dorothea—Dora as she was called—would take the property at the price of \$1,600. The bills then presented were to be paid from this money, and the balance was to be divided equally between them. Later it was discovered that one or two other bills, of no large amount, had been overlooked, and at a second conference, when these bills were presented, defendant Marie objected to their allowance, and thenceforward repudiated her trust, claimed the land as her own, and refused to convey any interest in it to plaintiffs. This is a brief outline of what appears in much detail of circumstance not necessary to be set out. The principles enunciated in *Cooney*

v. Glynn, 157 Cal. 583, 108 Pac. 506, apply equally strong here. In *Bollinger v. Bollinger*, 154 Cal. 695, 99 Pac. 196, the rule was stated that, to prove a trust by parol under conveyance absolute in its terms, the evidence must be clear, satisfactory, and convincing. It rarely happens that evidence so fully meets this rule as was the case here.

[4] Error is claimed because testimony was admitted relating to certain conversations touching the trust which took place two or three days before the deed was executed. It appeared that the subject of the trust was under consideration by the parties from day to day for three or four days, and, finally, when her father hesitated while signing the deed, Mrs. Merkh said to him: "Why do you act that way? Finish it up. You know I will do right. I will share with the others equally." There was no error in admitting any of these conversations, for they were all to the same purpose, and in the presence of the parties interested.

[5] The motion for nonsuit seems to rest on the failure to show the creation of a trust in writing, as required by section 852 of the Civil Code. The trust here arose out of the "personal confidence reposed in and voluntarily accepted by" Mrs. Merkh, "for the benefit of another." Civ. Code, §§ 2216, 2224. Such a trust resulting from conduct may be shown by parol, and sections 847 and 857, which forbid an express trust to convey land to a third person, have no application to trusts created by operation of law. The conduct of Mrs. Merkh, under the circumstances, constituted a constructive fraud sufficient to create a constructive trust. *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(20 Cal. App. 603)

NASSANO v. TUOLUMNE COUNTY BANK
et al. (Civ. 1,016.)

(District Court of Appeal, Third District, California. Dec. 12, 1912.)

1. BILLS AND NOTES (§ 44*)—NATURE OF INSTRUMENT—"NOTE."

An instrument directed to a bank, in which the signer had money on deposit, authorizing it to pay out of the signer's funds, for a valuable consideration, \$500 to N., on presentation prior to the signer's death, if countersigned by him across the back, or, on notification of the signer's death, without such countersignature, did not contain a promise by the signer to "pay a specified sum of money," and was not therefore a "note" within Civ. Code, § 3244.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 52; Dec. Dig. § 44.*

For other definitions, see Words and Phrases, vol. 5, pp. 4837-4839.]

2. ASSIGNMENTS (§ 49*)—BILLS AND NOTES (§ 15*)—"CHECK"—DRAWER'S FUNDS—EQUITABLE ASSIGNMENT.

A written instrument directed to a bank, in which the signer had a deposit account, directing the bank to pay a specified sum to the

payee if countersigned by the drawer and presented in his lifetime, and if presented after his death then to pay without being countersigned, would be regarded as a check, within Civ. Code, § 3254, defining a check as a bill of exchange drawn on a bank or banker or a person described as such on the face thereof, and payable on demand, without interest, and therefore did not operate as an equitable assignment of so much of the drawer's funds prior to presentation for payment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-98; Dec. Dig. § 49.* Bills and Notes, Cent. Dig. §§ 20, 21; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 2, pp. 1109-1112; vol. 8, p. 7600.]

3. BILLS AND NOTES (§ 15*)—"BILL OF EXCHANGE"—CHECK—DEATH OF DRAWER—EFFECT.

An order on a bank directing it to pay the payee or her order a specified sum on presentation prior to the signer's death, if countersigned by him, or to pay after his death without such countersignature, constituted a bill of exchange which was not invalidated by the drawer's death before presentation, but constituted a binding obligation, which the payee was entitled to enforce against the drawer's estate.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 20, 21; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 1, pp. 784-787.]

4. WILLS (§ 89*)—FORM—BILL OF EXCHANGE.

An order on a bank to pay a specified sum to a payee if countersigned by the drawer and presented in his lifetime, and if presented after his death then to pay without being countersigned, was not ineffectual, after the drawer's death, as an attempt to make a testamentary disposition of the drawer's property in a form unauthorized by law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 218; Dec. Dig. § 89.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Maria Nassano against the Tuolumne County Bank and N. T. McCown, as administrator of the estate of Louis Zanone, deceased. Judgment for defendants, and plaintiff appeals. Reversed.

A. H. Carpenter, of Stockton, for appellant. J. B. Curtin, of Sonora, and Geo. F. McNoble, of Stockton, for respondent.

CHIPMAN, P. J. It is alleged in the complaint that on November 18, 1911, Louis Zanone had on deposit in defendant bank \$1,100, subject to his order. On said date, Zanone, for good and valuable consideration, made and delivered to plaintiff "his promissory note, obligation, and order upon said defendant bank * * * in words and figures as follows: 'Stockton, Calif., November 18, 1911. Cashier of Tuolumne County Bank, Sonora, Cal.: You are hereby authorized to pay out of the funds I now have in your bank and for valuable considerations, which I have received, five hundred dollars to Mrs. Maria Nassano, or her order, said sum to be paid upon the presentation of this order prior to my death, if countersigned by me across the back, or on due notification of my death without such countersignature. In

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

witness whereof, I hereby set my name on the day and at the place first mentioned above, in the presence of two witnesses. [Signed] Louis Zanone. G. Villiborghi, witness. Luigi Pomponio, witness." (Acknowledged before a notary.) "That said order was not presented to said defendant bank for payment in the lifetime of the said Louis Zanone;" that on or about February 10, 1912, plaintiff presented said order or caused the same to be presented to the said defendant bank for payment, together with due proof that said Louis Zanone had died on the 19th day of December, 1911; that said bank refused payment, although it "had then and there, and at all times, the full amount of the said Louis Zanone's money in its hands or under its control wherewith it could have fully paid said order"; that said Zanone died intestate about December 19, 1911, in the county of San Joaquin, and left an estate therein "of more than \$1,100 cash in the hands of the said Tuolumne County Bank," which "it held subject to his order therefor." It is further shown that on January 8, 1912, defendant McCown was duly appointed administrator of the estate of Zanone, deceased; that, within the time appointed for the presentation of claims against said estate, plaintiff presented to said administrator her written claim, duly verified by her oath, based on said "note, obligation, and order," and that said administrator disallowed payment thereof on the 15th day of April, 1912.

The claim presented to the administrator, as shown in the complaint, is in the following form:

"In the Matter of the Estate of Louis Zanone, Deceased. The undersigned, a creditor of Louis Zanone, deceased, presents her claim against the estate of said deceased, for approval, as follows, to wit:

Estate of Louis Zanone, Deceased, to Maria Masano, Dr.

To principal sum of order and agreement...	\$500 00
To interest on same, from November 18th, 1911, at seven per cent. per annum to date	12 50
	<hr/> \$512 50

"Said agreement and order was made and given, for a valuable consideration, on the Tuolumne County Bank, of Sonora, Cal., and was drawn against the funds on deposit therein, and is in words and figures as follows:" Then follows a copy of the instrument set out in the complaint—" [Signed] Maria Masano.

"Subscribed and sworn to before me this 30th day of March, 1912. A. H. Carpenter, Notary Public in and for San Joaquin County, State of California. [Notarial Seal.]"

It is averred in the complaint that demand was made for "payment of said claim, note, obligation, or order, but the said defendants have at all times refused, and still continue to refuse, to allow or pay the same, * * *

although said defendants have in their hands sufficient money belonging to said deceased, after deducting therefrom all the costs and expenses of administration of said estate, to more than pay the same; and the said note, obligation, order, or claim hereinbefore set forth, together with the interest accrued thereon, is disallowed, rejected, wholly unpaid, and due and owing to plaintiff from said defendants." It is also alleged that said Zanone "left no wife, child, father, mother, sisters, or brothers in the said county of San Joaquin or elsewhere, to the knowledge of plaintiff." The prayer is for "judgment against said defendants for the sum of \$500," together with interest to the entry of judgment.

The complaint was demurred to by defendant administrator on the grounds following: (1) That the court has no jurisdiction of defendant McCown as administrator of said estate; (2) that there is a misjoinder in this: That the Tuolumne County Bank alone, if any person, should be made defendant; (3) that the complaint does not state facts sufficient to constitute a cause of action, for the reason that "the instrument set out in the complaint * * * shows on its face that it is an attempted testamentary disposition of property by means of an improperly executed will"; (4) that the complaint is ambiguous and uncertain, because "it is impossible to determine whether said instrument is pleaded as a note, an obligation, or an order or either or all," nor can it be ascertained from the complaint "whether the said instrument is a promissory note, an obligation, or an order upon a bank for the payment of money."

It is stated, as grounds of demurrer by defendant bank, that it appears from the complaint that said instrument was not presented to said bank for payment "during the lifetime of Zanone, and that Zanone died on the 19th day of December, 1911, and that said check or order was presented to Tuolumne County Bank on the 10th day of February, 1912, and by reason of the death of said Louis Zanone said bank could not lawfully pay said check or order," and that said bank is improperly joined as a defendant in the action with the administrator of said estate, who "is entitled to the possession of all the estate of said deceased, and that defendant, the bank, could not pay any claim against said estate to any one." The demurrer was sustained without leave to amend, and judgment dismissing the action was entered, from which plaintiff appeals.

[1] In her complaint, the plaintiff seems unable definitely to characterize the instrument sued on, and therefore describes it as "a promissory note, obligation, and order on said bank." The instrument is not a promissory note, for the signer does not promise "to pay a specified sum of money." Section 3244, Civ. Code; Kendall v. Parker, 103 Cal.

319, 324, 37 Pac. 401, 402 (42 Am. St. Rep. 117). "A check is a bill of exchange drawn upon a bank or banker, or a person described as such on the face thereof, and payable on demand, without interest." Civ. Code, § 3254. "A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another, called the drawee, to pay a specified sum of money." Civ. Code, § 3171.

[2] The instrument resembles a check, when reduced to its essential elements. It is an order on the Tuolumne County Bank to pay a specified sum to the payee, "if countersigned across the back" by the drawer and presented in his lifetime; and, if presented after his death, then to pay without being countersigned. Regarding it as a check on the bank, it did not operate as an equitable assignment of so much of the drawer's funds as he had in the bank at that time, without being presented for payment. *Donohoe-Kelly Banking Co. v. S. P. Co.*, 138 Cal. 184, 71 Pac. 93, 94 Am. St. Rep. 28. In 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, in the case of *Pullen v. Placer County Bank*, the question is also very fully discussed. The rule enunciated in both cases is that a check does not operate as an assignment of the money for which it was drawn; and, until the check is presented, no property right in the fund passes to the payee by virtue of the check. In *Pullen v. Placer County Bank*, *supra*, and in like cases, there was no contract with, or promise made to, the payee and no consideration to support the instrument. The claim that the death of Zanone revoked the authority of the bank to pay the check is not supported by the *Pullen Case*, in which the check was a gift.

[3] We have seen that a check is a bill of exchange. "The rights and obligations of the drawer of a bill of exchange are the same as those of an indorser of any other negotiable instrument." Civ. Code, § 3177. "Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him; * * * fourth, that if the instrument is dishonored, the indorser will * * * pay the same with interest. * * *" Civ. Code, § 3116. Mr. Daniels cites several cases where it has been held that notes made payable "after a man's death," or "to be allowed at my decease," or a provision to pay "on demand after my decease," or "one day after date or at my death," are good negotiable notes. 1 Daniels on Neg. Inst. (5th Ed.) § 46. The instrument in question is negotiable in form, and comes under the classification of negotiable instruments, as mentioned in section 3065 of the Civil Code. It not only recites a consideration but "it is presumed to have been made for a valuable consideration," before its maturity, "and in the ordinary

course of business." Civ. Code, § 3104. In effect, there was here an obligation that the drawer's estate would pay, if the bank refused.

Mr. Daniels shows that the doctrine of the revocation of a check or bill by the death of the drawer is generally based on the English case of *Tate v. Hilbert*, 2 Ves. Jr. 118 (1793), 4 Brown Chy. Cas. 286; *Chitty, Jr., on Bills*, 510. In *Tate v. Hilbert* it was held that the gift of a common check on a banker, payable to bearer, was not a *donatio mortis causa* or an appointment or disposition in the nature of it. Says Mr. Daniels: "It is quite true that authority to an agent is revoked, as a general rule, by death of the principal (*Story on Agency*, § 488); but this doctrine is qualified by the equally well-settled principle that, if the authority be coupled with an interest in the thing vested in the agent, the death of the principal operates no revocation. Now where a check is given to the payee for a valuable consideration (and the check imports value), the authority to the payee to collect the amount from the bank is coupled with a vested interest in the check. He can sue the drawer upon the check, if it be dishonored. * * * The English case, above referred to, does not determine, as has been supposed, that, where a check is given for value, the authority of the banker to pay it is revoked. The death of the drawer of an ordinary bill of exchange does not revoke it, and we can discern no principle of law which allows the death of the drawer to affect the rights of a checkholder who has given value for it." The author cites volume 1 at page 498; *Chitty on Bills*, 282, 287; *Cutts v. Perkins*, 12 Mass. 206; *Edwards on Bills*, 454; *Parsons on Notes and Bills*, 287. The author further says: "The idea that the death of the drawer of a check, given to the payee for value, operates a revocation is, as it seems to us, a total misconception of the law. For a check is a negotiable instrument as often, if not more frequently, given for value than any other species of commercial paper. The drawer is deemed the principal debtor (section 1587); and it is anomalous to hold that his death in any wise lessens his obligations, or the right of the bank to pay it, when given for value." 2 Daniels on Neg. Inst. § 1618b.

Mr. Morse discusses the doctrine of revocation in volume 1, § 400, and contends that it is "a perversion of reason, whatever may be the view taken of the question of assignment." Among other reasons given, the author says: "It is inconsistent to hold that a general deposit is a debt, and that the bank is not an agent or trustee or bailee in respect to it, and then, just to bolster up this error, turn completely about and say the bank is an agent, and must be governed by the rules of agency"—that, even admitting that the rules of agency control, "an agency clearly intend-

ed to be good after death is so held"; that the personal representatives take the property of the deceased, subject to all proper claims against it; that the holder may sue the drawer on a check. It is a binding instrument, and this contract should not be lessened by death more than others.

In the present case, it is not necessary to determine the question definitely. If the bank has paid the money of deceased to the administrator, it can show the fact, and in that case the administrator seeks only to be guided as to the payment.

[4] The principal objection made to the claim is that the check was an ineffectual attempt at a testamentary disposition. On its face, the instrument cannot be so regarded. It is a valid and binding obligation on which plaintiff may recover. *Landis v. Woodman*, 126 Cal. 454, 58 Pac. 857. If there is any good defense to it, this may be shown by answer and at a trial. We think the demurrer should have been overruled, and defendants required to answer.

The judgment is therefore reversed.

We concur: HART, J.; BURNETT, J.

(20 Cal. App. 686)

HOLLAND v. FLASH. (Civ. 1,211.)

(District Court of Appeal, Second District, California. Dec. 19, 1912. Rehearing Denied Jan. 18, 1913; Denied by Supreme Court Feb. 17, 1913.)

1. BROKERS (§ 43*)—COMPENSATION—NECESSITY OF MEMORANDUM—SUFFICIENCY.

Under Civ. Code, § 1624, requiring an agreement authorizing or employing a broker to sell real estate for a compensation or commission, a memorandum in writing, to the effect that defendant as the owner of certain realty had listed same for sale or exchange with plaintiff's assignor, who had obtained an offer in writing from a certain person to exchange certain land therefor, in which event defendant would pay a certain sum, and that if such exchange was not made the agreement should be of no effect, was not an agreement generally employing or authorizing plaintiff's assignors to act as agents in selling the property, and, failing, such exchange did not include any subsequent sales or exchanges.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. WORK AND LABOR (§ 10*)—EXPRESS CONTRACT UNENFORCEABLE.

A broker who proves no contract of employment in writing as required by Civ. Code, § 1624, is not entitled to recover the reasonable value of services in effecting a sale.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 25; Dec. Dig. § 10.*]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Walter Holland against H. L. Flash. Judgment for defendant, and plaintiff appeals. Affirmed.

Ray Howard, of Los Angeles, for appellant. Lynden Bowring and Frank C. Hill, both of Los Angeles (Geo. S. Hupp, of Los Angeles, of counsel), for respondent.

ALLEN, P. J. Plaintiff by his complaint sought to state two causes of action: First, that defendant listed, by a written contract or memorandum subscribed by defendant, his property with plaintiff's assignors, who were real estate brokers, and agreed to pay plaintiff's assignors for their services in negotiating a sale thereof the sum of \$900, alleging that pursuant thereto they did procure such customer, and did negotiate a sale and exchange of the property in pursuance of said employment. Nonpayment was alleged, and the assignment of the cause of action to plaintiff. The second cause of action, in substance, declares upon the same written employment and listing of the property, but alleges an agreement thereby to pay the reasonable value of their services, which reasonable value is alleged to be \$900. The assignment of this cause of action is also alleged, and the nonpayment. The complaint was verified, as was the answer, in which it was denied that there was any listing of the property with plaintiff's assignors; denied that any written contract, note, or memorandum was subscribed by defendant for such listing, or for any other purpose or at all; denied that they procured a customer; denied any agreement to pay, as in the complaint alleged, and generally denied each and all of the allegations of the second cause of action. Upon the trial of the cause a judgment of nonsuit was entered, from which judgment plaintiff appeals upon a bill of exceptions.

This bill of exceptions discloses that the only memorandum or instrument in writing executed between the parties was one which, in so far as material in determining the questions here involved, was in these words: "Whereas, I, H. L. Flash, * * * am the owner of that certain apartment house known as the St. Lelia Apartments, * * * desire to dispose of said property and have listed the same for sale or exchange with N. M. Entler; and whereas, said N. M. Entler has by his efforts succeeded in obtaining an offer in writing from Dr. H. A. Atwood * * * to exchange certain land situate in said Riverside county for my above-described property; provided that the mortgage of \$17,000 now about due can be refunded by me with a new loan of the same amount, to wit, \$17,000, for a term of three years, or thereabouts, at 7% per annum net; * * * now, therefore, it is hereby understood and agreed between said H. L. Flash and said N. M. Entler that if said above-mentioned exchange is consummated, that said H. L. Flash will pay to said N. M. Entler the sum of \$1,500, said sum to constitute full compensation for all services rendered by said Entler to said H. L. Flash, and to include all expenditures for assistance of other agents and brokers in negotiating and obtaining said loan. * * * Second. That if for any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reason the exchange above referred to is not consummated, then and in that case the above commission agreement shall be null and void; but if the loan of \$17,000 is actually negotiated or obtained by or through said N. M. Entler, said H. L. Flash will pay to said N. M. Entler the sum of \$510; * * * In witness whereof," etc. The bill of exceptions further discloses that there was no deal or exchange consummated between defendant and said Atwood, and none was procured by plaintiff's assignors; nor was any loan of \$17,000, or any sum, effected through the instrumentality of plaintiff's assignors. It is true that defendant and one Levi were negotiating for an exchange of the same property, and that plaintiff's assignors procured Levi to increase his offer theretofore made to defendant in the exchange to the extent of \$500, and defendant and said Levi consummated an exchange of property, which involved the property described in the contract hereinbefore referred to.

[1, 2] The question thus presented upon this appeal is as to the sufficiency of the contract or memorandum under subdivision 6 of section 1624 of the Civil Code as an agreement authorizing or employing an agent or broker generally to purchase or sell real estate for compensation or a commission. We think it clear from a reading of the memorandum that it was dual in its character. The only listing or agreement upon the part of defendant for commissions, or authorizing or employing plaintiff's assignors as agents or brokers, was to carry out a certain specified exchange with a particular individual upon terms therein set forth, and it was expressly stated that if such exchange with that individual, under the terms specified, was not accomplished, then the commission agreement should be null and void. It was agreed, however, that there was a general employment as brokers to negotiate a loan of \$17,000 upon defendant's property at a specified rate of interest. There is no pretense, however, that this loan was ever negotiated; hence nothing was done by plaintiff's assignors under the written memorandum of agreement. We do not construe this agreement as one generally employing or authorizing plaintiff's assignors to act as agents to negotiate or sell this property, or to do any act or thing connected with its negotiation or sale, other than to procure if possible the Atwood exchange upon the terms specified. Failing in that regard, the contract by its terms was at an end, and did not cover, or purport to cover, any agreement with reference to subsequent deals, sales, or exchanges. Were it even conceded that the exchange with Levi was procured through the agency of plaintiff's assignors, nevertheless, there was no written memorandum or agreement authorizing their employ-

ment in that regard, and for such services, under subdivision 6 of the above-named section, no recovery could be had. The complaint affirmatively alleges that the listing of the property was under this written agreement, and to this agreement alone must we look, then, to determine what was meant by the term "listing"; and from that we find that it was but an agreement of the limited character hereinbefore stated, and that there was no general listing and no general employment contemplated between the parties, or with reference to which any written memorandum was made. It was incumbent upon plaintiff to show the employment under which the commission or compensation was earned to have been by written agreement or memorandum. This he failed to do. There being no contract of employment in writing, it is clear that plaintiff is not entitled to recover the reasonable value of the services under the second count of his complaint. This question has long been settled by the decisions of our Supreme Court. *Jamison v. Hyde*, 141 Cal. 113, 74 Pac. 695.

We see no error of the court in granting the motion for a nonsuit, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 668)

QUAN QUOCK FONG et al. v. LYONS,
Constable of Los Angeles Tp.,
et al. (Civ. 1,204.)

(District Court of Appeal, Second District,
California. Dec. 18, 1912.)

1. JUDGMENT (§ 155*)—DEFAULTS—MOTION.

A notice of a motion to set aside a default, which stated that the grounds were based upon an affidavit attached to and forming a part of the motion, is sufficient under Code Civ. Proc. § 1010, providing that such notice shall state when the motion will be made, and the grounds upon which it will be made and the papers upon which it will be based, where the affidavit disclosed that the default had been taken during the time given defendants to answer over.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.*]

2. JUDGMENT (§ 160*)—MOTION—AFFIDAVIT OF MERITS.

An affidavit attached to a motion to set aside a default, which only stated that affiant was fully advised of the facts and circumstances involved in the defense, is insufficient as an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314-316; Dec. Dig. § 160.*]

3. JUDGMENT (§ 158*)—DEFAULTS—MOTIONS—AFFIDAVIT OF MERITS.

Where the court under Code Civ. Proc. § 473, extended the time in which defendant was required to answer, the enlarged time is as complete a protection from default as the original time given defendants, and a default wrongfully entered where the clerk refused to file defendant's answer may be set aside without an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.*]

4. APPEAL AND ERROR (§ 529*)—RECORD—CONSTRUCTION—MOTION.

A motion being a viva voce application to grant an order, plaintiff cannot complain on appeal that the record shows no motion actually made to set aside a default where the order appealed from recited that it was granted upon defendant's motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2389-2393; Dec. Dig. § 529.*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Quan Quock Fong and another against George W. Lyons, as constable of Los Angeles township, of Los Angeles county, Cal., and others. From an order vacating a default entered against defendants, plaintiffs appeal. Affirmed.

Paul W. Schenck and Roland G. Swaffield, both of Los Angeles, and John G. Munholland, of Long Beach, for appellants. C. W. Stahl and W. S. Baird, both of Los Angeles, (C. H. Sayles, of Los Angeles, of counsel), for respondents.

ALLEN, P. J. This appeal is by plaintiffs from an order vacating a judgment and setting aside a default theretofore made and entered against defendants.

An action, the character of which, or the sufficiency of the complaint to state a cause of action, is not disclosed, was commenced on December 13, 1911, by plaintiffs against defendants, and on December 21st defendants entered their appearance, one of the defendants filing a general demurrer to the complaint, and the other defendants filing a notice of motion to require plaintiffs to state more specifically certain matters generally alleged. The demurrer was on January 8, 1912, overruled, and on the same day the motion of the other defendants was denied. On January 10, 1912, the default of the defendants, other than the demurring defendant, was entered, and on January 22d the court ordered a judgment to be entered against all of the defendants, except the demurrant. On January 19th the defendants, other than the demurrant, served notice of a motion to vacate the judgment and default, the same to be heard January 29th, which notice of motion stated that the same would be based upon the following grounds, to wit: First, on the affidavit of C. W. Stahl, a copy of which was attached to and made a part of the motion; second, on the verified answer duly served on plaintiff's attorneys January 17th, and then in the possession of the clerk of the superior court of Los Angeles county; and, third, upon the pleadings, files, and record of the cause. The affidavit of Stahl alleged that at the hearing of the demurrer and motion on January 8th the court, when it overruled the demurrer and denied the motion, made and announced from the bench and entered upon the court calendar an order giving the defendants 10 days in which

to prepare and file their answer, which answer was prepared and offered for filing within the time specified, and the same was delivered to the clerk, who refused to mark the same as filed because of the entry of a previous default. Service of the answer of the demurring defendant was admitted. The record shows that the hearing of the motion to vacate was by stipulation continued to February 19, 1912, upon which date the same came on for hearing, and upon which hearing only the affidavit of Stahl was received and presented to the court and the court vacated the judgment and set aside the default of defendants. From this order plaintiffs appeal upon a bill of exceptions which discloses the matters hereinbefore stated.

[1] Appellant's first contention is that the notice of motion stated no grounds upon which the same would be based, as required by section 1010 of the Code of Civil Procedure. This section requires that the notice shall state when the motion will be made, the grounds upon which it will be made, and the papers, if any, upon which it will be based. We think a fair construction of the notice of motion may be said to state the grounds of the motion. It stated that the grounds were based upon the affidavit attached to and forming a part of the motion. This affidavit disclosed that the court had announced from the bench and entered upon the court calendar an order giving defendants until January 19th in which to answer. We think that reading this motion and affidavit together they state in a manner plainly to be understood that the motion would be based upon the grounds that the entry of default was made prematurely and within the time allowed by the court for answering.

[2, 3] It is next contended that the affidavit of merits was insufficient. This we think apparent. Such affidavit only stated "that affiant was fully advised of the facts and circumstances involved in the defense." This could not be considered an affidavit of merits. *Cooper-Power v. Hanlon*, 7 Cal. App. 724, 95 Pac. 678, and cases cited. We are then confronted with a question as to the necessity of an affidavit of merits where the motion is based upon facts showing a premature entry of default and judgment. We may assume that, when a motion is for relief under section 473 of the Code of Civil Procedure, an affidavit of merits is necessary. Under that section, the parties are seeking relief on account of mistake, surprise, or excusable neglect. That section confers power upon the court to enlarge the time for answer. When such power has been exercised and an order made from the bench enlarging such time, it was the ministerial duty of the clerk to have entered such order in the minutes, and a party defendant who answers and tenders for filing the answer within such enlarged time is not guilty of any

mistake or neglect, excusable or otherwise; and, when the attention of the court is called to the failure of the clerk to enter the proper minute order and the entry of default on account thereof and the rendition of judgment based upon such unauthorized default, it possesses the power, and it is the duty of the court, to vacate such unwarranted proceeding, and restore the record to the condition in which it would have been had the proper order of the court been recognized and obeyed. In the case at bar the court had before it the grounds of motion stated in the affidavit. It could, and it will be presumed that it did, verify the same from its calendar, and, finding the fact to be that the default and subsequent proceedings were in disobedience of the original order, properly vacated such default and judgment. The enlarged time given defendant by a court to answer is as complete a protection from default as is the original time given to answer, as specified in the summons, in which latter case no affidavit of merits is requisite. *Foster v. Vehmeyer*, 133 Cal. 459, 65 Pac. 974; *Norton v. Atchison, etc., R. R. Co.*, 97 Cal. 390, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; *Waller v. Weston*, 125 Cal. 203, 57 Pac. 892.

[4] It is further insisted by appellants that the record does not disclose that any motion was actually made to vacate the default and judgment. A motion being an application viva voce to grant an order, it appears from the order of court that such motion was made. The order reads: "It is ordered that defendants' motion to set aside," etc., "be and the same is hereby granted." Here is a declaration by the court that a motion was made and granted. We see no merit in the contention that the motion was not actually made.

We perceive no error in the action of the court in vacating the judgment and default, which was in line with what we conceive to have been its plain duty under the circumstances of the case.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

(64 Or. 432)

DEVLIN v. MOORE et al.

(Supreme Court of Oregon. Feb. 25, 1913.)

1. PLEADING (§ 110*)—WAIVER OF PLEA.

A plea in abatement was waived by an answer to the merits before trial of the plea.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 231-233; Dec. Dig. § 110.*]

2. BANKS AND BANKING (§ 94*)—CONSTRUCTION—PROPERTY ASSIGNED.

A savings bank which was in failing condition transferred to another bank all of its assets of every kind, including liabilities of stockholders for unpaid subscriptions, with the power to enforce all choses in action and other claims the same as the assignor could have done, had it not been placed into the hands

of a receiver. In consideration of this, assignee assumed all of assignor's legal obligations to be paid within two years from the assignment. The contract further provided that the receiver should continue for two years, or until the assignor's liabilities were paid and discharged by the assignee, for the purpose of distributing to the assignor's creditors money so paid by the assignee, and that the assets of the assignor should be held by the receiver as security for the faithful performance of the contract, subject to the assignee's right to substitute other assets therefor, and further provided that the officers of assignor should execute such assignments, etc., as might be necessary to vest full title to its assets in the assignee. Held, that the assignee bank, upon performing its part of the contract, was entitled to the benefits of all of the assets of the assignor of every character, including obligations owing to it from stockholders and choses in action, etc.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 227; Dec. Dig. § 94.*]

3. BANKS AND BANKING (§ 94*)—CLAIMS ASSIGNED.

The contract did not assign any right of action belonging to the assignor for damages caused by the negligence of its directors in managing its affairs; such claim not being an asset within the meaning of the contract.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 227; Dec. Dig. § 94.*]

4. BANKS AND BANKING (§ 54*) — JOINT TORT-DEBATORS—JOINT LIABILITY.

Bank directors acting jointly in the fraudulent withdrawal and misappropriation of notes held by the bank, for their mutual benefit, are jointly liable for the whole of such notes, with interest from the dates of their withdrawal.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

5. BANKS AND BANKING (§ 77*)—DUTY.

A bank receiver should adjust and settle the affairs of the bank within a reasonable time, obtaining the largest possible sum for its assets.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

6. BANKS AND BANKING (§ 77*) — SALES—AMOUNT OBTAINED.

If the amount obtained by a receiver of a bank for its securities is the highest amount possible at the time of the sale, but is not sufficient to satisfy the demand for which the securities are given, the remainder of the claim is not thereby canceled.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

7. BANKS AND BANKING (§ 77*)—LIABILITY OF DIRECTORS—NEGLIGENCE.

The fair value of land conveyed to the receiver of an insolvent bank by a director should be credited by the receiver on the amount due from such director for fraudulently misappropriating the bank's assets, though the receiver has not yet disposed of the property, so as to determine the exact proceeds.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

8. FRAUD (§ 20*)—RIGHT OF ACTION.

In order to recover damages for fraudulent misrepresentations, plaintiff must have been deceived by and relied upon such representations.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

9. EVIDENCE (§ 73*)—PRESUMPTION—CONDUCT OF BUSINESS.

It is strongly presumed that bank directors exercise their best judgment in conducting the affairs of the bank.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.*]

10. BANKS AND BANKING (§ 54*)—DUTIES OF DIRECTORS.

It is the duty of bank directors to exercise ordinary diligence in ascertaining the condition of its business, and reasonable control over its affairs, and they are not responsible for losses resulting from their conduct if they do so, but are responsible for losses resulting from their failure to exercise the care to avoid losses which a prudent person would have exercised under the circumstances.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

11. BANKS AND BANKING (§ 54*)—DIRECTORS—CARE REQUIRED—"ORDINARY CARE."

The "ordinary care" required of bank directors in conducting the bank's affairs means that degree of care which a diligent and prudent person would exercise under similar circumstances.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

12. BANKS AND BANKING (§ 54*)—DIRECTORS—DUTY—EXAMINATION OF CONDITIONS.

Bank directors should, in the exercise of ordinary care, have the conditions and resources of the bank examined at reasonable intervals.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

13. BANKS AND BANKING (§ 54*)—LIABILITY OF DIRECTORS—FRAUD OF OFFICERS.

To make bank directors liable for the fraudulent acts of other officers, the directors must have participated therein, or be negligent in supervising the bank's affairs.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

14. BANKS AND BANKING (§ 54*)—DIRECTORS—NEGLIGENCE.

A bank director who discharges his duties in the manner ordinarily performed by the directors of other banks in the city cannot be held guilty of gross negligence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

15. BANKS AND BANKING (§ 54*)—OFFICERS—AGENCY FOR BANKS.

The president, cashier, and other bank employees, though also directors, are not the agents of the directors, but of the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105, 107; Dec. Dig. § 54.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Thomas C. Devlin, as receiver of the Oregon Trust & Savings Bank, against Walter H. Moore and others. From a judgment in part for plaintiff, plaintiff, defendant named, and another appeal. Judgment modified as stated.

This is a suit by Thomas C. Devlin, as receiver of the Oregon Trust & Savings Bank, to recover of the defendants on the ground that they were negligent in the discharge of their duties as directors of the bank, and that they misappropriated the property and funds of the same. The circuit court rendered a decree in favor of plaintiff and against W. Cooper Morris, Walter H. Moore, and Henry A. Moore, from which the two latter appeal, and in favor of defendants Elmer E. Lytle, Lonner O. Ralston, Leo Friede, Albert T. Smith, and W. H. Copeland, from which part of the decree plaintiff appeals.

The bank was incorporated in March, 1904, under the name of Oregon Savings Bank, which name was subsequently changed to Oregon Trust & Savings Bank. It was organized with a capital stock of \$100,000 by defendants Lonner O. Ralston and W. Cooper Morris, together with J. E. Lancaster and C. L. Devins, the first three named taking stock to the amount of \$25,000 each, and the fourth subscribing to the amount of \$24,000, each depositing his note in the bank therefor. The bank opened for business in the city of Portland, Or., about May 5, 1904. Shortly after the corporation was organized, Devins and Lancaster entered into an agreement with Ralston and Morris, whereby they surrendered their stock and withdrew their notes. Starting in this manner, the bank did a large business of general savings and commercial banking, until the deposits amounted to about \$2,250,000. The bank purchased Tacoma telephone bonds of the par value of \$400,000, and Omaha telephone bonds of the par value of \$500,000, receiving stock in the respective companies as a bonus for like amounts. Both of the companies that issued these bonds are now in the hands of a receiver. On August 21, 1907, in a suit for that purpose, Thos. C. Devlin was appointed by the court as receiver of the bank.

It is alleged in the complaint, among other things, that immediately after the organization of the bank Lonner O. Ralston was elected a director and chosen president of the corporation, serving until September 15, 1905; that W. C. Morris was elected a director and qualified as such; that he served as cashier and secretary of the corporation, and was engaged in the active management of the affairs and business of the same during the entire period from its organization until the appointment of the receiver; that Albert T. Smith was elected a director of the bank about May 1, 1904, resigning the 15th day of September, 1905; that W. H. Copeland, was elected a director about the middle of November, 1904, and resigned about the 1st of January, 1905; that Henry A. Moore was named as a director about the middle of September, 1905, and served until the 21st day of August, 1907, but never qualified as such and had no stock in the bank;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that defendant Elmer E. Lytle was elected a director on September 15, 1905, never qualified, and did not own any stock in the bank until the 16th of October, 1906; that Leo Friede was elected a director about the middle of September, 1905, and acted until the 21st day of August, 1907, but never qualified and owned no stock. It is further alleged that each of the directors during his respective term neglected and violated all and singular his duties and obligations, and that each was guilty of gross negligence and inattention in the discharge of his several duties and obligations, and of a reckless disregard of the interests of the corporation, its stockholders, and creditors, resulting in large losses (particularly set forth in detail), on account of loans to insolvent and irresponsible parties and misappropriations of funds and property by some of the officers of the bank. The complaint further avers that at the time plaintiff was appointed receiver, and for a long time prior thereto, and since, the corporation has been and was insolvent; that the assets of the corporation coming into the hands of the plaintiff as receiver were insufficient to discharge the debts and obligations thereof; that this suit is prosecuted in behalf of the corporation, its stockholders, and creditors; that the debts and obligations of the corporation duly filed and approved by plaintiff, amounting to about \$300,000, are still unpaid; that this suit is prosecuted by order and leave of the circuit court; that no corporate records, minute book, or records of the transactions of the board of directors or stockholders of the corporation other than the ordinary account books of the bank and the stock certificate books have ever come into the possession of the receiver.

The defendants W. H. Moore, Henry A. Moore, E. E. Lytle, Leo Friede, Lonner O. Ralston, and Albert T. Smith, by way of plea in abatement, allege that plaintiff is not the real party in interest in the suit for the reason that on the 11th day of February, 1908, plaintiff, as receiver of the Oregon Trust & Savings Bank, for a valuable consideration, and pursuant to the order of the circuit court in the suit in which plaintiff was appointed as receiver, sold, assigned, and transferred to the German American Bank, a corporation organized and existing under the laws of the state of Oregon, the demands and cause of suit set forth in the complaint; and that the German American Bank has been the sole and exclusive owner and holder of such demand or right of suit ever since that date. Thereafter defendant W. H. Copeland filed a separate, identical plea in abatement. Issue being raised by replies to the plea, the matter was tried by the court, the findings of fact and conclusions of law were made, and a decree entered in favor of plaintiff.

The evidence relating to the plea in abatement is not contained in the record. It is

admitted that plaintiff was appointed as receiver of the Oregon Trust & Savings Bank, and that the bank was organized with a capital stock of \$100,000. The answers of the several defendants to the merits deny any liability, negligence, or misappropriation of the funds or property of the bank, and set forth the contract made by the receiver with the German American Bank, which is admitted to have been executed, and which provided for the assignment and transfer to the German American Bank of all the assets and property of the Oregon Trust & Savings Bank, in consideration that the former would assume and pay all the legal obligations of the latter, as shown in the report of Charles B. Pfahler. This contract was authorized by an order of the circuit court which was made a part thereof, and executed February 11, 1908. The German American Bank, in conjunction with the receiver, proceeded to carry out the terms of the above contract. A large number of the claims against the Oregon Trust & Savings Bank to the amount of approximately a million dollars were adjusted by transferring telephone bonds contained among the assets of the Oregon Trust & Savings Bank, many of which have since been claimed to be practically worthless. Some of the creditors seek to be relieved from such contracts, and to be paid in cash. Many of the creditors of the Oregon Trust & Savings Bank took stock in the German American Bank, amounting to some \$75,000, in lieu of their claims in the former bank. This stock is now asserted to be valueless. A portion of the other claims was paid with the funds which came into the hands of the receiver from the Oregon Trust & Savings Bank. On February 11, 1910, in order to keep the German American Bank running, and to assist in carrying the burden it had assumed by the contract, Mr. P. L. Willis, one of its directors, furnished and deposited in a bank in San Francisco the sum of \$200,000, to take care of the unsettled claims against the Oregon Trust & Savings Bank. As various claims were presented at the German American Bank for payment, they were paid with this money furnished by Mr. Willis, who took an assignment of such claims.

It is stated on behalf of plaintiff that all of these claims have been taken care of or purchased in this manner, except certain ones amounting to approximately \$10,000, about which there is some question. Plaintiff contends that the claims assigned to Willis have not yet been paid or discharged, but have only been assigned or taken care of temporarily. The other issues and facts of the case will be referred to as they are reached without stating them at length here. The record contains about 2,800 pages of typewritten evidence, and a large number of voluminous exhibits.

Alfred E. Clark and Martin L. Pipes, both of Portland, for appellant Devlin. C. W. Fulton, of Portland, for appellants Moore and another. J. N. Teal, of Portland (Teal & Minor and W. A. Johnson, all of Portland, on the brief), for respondent Friede. John H. Hall, of Portland, for respondent Lytle. J. M. Long, of Portland (C. A. Johns, of Portland, on the brief), for respondent Smith. Jay Bowerman, of Portland, for respondent Ralston. Samuel White, of Portland (Manning & White, of Portland, on the brief), for respondent Copeland.

BEAN, J. (after stating the facts as above). The defendants unite in their contention that by virtue of the contract and the proceedings thereunder the receiver in this suit represents neither creditors nor stockholders, and that neither of these exist; that payment of all the expenses of the receivership, including the attorney's fees, was provided for by the contract; that according to the agreement the German American Bank was required to pay and discharge all the indebtedness of the Oregon Trust & Savings Bank, and the expenses and costs of the receivership suit.

Defendants submit that the following propositions are established: (1) That all of the indebtedness of the Oregon Trust & Savings Bank has been paid and discharged; (2) that there are no stockholders for the receiver to represent, as all of them surrendered their stock for cancellation, as a condition to the contract of February 11, 1908, the stock having been canceled, with the exception of that held by the defendant Copeland, who now claims no interest in the same, directly or indirectly; (3) that all of the costs and expenses of the receivership have been provided for and are required to be paid by the German American Bank as a part of the consideration for its purchase of the assets of the Oregon Trust & Savings Bank.

[1] Certain of the defendants answered to the merits after they had interposed a plea in abatement, but before the trial thereof. This constituted a waiver of the matter in abatement. *Winter v. Norton*, 1 Or. 42, 44; 1 Cyc. 136; 1 Enc. Plead. & Practice, 33. The other defendants do not urge the pleas in abatement upon this appeal. Therefore it is unnecessary to consider the same, except in so far as the matters therein contained, which are also set forth in the answers to the merits, affect the equities of the case. As to a defense of this character, this court in the case of *Sturgis v. Baker*, 43 Or. 236, at page 241, 72 Pac. 744, at page 746, said: "The statute requiring that every action shall be prosecuted in the name of the real party in interest (B. & C. Comp. § 27) was enacted for the benefit of a party defendant to protect him from being again harassed for the same cause. But if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party

suing will fully protect him when discharged, then is his concern at an end." Much depends upon the contract entered into by the receiver and the German American Bank on February 11, 1908. We will first notice some of the provisions and the intent of this agreement. It provides for the assignment and transfer to the German American Bank of all the assets and property of the Oregon Trust and Savings Bank, the leasehold interest to the premises where the business was theretofore carried on, the bank fixtures therein, the liability of any stockholder of the bank, for any unpaid part of his subscription to the capital stock therein, and any and all property or properties sold or conveyed by any person or persons to the Oregon Trust & Savings Bank and to the receiver to assist in its liquidation or otherwise, it being intended to comprise and embrace all assets of every character and nature of the Oregon Trust & Savings Bank, or its receiver, with the right and power to enforce the collection for the benefit of the German American Bank of all choses in action and other claims of every character and nature, with the same right and power which the Oregon Trust & Savings Bank would have had in the event that it had not gone into the hands of a receiver, in consideration of and upon the condition that the German American Bank will assume and pay all the legal obligations and liabilities of the Oregon Trust & Savings Bank (as shown in the report of Charles B. Pfahler) on or before two years from the date of such transfer, without interest. The contract further provides that the receiver shall continue for a period of two years from the date of such transfer, or until such time as the obligations and liabilities shall be fully paid or discharged by the German American Bank, for the purpose of distributing to the creditors of the Oregon Trust & Savings Bank, moneys so paid by the German American Bank, and for the distribution of bonds and securities contracted for; further, that until such obligations of the Oregon Trust & Savings Bank shall be adjusted, paid, or discharged, the assets are to be held by the receiver as security for the faithful performance of the contract subject to the right of the German American Bank to finance such assets and substitute therefor at any time other assets of like estimated value, or, in lieu thereof, canceled obligations of the Oregon Trust & Savings Bank liquidated by the German American Bank equal in amounts to the assets received. It was understood that the contracts theretofore made by certain creditors of the Oregon Trust & Savings Bank to take certain bonds and securities in payment in whole or in part of other claims against the Oregon Trust & Savings Bank should be carried out by such creditors, and that they should accept and receive the bonds and securities contracted for by them in payment of their claims

against the Oregon Trust & Savings Bank to the extent of the amount agreed upon by the creditors.

It was contemplated by the contract that the receiver should be the channel through which the proceeds of the assets of the Oregon Trust & Savings Bank should flow to whomsoever they belonged. It does not appear by the contract that the claims against the Oregon Trust & Savings Bank were released or extinguished. The contract attempted to provide a means of payment. The receiver was not authorized by the court to cancel any claims against the Oregon Trust & Savings Bank until the same should be paid or adjusted and discharged by the claimants themselves. As a condition precedent to the carrying out of the provisions of this contract, the receiver required the directors of the Oregon Trust & Savings Bank, who comprised all of the stockholders, to surrender all their stock for cancellation. The directors fully complied with this requirement, with the exception of Mr. Copeland, as heretofore stated. The contract was made not only with the sanction of the circuit court, but the court was instrumental in arranging the details. It was provided that the personnel of the board of directors of the German American Bank should be satisfactory to the court and approved by it. It was evidently the intention of all the parties to the contract that the whole scheme for adjusting the affairs of the bank should be expressed therein and carried out in execution thereof. The officers and directors of the Oregon Trust & Savings Bank were virtually parties to this contract. It provided for an assignment to the German American Bank of "the liability of any stockholder of said bank, for any unpaid part of his subscription to the capital stock therein." It was further stipulated therein that "the duly constituted officers of the said Oregon Trust & Savings Bank shall also execute such assignments, deeds, and other writings as may be necessary to vest full title to all said assets in the German American Bank." Pursuant to the stipulation last quoted, as we understand it, the stockholders of the Oregon Trust & Savings Bank canceled and surrendered nearly all their stock to the receiver. It should be noticed that this is not a suit to set aside the contract, nor to annul any of the various settlements and adjustments of the affairs made in furtherance of the same. The two references made above as to the liability of any stockholder, and, as to the acts to be performed by the officers of the Oregon Trust & Savings Bank, are the only expressions found in the contract in regard to such liability or performance, and it would seem that this was all that was contemplated by the parties to the contract or those interested therein.

As to the liability of the directors for negligence in the conduct of the affairs of the Oregon Trust & Savings Bank, prior to the

contract, if we apply to that agreement the maxim "*Expressio unius est exclusio alterius*," it is difficult to understand how they can be held liable to the German American Bank under the terms of the contract for a failure to successfully manage the affairs of the Oregon Trust & Savings Bank. All the parties interested in the contract have acted thereon. The officers of the Oregon Trust & Savings Bank, acting through the receiver, said to the German American Bank, in effect, that they had made a failure in carrying on the business of their bank, and that if it (the German American Bank) would assume and pay all the legal obligations and liabilities of the Oregon Trust & Savings Bank, as shown in a certain report, that all of its assets and property including the liability of any stockholder of the Oregon Trust & Savings Bank for any unpaid part of his subscription to the capital stock therein would be transferred to the German American Bank. The latter in effect purchased the property in its then dilapidated condition.

[2] The execution of the contract was a step in the settlement and adjustment of the affairs of the bank which were very much involved. To go back of the contract or outside of the matters contained within its scope, and within the contemplation of the parties, would be to unsettle and annul the terms and conditions thereof. Under the stipulations entered into, the German American Bank, upon performing its part, is entitled to the benefit of all the property and assets of the Oregon Trust & Savings Bank, including each and every debt of every kind or character owing the bank, whether due from the directors, stockholders, or any one else, either upon notes, accounts, or implied contracts. In so far as the funds of the Oregon Trust & Savings Bank are concerned, the German American Bank is entitled to the same right as the Oregon Trust & Savings Bank would have had if the assets of the bank had not been transferred. Otherwise the German American Bank would not have full compensation for paying the obligation as agreed, and there would be a failure in carrying out the contract. It would be inequitable to require the German American Bank to pay the claims against the Oregon Trust & Savings Bank, and not to permit the paying bank to receive the benefit of the assets and property of the insolvent bank. There can be no question but that, prior to the contract, the Oregon Trust & Savings Bank could have maintained an action against an officer or director of that corporation for a misappropriation or conversion of any of the funds. In order to determine the rights of the respective parties in so far as affected by the contract, the same should be enforced according to the letter and spirit thereof. If any of the defendants, in breach of their trust as officers of the bank, have misappropriated money belonging to the Oregon Trust & Savings Bank, they are bound,

and should be required to return the same or make it good to the Oregon Trust & Savings Bank, or to its receiver, no matter how large or how small the amount, or by whom the stock is owned. To illustrate: If Walter H. Moore is owing a note or an account to the Oregon Trust & Savings Bank, or has taken, either alone or jointly, funds or negotiable instruments, and has appropriated the same to his own use, he should be held responsible therefor. To this extent, if there be any such liability, the receiver is authorized to maintain this suit and marshal the assets of the insolvent bank.

[3] We are not considering now the question of the liability of the directors for negligence as between the bank and the public or third parties. We do not hold that the right to bring an action for the alleged negligence could not be assigned, but that, according to the contract of February 11, 1908, giving a fair construction to the terms and conditions thereof, it was not the intention to assign such right of action to the German American Bank. A claim for such negligence is not an asset of the insolvent bank within the contemplation of the stipulation of February 11, 1908. The language of the Supreme Court of Rhode Island in *Hayes, Receiver, v. Kenyon*, 7 R. I. 136, where it was claimed that the receiver in order to recover, should satisfy the jury that some billholder, depositor, or other creditors, or some stockholders, had been injured by the act of the defendant, is applicable to this case. We quote therefrom as follows: "If, therefore, the property sought in this action is the property of the corporation, of which the defendant has wrongfully deprived it, we see no reason for imposing upon the receiver, as a condition to his right to recover it, that he should prove a special injury from the wrong to some creditor or stockholder of the bank. In bringing his action the plaintiff is in the performance of a statute duty necessary to the distribution required of him by law. The only questions are: Was this the property of the bank? And has the defendant in breach of his trust as an officer of the bank wrongfully appropriated it to his own use? And, under such circumstances, will an action for money had and received lie for it, at the suit of the receiver? * * * On the trial of this action, it was of no consequence who, or whether any one but the bank, would be injured by this wrongful appropriation of its property. Indeed, until the property is collected and ascertained, and the expenses of the trust paid, it could not be known who, or whether any one but the bank would suffer from this wrong, or to what extent." In a suit against the officers and directors of a corporation by the receiver thereof to recover moneys belonging to it, which were alleged to have been wrongfully appropriated and distributed among themselves, in *McCarty's Appeal*, 110 Pa. 379, 381, 4 Atl. 925, 927, answering a conten-

tion similar to that made by defendants, the court said: "This is truly a novel argument for the officers and directors of a dissolved corporation, who are clearly shown to have fraudulently misappropriated and distributed among themselves over \$18,000 of its funds to advance when called on to make restitution. It is a sufficient answer to all this to say that they have no right to retain the money."

"Directors of a corporation are fully justified in committing the performance of the ministerial work and the details of the corporate business to subordinate agents and officers. They do not thus become insurers of the fidelity of such agents and officers, but, if they act in good faith and with reasonable care and diligence in the appointment and supervision of such agents, they are not personally liable for losses happening either through the frauds, negligence, or crimes of such agents and officers. These agents, while selected by the directors, are not the agents of the directors, but agents of the corporation. It must be borne in mind in judging the liability of directors that they are not expected to devote their entire time to the management of the corporation, and that their custom is to commit the active management and responsibility of the corporate affairs to executive officers and subordinate agents to whom salaries are paid, and their entire time is required in the discharge of the duties; that the office of the directors being, in their character of part proprietors and mandataries, to superintend, direct, and control; and that the ground of their liability under the head of negligence and nonfeasance consists in their failure to exercise due diligence in the work of supervision and control, and the question being judged according to the circumstances of each particular case." 2 *Thomp. on Corporations* (2 Ed.) § 1280. In section 1295 the same author says: "A director, even under the doctrine that he is an agent, is liable to his principal for breaches of duties he has assumed. This is denominated a liability for nonfeasance. So a liability exists for trespasses, frauds, or other wrongs which he may commit against third persons while discharging the duties of such agency. This is usually denominated a liability for misfeasance. In the latter class where the wrong was done or committed in the course of the agency, or where it was directly authorized by the principal, both principal and agent are liable either jointly or severally. Directors stand toward strangers in the same relation in which any other agents stand toward third persons. For a breach of duty to such principal, redress can only be had by that principal, the corporation, or by the shareholders where the corporation refuses to sue. If the fraud is imputable to the corporation, the person injured may have redress against the corporation and the directors for the reparation of such injury.

The agent is personally liable to third persons, for his own misfeasance and positive wrongs, but he is not in general liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; and the privity exists only between him and his principal."

"Directors who had no knowledge and took no part in the transaction were held not liable for moneys embezzled and misappropriated by the president of the corporation, who agreed to pay a milling company an excessive price for treating ore of the corporation in consideration of payment to him of part of the profits." 2 *Thomp. on Corporations*, (2 Ed.) § 1280. In *Deaderick v. Bank*, 100 Tenn. 457, at page 463, 45 S. W. 786, at page 788, it is said: "That directors are liable in an action at law to their principal, the corporation, for losses resulting to it from their malfeasance, misfeasance, or their failure or neglect to discharge the duties imposed by their office, and in equity to the stockholders for these losses, the corporation declining to bring suit, is clear upon the authorities. Though the corporation is the legal entity, yet the stockholders are interested in the operations of the corporation while in a state of activity, and, upon its dissolution, in the distribution of its property, after all debts are paid; and so its officers or agents stand in a fiduciary relation to both. But it is otherwise as to creditors. The directors of a going corporation, whether able to pay its debts or not, owe no allegiance to them. It is true that the creditors may extend credit upon the faith that the company has assets to pay its debts, and that these assets are prudently managed, yet they are strangers to the directors. They maintain no fiduciary relation with them. There is a lack of privity between the two. As was said by the Supreme Court of the United States in *Briggs v. Spaulding*, 141 U. S. 132 [11 Sup. Ct. 924, 35 L. Ed. 662], the relation between the creditors and the corporation 'is that of contract and not of trust,' but there is nothing of either contract or trust in all ordinary cases to create any relation between the creditor and the directors. A creditor of a going corporation being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention than could the creditor of any other insolvent debtor maintain a suit against his agent under similar circumstances. In such a case as the one we are dealing with—that is, loss to the corporation resulting from mere negligence on the part of its directors—a creditor seeking to hold the directors liable for this loss, even in a suit

like this, must rest his claim upon some provision of positive law."

Defendant Albert T. Smith purchased stock in the bank from L. O. Ralston, giving his note for \$5,000. Mr. Smith testified that on September 1, 1905, he sold his stock to Mr. Ralston, who surrendered his note, which he destroyed, and considered the incident closed. On September 12, 1905, Mr. Ralston consummated a deal with W. H. Moore and W. C. Morris, whereby he surrendered to them all the stock certificates he had purchased. The notes he had given for a large portion of these certificates were delivered over to him, and he severed his connection with the bank. A new board of directors was elected, with the exception of W. H. Moore and W. C. Morris. There are two periods in the administration of the Oregon Trust & Savings Bank—one from the date of the organization to September 12, 1905, and the other from the last-named date to the time of the appointment of the receiver. The losses claimed in this suit to have been sustained during the first period are upon the notes given for stock subscription and upon loans and cash advanced to the Order of Washington and to one Lafe Pence, two patrons of the bank. During the second régime plaintiff seeks to recover against the directors for negligence of the board in failing to supervise the acts of their executive officers, and for the misappropriation and misuse of the funds of the bank. Mr. Ralston was called by plaintiff to testify in regard to the transactions with the two patrons above named. According to his account, early in 1906, he learned that the Order of Washington had borrowed money from the bank, and he told the paying teller not to let any more money go out of the bank unless it was O. K'd by him. He stated that he was never consulted in regard to but one loan of \$3,000, for which notes were offered as collateral security of which he did not approve, and that he refused the loan; that W. Cooper Morris said that he was an officer of the Order of Washington, and that he would see that whatever little overdraft they had would be made good, and that there would be a large fund of the order coming in shortly; that he (Ralston) knew that the order was doing business in a small way at the bank, and was making monthly payments; that, when a small amount of money was wanted, he investigated the matter, and would not make the loan to the order, but that small sums were loaned to individuals; that he afterwards discovered from the records that a large overdraft of the order was being carried as cash; that after that he never knew of any amount of credit being given to the order, although he often examined the ledger and notes for that purpose. Ralston further stated that Pence had been dealing with the bank passing a great deal of money through it, and that, when Pence wanted to borrow some money, he (Ralston) and Morris went out

and looked over Pence's plant; that the proposition looked good, but that they decided it was too much for their bank to carry, or to advance money for, and that they decided not to loan Pence any more money without ample security; that Pence paid the notes he owed, and afterwards asked for a loan of \$5,000, proposing to give a certain note of \$10,000 as security, which proposition was satisfactory; that this security was not given; that when he returned from eastern Oregon, he discovered that Pence had an overdraft in the bank, and that, when he inquired of Mr. Morris concerning the matter, Morris asked if Pence did not make arrangements with him to take the money; that he (Ralston) mentioned the promised security; that he then discovered that there was another such overdraft on the books, and ordered the tellers not to let another dollar go out of the bank unless O. K.'d by him; that Pence gave a note and commenced doing business at another bank, but that small sums were loaned to him until his arrangements were made.

The circuit court found that the defendants L. O. Ralston and Albert T. Smith, who were directors of the bank from the time of its organization until September 12, 1905, were not acting as such officers during the time that the losses complained of were sustained, except those resulting from loans made to the Order of Washington, and to Lafe Pence; that it did not appear that any who were creditors of the bank at the time the receiver was appointed were creditors of the same at the time defendants Ralston, Smith, and Copeland were directors; that the defendants L. O. Ralston, A. T. Smith, and W. H. Copeland, as officers and directors of the Oregon Trust & Savings Bank, performed all their duties in a careful and prudent manner during the time they served; that they employed, and sought to employ, only employes who were reputed to be careful, prudent, and efficient in the various departments in which they worked; that at all times they exercised reasonable control and supervision of all officers and agents of the bank in all matters pertaining to the business of the corporation during the period that they were directors, and that during such time they honestly believed that the books and accounts of the bank were being carefully and accurately kept; that correct reports of loans and discounts were being made to Ralston, Smith, and Copeland; and that the bank was being conducted in a careful and prudent manner. The circuit court also found that they exercised such diligence and supervision in the care of the banking and the affairs of the corporation as the nature of the business of banking required; that none of the acts, or omissions to act, complained of in plaintiff's complaint, wherein it is alleged that the corporation and its creditors and stockholders sustained a loss by reason of the acts, or omissions of defend-

ants Ralston, Smith, and Copeland, are sustained by the evidence; and that the said defendants should not be held liable for any losses sustained by the bank. We think this finding is fully justified by the evidence. While the exchange of the stock for the notes given therefor and held by the bank may have been irregular, it is not shown that any loss to the bank occurred on this account.

The defendant W. Cooper Morris did not appeal. He was one of the active figures in every business transaction of the bank, legitimate and illegitimate. When the bank opened, he put his own notes therein to cover his subscription to the capital stock, and afterwards took them out. He participated in all the manipulations and juggling of the capital stock and the stock notes. He had knowledge of the various transactions of the bank, of every bad loan made, and did the manipulating by which the treasury was looted. Some of these transactions were characterized by the most inexcusable and flagrant bad faith, while others were made to appear in the most favorable light possible by his misstatements and colorings. These matters furnish the basis of damages sought to be recovered in this suit. Defendant Walter H. Moore drew a salary of \$250 a month during the time that he was president of the bank. He took part in the manipulation of the capital stock and stock notes. He co-operated with Mr. Morris in the transaction of December 15, 1906, which resulted in the withdrawal of the notes of W. H. Moore, Morris, and Moore Bros. from the assets of the bank, aggregating some \$100,000. W. H. Moore caused the board of trade company to be organized, and this company, under his direction, drew out over \$80,000 from the bank in the form of overdrafts without giving any notes, security, or other evidence therefor, except the entries made in the bank books showing the cash withdrawn. Moore was about the bank every day, and evidently knew nearly all that was going on. While we do not impute to him any criminal intent, his conduct with reference to the affairs of the bank is in many respects wholly inexcusable. The question as to this defendant is, For what amount is he liable?

We find from the evidence that on December 15, 1906, W. H. Moore, president of the bank, and W. C. Morris, cashier, wrongfully withdrew from the assets of the bank the following notes:

Note of W. H. Moore, Moore Bros. and W. C. Morris, dated September 15, 1905.....	\$ 89,100 00
Note of W. H. Moore, (Interest from Apr., 1905).....	5,000 00
Note of W. H. Moore and Moore Bros. (Int. from Dec. 15, '06)...	10,000 00
Two notes of W. C. Morris, (Int. from Dec. 15, 1906).....	25,000 00
Note of W. C. Morris, (Int. from Dec. 15, 1906).....	900 00
Note of W. C. Morris, Trustee, (Int. from Sept. 15, 1906).....	20,000 00
	<hr/> \$100,000 00

Some payments were made on the \$25,000 note, the amount of which is not shown, and for which we make some allowance on interest. In lieu of these notes, certain telephone stock which was then the property of the bank was carried into the general bond and warrant account in order to balance the books. As expressed by W. H. Moore, the notes were written off the books, and the stock was written up in place thereof. He states that he consented to this arrangement with the understanding that the notes were not to be marked "Paid," and that they were to be left in the bank; that Morris put them in a small pouch, and that he has not seen them since; that they have not been paid. This was done without authority from the other directors, without consulting them, and without their knowledge.

[4] W. H. Moore and W. C. Morris acted jointly in the fraudulent withdrawal and misappropriation of the notes for their mutual benefit, and Moore is jointly liable with Morris for the whole of such notes (McCarthy's Appeal, supra, 110 Pa. 381, 4 Atl. 925), with interest thereon at the legal rate from the above dates which are as accurate as can be given without the notes. W. H. Moore is also liable for loss on the Board of Trade Building Company to the amount of \$40,735.74, with interest from August 21, 1907. This company was organized in October, 1906, at the instigation of W. H. Moore. Mr. E. R. Hickson, secretary of the Moore Investment Company, which was composed of Walter H. Moore and Henry A. Moore, by direction of W. H. Moore, subscribed for all the stock except two shares which were subscribed for by two other persons, who, with Mr. Hickson, constituted the officers of this corporation. Hickson held this stock for W. H. Moore. Mr. Hickson had no interest in this company, and acted as directed by W. H. Moore. The latter had obtained a contract for the purchase of a lot, and the company commenced the construction of a building. Shortly after its organization, the company drew checks on the Oregon Trust & Savings Bank for over \$80,000, with no funds in the bank for that purpose. None of the incorporators of the Board of Trade Building Company had any real interest therein. When the receiver was appointed, the indebtedness due the bank from that company was \$80,735.74. The property of the company was transferred to the receiver, who realized \$40,000 therefor. This transaction involves a question which runs through these two cases, viz., the amounts realized by the receiver upon the securities of the Oregon Trust & Savings Bank.

[5] The receiver, as an officer of the court, should within a reasonable time adjust and settle the affairs committed to his charge. He is compelled to obtain the largest sum possible for the property and assets. The disposing of the property and securities un-

der the direction of the court is in the nature of a forced sale, as upon execution in a foreclosure proceeding. It is extremely difficult for a receiver to speculate upon the market or wait for a favorable tide therein.

[6] Ordinarily, if the amount obtained for the securities is the highest sum possible at the time they are disposed of, and is insufficient to satisfy the demand for which the securities are given, the balance of the claim is not canceled. Plaintiff seeks to recover for the loss of \$50,000 in cash by reason of the manipulation of the books by Mr. Morris. This appears to have been a bookkeeping transaction for the purpose of fictitiously increasing the cash account. It is not shown that the money was taken from the bank. In other words, prior to that time the cash account was increased \$25,000 by mere figures on August 23, 1906, and again on August 27, 1906, by a like amount, the same being credited to the account of loans and discounts without one cent being paid in cash. This was "written off," and the amount reduced \$50,000 on December 15, 1906, without decreasing the amount of cash in the bank. This appears to have been done for general purposes. While it may have affected the other losses claimed in this suit, as well as being irregular and unfair to the public, we do not find any real loss in the transaction.

It is not shown that the interested defendants were in any wise concerned in, or responsible for, the shortages claimed by plaintiff, resulting through unexplained deficiencies in the following telephone stocks: Portland Home Telephone stock, par value, \$12,900, Tacoma Home Telephone stock, par value, \$35,175, Omaha Telephone stock, par value, \$27,550, as shown on the books of the corporation. It appears that the cashier, Morris, had charge of the bank books, and that his system of bookkeeping was anything but plain and correct. The claim of shortage in these stocks is based upon a faulty system of bookkeeping. The books of account are not a safe guide in this matter. It is a mere matter of conjecture as to whether or not there was a real shortage, or whether or not any shares were improperly disposed of. This is insufficient upon which to base any decree. The value of the Tacoma and Omaha stock, as indicated by the record, is very small, depending upon the result of two receivership suits. The receiver states that he does not consider them of any value. Plaintiff's brief states that nothing was paid for these telephone stocks, and that they are probably worthless.

[7] On September 20, 1907, defendant W. H. Moore and wife conveyed to the receiver a tract in the city of Portland, being 150 feet frontage on Montgomery street and 100 feet on Water street, and 6,405 acres of land situated in eastern Oregon and in the state of Washington, in order to secure the amount he owed the Oregon Trust & Savings Bank

and to assist in paying the claims against the bank. On February 11, 1908, Moore and wife quitclaimed the above real estate subject to a mortgage indebtedness against the same, thereby releasing the property from all the conditions, stipulations, and reservations in the first deed given therefor. W. H. Moore asserts that it was understood that this property should be taken by the receiver at the valuation of \$115,900, subject to mortgages for about \$45,000. The receiver listed the same at the above figure of \$115,900. Some testimony was introduced describing this real estate, and as to its value. It appears therefrom that the amount agreed upon between the receiver and Mr. Moore is not far from a fair value of the property, as near as can be ascertained. This amount should be credited by plaintiff on the sum due from W. H. Moore as of February 11, 1908. It is contended upon the part of plaintiff that this should not be done until the property is disposed of by the receiver and the amount of the proceeds over and above the incumbrances determined, and that the same should be settled in the receiver-ship case. This, however, we do not deem to be equitable in the premises. We do not think that a large judgment should be rendered against defendant W. H. Moore without deducting the amount of the property so transferred.

Considering the case as to Elmer E. Lytle and Leo Friede, it appears that in September, 1905, upon the resignation of L. O. Ralston and A. T. Smith, the above-mentioned defendants were named as directors. Lytle, beginning in the month of June, 1906, met with W. H. Moore, W. Cooper Morris, and Leo Friede, as directors of the bank, every morning when not absent from the city, for the purpose of passing on loans requested by customers of the bank. Lytle did not hold any shares of stock in the bank until October 16, 1906, when he purchased 250 shares, paying \$35,000 in cash therefor. In pursuance of an agreement between Morris, Moore, Lytle, and Friede certain loans were referred to them, and they were led to believe that all the loans made by the bank were so referred for their approval. From time to time they examined the notes in the pouches in order to ascertain what loans had been made. None of the loans complained of appeared among the notes or bills receivable of the bank. As far as it was possible for them to do so, they directed the affairs of the bank with more than ordinary diligence. They required that weekly statements of the condition of the bank be furnished them, and they carefully examined such reports. These statements were prepared by the cashier, or under his direction, and they had no reason to think that the same were not true as the aggregate amount of assets and liabilities shown by such statements conformed to the aggregate amount of assets and liabilities as shown by the bank books. Lytle

and Friede acted in good faith at all times, and fully believed that they knew of all the loans that were made, and of the condition of the bank. The reports showed the bank to be in a prosperous condition, and to be not only solvent, but gaining rapidly in deposits and assets. Especially in view of the contract between the receiver and the German American Bank, we think that these defendants should not be held liable for negligence.

It appears that in 1906 Henry A. Moore was requested by his brother, W. H. Moore, to act as a director. The former expected that his brother would transfer a share of stock to him in order that he might qualify. This was not done, and Henry A. Moore never became a stockholder, and was never formally elected. He did not qualify, and never acted as such director, except to meet informally with the officers while he had a real estate office in the bank building. His name, however, was printed on the bank stationery as a director, and also on the advertising cards upon which the assets of the bank were represented to be \$2,000,000, and the bank shown to be in a flourishing condition. Henry A. Moore evidently understood that he was one of the directors, for in a certain criminal case, which was tried after the commencement of this suit, wherein W. Cooper Morris was defendant, he admitted that he had been a director of the corporation at one time. He had no pecuniary interest in the bank nor in the transactions involved in this suit. He was not guilty of any fraudulent act pertaining in any way to the business of the bank. It does not appear that any of the directors, other than Morris, knew that the statements on the advertising cards were false.

[8] If it be assumed that the cards and stationery were printed and circulated with Henry A. Moore's consent, "it is," as said in *Wakeman v. Dalley*, 51 N. Y. 27, 31, 10 Am. Rep. 551, 553, "an elementary principle that, in an action to recover damages for fraudulent representations, the plaintiff must show that he was deceived by, and relied upon, the alleged representations." It was held in that case that the director of a company is not liable for representations, false in fact, but not known by him to be so, made in published circulars of the company on which his name appears only as one of the list of directors. From the whole of the evidence in the case at bar it does not appear that Henry A. Moore had anything to do with the bank, or that he had any influence in the conduct of its affairs, or that he misled any party interested in this case to his injury by permitting any false representations to be made. He was not guilty of any fraud in the matter. We think that the decree of the circuit court should be changed as to Henry A. Moore, and that he should not be held liable in this suit.

From the evidence it appears that no fraudulent conduct should be imputed to defendants Lytle, Friede, Smith, and Copeland during their administration as directors. No financial advantage in any sum was ever realized or attempted to be realized by them, and there was no embezzlement or misappropriation of the funds of the bank by any one of them. None of these defendants made any personal profit from the transactions of the bank. Viewed in the light of subsequent events, the supervision of the affairs of the bank was faulty. The funds were invested in telephone bonds of speculative value to large amounts. When inquiry was made of Cashier Morris as to such investments, he stated that the bonds were simply held under a contract, and that they had not been purchased. Possibly these bonds would have proved a fair investment had it not been for the partial stagnation of business caused by the panic of 1907. From the disposition of many of these bonds after the bank closed, it was no doubt then expected that a fair amount would be realized therefor. When an investigation was made by some of these directors as to loans, and further loans to certain parties were ordered to be refused, the cashier, in direct violation of his directions, secretly made the loans, or pretended loans. In many other instances, either for personal gain or otherwise, the cashier misled and misinformed the directors as to the true state of affairs. When an expert was employed to examine the accounts of the bank, Mr. Morris, for reasons apparently sufficient, discharged him after he had worked for a time, but before any report was made, and before any information was gained by the directors. The directors comprised all the stockholders of the institution.

[8] There is a strong presumption that they exercised their best judgment in conducting the affairs of the bank. This would be to their interests. A short time before the receiver was appointed, defendant Lytle purchased 250 shares of stock in the Oregon Trust & Savings Bank, paying \$35,000 therefor. This was certainly an indication of good faith on his part. It behooved him to do his very best in the interest of the bank in order to lessen his chances of losing the money he had put in. While it does not appear that he was an expert banker, yet he met at the bank nearly every day, in conjunction with Mr. Friede, to look after the business. The two men exerted themselves and exercised their best judgment and skill in the interests of the bank, although their advice was not always followed, and acted at all times in good faith. Instead of being shown to have been grossly negligent in regard to their duties, they appear to have been deceived by the adroit manipulation and fraudulent schemes of Morris. Under all the circumstances in the case, they should not be held liable for negligence under the conditions of the contract above referred to,

in a suit in which the German American Bank is principally interested. The payment of claims was made by Willis as an officer of the German American Bank pursuant to the contract, and he, by taking an assignment of such claims, would stand in the place of that bank, and not in the position of the original creditors.

[10] As a general rule, directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank and are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors.

[11] Ordinary care, in this matter as in other departments of the law, means that degree of care which prudent and diligent men would ordinarily exercise under similar circumstances. The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances of that particular case. If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, on the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. They are not required to be bookkeepers.

[12] It is incumbent upon bank directors in the exercise of ordinary prudence and as a part of their general supervision to cause an examination of the condition and resources of the bank to be made with reasonable frequency. *Rankin v. Cooper* (C. C.) 149 Fed. 1010, 1013. See, also, *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

[13] To render directors or other officers of a corporation liable to it for the fraudulent or wrongful acts of other officers, they must have participated therein, or else they must be chargeable with culpable negligence. *Clark & Marshall on Private Corporations*, vol. 3, p. 2279, § 751; *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

[14] If a director performs his duty as

such in the same manner as such duties are ordinarily performed by all other directors of all other banks of the same city, it cannot be fairly said that he was guilty of gross negligence. *Swentzel v. Penn. Bank*, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718, 722; *Bolles on Modern Law of Banking*, p. 280; *Spering's Appeal*, 71 Pa. 11, 21, 10 Am. Rep. 684.

[16] The president, cashier, and other employees of the bank, although selected by the directors, are not the agents or servants of the directors, but of the corporation. *Briggs v. Spaulding*, supra; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; *Morawetz on Private Corporations*, § 552, et seq. Our construction of the contract in evidence to which we have referred renders it unnecessary to pass upon all the questions discussed by counsel in their briefs. To comment upon all the phases of the case which we have examined and considered would make this opinion too lengthy.

The decree of the lower court will therefore be modified as herein indicated.

(64 Or. 464)

DEVLIN v. MOORE et al.

(Supreme Court of Oregon. Feb. 25, 1913.)
BANKS AND BANKING (§ 54*)—RIGHT OF ACTION.

Where a bank loaned a sum to four persons, including some of its officers, for financing a corporation in which they were interested, by issuing certificates of deposit in consideration of a purported purchase of bonds which were in fact merely held by the bank as security, though appearing on its books as having been purchased, such persons were bound in equity and good conscience to account to the bank for the money so advanced.

[ED. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 92-98, 105-107; Dec. Dig. § 54.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Thomas C. Devlin, receiver of the Oregon Trust & Savings Bank, against Walter H. Moore and others. From a decree dismissing the action as to three of the defendants and for plaintiff as against the remaining defendants, all of defendants except one appeal. Modified.

This is a suit by Thomas C. Devlin, receiver, against the defendants W. H. Moore, Henry A. Moore, S. W. Stryker, G. L. Estes, W. Cooper Morris, E. E. Lytle, Leo Friede, and J. F. Reddy. The lower court dismissed the suit as to the defendants Lytle, Friede, and Reddy, and entered a decree against the other defendants for \$14,500, from which they all appeal, except W. C. Morris.

This case was consolidated for trial in the court below with that of Devlin, Receiver, v. Moore et al., 130 Pac. 35, and the evidence was taken as for one case. Many of the legal propositions presented apply equally to both cases. Therefore what we have said in the opinion in the principal case need

not be repeated here. In what is termed in the briefs as the Pacific & Eastern suit, the allegations of the complaint are in substance as follows: That some time between January 1, 1907, and May 27, 1907, the defendants conspired to use the funds of the Oregon Trust & Savings Bank to acquire the property of the Medford & Crater Lake Railroad Company for their own use and profit. That as to the defendants E. E. Lytle, H. A. Moore, and Leo Friede it is averred that all the transactions set forth were matters of common knowledge. That the defendants either joined in the conspiracy or were guilty of gross negligence or inattention to their duties as directors of the bank. That the Crater Lake Railroad Company was organized prior to January 31, 1907, and that it executed a first mortgage on all its properties for \$45,000 to one C. A. Dewing. That in a suit in Jackson county defendant Reddy was appointed receiver. That the mortgagee was not a party to such suit.

The complaint further alleges that the Estacada State Bank was an organized state bank, with a capital stock of \$20,000, of which defendant Geo. L. Estes was president, and defendant Stryker a director, and that the two dominated such institution; that defendant Reddy was also a stockholder in the Oregon Trust & Savings Bank during all the time that he was receiver of the Crater Lake road; that pursuant to the alleged conspiracy the parties thereto caused the defendant Reddy, as receiver, to make application for an order for the sale of the properties of the Crater Lake Railroad; that such order was entered, and, the properties being offered for sale, defendant Estes bid \$82,500 for the same, subject to a first mortgage of \$45,000; that this was reported to the court, the bid accepted, and an order made directing the receiver to convey the properties to Estes upon payment of such sum; that Estes had no money or means with which to purchase; that in payment of the purchase price the president and cashier of the Oregon Trust & Savings Bank issued to the receiver Reddy a certificate of deposit for \$81,500, and a cashier's check for \$1,000; that to cover the issuance of the check and certificate of deposit there was entered in the account of the Oregon Trust & Savings Bank a fraudulent and fictitious entry to bonds and warrants of \$41,250, and there was also entered for a like amount a certificate of deposit issued by the bank of Estacada in favor of the Oregon Trust & Savings Bank. It is averred that the certificate of the Estacada Bank was issued fraudulently, and that the same was of no value; that the Pacific & Eastern Railway Company was afterwards organized with a capital stock of \$1,000,000, divided into shares of the par value of \$100 each; that the defendants Estes, Stryker, Morris, and W. H. Moore each subscribed for 1,250

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shares, and that the first three were elected as directors; that the stockholders authorized the issuance of bonds on all the properties of the Pacific & Eastern, and that thereafter the Crater Lake Road, purchased from the receiver Reddy, was conveyed by Estes to the Pacific & Eastern; that a trust deed or mortgage upon the railroad properties was authorized and executed to the Oregon Trust & Savings Bank, trustee, to secure an issue of \$1,000,000 in bonds; that a considerable part of the bonds was issued; that between the 28th day of May, 1907, and the 21st day of August, 1907, the officers of the Pacific & Eastern Railway Company drew out of the Oregon Trust & Savings Bank \$18,500 of its funds, and took over and appropriated the same to the use and benefit of the officers, directors, and stockholders of the Pacific & Eastern. It is further alleged that bonds to the par value of \$100,000, of no value, were deposited with the Oregon Trust & Savings Bank as security for the certificates of deposit, loans, and advances; that bonds to the amount of about \$50,000 were placed in the Estacada Bank as security for the certificates of deposit issued to the Oregon Trust & Savings Bank; that thereafter, pursuant to an order of the court, plaintiff Devlin surrendered to the Estacada Bank the certificate for \$41,250, in consideration of the release of an apparent balance due the Pacific & Eastern Railway Company upon an open account, and surrendered to receiver Reddy the \$100,000 bonds of the Pacific & Eastern in consideration of the surrender by Reddy to the plaintiff of the certificate of deposit of the Oregon Trust & Savings Bank for \$81,500; that that is all that was recovered; that the loss to the Oregon Trust & Savings Bank was \$18,500 drawn out and converted to the use and benefit of the officers, directors, and stockholders of the Pacific & Eastern Railway Company; that the Medford & Crater Lake Railroad Company's properties were worth not to exceed \$50,000; that Estes executed a conveyance of the Crater Lake Road properties in consideration of the issuance to the defendants Estes, Stryker, Morris, and W. H. Moore of \$500,000 of the capital stock fully paid up and nonassessable, divided equally between these four men; that between that time and the failure of the bank the defendants interested in the railroad company, through its agency, withdrew from the funds of the Oregon Trust & Savings Bank \$13,500; that a cashier's check issued at the time of the purchase of the road was cashed by defendant Reddy as receiver; that the plaintiff in effecting a settlement by which he obtained a cancellation of the certificate of deposit issued to Reddy was compelled to pay \$1,000 out of the funds of the receivership estate. The defendants filed pleas in abatement which were tried, and a decree rendered, identical with the decree in

the principal case. The answers interposed in this case by the defendants are in their essential respects the same as those interposed in the main case.

On the part of defendants the following facts are claimed: That the Pacific & Eastern Railway Company was worth from \$125,000 to \$150,000; that, in addition to the \$50,000 which the four men agreed to furnish, it was intended to borrow a sufficient amount to put the plant in good shape, and to either operate or sell it; that something over 11 miles of road had been constructed, graded, tied, and ironed; that from the day of the organization of the Pacific & Eastern Railway Company it was a going concern and constantly grew stronger; that the evidence shows that there was a considerable amount of money put into the enterprise by the parties, and that ultimately other parties came in and purchased large blocks of the stock; that the road has ever since been a paying proposition, meeting all of its obligations, and that plaintiff could have recovered from it every dollar that it owed the bank; that he failed and neglected to do so, and, instead, turned the whole matter over to the German-American Bank under its purchase of Oregon Trust & Savings Bank assets; that the German-American Bank made a settlement of the matter, whereby it surrendered to receiver Reddy the \$100,000 in bonds in consideration of the return of the \$81,500 certificate of deposit, and as a part of the transaction surrendered to the Estacada Bank its certificate of deposit for \$41,500 in consideration of the surrender by the Estacada Bank of certain claims it held against the Oregon Trust & Savings Bank. It is admitted on the part of W. H. Moore and Morris that it was not a wise step for them to take because they were directors of the Oregon Trust & Savings Bank, but that it was not in violation of their duties or fraudulent; that the advances made to the Pacific & Eastern Railway Company were made on the strength of the Estacada Bank certificate of deposit which was surrendered without any attempt to collect the advances made on the open account; that \$5,000 of the \$18,500 balance against the Pacific & Eastern was a commission charged by the bank against the Pacific & Eastern as a discount on the \$100,000 in bonds, which should be deducted therefrom.

C. W. Fulton, of Portland, for appellants Walter H. Moore and Henry A. Moore. Frank Schlegel, of Portland, for appellant S. W. Stryker. Sweek & Fouts, of Portland, on the brief, for appellant George L. Estes, Alfred E. Clark and Martin L. Pipes, both of Portland, for respondent Thomas C. Devlin.

BEAN, J. (after stating the facts as above). It appears from the evidence that George Estes was employed by the Oregon Trust & Savings Bank from November 1, 1906, until

May, 1907; that Estes was secretary, treasurer, and manager of the Pacific & Eastern Railway Company; that each of the four men interested agreed to pay \$12,500 into the corporation. Estes testified that he and Dr. Stryker paid in approximately \$9,000 to liquidate some of the floating indebtedness. In regard to the adjustment involving the bonds of the Pacific & Eastern, he stated that it was a three-cornered settlement, and that the bonds held by the Estacada Bank were surrendered to the Oregon Trust & Savings Bank or to its receiver; that the Oregon Trust returned the certificate of deposit to the Estacada Bank, and that thereupon the bonds of the Pacific & Eastern, amounting to approximately \$150,000, were surrendered to J. F. Reddy, receiver, in consideration of the certificates of deposit issued by the Oregon Trust & Savings Bank of \$81,500.

The situation and transactions relative to the Pacific & Eastern were complicated, and contemplated deals, hindered and delayed by the financial panic of 1907, during which time most of the banks in this state were closed, from about the 28th day of October, 1907, until the latter part of December of that year, during which time so-called "bank holidays" were proclaimed by the Governor of this state. It appears that the purchase of the Pacific & Eastern Railway was a personal transaction. The sum of \$14,327.69 advanced by the Oregon Trust & Savings Bank was a loan to and for the benefit of the four men, Morris, W. H. Moore, Estes, and Stryker. The bonds held by the bank, while appearing on the records as a purchase, were in reality security for the money advanced and credit extended by the Oregon Trust & Savings Bank. The bank was not to make any profit on the bonds. The promoters and owners of the road hoped to profit by the deal. They were practically doing business in the name of the Pacific & Eastern Railway Company. The certificates of deposit for \$81,500 and the check for \$1,000 were issued by the Oregon Trust & Savings Bank before the Pacific & Eastern was in existence. W. H. Moore testified in regard to this deal as follows: "Well, these certificates were put up for the four parties. * * * It was the intention all the time, it was for the four. We were not organized at that time, but intended to organize, which was done in a few days. * * * If we bought now before we organized, we would pay for it as four as you will see, paid for it after the organization would be paid for as a corporation by the same parties."

In equity and good conscience these four men should be answerable for the loan. In disposing of the Pacific & Eastern bonds held by the bank as security, the receiver was able to realize only the amount of the certificates of deposit leaving the account, \$13,327.69, and check for \$1,000 still unpaid.

Negotiations for this arrangement were pending for some time, and it appears that the receiver obtained the largest amount possible. It does not appear that the four promoters of the Pacific & Eastern Railway Company had any objections to this adjustment.

It seems that Mr. Estes acted for the Estacada State Bank in making the adjustment, whereby that bank had the certificates of deposit for \$41,500 returned to it. Mr. Estes was also manager of the Pacific & Eastern Railway Company, and it is not to be presumed that he took any action against the interests of his associates. All the parties interested in the Pacific & Eastern seem to have been anxious to obtain all the bonds of the corporation so that a sale of the railroad might be made to eastern parties, which sale was afterwards accomplished. We cannot understand how the releasing of securities given by these four defendants by the receiver could in any way prejudice their rights. They had each obtained \$12,500 par value of shares of stock in the Pacific & Eastern Railway Company with the money and credit furnished to them by the Oregon Trust & Savings Bank, without, in the first instance, paying a dollar of their own money. The surrender of the bonds of the Pacific & Eastern which was accomplished in the adjustment was an advantage to them. Evidently the \$50,000 in bonds held by the Estacada Bank could not be delivered without a surrender of the certificate of deposit for \$41,250. This certificate of deposit appears to have been issued as security for one-half of the original purchase price of the road, and in lieu of payment therefor, by defendants Estes and Stryker. It was issued to the Oregon Trust & Savings Bank to be used as a basis of the certificate of deposit issued by that bank in payment for the road.

It does not appear from the evidence that Henry A. Moore was connected in any way with this deal, and we do not think that the allegations of the complaint are sustained as to him. We find that they are sustained by the evidence as to defendants W. H. Moore, S. W. Stryker, and George L. Estes in regard to the \$14,327.69, cash advanced (including the cashier's check which was paid). Interest should be computed on this sum from August 21, 1907. These defendants at the time the so-called adjustment was made and the certificates of deposit were surrendered must have known that there had never been any money deposited in the Oregon Trust & Savings Bank in connection with the Pacific & Eastern deal, and that the bank was not indebted to the Pacific & Eastern. They should not be allowed to profit by obtaining possession of the certificates of deposit based upon an erroneous account in the books, whereby it appeared that the Oregon Trust & Savings Bank was indebted to the Pacific & Eastern Railway Company on an open ac-

count, and thereby escape paying the amount justly due. This would be as unconscionable and inequitable as it would be to allow one who had been paid \$100.00 by mistake in counting money to retain the same. The receiver swears that he did not know that the credit appearing on the books in favor of the Pacific & Eastern was based on the certificate of deposit of the Estacada State Bank. It appears that on December 17, 1907, when the Estacada Bank certificate was surrendered, the receiver was paid \$827.69. This amount should be credited by plaintiff as of that date.

Defendants claim that there should be an additional credit of \$4,416.49, an account of claims against the Oregon Trust & Savings Bank held by different corporations and individuals which were settled and canceled. We think that these claims were liquidated in another transaction pertaining to the Pacific & Eastern note, and should not be allowed as a credit on this claim.

The decree of the lower court will be modified in accordance herewith.

(64 Or. 306)

EDWARDS v. MT. HOOD CONST. CO.
(Supreme Court of Oregon. Feb. 25, 1913.)

1. MONEY RECEIVED (§ 9*)—CONTRACTS—LIABILITY.

Where a railroad contractor undertook through its general superintendent that plaintiff boarding employes of the subcontractor should be paid, and instructed the subcontractor to deduct from the wages of the employes the sums due for board, and retained the same out of the wages due the employes, plaintiff could recover from the contractor the amount thereof in an action for money had and received, for, though the contractor did not directly receive money from the employes, it received the equivalent thereof in the discharge of their claims.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 31; Dec. Dig. § 9.*]

2. MONEY RECEIVED (§§ 4, 15*)—NATURE OF OBLIGATION.

An action for money had and received is equitable in character, and may be sustained by any evidence that defendant has possession of money of plaintiff which in equity and good conscience he ought to pay over.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 7-13; Dec. Dig. §§ 4, 15.*]

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where the jury, under the uncontradicted testimony, could only return a verdict for plaintiff, the error in permitting her to establish facts arousing sympathy in her favor was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

4. TRIAL (§ 29*) — CONDUCT OF PRESIDING JUDGE—IMPROPER REMARKS.

It is error for the trial court to express an opinion of the evidence in the presence of the jury, and it is improper to say to an attorney in the hearing of the jury that his case

is infamous, and that his client shall not have a judgment, especially before the client has presented his case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.*]

5. EVIDENCE (§ 594*)—WEIGHT.

Where the witnesses of plaintiff were not impeached, and their testimony was reasonable and probable, the jury, in the absence of any contradiction, must receive it as true, and render a verdict accordingly.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

6. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR — ERRONEOUS REMARKS OF PRESIDING JUDGE.

Where the jury under the uncontradicted testimony rendered the only verdict that could be rendered, the error of the presiding judge in expressing his opinion on the evidence in the presence of the jury, and saying to an attorney of the defeated party, in the hearing of the jury, that his case was infamous, and that his client should never have a judgment, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Mary A. Edwards against the Mt. Hood Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for money had and received. The complaint alleges substantially that the defendant is a corporation engaged in the construction of a railroad, that at certain dates mentioned in the complaint plaintiff, at the request of defendant, furnished 355 meals at 25 cents per meal to divers laborers employed by defendant in construction work on the railroad, and that later she furnished 2,011 meals to laborers so employed by defendant, the total value of all meals so furnished being \$591.50. The names and number of meals furnished each laborer are set forth in the complaint. The defendant paid said laborers for their services once a month. The complaint continues as follows: "That defendant aforesaid employed a time-keeper whose business it was and who did keep an account of the names of the men and laborers so employed by said defendant, and the number of days that the said men and laborers who did work and furnished labor and services on said railroad construction work for said defendant in the construction of the said Mt. Hood Railroad, and did make, issue, and deliver to each and all of said men and laborers aforesaid working for said defendant on said construction line aforesaid 'time checks,' which said time checks showed and specified the number of days each and every one of said men and laborers were entitled compensation therefor. That said time checks so made and delivered specified and set forth the number of days each man and laborer worked and the amount of money due each one, and also

the amount of each individual for hospital fees, commissary supplies, and the amount of each man and laborer so employed aforesaid so indebted and owed plaintiff for board and meals for the time he worked for said defendant upon said construction work aforesaid up to and including the date of issuing of said time check. * * * That said defendant by request and consent of the herein named employes retained, deducted, and kept from each and every man aforesaid and named hereinabove, the same being the said men and laborers working on said railroad and construction work as hereinabove named, specified, and set forth, the sum of seventy-five cents (75c) per day for each and every day, while each and every man and laborer was employed upon said construction work aforesaid, for his said meals and board, and acted as the agent for plaintiff herein and retained said money and now has said money in its possession and custody. * * * That said defendant aforesaid so collected, received, and retained from each of the above-named men and laborers aforesaid and as specified hereinabove the said sum of seventy-five (75c) per day belonging to and to pay plaintiff herein for each and every day they were so employed upon said work aforesaid, and for the time between the dates as hereinabove named and specified making a total sum of five hundred and ninety-one dollars and fifty cents (\$591.50), which said sum defendant has in its possession and control for and belonging to plaintiff herein. That from and including the twenty-eighth (28th) day of December, one thousand nine hundred and ten (1910), to and including December thirty-first (31st), one thousand nine hundred and ten (1910), and from and including the first (1st) day of January, one thousand nine hundred and eleven (1911), to and including the twenty-sixth (26th) day of January, one thousand nine hundred and eleven (1911), defendant hereinabove named retained and received the sum of seventy-five cents (75c) per day from each and every man and laborer named and specified herein for and on account of plaintiff herein, and which sum is the sum of five hundred and ninety-one dollars and fifty cents (\$591.50) which defendant collected, retained, and has appropriated belonging to and which was and is the property of plaintiff herein. That plaintiff has demanded said sum aforesaid from said defendant hereinabove named, and said defendant has refused and still refuses to pay plaintiff the said sum or any part thereof. * * * That not one of the above-named men and laborers herein specified and named working for said defendant in the constructing of said railroad aforesaid have been paid any sum or amount for the deducted meals and board, or received any money on account thereof, or has received any part of said sum of seventy-five cents (\$.75) per day so re-

tained and collected by defendant for them between the dates hereinabove specified." There was a general denial of all material issues. On the trial plaintiff introduced evidence to the effect that one V. T. White was a subcontractor of defendant for the construction of a portion of the roadbed, and applied to plaintiff to furnish board for his employes; that she declined to furnish the board on Mr. White's credit because he had failed to pay for board previously furnished; that defendant's general superintendent, Mr. Packer, came to her and told her to go ahead and board the men, and that the construction company would stand good for it; and that relying upon this promise she furnished meals as above mentioned. There was evidence tending to show that the defendant had instructed White, the subcontractor, to give the laborers time checks upon the company's blanks for the amounts of their wages, deducting board and hospital dues, stating, in effect, that the company would have to pay these in any event, and that these time checks were so given and collected by the men. At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, which was denied.

On the trial the following colloquy took place between court and counsel: "Q. And did you have a contract with that lady to board these men? The Court: It is immaterial whether he did or not—I cannot see how it is material in this case whether he had such a contract with her or not. Mr. Banks: We will save an exception to the ruling of the court. The Court: You may have an exception. Mr. Banks: And I also save an exception to the court acting as counsel for the plaintiff in this case. The Court: Very well, you may have your exception. Mr. Banks: Also save an exception to the court's actions in favor of the plaintiff in this case as indicated by the court's demeanor upon the bench. The Court: You may take your exception. Mr. Banks: And I also save an exception to the court acting in favor of the plaintiff in this case by its mental attitude, and its rulings, and its attitude upon the bench, something which this defendant cannot get upon the record, but which is prejudicial to its rights, and before the court has even heard the testimony on behalf of the defendant; and I desire to further except and object, as strongly as I can possibly do so, and insist that it is not the business of the court to undertake to influence the jury by its attitude upon the bench in the trial of this cause, and I will say right here, and without any intention of offering an insult to your honor, and realizing that I am an attorney in the case, but necessarily am here to protect the rights of my own client, that I must protest against the attitude of the court in this case, and I wish the record to show that I am here, and do protest against the attitude of the court,

the facial expression of the court in its rulings, the demeanor of the court as shown by its actions upon the bench during the taking of this testimony on behalf of the plaintiff in this case. The Court: You may have an exception to every bit of it, and you can get a photographer to take the facial expressions of the court, and a phonograph of the voice of the court. Mr. Banks: And, if the court is willing, I am willing to put into the record that the court has stated to me, outside the trial of this case, that he did not propose to see the plaintiff in this action defeated, and that that statement was made before the testimony of the defendant had been presented. Does the court want that in the record? The Court: Put everything in the record. I tell you now that this infamous case will not be decided against this woman. Mr. Banks (to stenographer): Just take that down, 'I tell you now that this infamous case will not be decided against this woman,' just put that into the record. The Court: Yes; put that into the record—against this woman it will not be. Mr. Banks: And we take an exception to that remark, to the remark of the court just made. Will an exception be allowed, your honor? The Court: Certainly, certainly."

The court also permitted plaintiff, over defendant's objection, to testify that she was living in a tent, where she could not send her children to school; that she was compelled to stay there and work to pay the bills incurred in boarding the laborers of the construction company; that she and her husband had been compelled to mortgage their home to buy the groceries and provisions used to furnish food for these laborers, and to make other statements of a like character. The admission of this testimony is also alleged as error. Other alleged errors will be noted in the opinion.

W. W. Banks, of Portland (A. E. Clark, of Portland, on the brief), for appellant. J. A. Strowbridge, of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] The first question to be considered is whether or not there was any testimony to go to the jury upon the case made by plaintiff. We think there was. Plaintiff through Packer assumed to see Mrs. Edwards paid. To do this it instructed White to deduct from the wages of the laborers, which it had assumed to pay, the sums due from them to Mrs. Edwards. Had it refused absolutely to apply these sums upon the laborers' board bills due Mrs. Edwards, they would have had a lien upon the road for the wages so deducted and unpaid, so that it was virtually compelled either to pay the laborers the whole amount of their wages, or to do the equivalent by paying 75 cents per day out of the amount to Mrs. Edwards. Having kept this money out of the wages

due the workmen for the latter purpose, it should not be permitted to enrich itself at the expense of Mrs. Edwards, nor of the laborers.

[2] The action for money had and received is a form of recovery greatly favored by the courts on account of its equitable character. 27 Cyc. 849. An action for money had and received may be sustained by any evidence showing that the defendant has possession of money of the plaintiff which in equity and good conscience he ought to pay over to him. 8 Enc. Evidence, 629. In the case at bar the defendant did not directly receive money from the laborers, but it received the equivalent of money in the discharge of their claims, and this is sufficient. 8 Enc. Evidence, 628; 27 Cyc. 852.

[3] The court erred in permitting the plaintiff to relate the various hardships suffered by her by reason of the nonpayment of the money, but the testimony as to the principal matter was uncontradicted by any witness, and in any event the jury could not have returned a different verdict, no matter where their sympathies lay.

[4] It was error for the court to express its opinion of the evidence in the presence of the jury. The duty of a judge is to see that both sides of a case have a fair hearing, and that the jury renders an impartial verdict, without any suggestion or comment from the court as to what verdict ought to be rendered. To say to an attorney in the hearing of the jury that his case is "infamous," and that his client shall never have a judgment, and especially before the client has had an opportunity to present his side of the case, is language that should never be used in a court of justice. Upon the case presented by the plaintiff there was certainly some ground for the supposition that defendant had dealt unfairly with the plaintiff, but the defendant's story had not been heard, and, when heard, might have given the case an entirely different aspect. The writer knows from experience on the circuit bench that it is sometimes very difficult for a judge to refrain from making comments on a case during the progress of the trial, and especially where an apparent injustice seems to have been perpetrated; but after a reversal or two, occasioned by this practice, he concluded to go, not to the ant, but to the meek and lowly oyster, to "consider its ways and be wise," and to keep the judicial mouth shut. He commends the example of the silent oyster to all trial judges.

[5, 6] The defendant introduced no testimony whatever, leaving the testimony of plaintiff and her witnesses wholly uncontradicted. The witnesses were not impeached, their testimony was reasonable and probable, and, in the absence of any contradiction, the jury was bound to receive it as true and render a verdict accordingly. Had there been any contradictory evidence introduced,

so that a question of the preponderance of evidence one way or the other had been presented to the jury, we should be compelled to reverse this case; but, as it now stands, the evidence is all on the side of the plaintiff, and notwithstanding the errors complained of the verdict must stand.

Other errors in the rulings of the court are assigned, but we do not deem them well taken.

The judgment is affirmed.

(64 Or. 216)

**PORTLAND HARDWOOD FLOOR CO.
v. CHAS. K. SPAULDING LOG-
GING CO. et al.**

(Supreme Court of Oregon. Feb. 25, 1913.)

1. MECHANICS' LIENS (§ 157*)—ENFORCEMENT OF LIEN—EVIDENCE.

If nonlienable items are not so intermingled with those which are lienable that the two classes are incapable of segregation by inspection of the notice of the lien itself, the claimant may prove the amount, value, and kind of material furnished by him which went into the construction of the building against which the lien is sought, although all the materials were sent and charged together in one account against the contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

2. MECHANICS' LIENS (§ 281*)—ENFORCEMENT OF LIEN—EVIDENCE.

While a general account, showing all the transactions between a materialman and the contractor, should be considered in determining whether the claim is for a lump sum covering several buildings indiscriminately, it is not conclusive.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

3. MECHANICS' LIENS (§ 115*)—PAYMENT—APPLICATION.

Where a contractor purchased lumber for three buildings, an account of which was kept in one account on the seller's books, in which payments were entered without discriminating upon what building they were to be applied, the contractor and materialman could, after the time for filing liens on two of the buildings had expired, agree to apply such payments on such two buildings, in the absence of any provision in the contract with the owner relative to such matter, especially where it was not shown from what source the contractor derived the funds with which such payments were made.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

Appeal from Circuit Court, Washington County; J. U. Campbell, Judge.

Suit to foreclose lien by the Portland Hardwood Floor Company against the Chas. K. Spaulding Logging Company and others. From a decree dismissing its claim, the defendant named, appeals. Reversed and rendered.

This is a suit to foreclose a materialman's lien upon a residence erected for the defendant Sholes. He had contracted with the de-

fendant Sparks to erect three dwelling houses by separate contracts. The latter in turn contracted with the plaintiff for the flooring in the largest of the buildings, which for convenience will be called the Sholes residence. He took from the defendant Spaulding Logging Company separate contracts for the millwork to be used in each of the dwellings, and during the progress of the work bought from the company a large amount of other material, which he used in the construction of each of the three buildings. The plaintiff instituted this suit against Sholes as owner, Sparks as original contractor, and sundry lien claimants, including the Spaulding Logging Company, to foreclose its lien on the Sholes residence, but before the hearing all other liens had been settled or disposed of in one way or another, until the only remaining claimants were the plaintiff and the defendant Spaulding Logging Company. At the hearing the circuit court established the lien of the plaintiff, and dismissed the claim of the logging company, which appeals.

W. T. Vinton, of McMinnville, and Geo. G. Bingham, of Salem (McCain & Vinton, of McMinnville, and J. M. Wall, of Hillsboro, on the brief), for appellant. W. G. Hare, of Hillsboro (Bagley & Hare, of Hillsboro, on the brief), for respondent.

BURNETT, J. The question here to be determined arises between the logging company and the proprietor of the property upon which it claims a lien. It is established without serious dissent that Sparks, the original contractor, called upon the logging company for separate bids for the millwork for each of the three dwellings, and, having received such separate proposals, accepted them separately, so that each party knew in advance what millwork was to be furnished for each of the three dwellings. At the request of the contractor, as the work progressed, the logging company shipped him to be, and which was, used in the three dwellings three car loads of stuff composed of the millwork included in its bids, together with other material consisting of rough lumber, flooring, and the like. What are known in the case as the two small dwellings were finished before the Sholes residence was completed. The logging company had kept an account on its books, wherein were entered all the items of lumber and millwork furnished him in any way. Upon this account Sparks had made some payments, without designating upon what building they were to be applied, and the logging company had credited them in this account. The time within which the logging company could have filed a lien upon the two small dwellings had expired; and, as the period for filing a lien upon the Sholes residence was about to lapse, an agent of the company went to Washington county for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the purpose of adjusting the balance due from Sparks for all the material furnished. With the acquiescence of Sparks the agent applied the payments mentioned upon the amount due on the small dwellings, filed a lien on the Sholes residence for the balance remaining unpaid on account of material of all kinds used in that building, and began an action at law to recover the other claims due on the small houses. Sparks made no objection to this application of the payments already made, and made no defense to the subsequent suit to foreclose the lien.

The proprietor of the real property sought to be charged objects to the lien of the Spaulding Logging Company on two grounds: First, that it is a lump charge which includes materials furnished for all three of the houses; and, second, that Sparks and the logging company had no right to apply all the payments made on the open account by the former to the amounts due on the two small dwellings, and thus to allow the claimant to look solely to the Sholes residence by virtue of its lien for the amount due on that building.

[1, 2] We take it that so long as nonlienable items are not so intermingled with those which are lienable that the two classes are incapable of segregation by inspection of the notice of the lien itself, the claimant is at liberty to prove the amount, value, and the kind of material furnished by him which went into the construction of each house. This he may do although the materials were sent and charged together in one account against the contractor. It is true that if nothing else is shown, a general account showing all the transactions between the materialman and the contractor would be a circumstance to be considered in determining whether the claim was for a lump sum covering several buildings indiscriminately, but it is not conclusive, and the contrary may be shown. This we think the claimant has accomplished in this case by a proper preponderance of the testimony. It is not essential that each piece of lumber shall be marked and designated for each particular house. Suppose, for illustration, that each of the small houses required 100 pieces 2x4 16 feet long, and the residence should require 200 pieces of that description. It would not be necessary to send 200 marked pieces of that dimension in a separate car to the large dwelling, and 100 each in two other separate cars to the small dwellings. In good reason, where the material is of the same kind, it may be shown by other testimony what actually went into the construction of the building, although they were sent to the contractor in one lot.

[3] A book account is primarily indicative of financial transactions between a debtor and creditor, and is not intended to illustrate relations between the property owner and the materialman between whom no agree-

ment exists. Sparks was a debtor to the logging company for the materials furnished for each of the two small houses, and in analogy to the principle that a debtor can pay one creditor in full and not pay another at all, he could liquidate his indebtedness to his creditors on the two small houses in full and refuse to pay a creditor on the large house. This can make no difference in principle as between Sholes and the logging company, because the former was not personally liable to pay for the material furnished. In other words, the relation of debtor and creditor did not exist between the proprietor and the materialman. As between them, each house was a separate transaction, and liable under any lien upon it only for the amount of material going into its construction, without reference to other buildings. The proprietor's only interest as against the logging company was that each house be charged only with what material entered into its construction. He could not interfere with the right of Sparks to pay what creditor he chose or apply the payments when and where he pleased. If he desired to control that matter he should have made it the subject of contract with Sparks in the beginning. The Spaulding Company could not make a lump lien on all three houses when they were contracted separately, neither could Sholes have any election as to how Sparks should apply a lump payment on the indebtedness of the latter, especially when it does not appear in the pleadings from whence Sparks derived the funds with which to pay.

For these reasons the decree of the circuit court dismissing the claim of the Spaulding Logging Company will be reversed, and one entered here establishing and foreclosing that lien as prayed for in its answer.

(64 Or. 321)

IN RE SEIDEL'S ESTATE.

SEIDEL v. CHICK.

(Supreme Court of Oregon. Feb. 25, 1913.)

1. GUARDIAN AND WARD (§ 107*)—SALES—OPENING AND VACATING.

Where a county court's order confirming a guardian's sale was not directly attacked by an appeal therefrom or a suit in equity to vacate it, the purchaser could not, on appeal from the denial of a motion to vacate it, attack its validity on the ground that the guardian was not present in the state, did not exercise any supervision over the sale, and that a second resale was unauthorized by law.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 392, 393; Dec. Dig. § 107.*]

2. COURTS (§ 183*)—JURISDICTION OF COUNTY COURTS—GUARDIANS' SALES—OPENING AND VACATING.

A suit to vacate an order of the county court confirming a guardian's sale must be brought in the circuit and not in the county court, since the county court has no equitable jurisdiction, and exhausts its power in the proceeding to sell when it confirms the sale.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 437-468; Dec. Dig. § 183.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. GUARDIAN AND WARD (§ 104*)—SALES—OPENING AND VACATING.

Under L. O. L. § 1357, requiring guardians to proceed in the matter of sales like executors and administrators, and section 1258, requiring in the case of executors or administrators a return to be made within 10 days after the sale, and allowing 15 days thereafter for urging objections against the confirmation of the sale, a purchaser who did not appear in the county court prior to the confirmation waived his objections to the sale, and could not maintain a motion to vacate the confirmation decree.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 382; Dec. Dig. § 104.*]

4. NEW TRIAL (§ 109*)—STATUTORY PROVISIONS.

The provisions of L. O. L. §§ 173-178, prescribing the method of obtaining a new trial, are not applicable to suits in equity.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 230; Dec. Dig. § 109.*]

Appeal from Circuit Court, Lane County; Lawrence T. Harris, Judge.

Proceeding by Emma Seidel, guardian of Ida E. Seidel, and others, for the sale of the lands of her wards. From a decree of the circuit court affirming an order of the county court denying a motion to vacate the sale, and from an order of the circuit court denying a motion to vacate the decree of affirmation, Charles H. Chick, purchaser, appeals. Affirmed.

Acting in pursuance of section 1359 et seq., L. O. L., relating to sales by foreign guardians of the lands of their wards situated in this state, Emma Seidel, a Missouri guardian of her minor children, residing in that state, but owning land in Oregon, procured from the county court of Lane county a license under date of July 8, 1910, authorizing her to sell the interest of her wards in certain lands situated in that county. She afterwards reported a sale of the premises to David and H. C. Auld for \$3,010. On the representation of Charles H. Chick that he would pay 10 per cent. advance on the sum realized at this sale and his deposit of \$325 in court, the county court on September 30, 1910, vacated this sale, and directed the guardian to sell the property again. At the second sale Chick was the successful bidder at \$3,311. On December 30, 1910, the second sale was vacated on the strength of H. C. Auld's deposit of \$375 in court, and his representation that he would pay 10 per cent. advance on the bid of Chick. On February 1, 1911, the land was sold at public auction to Chick for \$6,100. Two reports identical in terms were made concerning this sale. One sworn to by the attorney for the guardian was filed on February 3, 1911, and in pursuance of this report the sale was confirmed by an order made by the county court February 18, 1911, and the other verified by the guardian in Missouri, filed February 11, 1911, in pursuance of which the sale was again confirmed March 29, 1911. No objections to these orders of confirmation were

made by any one in any manner except that on April 14, 1911, Chick appeared and filed a motion in the county court "based upon a petition and the proceedings already had to vacate and set aside the second resale to him on the ground that the same was illegal, invalid, and that he would gain no title to the premises thereunder because the guardian was not present in the state at the time of the sale, did not exercise any supervision thereof, and because the second resale was unauthorized by law, the power of resale having been exhausted by the first resale." The county court denied this motion, and Chick appealed from the order thereon to the circuit court for Lane county. On August 12, 1911, the court, after making sundry recitals from the record, denied the petition of Chick, and affirmed the orders of the county court. On September 5, 1911, Chick filed a motion in the circuit court to vacate the decree of that tribunal and to permit him to offer proof to show that the guardian, Emma Seidel, was not within the state of Oregon when the second sale was made, and supported his motion by an affidavit of one of his counsel. On January 2, 1912, the circuit court denied this motion to vacate its decree. Chick has appealed from both rulings of the circuit court.

R. Sleight, of Portland, for appellant. J. F. Boothe, of Portland (Boothe & Richardson, of Portland, on the briefs), for respondent.

BURNETT, J. (after stating the facts as above). [1] The county court was a tribunal of competent original jurisdiction in the matter under consideration. Both the persons and the subject-matter involved were properly within its control by virtue of proceedings already had. It therefore had the power to decide rightly or wrongly in the matter of the confirmation of the sale of the property to Chick for \$6,100. Conceding, without deciding, that Chick had a right to appeal from this order of confirmation, he did not exercise this right, but appealed only from the decision of the county court denying his motion. He thus abandoned one of the methods of direct attack upon the order confirming the sale.

[2] The only other method of direct attack upon the confirmation was by an original suit based upon some ground of equitable cognizance. So far as the disposal of the property was concerned, the county court had exhausted its power, and was functus officii when it confirmed the sale. Although the mode of proceeding in that court is in the nature of that in a suit in equity as distinguished from an action at law that tribunal has no authority to entertain an original suit in equity, that being an exclusive prerogative of the circuit court, barring exceptions authorizing this court to assume original ju-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jurisdiction under section 8, article 7, of the Constitution of Oregon. Richardson's Guardianship, 39 Or. 264, 64 Pac. 390.

[3] By section 1357, L. O. L., guardians are required to proceed in the matter of sales like executors and administrators whose duties in that respect are, in turn, prescribed by section 1258, L. O. L. This section requires a return to be made within 10 days after the sale, and allows 15 days from the filing of the return for urging objections against the confirmation of the sale. If Chick had a right to object to the sale, his time to do so was within those 15 days. Not having thus appeared in the county court at any time prior to the confirmation of the two reports of sale referred to, he must be deemed to have waived any objections to the sale so far as the county court is concerned. His motion to overturn the confirmation decree came too late in that court and cannot affect the proceedings.

[4] It was tantamount to a motion for a rehearing on the application to confirm the sale, but no provision for motions for new trial is made in the general statutes relating to equitable procedure. Many sections and chapters of the Code relating to actions at law are made applicable to suits in equity, yet chapter 8 of title 2 of the Code of Civil Procedure (L. O. L. §§ 173-178), prescribing the method of obtaining a new trial, is not among them. The situation is that a county court, a tribunal of original jurisdiction, over the persons and subject-matter in question rendered a decree of confirmation which is not assailed by appeal or by an original suit in equity to set it aside. The decree is therefore valid as against all attacks in the procedure before us.

We affirm the decree of the circuit court sustaining the orders of the county court.

(64 Or. 254)

CASNER v. HOSKINS.

(Supreme Court of Oregon. Feb. 25, 1913.)

1. APPEAL AND ERROR (§ 889*) — REVIEW—PLEADING.

On appeal an order permitting amendment of the answer to correct a mistake will be treated as such amendment, though the amendment was not actually made, where the cause was tried as though it were.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

2. USURY (§ 117*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that notes sued on were usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340; Dec. Dig. § 117.*]

3. EVIDENCE (§ 70*)—PRESUMPTIONS—PLACE OF EXECUTION OF NOTE.

In the absence of any evidence to the contrary, it will be presumed that a note was executed at the place where it pretends to be dated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 91; Dec. Dig. § 70.*]

4. EVIDENCE (§ 70*)—PRESUMPTIONS—PLACE OF EXECUTION OF MORTGAGE.

A chattel mortgage will be presumed to have been given in the jurisdiction where it is sought to be enforced and where the property was when mortgaged, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 91; Dec. Dig. § 70.*]

5. USURY (§ 80*)—MORTGAGES—LAW GOVERNING.

A mortgage being only an incident of the debt, the validity of the security, so far as it may be affected by usury, is, in the absence of any enactment to the contrary, governed by the law applicable to personal contracts.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 158-160; Dec. Dig. § 80.*]

6. USURY (§ 2*)—LAW GOVERNING.

In the absence of any attempt to evade the usury limitations, the law of a state where a contract was consummated governs the enforcement of its terms; but, where a contract is expressly or impliedly to be complied with in a place other than that where it was made, the presumed intention of the parties controls the interpretation of their agreement subjecting it to the law of the place of performance.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 2-15, 418; Dec. Dig. § 2.*]

7. USURY (§ 111*) — EVIDENCE — ADMISSIBILITY.

If one sued on notes has had no opportunity to plead statutes relative to usury, he is entitled to offer in evidence the appropriate statutes.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 272-306; Dec. Dig. § 111.*]

8. USURY (§ 88*) — PURGING MORTGAGE OF USURY.

A mortgage tainted with usury cannot be validated by applying the excess interest on the principal as required by Rev. St. Mo. 1909, §§ 7180, 7183.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 176-187; Dec. Dig. § 88.*]

9. USURY (§ 97*)—ENFORCEMENT OF USURIOUS MORTGAGE—AS CONVERSION.

Seizure of personality under a mortgage which is void because usurious is actionable conversion, though plaintiff paid from the proceeds the amount of prior liens; he being a mere volunteer in so doing.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 203, 204; Dec. Dig. § 97.*]

On petition for rehearing. Petition denied. For former opinion, see 128 Pac. 841.

MOORE, J. In a petition for a rehearing it is maintained that the judgment in the case at bar was affirmed on the ground that the plaintiff had charged usurious interest on the promissory notes sued on, and that in reaching such conclusion this court overlooked the averments of the answer and the defendant's testimony respecting the alleged unlawful rate of interest. This action is based on three promissory notes for \$10,000 each and one note for \$1,750, executed April 29, 1905, the smaller note payable in 90 days and the larger notes August 1st of that year, with interest on each from maturity until liquidated at the rate of 8 per cent. per annum. The answer, in stating the items forming the consideration of these notes, alleged in substance

that prior to April 29, 1905, the plaintiff had loaned the defendant money, evidenced by promissory notes that had been frequently renewed and on that day amounted to \$19,000; that other sums of money had also been so loaned prior to April 29, 1905, for which no notes were given and on that day equaled \$2,049.43; that the defendant had given the plaintiff, for capital stock in a corporation, a promissory note for \$9,000, aggregating \$30,049.43; that the interest in advance was computed on the latter sum from April 29, 1905, when the notes were executed, to August 1st of that year, when they matured, at the rate of 1 per cent. a month, to wit, \$985.87, and added to the principal.

[1] The reply denied these averments and alleged that, instead of loaning \$19,000 to the defendant, the plaintiff had advanced to him \$19,714.70. At the trial defendant's counsel admitted that such sum should have been \$19,714.70 as set forth in the reply, and thereupon obtained leave to amend the answer so as to correct the mistake in this respect; but no alteration in that pleading was made. The cause was tried, however, as though the amendment was actually made, and, such being the case, the order permitting the alteration will be treated as an amendment. 1 Ency. Pl. & Pr. 641, note 1. Correcting the answer filed by adding \$714.70 to \$19,000, and including the items loaned and the interest stated, it will be seen that the result exactly coincides with the sum of the several promissory notes sued on, thus evidently disclosing an inadvertent mistake in the defendant's pleading. By computing the interest in advance on \$30,764.13, the corrected sum, at 1 per cent. per month for 94 days, the actual time from April 29th to August 1st, it will be found to be \$963.88, instead of \$985.85, as alleged in the answer, a difference of \$21.97.

[2] The defendant, referring to the material part of his answer, as hereinbefore set forth, testified as follows: "I paid interest at the rate of 1 per cent. per month; the computed interest amounting to \$2,224.12. None of this interest has ever been repaid to me or credited upon the notes."

H. H. Hopkins, who during the years 1904 and 1905 was the defendant's bookkeeper, corroborated Hoskins' testimony as last hereinbefore quoted and made the following statement upon oath: "That the interest upon the notes sued on in this action was added to the principal up to the time of the maturity thereof and figured at the rate of 1 per cent. per month."

In the deposition of E. G. Wilson, who in the years 1904 and 1905 was the president of the United States Oil & Mining Company, and also secretary of the Denver, Wichita & Memphis Railway, corporations engaged in business at Catoosa, Ind. T., the following interrogatory appears: "State, if you know, whether plaintiff ever charged the defendant interest at the rate of 1 per cent. per month

on moneys owing from defendant to plaintiff on or before the 29th day of April, 1905, or at any other time." The response was: "To this inquiry I answer, 'No,' for the reason that I had these notes in my hands for collection and talked with Mr. Hoskins frequently about them, and he made no mention of any excess charge, or any charge with which he was dissatisfied, or any charge other than shown by the notes and mortgages."

The foregoing comprises the substance of the allegations of the answer, respecting the consideration for the promissory notes in question, and the entire testimony found in the bill of exceptions as to the rate of interest which the plaintiff charged the defendant on account of money loaned or for sales of property or choses in action.

A substantial issue was made with regard to the alleged usurious rate of interest, and if it be assumed that Wilson's answer as quoted was the statement of a probative fact and not an inference based upon other facts, so that a conflict in the evidence was thus created, there was sufficient testimony received from which the jury could undoubtedly have reached the conclusion that usurious interest was charged by the plaintiff as they were instructed. Any statement to that effect that may be found in the former opinion in this cause was made after considering the pleadings and the testimony now set forth, and the conclusion there reached has not been changed by a careful re-examination of the question.

It is contended that in determining, in the absence of any testimony on the subject, that the chattel mortgage in question was governed by the law of Arkansas as applied to Indian Territory, while the notes sued on were subject to the laws of Missouri, an error was committed. The defendant, referring to such matters, testified as follows: "All the transactions set forth as counterclaims in defendant's answer and the business connected therewith in reference to the Denver, Wichita & Memphis Railroad took place in the Indian Territory and were Indian Territory transactions."

[3] Each of the promissory notes described in the complaint purport to be dated at Kansas City, Mo., and is expressly made payable at that place. In the absence of any evidence to the contrary, it will be presumed that a promissory note was executed where it pretends to be dated; but this deduction is overcome by evidence showing that the instrument was given at a different place. 4 Am. & Eng. Ency. Law (2d Ed.) 129; Parks v. Evans, 5 Houst. (Del.) 576; Plauto's Adm'r v. Patchin, 26 Mo. 389; Hopkins v. Miller, 17 N. J. Law, 185. In each of the four causes of action set forth in the complaint it was alleged that the promissory note there referred to was executed in Missouri. In the third instruction the jury were informed that it was admitted that the notes sued on

were made and delivered in Missouri. This declaration by the court must be accepted as a true statement of the evidence received at the trial, though such fact is not disclosed by the meager bill of exceptions herein.

[4] In its general charge the court referred to the chattel mortgage given by the defendant to the plaintiff, but did not state to the jury when or where it was made, and, the bill of exceptions containing no evidence on that subject, it will be presumed that the mortgage was given in Indian Territory, where it was undertaken to be enforced and where the property was when it was hypothecated, as intimated in the former opinion. *Jones, Chat. Mort. (5th Ed.)* § 305. The presumption is strengthened by the defendant's testimony, hereinbefore quoted, to the effect that all his counterclaims and the business connected therewith arose and occurred in Indian Territory. The defendant, referring to his dealings with the plaintiff, testified as follows: "I commenced borrowing money and borrowed in various amounts at various times from Mr. Casner between November, 1904, and April 29, 1905, amounting to a total of \$19,714.70." As the defendant during the time thus stated was engaged in business in Indian Territory, it is fairly inferable that the money so obtained was furnished by the plaintiff at that place, and, though the notes may have been executed in Missouri, the contract for the loans was evidently made in Indian Territory.

The evidence referred to presents for consideration the question whether promissory notes given in Indian Territory on property then therein render such hypothecation void under the law applicable to that territory, on account of the usurious interest. If the bill of exceptions had disclosed an application by the defendant for a loan to be made in Missouri accompanied by a stipulation that the promissory notes evidencing the debt should be secured by a chattel mortgage of property then in Indian Territory, the agreement might possibly be construed as a Missouri contract, which, so far as it related to the notes, was not void in that state by reason of the usury, and, these negotiable instruments being valid there, they would be efficacious elsewhere. *Hosford v. Nichols*, 1 *Paige* (N. Y.) 220.

[5] The rule is quite general that, a mortgage being only an incident of a debt, the validity of the security, so far as it may be affected by usury, is, in the absence of any enactment to the contrary, governed by the principles of law applicable to personal contracts. *McIlwaine v. Ellington*, 111 *Fed.* 578, 49 *C. C. A.* 446, 55 *L. R. A.* 933; *Bank v. Doherty*, 42 *Wash.* 317, 84 *Pac.* 872, 4 *L. R. A.* (N. S.) 1191, 114 *Am. St. Rep.* 123; *Manhattan Life Ins. Co. v. Johnson*, 188 *N. Y.* 108, 80 *N. E.* 658, 9 *L. R. A.* (N. S.) 1142, 11 *Ann. Cas.* 223; *Tenny v. Porter*, 61 *Ark.* 329, 33 *S. W.* 211. No distinction in this respect

exists between real estate and chattel mortgages. *Trower Bros. Co. v. Hamilton*, 179 *Mo.* 205, 77 *S. W.* 1081; *Central National Bank v. Cooper*, 85 *Mo. App.* 383.

The notes sued on having been made payable at Kansas City, Mo., the place there expressly designated became important only for the purpose of making presentment of the negotiable instruments for payment. An action could have been maintained on the notes in any court of competent jurisdiction in the United States where personal service of process could have been had on the defendant. In the absence of the service indicated, an action could also have been supported in any such court to the extent of the defendant's property if necessary, by the seizure thereof within the territorial jurisdiction and the giving of such notification as the statute demanded, whereupon a judgment of condemnation, in the nature of a proceeding in rem, could have been given pursuant to which the property so taken into possession could have been sold and the proceeds arising therefrom applied on the notes. Any proceeding, however, undertaken to foreclose the chattel mortgage, was not transitory, but was required to be had in Indian Territory where the property was being used.

[6] At the trial the plaintiff's counsel observed: "We think the defendant should be required to elect under what law they desire to stand on; whether the laws of Arkansas or the laws of the state of Missouri." The defendant's counsel replied: "We stand on the mortgage in the place where the mortgage was given, and we stand on the notes on the place where the notes were given." The weight of authority supports the rule that, in the absence of any attempt to evade the usury limitations, the law of a state where a contract was consummated governs the enforcement of its terms. Where, however, a contract is expressly or impliedly to be complied with in a place other than that where it was made, the presumed intention of the parties controls the interpretation of their agreement subjecting it to the law of the place of performance. *Storey, Conflict Laws* (7th Ed.) § 280. It is generally conceded that the situs of a debt is not governed by the situs of the security, and that the debt is usually subject to the law of the domicile of the party to whom it is due. *I Wharton, Conflict Laws* (3d Ed.) § 368. This legal principle would seem to make the laws of Missouri relating to usury applicable to the chattel mortgage of property in Indian Territory, particularly so when the notes for which the security was intended to be given were expressly made payable at Kansas City, Mo., the place of the plaintiff's domicile. Whatever the rule may be in this respect, it was attempted in the former opinion to adopt the theory evidently advanced by the parties at the trial with respect to the law of usury as applied to the chattel mort-

gage. The answer on this branch of the case sets forth the substance of the laws of Missouri on the question of usury. At the trial the plaintiff was permitted to amend his reply so as to aver that possession of the property was taken under the chattel mortgage upon default therein. No alteration, however, was made in that pleading, but the cause appears to have been tried as though the amendment had in fact been made.

[7] The defendant never having had an opportunity to plead either the statute of Missouri with respect to a chattel mortgage affected by usury, or to set forth the enactments of Arkansas applicable to Indian Territory in relation to usury or to the effect thereof upon a chattel mortgage, was entitled to offer in evidence the statutes of these states upon those subjects. The Missouri statute as to the rate of interest provides generally that the parties may agree in writing for the payment of 8 per cent. per annum, and that usury may be pleaded as a defense in a civil action in any court in that state, and upon proof that more than the prescribed rate had been exacted the excess shall be credited upon the principal debt. R. S. Missouri 1909, §§ 7180, 7183. This evidence was admissible under the original averments of the answer. Pursuant to the permission to amend the reply, the defendant's counsel offered in evidence another section (section 7184) of the Missouri statute, as follows: "In actions for the enforcements of liens upon personal property pledged or mortgaged to secure indebtedness, or to maintain or to secure possession of property so pledged or mortgaged, or in any other case where the validity of such lien is drawn in question, proof upon the trial that the party holding or claiming to hold any such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property or any lien whatsoever thereon given to secure such indebtedness, invalid and illegal." *Id.*, section 7184. Upon the receipt of this evidence it would seem that the situs of the property was thereupon assumed and treated by court and counsel to govern the place of the enforcement of the contract, thereby making the statute of Arkansas applicable to Indian Territory relating to usury and the effect thereof upon contracts also admissible in evidence.

[8] It was not considered in the former opinion, nor is it now believed to be important, under which statute the contract should be interpreted, for by either it was invalid if the jury found that the interest exacted equaled the sum testified to by the defendant and his witnesses. It will be kept in mind that in Missouri, where the rate of interest is in excess of that prescribed, and the right to retain the sum exacted is controverted, and that issue is established at the trial, the undue amount is to be credited on the prin-

cipal debt. This application of the surplus exacted, however, does not validate a mortgage tainted with usury. *Wintergirst v. Loan Co.*, 60 Mo. App. 186; *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917.

[9] In any event, therefore, the chattel mortgage was void, and a seizure of the property under a pretended foreclosure was a wrongful act that rendered the plaintiff liable for the value of the property converted, and because from a sale of the goods and chattels he paid off prior liens on the property is of no consequence, for, being a volunteer, he must suffer the consequences of his intermeddling.

We adhere to the former opinion, and the petition for a rehearing is denied.

(42 Utah, 360)

WITHEROW v. MYSTIC TOLLERS.

(Supreme Court of Utah. Jan. 31, 1913.)

1. PRINCIPAL AND AGENT (§ 22*)—PROOF OF RELATION—DECLARATIONS OF AGENT.

In an action against a fraternal insurance society, the declarations of a person that he was the secretary of such society were inadmissible, since the declarations of an agent are incompetent, and not merely insufficient, without other proof to establish the fact of agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

2. EVIDENCE (§ 258*)—DECLARATIONS OF AGENT.

In an action against a fraternal insurance society, the declarations of a person, claimed to be its supreme secretary, that it had taken over the books of another society were inadmissible, in the absence of any evidence except his own declarations to show that he was such secretary.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

3. INSURANCE (§ 819*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a fraternal insurance society evidence held insufficient to support the allegation that it had assumed the debts and obligations of the society which issued the benefit certificate sued on.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

Appeal from District Court, Summit County; M. L. Ritchie, Judge.

Action by Mary Witherow against the Mystic Tollers. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

E. A. Walton, of Salt Lake City, for appellant. L. B. Wight, of Park City, for respondent.

STRAUP, J. The plaintiff brought this action to recover on a benefit certificate issued by the Fraternal Order of Mountaineers on the life of William J. Witherow. In the complaint it is alleged that "the deceased became a member of the Fraternal Order of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mountaineers on the 23d day of September, 1910, a mutual benefit association organized under the laws of Montana, and doing business of insuring the lives of its members upon the mutual assessment plan"; and that it issued to him the certificate sued on, a copy of which is set out in the complaint. It is further averred that the deceased died on the 19th of October, 1910, and that proof of death was made to the Fraternal Order of Mountaineers at Billings, Mont. Then it is averred that thereafter, and on the 15th day of December, 1910, the defendant, the Mystic Tollers, a beneficial association organized under the laws of Iowa, "and doing business of insuring the lives of its members upon the mutual assessment plan, entered into an agreement with the Fraternal Order of Mountaineers, the exact nature of which is to the plaintiff unknown, but that by the terms of said agreement all the members of the Fraternal Order of Mountaineers became members of the Mystic Tollers, and the defendant thereby became possessed of all the revenues and benefits accruing to the said order and liable for all its debts and obligations contracted by them, and that the said Fraternal Order of Mountaineers was entirely absorbed by and became a part of the Mystic Tollers, and said Mystic Tollers became liable to the plaintiff for the amount due her as beneficiary named in said benefit certificate issued to said William J. Witherow." The defendant by its answer admitted that the deceased "received into his possession" the certificate set forth in the complaint; that he died on the 19th of October, 1910; that proofs of loss were made to the Fraternal Order of Mountaineers at Billings, Mont.; and that it on the 15th of December, 1910, "entered into an agreement with the Fraternal Order of Mountaineers whereby it took over the membership of the Fraternal Order of Mountaineers." But it expressly denied that it thereby, or otherwise, became liable or assumed a liability on the certificate, and denied all other allegations of the complaint. The defendant further alleged that, if any contract of insurance was entered into between the deceased and the Fraternal Order of Mountaineers, the contract was void on account of breaches of warranties with respect to statements and representations of the deceased concerning his health and physical condition, and because of collusion between him and the medical examiner in the making of false and fraudulent statements and representations concerning the health and physical condition of the deceased at the time he applied for, and was given, the certificate. As a further defense, the defendant also averred that the deceased was not a member of the Fraternal Order of Mountaineers when the certificate was issued to him, nor at the time of his death, and that membership was essential to obtain a certificate. Upon these issues, the case was

tried to the court and a jury. A verdict was rendered, and a judgment entered in favor of the plaintiff. The defendant appeals.

The deceased was insured, if at all, by the Fraternal Order of Mountaineers, and not by the defendant, the Mystic Tollers. They were different and separate associations or organizations. And it is conceded that the defendant is not liable on the certificate, unless it, by a binding and an enforceable agreement, after the deceased's death, contracted and assumed a liability on the certificate. The allegations in such respect are that the defendant, several months after the death of the deceased, entered into an agreement with the Fraternal Order of Mountaineers, by the terms of which "the Fraternal Order of Mountaineers became members of the Mystic Tollers, and that the defendant thereby became possessed of all the revenues and benefits accruing to the said Fraternal Order of Mountaineers, and liable for its debts and obligations contracted by them," and became liable to the plaintiff for the amount due her on the certificate sued on. It will be observed that these allegations are mostly but legal conclusions. But they are denied in toto, except that the defendant on the 15th day of December, 1910, several months after the death of the deceased, "took over the membership of the Fraternal Order of Mountaineers." To prove the issues thus raised, plaintiff herself testified that, some time after the deceased's death, one J. F. Taake "came to my house in Park City. He said something about the books of the Mountaineers in Park City." She was asked by her counsel, "What did he say to you about them?" Over the defendant's objection, she was permitted to answer that he told her, "I have been over to Mrs. Schoettlin's and got the Mountaineer's books. I have them in my possession in this little suit case. Mrs. Schoettlin made no objections to my taking them." She further testified that, in response to two letters written to the defendant at Des Moines, Iowa, she, on what appeared to be the letter head of the defendant, received two. The letters received by her were put in evidence, over the defendant's objections. One dated April 19, 1911, and addressed to Mary Witherow, is: "The supreme directors have rejected the death claim of William J. Witherow, and they desire that I notify you of same. They are convinced that the insurance was obtained fraudulently and are making an investigation with a view of placing upon the proper persons the responsibility of same. Yours fraternally, J. F. Taake, Supreme Secretary." The other, dated April 29, after referring to an offer and rejection of compromise, recites: "I am not in position to state what the supreme directors will do in the matter, but I will suggest to you, that if you are willing to accept \$200.00 in full for all claims, demands, that you make a receipt for this amount, acknowledge it before a notary public, and

forward it to the Mechanics' Savings Bank, Des Moines, Iowa, with the instructions that if the supreme directors reconsider their former action upon the claim and will allow you the amount of \$200.00, that they shall upon receipt of that amount for you turn over to them the receipt and benefit certificate and forward to you the amount of \$200.00. On the other hand, if the supreme directors decline to reconsider their former action upon the claim, that the bank above mentioned return to you the receipt and benefit certificate. If you give this matter your immediate attention, you can have this instruction at our office at the time of the meeting of the supreme directors on May 10. Mrs. Witherow, I wish for you to distinctly understand that I am not making you the above offer as a compromise as an officer of our society, nor can I assure you that our supreme directors will agree with me in paying you the above mentioned amount, but I will, as a personal matter do all that I can to have them agree to pay you the amount of \$200.00. This letter is written to you, not as an officer of our society, but personally, by me. My advice to you is to act in accordance with my suggestion, and I will try to do all that I can for you. Fraternally, J. F. Taake."

[1-3] The plaintiff, after testifying that Taake came to Park City before she had received the letters, was then asked by her counsel: "Q. Did he say whether or not he was the supreme secretary of the Mystic Tollers of Des Moines, Iowa? Q. Did he have anything to say about the Mystic Tollers, or their liability upon this contract? Q. Did he say anything about whether or not the Mystic Tollers had assumed the obligations of the Fraternal Order of Mountaineers named in the certificate?" Timely objections were made to these questions on the ground of incompetency of the evidence; that the questions called for hearsay testimony; that agency cannot be shown by the declarations of the agent, but must be shown by evidence dehors such declarations, and must first be shown before the declarations of the agent are receivable, and that it was not shown that the declarations were within the scope of the agent's authority; that if there was any liability created by the defendant by the contract, as alleged in the complaint, the same could only be shown by proving the terms and conditions of the contract, and not by the declarations of some one not shown to be either the agent of the defendant, or to have authority to make admissions against the defendant as to the terms of such contract or the extent of liability thereunder. The objections were overruled, and the witness permitted to answer. She testified that Taake said to her, "My name is Taake. I am the supreme secretary of the Mystic Tollers; that they have taken over the Mountaineers' books. I am here to settle that death claim."

This is all the evidence with respect to the contract, as alleged in the complaint between the defendant and the Fraternal Order of Mountaineers. The court concerning it charged: "You are instructed that in considering the testimony concerning statements made by one J. F. Taake that you are at liberty to consider, in connection with other evidence, his statement that he was a representative of the Mystic Tollers, although that statement alone is not sufficient to show that he was their representative. And you may consider the fact, if you find it proven by the evidence, that he carried away the books of the local organization of the Fraternal Order of Mountaineers, but you cannot consider any statement that he may have made as any admission of liability on the part of the Mystic Tollers, or as any foundation for the cause of action, so far as the mere statement itself is concerned, because there is no showing that he had any authority to make any statement concerning that matter." As to this, three contentions are made by the defendant: (1) That the evidence was improperly received; (2) that it is wholly insufficient to prove the allegations of the complaint, that the defendant "became possessed of all the revenues and benefits accruing to the" Fraternal Order of Mountaineers, and became "liable for all debts and obligations contracted by them," and that the defendant "became liable to this plaintiff in the amount due her" on the certificate sued on; and (3) that the court erred in the charge.

We think the defendant is entitled to prevail as to all of them. Of course agency cannot be shown by declarations of the agent. And, before declarations of the agent may be received as admissions against his principal, the agency and the authority of the agent must first be shown. Here neither was shown. Nor is it true, as the court seems to indicate in the charge, that declarations of an agent, to show agency, go merely to the question of sufficiency of the evidence to show such relation, and hence may be considered for such purpose, in connection with other evidence. The authorities, we think, are to the effect that such evidence is incompetent for such purpose, and that the fact of agency must be established by evidence dehors the declarations of the agent. And by a comparison of the evidence adduced, with the allegations of the complaint in respect of the alleged terms and conditions of the contract between the defendant and the Fraternal Order of Mountaineers, it is manifest that the evidence, had it been competent, is wholly insufficient to prove such allegations.

The judgment of the court below is therefore reversed, and the cause remanded, with directions to grant a new trial. Costs to appellant.

McCARTY, C. J., and FRICK, J., concur.

(42 Utah, 253)

HOFFMAN et al. v. TOOEELE CITY et al.
(Supreme Court of Utah. Jan. 31, 1913.)

1. INJUNCTION (§ 85*)—RESTRAINING PROSECUTIONS UNDER ORDINANCES—JURISDICTION.

Equity has no jurisdiction to restrain prosecutions for violations of an ordinance prohibiting the sale of intoxicating liquor in a city, the voters of which, at a local option election, had declared against the sale of liquor; so that the state law prohibiting sale is in force in the city, since irreparable damage is impossible, and since there is an adequate remedy at law by appeal from convictions under the ordinance alleged to be invalid, on the ground that it is covered by the state law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

2. EQUITY (§ 43*)—LEGAL AND EQUITABLE.

Though law and equity may be administered by the same court and in the same action, the functions of law and equity cannot be disregarded; and equity may intercede only where the law is inadequate, or is impotent to prevent gross injustice or irreparable injury.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. § 43.*]

Appeal from District Court, Tooele County; Geo. G. Armstrong, Judge.

Action by Frank Hoffman and others, suing on behalf of themselves and such other persons as may see fit to make themselves plaintiffs, against Tooele City and others. From a judgment granting insufficient relief, plaintiffs appeal, and defendants appeal from the part of the judgment granting relief. Appeal dismissed.

Smith & McBroom, Weber & Olson, and Hurd & Hurd, all of Salt Lake City, for appellants. L. L. Baker, of Tooele, and Booth, Lee, Badger, Rich & Parke, of Salt Lake City, for respondents.

FRICK, J. This is an action in equity for injunctive relief. The matters upon which the aid of a court of equity is invoked are set forth in the complaint. The substance of the complaint, after setting forth the status and relationship of the parties to the subject of the action, is as follows: That in June, 1911, a certain election was held in Tooele city, pursuant to chapter 106 of the Laws of Utah 1911, a local option statute, in which election the question of whether intoxicating liquors should be permitted to be sold after the 30th day of September, 1911, in such city was submitted to a vote of the legal voters, and was by them determined against sale; that thereupon the city council of Tooele city, on the 18th day of September, 1911, attempted and pretended to pass a certain ordinance prohibiting the sale of intoxicating liquors in said city, and said ordinance prescribed certain rules of evidence, and provided for certain penalties for its violation. The ordinance is made a part of the complaint. It was further alleged that thereafter, and in pursuance of the provision of said ordinance, the officers of said Tooele city filed complaints in a court of

competent jurisdiction against many of the residents of said city, charging them separately with having violated the provisions of the ordinance, aforesaid, and among those against whom complaints were so filed are the plaintiffs; that the plaintiff Bezeek was complained of and charged with a misdemeanor for having violated the provisions of said ordinance three times between the 29th day of February and the 8th day of March, 1912; that the plaintiff Frank Penna was so charged three times between the 11th day of January and the 8th day of March, 1912; that the plaintiff Alex Voyich was so charged once between said dates; that the plaintiff Fred Smith was charged once; that the plaintiff Frank Hoffman was charged twice; that the plaintiff Frank Pejnovich was charged once, and the plaintiff Alma F. Mallet three times, and all of the foregoing complaints contained separate and distinct offenses; that the officers of said Tooele city did prosecute said several complaints and charges, and threaten to continue to prosecute said plaintiffs for supposed violations of said ordinance.

The allegations upon which plaintiffs rely for injunctive interference with said alleged and threatened prosecutions are as follows: "That to defend the said prosecutions severally, as the plaintiffs will be compelled to do, unless the said prosecutions are restrained by order of this court, does and will give rise to multiplicity of actions; that the plaintiffs herein, if compelled to defend said actions separately, will be compelled to expend large sums of money; that the said prosecutions are oppressive and unreasonable, and, unless the said city is restrained from prosecuting the said actions by order of this court, the means of these plaintiffs will be totally consumed in defending themselves against said charges, and the plaintiffs herein will no longer be able to properly defend themselves in such actions, to the great and irreparable damage of the plaintiffs."

For a second cause of action it is alleged that, pursuant to the provisions of said ordinance, the plaintiffs have been charged with and prosecuted, and will continue to be prosecuted, for maintaining nuisances; and for a third cause of action it is alleged that, by virtue of a search and seizure provision contained in said ordinance, the officers of said Tooele city have seized and carried away certain intoxicating liquors, the property of said plaintiffs. It is also alleged, upon information and belief, that prosecutions based on said ordinance will be instituted against other residents of Tooele city. It is further alleged that said ordinance is void; the reasons therefor being stated.

The defendant demurred to the complaint for want of facts. The district court of Tooele county sustained the demurrer as to the first two causes of action set forth in the complaint and overruled it as to the third.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Pursuant to the stipulations of counsel electing to stand upon their pleadings, respectively, the court then issued a perpetual injunction against the city on the third cause of action, and denied an injunction and dismissed the complaint as to the first and second causes of action. Plaintiffs appeal from that part of the judgment denying the injunction, and the defendants appeal from that part granting the same.

[1] At the hearing we, sua sponte, questioned the power, or, at least, the propriety of a court of equity to grant the relief under the conceded facts and circumstances. Counsel for both sides, however, urgently requested that we should hear and determine the appeal. We accordingly heard their arguments upon the condition that they file a brief, in which they should refer us to the authorities in support of the contention that it is proper for a court of equity to grant injunctive relief in cases like the one at bar. Counsel have filed such a brief, in which they have referred us to many cases where courts of equity have granted injunctive relief, involving both criminal and quasi criminal prosecutions based upon ordinances or laws that were alleged to be void. They have also referred us to cases wherein the courts have denied such relief. Among the cases cited by counsel wherein courts have interfered are the following: *Detroit v. Detroit*, etc., R. Co., 184 U. S. 378, 22 Sup. Ct. 410, 46 L. Ed. 592; *South Covington & C. St. Ry. Co. v. Berry*, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161; *Hall v. Dunn*, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; *Mayor v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Bear v. City of Cedar Rapids*, 147 Iowa, 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150; *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224. We shall not pause now to set forth the facts and circumstances upon which the decisions in the foregoing cases are based. It must suffice to say that a mere cursory reading of them shows that in all of them some legal, and in some of them quasi public, business or enterprise was involved which would suffer irreparable injury, if it would not be entirely destroyed, in case the prosecutions under the alleged invalid ordinances were permitted to be carried on or continued. Again, in many of those cases many hundreds, possibly thousands, of people might be directly affected, or indirectly at least, by the prosecutions, many of whom might have been seriously inconvenienced and damaged. In addition to the foregoing, the penalties that might have been imposed for violations of the ordinances in question, if multiplied as they might have been by continued prosecutions, would have been a most serious burden upon a lawful business or enterprise, and might, in many cases, have caused its destruction. While we do not wish to be

understood as saying that in all of the cases all of the foregoing consequences would follow or were threatened, yet in all of them either irreparable injury was threatened, or a multiplicity of suits were imminent, which, if carried on, would, of itself, have amounted to oppression.

No lawful business or enterprise is being assailed here, although plaintiffs are prosecuted under an alleged invalid ordinance. Nor is it alleged that any property which plaintiffs may lawfully possess or deal with will be interfered with. The ordinance in question covers precisely the same ground that is covered by the state law which was in full force and effect in Tooele city when the acts with which the plaintiffs are charged in the complaints filed against them are alleged to have been committed. Indeed, one of the grounds upon which the validity of the ordinance is assailed is that it covers precisely the same ground covered by the state law, with penalties practically the same as those imposed by that law. Neither of the plaintiffs, therefore, could have been lawfully engaged in the traffic of intoxicating liquors when the complaints were filed against them; nor can either of them, nor any one else, be so engaged now in Tooele city. No lawful business or enterprise is therefore either molested or threatened by the prosecutions in question, or by any similar ones. How can it be successfully contended, therefore, that irreparable damage to or loss of property which is being devoted to legal purposes is possible? All that plaintiffs, or either of them, could gain if the ordinance in question were held void would be that the penalty and costs that were imposed upon the conviction in the lower court could not be enforced against them. This is the usual result of every criminal prosecution which falls on appeal, regardless of the grounds for which it falls. Again, plaintiffs are not threatened with prosecutions, nor with search and seizure, nor with maintaining nuisances, unless there is some cause for believing that they have committed some act which is not alone prohibited by the ordinance in question, but is likewise prohibited by the state law. Immunity, therefore, from prosecutions for committing acts denounced by the ordinance is of little, if any, consequence, since the same acts are prohibited by the state liquor law, which is in force in Tooele city. If a court of equity may interfere in this case, it may do so in any criminal prosecution, where the claim is put forth that the ordinance or law upon which the prosecution is based is invalid. Indeed, why may it not be done in a case where the plaintiff, as here, alleges that if he continues to violate the law or ordinance he will continue to be prosecuted, and the numerous prosecutions will be an irreparable injury to him, although the prosecutions are perfectly legal? In addition to all this

plaintiffs have a plain, speedy, and adequate remedy at law by appeal to this court. In this connection, if it had been desired to hasten the progress of the case to test the validity of the ordinance in this court, counsel could have stipulated the facts, as in legal effect was done in this case, and the trial court, in passing upon the facts, also could have passed on the validity of the ordinance, and either party could then have appealed from the decision, and could thus have the question of the validity of the ordinance determined in the usual and ordinary method. From what is made to appear, we do not see why such a case could not have been presented on appeal and submitted to this court within the time that this case was heard and submitted. If such a course had been pursued, in view that the case is criminal in its nature, it could, and no doubt would, have been decided as soon as this appeal is now being decided. In the six years that the writer has been a member of this court, no criminal case that was regularly submitted to this court has been permitted to pass beyond the term without a decision. Appeals to this court in criminal cases, especially where the validity of statutes or ordinances is involved, may thus be speedily presented, and will, except for special reasons, as speedily be determined. In no view, therefore, that can be taken is there any ground upon which to base a right to equitable relief in this case.

The following are a few of the many cases that could be cited in which it is held that courts of equity have no authority to enjoin courts of law from prosecuting alleged violations of ordinances in the regular and ordinary manner, although such ordinances were claimed to be, and in some cases conceded to be, void in certain respects: *Chicago, B. & Q. Ry. v. City of Ottawa*, 148 Ill. 397, 36 N. E. 85; *Shellman v. Saxou*, 134 Ga. 29, 67 S. E. 438, 27 L. R. A. (N. S.) 452; *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; *Yates v. Village of Batavia*, 79 Ill. 500. We think no case can be found, at least we have found none, where a court of equity has interfered with a case in which the facts and circumstances were as in the case at bar.

[2] It no doubt sounds well, and especially to the lay ear, to say that a court that has jurisdiction of the general subject-matter should in all cases determine the real questions involved, regardless of the manner or form in which such questions are presented to the courts. To argue for such a procedure is to ignore the fact that, although law and equity may be administered by the same court, and in this state in the same action, nevertheless the functions of law and equity cannot, without endless confusion, be entirely disregarded or ignored. Equity can intercede only where the law is inadequate,

or is impotent to prevent gross injustice or irreparable injury. If a court of equity interfered with the law when the law, as in the case at bar, is supreme, it would amount to usurpation. Usurpation must inevitably lead to revolution, and revolution to anarchy and chaos. If, therefore, we, in our equitable power, should interfere in this case, such interference, in our judgment, would be usurpation, pure and simple. This we have no right to do.

The appeal should therefore be dismissed. Such is the order.

McCARTY, C. J., and STRAUP, J., concur.

(42 Utah, 263)

**PROGRESS SPINNING & KNITTING
MILLS CO. v. SOUTHERN NAT.
INS. CO.**

(Supreme Court of Utah. Jan. 29, 1913.)

1. INSURANCE (§ 319*)—FIRE INSURANCE—CONDITIONS—ADDITIONAL RISK.

Where a fire policy issued upon a building described as a water power woolen mill provided that it should be void if the hazard was increased by any means within the control or knowledge of the insured, the policy became void upon the insured's beginning the exclusive manufacture of cotton bats, which was much more likely to cause fire than manufacture of woolen goods.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 751-756, 758; Dec. Dig. § 819.*]

2. INSURANCE (§ 372*)—CONDITIONS—WAIVER.

A condition in a fire policy that it should become void if the risk be increased by any means within the control or knowledge of the insured, being for the benefit of the insurer, may be waived.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 941; Dec. Dig. § 372.*]

3. INSURANCE (§ 378*)—FIRE INSURANCE—"WAIVER"—WHAT CONSTITUTES.

A waiver of a condition in a fire policy operates as an estoppel on the party who waives, and it is not essential that the party in whose favor it is made must prove all the elements of an estoppel in pais, consequently a condition in an insurance policy that it should be void if the hazard was increased by any means within the knowledge of the insured is not waived because the agent of the insured inspected the property which was described as a woolen mill about a year before the fire, and before the insurer had begun the manufacture of cotton bats which caused the conflagration.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7375-7381.]

4. APPEAL AND ERROR (§ 1029*)—REVIEW—HARMLESS ERROR.

In an action on a fire policy, where the evidence was not in conflict, and the jury could have rightfully returned only one verdict, the verdict is equivalent to a directed verdict, and any errors committed are harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4085, 4086; Dec. Dig. § 1029.*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Progress Spinning & Knitting Mills Company against the Southern National Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Stewart, Stewart & Alexander, of Salt Lake City, for appellant. Soren X. Christensen, of Salt Lake City, for respondent.

FRICK, J. Appellant brought this action upon a fire insurance policy to recover a loss by fire of property covered by said policy. The cause was tried to a jury, who returned a verdict for the insurance company, the respondent here. The court entered judgment upon the verdict, from which this appeal is prosecuted.

[1] Respondent admitted the issuance and delivery of the policy, admitted the fire and the loss, but interposed various affirmative defenses, among which was one that at the time of the fire the policy in question was not in force "for the reason that the said policy contained a provision that if the hazard was increased by any means within the control or knowledge of the insured said policy should be void." It is accordingly averred in apt terms that the property described in the policy, after the insurance thereof, was, by the insured, devoted to a use which greatly increased the hazard or risk of destruction by fire without the knowledge or consent of the insurer. The facts constituting the increased hazard are fully set forth in the answer.

The property that was covered by the policy was described thus: Five hundred dollars on one and two story shingle and metal roof frame building, occupied as water power woolen mills and dyehouse, \$400 on machinery and fixtures "while contained in the above-described building." The other items covered by the policy, amounting to \$100 additional, are not material here. At the trial, after the evidence was all in, both parties moved for a directed verdict, which the court denied.

We have carefully read all the evidence adduced at the trial as the same is preserved in the original bill of exceptions, and we agree with counsel on both sides that there is practically no conflict in the evidence, which, with respect to the defense referred to, was in substance as follows: That at the time of the fire the insured property was used exclusively for the manufacture of "cotton bats"; that the fire originated in a machine while in operation that was used in making said cotton bats; that the use of such machines and the manufacture of cotton bats is extremely hazardous; that the making of cotton bats is much more hazardous than the manufacture of woolen bats or woolen yarns. Indeed, it is beyond controversy that, in order to make cotton bats with any degree of safety, the work should be done in a fireproof building or apartment,

and that the building in which the cotton bats in question were manufactured by appellant was not fireproof. Counsel for appellant do not question the proof with respect to the great hazard which surrounds the manufacture of cotton bats. The president of the appellant corporation, as well as all of its witnesses, conceded that to be a fact. Counsel contend, however, that the property was insured as "woolen mills," and that it is usual in the conduct of such mills to manufacture cotton bats, cotton yarns, or fabrics composed of both wool and cotton in connection with the manufacture of woolen goods generally. There is evidence in the record to the effect that at least in some woolen mills there were also manufactured cotton goods and cotton fabrics, but the evidence to our minds is conclusive that a manufacturing plant which manufactures cotton bats exclusively is not and cannot come within the designation of a woolen mill. Moreover, it is practically conceded by all the witnesses who had the experience and testified upon the subject that the only safe method of manufacturing cotton bats is in a fireproof building or department where the fire can be confined to the machine where it originates. That the statements in the record made by the witnesses are well founded is abundantly demonstrated in the case at bar. The fire in question started in a machine while the operator thereof was working at it making cotton bats. This the foreman of appellant's plant testified was the usual and ordinary way fire starts in such machines. He, in effect, further testified that, when fire starts in such a machine, it is practically the same as a gunpowder explosion; that the fire in an instant envelops the whole machine and all the cotton that may be in, on or near it; that in the manufacture of woolens, although fire were caused by the use of the machine, yet the woolen fabric would not cause an explosion, nor would it burst into flame, but would only smolder, and therefore could be controlled, while a fire originating in a machine that was used to manufacture cotton bats, such as the one used by appellant, cannot be controlled. It is also true that one of the witnesses for appellant testified that he knew of three so-called woolen mills that produced cotton bats in connection with woolen bats and other fabrics, but he admitted that at least two of those mills were destroyed by fire within a short time after commencing the manufacture of cotton bats as aforesaid. Another witness testified that he knew of at least one so-called woolen mill in the east that manufactured cotton bats in connection with the manufacture of woolen goods. All of these witnesses, however, admitted that the manufacture of cotton bats is extremely hazardous so far as concerns the risk of setting fire, and in that regard much more hazardous than the manufacture of woolen bats or

woolen fabrics. There is, therefore, no dispute in the evidence that the manufacture of cotton bats is much more hazardous than is the manufacture of woolen bats or woolen fabrics, or even fabrics composed of both wool and cotton. The attempt made by appellant, therefore, to show that in a few other instances so-called woolen mills also manufacture cotton bats or mixed woolen and cotton fabrics, can have no bearing upon the question involved here. We think no one would question the right of any woolen mill to also use cotton in its mill, and so long as the hazard is not materially increased, which is always a question of fact, the use of cotton in connection with wool could not be objected to; but when, as in this case, the mill is practically turned into a powder magazine, the insurer has a right to insist upon the conditions of the policy that the hazard shall not be materially increased by the insured with impunity.

[2, 3] Nor can the contention made by appellant be sustained that the agent of respondent knew to what use the insured property was devoted, and therefore the right to insist upon the condition in the policy was waived. The only evidence in the record upon that subject is that the agent of respondent, who lived in Salt Lake City, while the property in question was located in Springville, more than 50 miles distant from Salt Lake City, became "acquainted with the property" the year preceding the fire when a prior policy covering the same property was issued; that either he or some of his assistants had inspected the property either before or after the present policy was issued. There is not a word of testimony, however, that either the agent who issued the policy or any of his assistants knew that the property was devoted to the manufacture of cotton bats. There is no evidence that either the agent or any one of his assistants was ever inside of the building, or, if so, that either knew anything about what appellant's methods of manufacturing were. No doubt such a provision in a policy, like all others that are made for the benefit of the insurer, may be waived, and this may be done either expressly or by implication; but a waiver implies knowledge of the actual conditions waived. In *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 10-11, 45 Pac. 723, in passing upon a like provision in an insurance policy, the court says: "To constitute a waiver, however, there must be something more than mere knowledge on the part of the agent. His language or conduct must be such as to show an intention to waive the particular condition of the policy which is the subject of controversy, or to evidence his consent to any change made which affects the hazard of the risk, when consent is necessary." In *Mechanics' Ins. Co. of Philadelphia v. Hodge*, 149 Ill. 298, 37 N. E. 51, in the headnote, the rule is stated thus: "Notice of the facts constituting the increased hazard, to the agent

of the company, is the same as notice to such company. When the agent has all the knowledge of the increased danger that the assured has, notice to such agent is not required." When a waiver is claimed, the question of whether it is established or not may depend very much upon the nature of the condition or the thing which it is asserted was waived. As pointed out in *Lottis v. Insurance Co.*, 38 Utah, 532, 114 Pac. 134, "a waiver operates as an estoppel on the party who waives," yet "it is not (in all cases) essential to a waiver that a party in whose favor it is made must prove all the elements of an estoppel in pais before he is entitled to avail himself of the waiver." In a matter such as is claimed was waived here it must therefore appear that the agent of the company knew all of the facts and conditions concerning the use of the property, and, after knowing them, permitted the policy to continue in force, or that he issued it with full knowledge of the facts and conditions which would avoid the policy. It may be that the language used by the Kansas court is a little too strong, since it implies that some affirmative act, and hence more than full knowledge upon the part of the agent is required. We think it is necessary, as stated by the Supreme Court of Illinois in the case above referred to, that it be shown that the agent who issued the policy had full knowledge respecting the use and condition of the property, and then from his acts and conduct, considered in connection with such knowledge, a waiver might be implied. A condition in an insurance policy like the one now under consideration is of the essence of the contract of insurance and should not be deemed to be waived, unless the company through its authorized agent or otherwise is shown to have had full knowledge that the property was not devoted to the use specified in the policy, and that the use to which it was being devoted materially increased the hazard. When such is made to appear, and it is also made to appear that after having full knowledge as aforesaid the company does not within a reasonable time cancel the policy but continues it in force, it may not thereafter, in case of loss through fire, insist upon the forfeiture of the policy.

[4] In this case there is no evidence upon which a finding of a waiver could be based or justified. In view, therefore, that the evidence showing a material increase in hazard which was entirely under the control of the insured is practically without dispute, and that there is no evidence which would support a waiver, the jury, under their oaths, would not have been justified in returning any other verdict than the one that was returned. In legal effect, therefore, the verdict is the same as though the court had directed it as matter of law.

In view of the foregoing, the other assignments become immaterial, since the errors if any were committed, are harmless.

We are of the opinion, in view of all the evidence, which, as we have seen, counsel for both parties by their requests conceded to be without dispute, the verdict and judgment are clearly right, and should be affirmed.

The judgment is affirmed, with costs to respondent.

MCCARTY, C. J., and STRAUP, J., concur.

(42 Utah, 344)

CULMER PAINT & GLASS CO. v. GLEASON
et al.

(Supreme Court of Utah. Jan. 31, 1913.)

1. MECHANICS' LIENS (§ 281*)—FORECLOSURE—AMOUNT OF INCUMBRANCE—EVIDENCE—WEIGHT.

In an action to foreclose a mechanic's lien, evidence held to show that the mortgagee, under a mortgage for \$12,390, given for the purpose of raising funds to construct the building involved, advanced only \$10,407.60 thereunder.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 566-572; Dec. Dig. § 281.*]

2. MORTGAGES (§ 151*)—MECHANICS' LIENS—PRIORITY.

While a mortgagee, under a mortgage given for the purpose of raising funds to construct a building, has a lien prior to that of a subcontractor performing labor and furnishing materials for such building, such lien extends only to the amount actually advanced on the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309-311, 314, 329, 332-336; Dec. Dig. § 151.*]

3. MORTGAGES (§ 151*)—MECHANICS' LIENS—PRIORITY.

Where mortgages and the secured notes and bonds were made payable to a trust company, it was not a purchaser thereof; and hence was entitled to enforce its lien, as against a subcontractor furnishing materials and labor for the improvement of the property, only for the amount advanced, and not for the face value of the mortgages.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309-311, 314-329, 332-336; Dec. Dig. § 151.*]

4. USURY (§ 50*)—EVIDENCE—SUFFICIENCY.

Under Comp. Laws 1907, § 1241x3, providing that all bonds, mortgages, etc., whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater interest than that prescribed by statute, shall be void, and section 1241x8, providing that when it satisfactorily appears that any such instrument is usurious the court must declare it void and order it delivered up and canceled, the court could not declare a mortgage void where, if interest was computed by one method, there was no usury, although, if computed by another method, there was usury, since forfeitures will be enforced only when the proof is clear and convincing.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 107; Dec. Dig. § 50.*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by the Culmer Paint & Glass Company against John T. Gleason and others to foreclose a mechanic's lien. From the judgment, defendant P. W. Gorman appeals. Reversed and remanded, with directions.

E. A. Walton, M. E. Willson, and Goodwin & Van Pelt, all of Salt Lake City, for appellant. Edward McGurrin and Snyder & Snyder, all of Salt Lake City, for respondent Salt Lake Security & Trust Co.

FRICK, J. The Culmer Paint & Glass Company commenced this action against John T. Gleason and Adell Gleason, as owners of certain real estate, which is described, and against one O. M. Engdahl, as contractor, to foreclose a mechanic's lien. The appellant, P. W. Gorman, and the Salt Lake Security & Trust Company, hereinafter called trust company, were also made parties; the former claiming a mechanic's lien, and the latter claiming a lien as mortgagee, upon the real estate aforesaid. There were also other parties to the action; but all of those, as well as the Culmer Paint & Glass Company and the Gleasons, have either been dismissed from or have abandoned the case. Both Mr. Gorman and the trust company filed cross-complaints, in which they set up their respective liens; and the whole controversy on this appeal is between those two claimants.

The district court, in substance, found that on the 12th day of May, 1910, the Gleasons entered into a contract with O. M. Engdahl, wherein said Engdahl agreed to construct and complete a certain building for said Gleasons upon certain real estate, duly described, for the sum of \$12,390, which building was duly erected; that thereafter P. W. Gorman entered into a contract with Contractor Engdahl, wherein said Gorman agreed to furnish the material and perform the necessary labor to complete the plumbing, and to install a steam heating plant in said building, for the sum of \$1,400, which Engdahl agreed to pay Gorman for said material and labor; that said Gorman fully performed his said contract and completed the plumbing and installed the heating plant in said building, but received only the sum of \$500, to be applied on the contract price, leaving a balance due him of \$900; that Gorman had complied with all the provisions of our statute relating to mechanics' liens, and was entitled to a mechanic's lien on the building and real estate on which it stands; that Gorman also was entitled to \$6.30 costs for filing his lien and \$25 as an attorney's fee for foreclosing the same, under the statute; that on the 21st day of April, 1910, said Gleasons "made, executed, and delivered to the Salt Lake Security & Trust Company" their two certain mortgages, one for \$8,000 and the other for \$4,390, both of which were duly recorded, and were liens on the real estate on which the building was erected, as aforesaid.

As conclusions of law, the court found that Gorman was entitled to a lien for the amounts found due him, as aforesaid, on the building and real estate; that the trust company also was entitled to a lien for the amount of its mortgages, to wit, \$12,390; and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said mortgage liens were prior and superior to Mr. Gorman's lien.

A judgment or decree of foreclosure of appellant's lien was entered in accordance with said findings and conclusions of law. Mr. Gorman alone appeals. He assails both the findings of fact and conclusions of law.

Counsel for appellant contend that there is no evidence to support the finding that the trust company is entitled to a prior lien for the sum of \$12,390 as against Gorman, nor that the contract price for the construction of the building was that amount. They insist that the evidence is undisputed that the contract price for the construction of the building was \$9,250 and no more. Further, that the evidence shows that the trust company, and not Engdahl, was the real contractor. We remark that the evidence does not sustain the last contention.

[1] While it is true that the nominal contract price for the construction of the building was \$12,390, yet the undisputed evidence is to the effect that the actual amount to be paid the contractor was \$9,250, and that only that sum was actually paid to him for the construction and completion of said building. The evidence, therefore, does not sustain the finding that the contract price to construct and complete the building was \$12,390. Nor can the finding or conclusion, as against Gorman, be sustained that the trust company had a prior lien on the building and lot on which it stands for the sum of \$12,390. With regard to what the actual amount was that was advanced by the trust company, the testimony of the president of said company leaves no room for doubt. His testimony, as set forth in the printed abstract, and which is not disputed by any one, is as follows: "Exhibit G is a transcript of our ledger account of O. M. Engdahl. Exhibit F is a true and correct transcript of the Gleason account. In the fourth line the entry of A. H. Birrell, \$590, is one of the disbursements on account of the purchase price of this bond and mortgage. My understanding is that the next item is for the services of Mr. Cahoon. The item of \$2,210 is the difference between the price at which we purchased these bonds and mortgages and their face. I would like to say that \$250 should come out of that, making a net amount of \$1,960. That item is the difference between what we paid for the bond and its face. We purchased these bonds and mortgages at 84 per cent. of their face, and this represents the difference between that 84 per cent. and the face value. We purchased from Mr. Birrell."

Eighty-four per cent. of \$12,390 amounts to the sum of \$10,407.60. The president's testimony, to our minds, is corroborated by the amounts that the trust company claims were actually paid out for the construction of the building. The amount paid to Contractor Engdahl, as shown by the vouchers, is \$9,263.70, or \$13.70 more than the contract

price; and the amount paid to the architect is \$706.10. These two items amount to \$996.80, or \$437.80 less than the 84 per cent. advanced on the mortgages. There is evidence to the effect, however, that out of the \$437.80 there were various sums paid for other purposes, so that it is probable that the trust company did in fact advance upon the mortgages the full 84 per cent. of the \$12,390, the face value thereof. While the evidence is not as clear upon the latter point as it might be, yet we think the evidence clearly supports a finding that the 84 per cent. was in fact advanced for the benefit of the Gleasons. There is therefore a discrepancy between the amount stated in the mortgages and the amount advanced on them, amounting to \$1,982.40. The president of the trust company, in his testimony, admitted this discrepancy to be \$1,960. He, however, claims that various amounts were paid out as commissions. For example, there is one item of \$2,210, of which the president claims the \$1,960 is a part, which he said was paid as a commission to Mr. Birrell. Mr. Gleason, however, testified that he knew nothing about commissions, "except the architect's fee." Again, it is not easy to perceive how the trust company could pay a commission of either \$2,210 or \$1,960 out of \$437.80, the amount remaining of the 84 per cent., after the contractor and the architect were paid. There is therefore nothing upon which the trust company can base its claim for the \$1,982.40, except we say, as the district court found, that the contract price for the construction of the building was \$12,390. Such a finding, however, cannot be sustained, for the reason that the contractor positively states that his contract for the construction of the building was for only \$9,250, and the vouchers introduced in evidence show that he was paid \$9,263.70, or only \$13.70 in excess of the contract price. There is no claim that he was paid for extras, unless the \$13.70 represented extras. The only theory upon which the trust company's claim can be sustained would be that it entered into a contract to construct the building for the sum of \$12,390, and then had sublet the construction thereof to Engdahl for the sum of \$9,250, and that the difference between the two amounts constituted profits upon the contract belonging to the trust company. This theory, however, fails, because the trust company positively denied that it had entered into the contract with the Gleasons to construct the building, and that it was the original contractor. We have already said that the record would not support a finding that the trust company was the contractor. There is therefore no basis for the trust company's claim to the surplus of \$1,982.40 as against Mr. Gorman's lien.

[2] The Gleasons are not here complaining, but Mr. Gorman does complain, and, as against him, the trust company cannot recover more than it has advanced to the Gleason

sons, and, under the undisputed evidence in this case, no more than \$10,407.60. Moreover, it is clear from the evidence that the mortgages were given to the trust company for the express purpose of raising funds to construct the building. The trust company apparently retained the money in its possession as mortgagee, and paid it out from time to time upon vouchers issued by the contractor. In this case, therefore, the material furnished and the labor performed by Gorman and the money advanced by the trust company were intended and used for the same purpose, namely, the construction of the building upon the real property owned by the Gleasons, and upon which the mortgages were given as a first lien. The equities, as between the trust company and Gorman, were therefore entirely equal in time; and were it not for our statute, which gives the mortgagee the preference, they would be equal in right. The statute, however, does not permit the mortgagee to claim a lien for more than he has advanced to the mortgagor, as against any other lien claimant. Equity and good conscience both forbid the enforcement of such a claim, especially as against another lien claimant who has furnished material and performed labor upon the building, and has thus enhanced the value of the mortgaged property. The real estate upon which the building is erected, and which is necessary for the use thereof, together with said building, constitute a fund out of which the lien claimants, including the mortgagee, are to be paid. The fact that the mortgagee is given priority under our statute does not permit him to reduce the fund by fictitious claims; but his claims must be limited, at least as against other bona fide lien claimants, to the amount he has actually advanced on the mortgage which he claims to be a first lien.

[3] Nor is the claim advanced by the president of the trust company permissible that said company purchased the notes and bonds secured by the mortgages at less than the face value thereof, namely, for 84 per cent. of that value. The notes and bonds, as well as the mortgages, are all made payable to the trust company or its order. The notes and bonds and the mortgages therefore belonged to the trust company as soon as they were signed and delivered to it. Indeed, the court expressly found, as we have seen, that the notes and mortgages were made, executed, and delivered to said company. No one, therefore, could have owned the paper and then sold it to the trust company at a discount. In our judgment, such a claim cannot be sustained, and is advanced for the purpose of claiming the \$1,982.40.

In view of the whole record, we can arrive at no other conclusion than this: That when the Gleasons had expressed a desire to erect a building on the real estate the matter was by some one (no matter by

whom) submitted to the trust company; that the company agreed to advance sufficient money to construct the building, not to exceed the sum of \$12,390; that two mortgages, one for \$8,000 and the other for \$4,390, were at once executed and delivered to the trust company; and that company was to pay out the money as the building progressed, and until it had paid out the aggregate amount specified in the two mortgages, if it required that sum to complete the building. It, however, did not require that sum; and since it did not the trust company did not pay out that sum, and hence cannot claim a lien for that amount, as against other bona fide lien claimants.

[4] Counsel for Mr. Gorman vigorously contend that the claim of the trust company is usurious under our statute. After carefully considering all of the facts and circumstances, we, however, entertain a serious doubt with respect to the usury claim. Our statute (Comp. Laws 1907, § 1241x3) provides as follows: "All bonds, bills, notes, assurances, conveyances, mortgages, deeds of trust, all other contracts or securities whatsoever, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action than is above prescribed, shall be void; but this title shall not affect such contracts as have been made previous to the time it shall take effect."

Section 1241x8, in substance, provides that whenever it satisfactorily appears by the admission of the party, or by proof, that any bond, bill, note, assurance, pledge, conveyance, mortgage, deed of trust, contract, security, etc., is usurious, the court must declare the same void and order it delivered up and canceled, and enjoin any prosecution thereon. This is a most drastic statute, since it forfeits the creditor's entire claim. The statute authorizes more than confiscation for public use. It, in effect, permits it for private use, since the debtor seems to be entirely relieved from his obligation to pay, in case usury is established. Courts always abhor forfeitures, and this is especially true of courts of equity. Forfeitures, therefore, especially such as have the effect of taking property from one and giving it to another, should be enforced only when the proof is clear and convincing, if not beyond a reasonable doubt. Counsel for appellant practically concede that by computing interest upon one method there is, perhaps, no usury, but that, if it be computed upon another, then there is usury in the transaction. This, to say the least, leaves the matter in doubt, and in view of such a doubt we ought not to enforce the forfeiture.

In view of the foregoing conclusions, we need not consider or pass upon the conten-

tion made by counsel for the trust company that Mr. Gorman, as a junior incumbrancer, is not in a position to raise the question of usury. Upon that point we express no opinion.

From what has been said, it follows that the findings of fact and conclusion of law, so far as they affect Mr. Gorman, and to the extent that they are in conflict with what we have said, must be vacated and set aside; that the judgment, so far as it affects Mr. Gorman, must be reversed and the cause remanded to the district court, with directions to vacate its findings with respect to the amount found due on the two mortgages of the trust company, and to substitute therefor a finding that there is due on said mortgages, as against Mr. Gorman, the sum of \$10,407.60, with interest as stated in the findings; to make conclusions of law that, subject to said sum of \$10,407.60, Gorman has a lien on the mortgaged premises for the sum stated in the court's findings; to enter a decree of foreclosure ordering a sale of the mortgaged property and a distribution of the proceeds of the sale as follows: \$10,407.60, with accrued interest, to the trust company; \$900, with costs, attorney's fee, and interest, to Gorman; and the balance, if any, to the owner of the property. Except as modified above, the findings of fact, conclusions of law, and judgment are affirmed. Appellant to recover costs.

MCCARTY, O. J., and STRAUP, J., concur.

(23 Colo. App. 452)

CITY OF FT. COLLINS v. WALLACE.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. EMINENT DOMAIN (§ 2*)—ACCUMULATION OF SEWERAGE—DAMAGES.

Under Const. art. 2, § 15, providing that private property shall not be taken or damaged for public use without compensation, a city discharging sewerage in an arm of a river, and at a point near to or on the premises of an individual, causing damage to him, is liable for the damages sustained.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

2. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where the judgment, under the facts disclosed by all the evidence, satisfies the ends of justice, it will not be disturbed, on appeal, for technical defects in the pleadings in no manner affecting the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Appeal from District Court, Larimer County; Harry P. Gamble, Judge.

Action by Harriet Raynor Wallace against the City of Ft. Collins. From a judgment for plaintiff, defendant appeals. Affirmed.

Paul W. Lee, of Ft. Collins, for appellant. Fleming & Ault, of Ft. Collins, for appellee.

CUNNINGHAM, P. J. On October 19, 1907, appellee, Wallace (hereinafter referred to as plaintiff), filed her complaint, alleging ownership of two certain lots in the city of Ft. Collins, and charging the defendant with having so negligently and carelessly constructed a sewer, and the outlet thereof, as to cause great quantities of sewerage matter to accumulate upon and near the plaintiff's premises, to her great damage. This states, in substance, her second cause of action. Her first cause of action, having been dismissed by the court, need not be further referred to.

[1] The case was tried to the court without a jury, resulting in a decree in plaintiff's favor, awarding her damages in the sum of \$504 and a perpetual injunction restraining the city "from keeping and maintaining the said sewer as the same is now kept and maintained, so that said filth and sewerage matter is caused to flow on and accumulate on or near the premises of the plaintiff." It appears from the evidence that the immediate line of sewer pipe which discharged upon or near plaintiff's premises was a part of a system that accommodated a considerable section of the city; and that the sewerage from a large area was assembled by connecting pipe lines, which converged into the particular pipe line of which complaint was made. The discharge was in an arm of the river, which ran but very little, if any, water, except at certain seasons of the year, and at a point near to or upon the plaintiff's premises. The velocity of the sewerage flow was diminished, after being discharged from the pipe line into the arm of the river, from 8 feet, in the pipe line, to 1.65 feet, per second. This difficulty was accentuated by boulders that were permitted to remain in the channel of the river bed, thus further obstructing the flow of sewerage after the same had been discharged from the pipe line proper. It was but 75 yards from the point where the mouth of the sewer discharged into this arm of the river to the main channel. There was ample evidence to support the allegations of the plaintiff's bill touching the damage which she had suffered, and to support the judgment of the trial court in that behalf, providing, of course, that the plaintiff was entitled to recover any damage, which the city disputes, upon the theory, apparently, that, the city having a lawful right to construct the sewer, which was not denied, the resulting inconvenience therefrom which the plaintiff suffered was *damnum absque injuria*. This contention of the city seems to proceed upon the theory that every one else living in that immediate vicinity—i. e., the vicinity of the plaintiff's home—suffered the same inconvenience, and, if the sewer pipe was carried on to the river proper, that there were people living along its bank where the deposits would then be made,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and that they would suffer like damage; and, further, that to carry the pipe entirely beyond the habitable part of the city would occasion too great an expense. Of course, every case of this character must be determined upon the facts and conditions which it presents, and we shall attempt to lay down no general rule governing such matters. We expressly ruled in *Pueblo v. Bradley*, 128 Pac. 888, that, under section 15 of article 2 of our state Constitution, when it became necessary to inflict damage upon private property in connection with public improvements the public should make good the loss to the individual. It is not necessary for us to set forth here or quote from the authorities which we there cited and commented upon.

[2] Technically, there may be some basis for criticizing the pleadings and the issues upon which the case was tried, but the record indicates a disposition on the part of the trial judge to be entirely fair to both parties; and we are persuaded that his judgment, under the facts disclosed by all the evidence, fully satisfies the ends of justice, and that the same ought not to be disturbed for errors which in no manner affected the substantial rights of the parties.

Judgment affirmed.

(23 Colo. App. 455)

OLSON et al. v. MAMMOTH MINING & MILLING CO.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. APPEAL AND ERROR (§ 267*)—QUESTIONS REVIEWABLE—JUDGMENTS—EXCEPTIONS.

Under Sess. Laws 1911, p. 18, § 24, authorizing the review of judgments, though no exception was saved thereto, and providing that it shall apply to all causes pending at the time of its adoption, the court may review a judgment, where an appeal was pending at the time of the adoption of the act, though no exception was saved to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1447, 1463, 1572-1578, 1581; Dec. Dig. § 267.*]

2. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting testimony and sustained by testimony will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error to District Court, San Miguel County; Sprigg Shackelford, Judge.

Action by the Mammoth Mining & Milling Company against John B. Olson and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

L. C. Kinikin, of Telluride, for plaintiff in error. H. M. Hogg, of Cortez, and C. L. Watson, of Grand Junction, for defendants in error.

CUNNINGHAM, P. J. On March 13, 1909, the defendant in error filed its action in the county court to recover a balance claimed to be due on the purchase price of an electric motor. After issues joined the case was tried in the county court, resulting in a judgment in favor of the plaintiff for \$261.21. Thereupon plaintiffs in error appealed their case to the district court, where, again, judgment went against them for a like amount, from which judgment this appeal is prosecuted. There appears to be no question as to the amount of the judgment, providing the plaintiffs in error were liable at all, since the counsel stipulated or assented that the verdict, if a verdict was rendered in favor of the plaintiff below (defendant in error here), should be the same as that given in the county court. By consent of counsel for the respective parties, the court instructed the jury orally; neither party tendering any instructions or saving any exceptions to the court's instructions. The record is singularly free from objections to the introduction of testimony, inasmuch as practically every question to which the plaintiffs in error objected was withdrawn by counsel for defendant in error.

[1] It is contended that we may not review the judgment in this cause, because no exception was saved thereto. Since the briefs were filed in this case, the Legislature has amended the law pertaining to appeals and writs of error, so that it is no longer necessary, in order to have a judgment reviewed, to save an exception thereto; and in express terms this provision is made to apply to all causes pending at the time of the adoption of the same, as well as to causes thereafter appealed from. See section 24, c. 6, Session Laws 1911, p. 18.

[2] The plaintiffs in error insist that they had never purchased the motor, but had originally rented it from the defendant in error, and that thereafter the plaintiff in error Olson had individually purchased the implement and paid therefor. The testimony was conflicting, but was amply sufficient to sustain the verdict and judgment rendered thereon; and the judgment of the trial court will be affirmed.

(23 Colo. App. 420)

COLORADO FUEL & IRON CO. v. HAWKINS.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. MASTER AND SERVANT (§§ 101, 102*)—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.

An employer must exercise ordinary care to provide a reasonably safe place in which the employé may work, use diligence to keep it in a reasonably safe condition, and provide reasonably safe ways for passing to and from the place of labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. MASTER AND SERVANT (§§ 206, 217, 219*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed which are open and obvious, and which would have been known to him had he exercised ordinary care and diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 574-600, 610-624; Dec. Dig. §§ 206, 217, 219.*]

3. MASTER AND SERVANT (§ 280*)—ACTIONS FOR INJURIES—EVIDENCE—SUFFICIENCY.

In an action for the death of an employé struck and killed by an electric car in the blast furnace department of iron and steel works, evidence held to show that deceased knew of the conditions claimed to show negligence, and appreciated the danger therefrom, and hence that he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*]

4. MASTER AND SERVANT (§ 224*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Where a proprietor of iron and steel works provided a regular crossing on an electric railway at which a turnstile was placed, upon which was the warning, "Look out for the cars," an employé, by voluntarily crossing at another place, which was more dangerous by reason of its situation and lack of warning, assumed the risk of injury, especially where it was not necessary for him to cross the track at all.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 654; Dec. Dig. § 224.*]

5. MASTER AND SERVANT (§ 233*)—CONTRIBUTORY NEGLIGENCE—CHOICE OF WAYS.

An employé in iron and steel works, struck and killed while crossing an electric railway track therein, was guilty of contributory negligence as a matter of law, where his work did not require him to cross the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.*]

6. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL FUNCTIONS—LEGISLATION.

The courts can neither abrogate, nor permit juries to abrogate, the rule of assumed risk, since this would constitute legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

Appeal from District Court, Pueblo County; C. S. Essex, Judge.

Action by Grace Hawkins against the Colorado Fuel & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Devine & Preston, of Pueblo, Fred Herrington and Cass E. Herrington, both of Denver, and H. C. Vidal, of Pueblo, for appellant. J. C. Elwell, S. R. Durham, G. W. Collins, and W. J. Kerr, all of Pueblo, for appellee.

KING, J. The plaintiff, Grace Hawkins, brought this action, as the widow of W. S. Hawkins, to recover damages for the death of her said husband, an employé of the Colorado Fuel & Iron Company, appellant herein. Said Hawkins was struck and killed on

the 27th day of February, 1907, by a car then operated by the defendant company at its iron and steel works at Pueblo, Colo. At the time of the injury he was foreman of steam pipe fitters, and his duties were confined to the blast furnace department. This department consisted of six furnaces, in connection with which was a system of bins containing ore, limerock for flux, and coke for fuel. This system of bins extended north and south for a distance of about 80 rods. At intervals corresponding with the locations of the six furnaces were "skips" or elevators, extending from the bins and the railroad track hereinafter mentioned, upward a distance of perhaps 100 feet, and used for carrying ore, flux, and fuel to the top of the blast furnaces. The bins were elevated about nine feet from the ground, and supported by iron pillars about twelve feet apart. At the base and on the west side of this system of bins, a line of track, consisting of steel rails and wooden ties, was constructed, upon which was operated by said defendant company a car propelled by electricity, by means of an overhead trolley system. This car was called a "scale car," and was controlled and operated from the south end only. It contained a hopper or bin, which was filled from the several stationary bins with ore, fuel, or flux, as might be needed, which was carried to and discharged into the "skip," or elevator, to be elevated to the blast furnaces. It had no fixed schedule of time for running, but ran north or south, back and forth, as required in receiving and delivering the various materials used for feeding the blast furnaces, and was in continuous operation day and night. The space underneath the bins and between the pillars supporting the same was not fenced off from the track, and employes could, and sometimes did, pass under the bins between the pillars and cross said track going to or from their work, and this fact was known to the company. At various places along this system of bins the company had constructed regular passageways for employes, including steps leading from the lower ground on the east up to the railroad track, and in which, immediately before entering upon the track, were placed turnstiles, upon which was painted in large letters, "Look out for the cars." One of these passageways so arranged was situated about 25 feet south from the skip to furnace D. The point where Hawkins was killed was about 20 feet north of that skip. On that day he, and two pipe fitters under his direction, had been engaged in repairing a pipe on the trestle of the skip leading to furnace D. While the car was engaged in discharging a load into this skip, Hawkins, the foreman, went east of the bins to a rigging house for some purpose not clearly indicated, and his two assistants sat down on a sill opposite the skip and west of the track. Hawkins, instead of returning through the regular pas-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sageway, climbed over a stone wall 4 feet and 3 inches high to the ground underneath the coke bins, and, traveling westward, stepped onto the track from beneath these bins just as the car, leaving the skip, passed the point at which he stepped upon the track. Hawkins was struck by the car, dragged 25 or 30 feet, after which the car ran over his body. He was instantly killed. The evidence further shows that said Hawkins was a young man, 29 years of age, of more than ordinary intelligence; that he had been working for the defendant company as foreman of its steam pipe fitters, in and about said blast furnace department, for the period of seven months prior to the accident; that his duties called him to work at different places, from time to time, throughout said department, as necessity might require, and that he had frequently passed and repassed over and across the tracks mentioned, and in and about the ore bins and through the regular passageways mentioned, as well as through and between the pillars where there were no passageways provided; that he knew of the operation of the said car, and its structure and manner of operation, and the construction of the works, which had been the same during all the time of his employment and for a number of years prior thereto; that at the time of the accident he was seen by his assistants returning from the rigging house between the pillars and under the coke bins, which differed from the ore bins in that they were provided with dust pockets and spouts extending much nearer to the ground than the bottoms of the ore bins. He had a coil of rope around his shoulder and was walking with his eyes to the ground, apparently in ignorance of the approaching car. His assistants, seeing him about to step upon the track in front of the moving car, shouted a warning, which he did not heed and apparently did not hear. There was much noise, caused by the blast furnaces and escaping steam. The two employes, assistants of deceased, testified that they were well acquainted with all of the conditions of construction and operation of the blast furnace department; that they knew the risk and danger of crossing the track, and seldom, if ever, did so without stopping and looking for a car, and knew that if they entered upon the track without such precaution, they were taking their own chances, and that they appreciated such risk. It appears that the person operating the scale car with the controller on the south end could see persons upon the track, or entering thereon, a distance of perhaps 50 feet north from where he stood, but because of the hopper and construction of the car, he could not have seen deceased stepping upon the track at the point where he was killed.

The complaint charges generally that the defendant was guilty of negligence in failing to provide a reasonably safe place in which the said Hawkins was to perform his duty,

and specifically states the negligent acts to consist: (1) Of operating the said trolley system in combination with the location of said bins and passageways; (2) in negligently failing to equip said ore car so that it could be operated from either end, so that the motorman could observe the danger to which the company's employes were subjected in attempting to cross the track; (3) in not equipping said car with a fender which, it is alleged, would have been a protection to the said Hawkins, and would have prevented the injury; (4) in operating the system without fencing off and preventing the use of all passageways, except the one adjacent to the skip where the car usually stopped; (5) in not fencing off all of said passageways and adopting some regular crossing, and placing therein an electric bell to warn employes of the approach of the car; or (6) in not stationing a watchman at some regular crossing whose duty it would be to warn the employes, and especially the said Hawkins, of the danger of the approaching car. Plaintiff further alleges that all of said particular acts of negligence combined and concurred in causing the injury and in rendering the place, where the said Hawkins was called upon to perform his labor, dangerous and unsafe, and alleges that all of these things were well known to the defendant company long prior to the injury. It is not alleged that the conditions were not well known to the said Hawkins, but the complaint does allege that in the discharge of his duties he was compelled to pass and repass over said track, and "was wholly ignorant and unconscious of the extreme dangers to which he was being subjected in crossing said track."

The defendant answered, admitting that the said Hawkins was an employe of the defendant company, and was struck and killed by an electrically propelled car, just as he stepped upon the track on which it ran, and denying all other allegations of the complaint, and for further defenses alleged that said Hawkins was guilty of contributory negligence, the proximate cause of the accident, and that the said Hawkins, at and before the happening of the accident, knew, or in the exercise of ordinary care should have known, of the alleged negligence of the defendant complained of, and of all the facts, circumstances, and conditions, and of the risks and dangers incident to his labor under such circumstances and conditions, and voluntarily assumed such risks and dangers. Other defenses alleged are not necessary to consider. The new matter of defense was put in issue by reply. The jury returned a verdict for the plaintiff in the sum of \$1,500, upon which judgment was entered, from which defendant appealed.

We think some of the exceptions to the instructions given by the court are well taken; but because of the view we take of the case, as hereinafter expressed, it will be unneec-

essary to call attention specifically to any of the many specifications of error. The cause was submitted to the jury with instructions generally to determine: First, whether the defendant was negligent in its duty toward said Hawkins in failing to provide for him a reasonably safe place in which to perform his work; second, whether said Hawkins assumed the risk of his employment; third, whether he was guilty of contributory negligence.

The facts in the case are undisputed. All the evidence introduced was that upon the part of the plaintiff, with the exception of proof as to the correctness of the model of that portion of the system of bins and track at or near which the accident occurred. Nor is there conflict in the testimony of plaintiff, except the slight difference which usually appears in the testimony of different witnesses truthfully relating their understanding of occurrences witnessed by them. Therefore, the consideration of the case is upon undisputed facts and inferences to be deduced therefrom, and this court must determine whether, from such undisputed facts and the inferences legitimately deducible therefrom, the verdict and judgment can be sustained.

1. Upon the question of the sufficiency of the evidence to sustain the finding of the jury that the defendant was negligent, in that it failed to provide for the said Hawkins a reasonably safe place in which to perform his labor, we need express no definite conclusion, for the reason that, conceding, but not deciding, that in some of the matters specifically charged as negligence upon the part of the defendant, or in the combination or concurrence of all the conditions therein specified as negligence, the evidence was sufficient to show a default by the defendant in its duty toward the deceased in providing for him a reasonably safe place in which to perform his labor, nevertheless, we think the undisputed facts, and all legitimate inferences to be drawn therefrom, clearly establish an assumption of the risk by deceased, and contributory negligence upon his part which was the proximate cause of the injury resulting in his death, and without which the accident would not have occurred. We think it proper to state, however, that in our opinion there is grave doubt as to the sufficiency of the evidence to support the verdict upon the charge of defendant's actionable negligence resulting in injury to deceased, in the absence of any other defense than the general denial of negligence.

[1] No question is made as to the contention that the employer must exercise ordinary care to provide a reasonably safe place in which the employé may perform the services required of him, and that it is its duty to use diligence to keep its place in a reasonably safe condition, so that the servant may not be exposed to unnecessary risk, and that

such duty extends to the provision of reasonably safe ways for passing to and from the place of labor (*Gregoric v. Percy-La Salle M. & P. Co.* [Sup.] 122 Pac. 785), and that such was the duty of the defendant in this case. That such is the law in this state is established by an unbroken line of decisions, a brief résumé of which is given by Walling, Judge, in *Great Western Sugar Co. et al. v. Parker*, 22 Colo. App. 18, 33, 123 Pac. 670.

[2] 2. There is no necessity of going beyond the decisions of our own courts to ascertain the law of assumed risk applicable to the circumstances of the present case. It has been repeatedly and uniformly held that an employé assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed which are open and obvious, and which would have been known to him had he exercised ordinary care and diligence. By voluntarily continuing in the service with knowledge, or means of knowledge, equal to his employer's of any defect in the appliances or the machinery used without objection, or promise on the part of the employer to remedy the defect, the employé assumes all the consequences that result from such defect, and waives the right to recover for any injury caused thereby. *Denver Tramway Co. v. Nesbit*, 22 Colo. 403, 45 Pac. 405; *Kent Mfg. Co. v. Zimmerman*, 48 Colo. 388, 400, 110 Pac. 187; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Great Western Sugar Co. et al. v. Parker*, supra; *Colorado Springs Gazette Co. v. Simmons*, 22 Colo. App. 303, 123 Pac. 968; *Gregoric v. Percy-La Salle M. & P. Co.*, supra.

[3, 4] The evidence in this case clearly shows that all the conditions complained of, whether defective or otherwise, were permanent, and had been the same during the entire seven months of Hawkins' service, and that they were open and obvious; that the deceased had every opportunity to observe these conditions, and was thoroughly acquainted with them. Counsel for appellee admits that the alleged defective construction of the car, and failure to fence off all passageways but one, or to keep a watchman, or provide an electric bell, were obvious to any intelligent person, and well known to deceased, but insists that it is not shown, and cannot be assumed, that Hawkins apprehended or appreciated the danger. The testimony shows that his coemployés, in positions subordinate to his, and under his direction, understood, appreciated, and guarded against the risk and danger. The danger was as open and obvious to ordinary intelligence and prudence as the conditions themselves, and we think it not only a reasonable, but a necessary, presumption that the deceased, who was shown to be a person of more than ordinary intelligence, not only

knew all the conditions, but appreciated the danger and risk occasioned thereby. Furthermore, it clearly appears that a regular crossing had been provided in which a turnstile was placed, which was itself a warning, and upon which was placed a constant warning. By declining to use this passageway, and voluntarily adopting another and more dangerous one by reason of its situation and lack of warning, he clearly assumed the risk.

[5] 3. Upon the question of the contributory negligence of the deceased, and that such was the proximate cause of his injury, without which it would not have occurred, the evidence seems to be full and clear and the conclusion irresistible. We are not unmindful of the well-recognized rule, clearly stated and applied by Mr. Justice Elliott in *Lord v. Pueblo Smelting & Refining Co.*, 12 Colo. 390, 21 Pac. 148, that if the evidence be contradictory in any substantial matter upon the question of contributory negligence, or, when there is any conflict in the testimony bearing upon that subject, or the determination of the question depends upon the inferences to be drawn from a variety of facts and circumstances in the consideration of which there is room for a substantial difference of opinion between intelligent and upright men, then the question should be submitted to the jury under proper instructions. But in this case, as has been said, there is no conflict in the evidence nor dispute as to the facts, and we are convinced that, upon the inferences to be drawn from the facts and circumstances in evidence, there is not room for a substantial difference of opinion, and that from such facts, circumstances, and inferences, if the jury had understood and observed the instructions of the court, it must necessarily have found that the negligence of the deceased not only contributed to, but in every substantial sense was the sole cause of, his injury. He was in the employ of the defendant as overseer of workmen. He was familiar with the premises where, and the construction and operation of the machinery by which, he was injured. He knew that the car was being employed, according to the usual custom at the time and place of the accident, in receiving and unloading materials for the furnaces. He understood that there was a definite and certain passageway provided for the use of employes in crossing the track. Under the circumstances shown, to attempt to cross the track at the point where he was injured was a perilous undertaking, and we must presume that he was aware of the danger. As was said in *Lord v. Pueblo Smelting & Refining Co.*, supra: "It was broad daylight, and he was acting under no command or direction of any superior. Even if defendant's failure to provide a safe passageway for its employes from one part of the works to another was a neglect of duty, the plaintiff

knew of such neglect, and voluntarily remained in the service of the defendant without any promise on its part to remedy the same." Furthermore, we have discovered nothing in the evidence which shows, or even suggests, the necessity for deceased to cross the track at the time and place of the injury. The skip which he had been engaged in repairing was wholly on the eastern side of the track, and when returning from the rigging house to his work he was upon the same side of the track, and the evidence seems to conclusively show that from the direction in which he came he could readily have reached the place of work without crossing or entering upon the track; and for these reasons we are strengthened in the conviction of the correctness of our conclusion, both as to the assumption of risk by, and the contributory negligence of, the deceased.

[6] The tendency of modern thought is, we believe, that the public welfare demands a modification, or perhaps an abrogation, of the rule of assumed risk in hazardous industrial occupations. This growing sentiment is being crystallized into law by the Legislatures of many of the states. With it we are in full accord, and believe such legislation wise, both for employer and employe, and for the state which is always and most vitally interested. But under the law as we find it, and as settled by the courts of appeal of this state from the earliest declaration down to the present time, this court has no right to abrogate the rule, for such would be judicial legislation, nor to permit a jury to abrogate it by returning a verdict obviously against the evidence and the instructions of the court. The trial court should have set aside the verdict. Believing that no good will result from a new trial, as, under the evidence, no verdict against the defendant could be sustained, the judgment appealed from will be reversed, and the cause remanded to the district court with directions to dismiss the same.

Reversed and remanded.

(23 Colo. App. 407)

HENDRIE, County Treasurer, et al. v.
ACORN GOLD MINING CO. et al.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. JUDGMENT (§ 704*)—PERSONS CONCLUDED
—CODEFENDANTS—COUNTY.

Where, in a proceeding against county officers to enjoin the execution of tax deeds, the tax certificate holders were made defendants, and allowed default judgment to go against them without exception or appeal, but the plaintiffs acknowledged some liability, on appeal by the treasurer and the county commissioners, the default will not be held binding on tax certificates bid in by the county, although it did not except or appeal as a tax certificate holder.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1229; Dec. Dig. § 704.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. TAXATION (§ 610*)—EXCESSIVE VALUATION—TENDER—INTEREST—PENALTIES.

In a proceeding to enjoin the collection of taxes on the ground of excessive valuation, although judgment is for the taxpayer, he is not relieved from tendering the amount of tax really due on the ground that all the data upon which the ascertainment of valuations could be based was in the hands of the assessor, and he is liable for interest and penalties.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 610.*]

Appeal from District Court, El Paso County; J. W. Sheafor, Judge.

Proceedings by the Acorn Gold Mining Company and others to enjoin Harry Hendrie, Treasurer of Teller county, and others, from collecting taxes. Judgment for plaintiffs, and defendants appeal. Reversed.

See, also, 22 Colo. App. 417, 125 Pac. 542.

Tully Scott, of Denver, C. P. Nevitt, of Cripple Creek, and Thomas, Bryant & Malburn, of Denver, for appellants. Hildreth Frost, of Colorado Springs, and Schuyler & Schuyler, of Denver, for appellees.

CUNNINGHAM, P. J. The contest involved in this appeal grew out of the assessment of certain nonproductive mining claims in Teller county for the year 1900, and the sale thereof for overdue taxes. A large number of owners of nonproductive properties, including the defendants in error in this case, numbering upwards of 250, in December, 1900, filed their petitions under the provisions of section 3839, M. A. S., to the county commissioners, asking for relief from what they claimed to be unjust, unequal, and unlawful assessments. The complaint of the mineowners went to the question of valuation, which they contended was unjust. These petitions were heard and denied by the county commissioners. The petitioning mineowners, including these defendants in error, thereupon stipulated with the county commissioners to allow four of said petitioners, to wit, the Anaconda Mining Company, the Hart Mining Company, the Moon Anchor Mining Company, and the Pilgrim Consolidated Mining Company, to appeal to the district court under the statute, and that said four cases so appealed should be deemed test cases for the purpose of finally determining the rights of all the petitioners, including the defendants in error, and that upon the final decision in said cases by the courts and the certification thereof to the board the assessments and taxes of all the petitioners should be adjusted in accordance with such final determination. The appeal as to the four cases was thereupon perfected and came to trial in the district court of Teller county in March, 1901. The Anaconda Company, however, having made a settlement or adjustment of its difficulties, dropped out of the litigation, and the other three became the

test cases under the agreement. The district court heard these cases on appeal, and judgment was rendered by it against the petitioners and for the county. Thereupon an appeal was taken to the Supreme Court, which was dismissed on the ground that the Supreme Court was without jurisdiction. The action of the Supreme Court in the matter of the appeal is reported in 32 Colo. 334, 76 Pac. 364. All three of the cases were consolidated, and for convenience are referred to as the Pilgrim Case.

In the Pilgrim Case, supra, the Supreme Court made a very full statement of many of the facts, which makes it unnecessary for us to incumber the record here by their repetition. Thereafter—i. e., after the dismissal of the appeal by the Supreme Court—a writ of error was sued out of the former Court of Appeals, which latter court held that the judgment of the district court was final because rendered in a special statutory proceeding which did not provide for a review. See *Pilgrim Consolidated Mining Company v. Board of County Commissioners of Teller County*, 20 Colo. App. 311, 78 Pac. 617. In the meantime, while the cases were pending in the Supreme Court and the Court of Appeals, the county treasurer caused the property of the defendants in error to be sold for taxes, and by the time the cases were finally determined in the court of appeals the time for redeeming from the tax sales lacked but a few days of having expired. Thereupon the defendants in error here (who were parties to the original stipulation hereinbefore referred to, but not the four companies who actually took the appeal from the ruling of the commissioners and prosecuted the litigation through all the courts) brought this equitable action in the district court against the county treasurer for the purpose of restraining him from issuing tax deeds on their property. The district court first issued a temporary restraining order, and later a temporary injunction, which was finally made permanent. The final decree of the district court from which this appeal is prosecuted adjudged null and void and of no effect the taxes assessed against defendants in error's property, and decreed all the proceedings under the assessments for that year, in so far as the same affected the property of the defendants in error, void and illegal, and perpetually enjoined the treasurer from making, executing, issuing, or delivering any tax deeds to the property of the defendants in error, and restrained the county treasurer and the county commissioners, who, during the litigation, had been made parties defendant to the proceeding, from in any manner enforcing or seeking to enforce the payment of the taxes levied upon the defendants in error's property for the year 1900. On motion of the county treasurer filed after his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appearance had been entered, the holders of the tax certificates were brought in and made parties defendant. No appearance was ever made by these holders of the tax certificates so brought in, and before the final hearing they were defaulted, and a decree perpetually enjoining and restraining them from procuring or seeking to procure from the county treasurer the issuance of any tax deed or deeds for the property named in their certificates of sale was entered. These tax certificate holders were further ordered to forthwith surrender to the clerk of the court for cancellation their certificates of sale, and the clerk of the court is by the decree ordered, upon their surrender, to mark same: "Canceled by the judgment of the district court of El Paso county." No exception was ever saved to this decree entered as by default against the tax certificate holders, and no appeal was ever prayed from it, hence none of the tax certificate holders are parties to this appeal, unless it is the county.

It will be seen from the foregoing that by the decree of the district court the mine-owners interested in this case were entirely relieved from the payment of any taxes whatever on their property for the year 1900, and this notwithstanding that in their bill filed in this cause they "offer to pay any amount of taxes now or hereafter found to be due by this honorable court or which may hereafter be assessed against the said property by the proper official of said county for the taxes of said year 1900." The petitioners plead in their bill as an excuse for not having made tender of any taxes due on their property "that it is impossible for your petitioners to estimate or ascertain what would have been the valuation assessed against the property of your petitioners for revenue purposes for the year 1900 in said county, had the assessor proceeded in said year in the manner provided by statute, * * * but the information and data upon which the estimation could be made are within the possession of the assessor and taxing board and officers of the county of Teller." Nowhere in their bill do the plaintiffs negative their liability for taxes, but, on the contrary, it will be seen from the quotation just made therefrom that they practically admit such liability.

The case was submitted upon an agreed statement of facts; hence the contentions urged here by opposing counsel present purely questions of law. Many intricate and extremely difficult questions are brought forward on behalf of the respective parties and debated with rare skill, evincing great learning and much research. If this case were permitted to turn upon technicalities, we should experience great difficulty in determining to which of the contending parties victory should be awarded. For instance, a literal interpretation of the stipulation entered into by the four mining companies who

prosecuted their appeal from the findings of the county commissioners, which stipulation it is conceded was entered into on behalf of these defendants in error as well, might warrant a ruling that the defendants in error were precluded by the judgment of the district court from further litigating the questions presented in this case. This upon the theory that their appeal having been dismissed by the Supreme Court, and their writ of error sharing a similar fate in the court of appeals, the judgment of the district court against them became and was final. On the other hand, it is plausibly urged by the defendants in error that the county having sold their property at tax sale, and thereby realized the money which it claimed to be due for the delinquent taxes, and the holders of the tax certificates issued by the county treasurer having suffered judgment to go against them by default, no practical relief of any kind whatsoever can be obtained by plaintiffs in error through a reversal of the decree of the lower court entered herein, and that, for this reason, this appeal presents a moot question.

[1] It appears from the records in this case that at the tax sale the county bid in a considerable portion of the property here involved, and that the county holds these tax certificates. Hence, it is apparent that upon these particular properties the county has received nothing by way of taxes for the year 1900, and we are disposed to think from an examination of the entire record that the default against the holders of the tax certificates and the decree entered thereon does not properly include the county, and should not control it. It is not at all difficult to discover from the history of this litigation, which has been prolonged over more than a dozen long and weary years, three facts that stand forth prominently, namely: (a) That the mining companies here involved ought to have paid to the county for the year 1900 a just tax; (b) that by the decree of the district court they have been relieved from paying any tax whatever for that year; and (c) that the valuation put upon their property by the assessor, and the tax levied thereon, by reason of such unjust valuation, has been held by the Supreme Court in the Pilgrim Case to be grossly unjust. It may be said, indeed, it is contended by defendants, that the ruling of the Supreme Court in the Pilgrim Case is not binding, inasmuch as that court finally held that it was without jurisdiction to consider the questions presented to it. But we find that the opinion in that case has been quoted and followed by our Supreme Court in *Foster v. Hart Consolidated Mining Co.* (Sup.) 122 Pac. 53. The ends of justice will, in our judgment, be best subserved by a reversal of the decree of the district court rendered in this case, and the remanding of the case with instructions to that court, upon the application of either of the parties hereto, to take such further proceed-

ings as may be necessary to ascertain the just liabilities of the defendants in error to the county for taxes for the year 1900, limited, however, to the properties bid in by the county at the tax sale the following year, such proceedings to be in conformity with the views expressed by the Supreme Court in the case of *Pilgrim Consolidated Mining Company v. Board of County Commissioners of Teller County*, 32 Colo. 334, 76 Pac. 364, touching the question of valuation.

[2] We are not favorably impressed with the contention of the defendants in error that they were in the circumstances of this case relieved from making a tender of any sum whatsoever before bringing this action. The only justification attempted to be plead by the defendants in error for their failure to make tender of the amount of taxes justly due is that it was impossible for them to "estimate or ascertain what would have been the valuation assessed against the property of your petitioners for revenue purposes for the year 1900 had the assessor proceeded in said year in the manner provided by statute." This allegation does not comport with other portions of the bill, wherein the defendants in error make allegations indicating a very thorough knowledge of the correct valuations upon mining properties similar to their own in practically every mining county in the state. Furthermore, it is alleged by the defendants in error that "the information and data upon which such ascertainment [meaning the ascertainment of valuations] could be made are within the possession of the assessor and taxing board and officers of the county of Teller." It must, therefore, be presumed that the appellees, if they had made proper effort so to do, could have had access to this data in the possession of the public officials of Teller county. In *Walsh v. Sprankle*, 21 Colo. App. 129, 121 Pac. 951, we ruled that in an action to enjoin the collection of taxes upon the ground of excessive and oppressive valuation the complaint must allege a tender of such part of the tax as it admitted, and we there held that the complaint, having failed to so allege, was bad on demurrer. It is true that no specific amount of tax is admitted in this case to be due, but a liability is in effect admitted, and it is apparent that the amount of that liability, even granting the theory of plaintiffs to be the correct one, was capable of ascertainment. Therefore, they should be required to pay the interest and other penalties provided by the statutes of this state governing delinquent taxes upon whatever sum it may ultimately be determined they should have paid to the county for the taxes of 1900 upon the properties which the county was obliged to bid in at the tax sale.

The decree rendered by the district court against the holders of the tax certificates will not be disturbed, except as the same

may apply, if it does apply, to the rights of the county of Teller.

The judgment of the district court is reversed and remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

(23 Colo. App. 431)

DURST v. HAENNI et al.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. APPEAL AND ERROR (§ 77*)—APPEAL FROM PROBATE—FINAL JUDGMENT.

Petitioners filed a petition requiring defendant administrator to show cause why he should not inventory a certain note executed by him to the decedent as a part of the estate. The administrator answered individually, denying liability on the note and claiming that it had never been delivered. The court ordered that defendant administrator file an additional inventory, including the note and any other property that might have come into his hands belonging to the estate. *Held*, that such order was not a mere interlocutory one against the defendant in his representative capacity, but was a final order against him personally, and was therefore appealable to the district court, under Rev. St. 1908, § 7254, providing that from all final judgments in probate appeals shall lie to the district court, and from there to the Court of Appeals or Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 444-463; Dec. Dig. § 77.*]

2. EXECUTORS AND ADMINISTRATORS (§ 85*)—DISCOVERY OF ASSETS—PROBATE PROCEEDING—JURISDICTION.

Rev. St. 1908, § 7253, provides, on complaint to the county court that any person has in his possession any claim or demand of the decedent, the court may examine him with reference to the complaint; and, if he refuses to appear and answer, the court may commit him until he submits to the order of the court. *Held*, that such section did not confer on the county court sitting in probate jurisdiction of a petition to compel an administrator to inventory a note and deed of trust claimed to have been executed by him to the decedent as a part of the assets of the estate; the proper proceeding after discovery of the note and deed of trust, if denied by the administrator, being to appoint some person to take charge of the same and enter action in a court of competent jurisdiction against the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 323, 339-358; Dec. Dig. § 85.*]

Cunningham, P. J., dissenting.

Appeal from District Court, Chaffee County; Lee Champion, Judge.

Petition by Elizabeth Haenni and others, in the county court sitting in probate, to compel Gabe Durst, as administrator of the estate of John Haenni, deceased, to inventory a certain note payable to Haenni and executed by Durst. From a judgment of the district court, dismissing an appeal from an order in favor of petitioners, Durst appeals. Reversed, with directions.

G. K. Hartenstein, of Buena Vista, for appellant. Charles J. Munz and Murray & Ingersoll, all of Denver, for appellees.

MORGAN, J. Appeal from a judgment of a district court, dismissing an appeal from a judgment of a county court, sitting in probate, entered upon a petition by certain persons interested in the estate of John Haenni, deceased, requesting that the administrator and another be ordered to show cause why the administrator should not inventory a certain promissory note payable to Haenni and signed by Durst prior to Haenni's death, which Durst, as administrator, had not listed in his inventory. The judgment and order favored the petitioners, and Durst appealed to the district court, and this appeal by him is from the judgment of the district court.

The petition states that G. K. Hartenstein has the note, and a duly recorded deed of trust given to secure it, in his possession, "executed by one Gabe Durst," and "that your petitioners are informed and believe that such note and deed of trust are the property of the estate of the deceased, and are evidence of an indebtedness of the said Gabe Durst to the estate of the said deceased * * * for funds loaned and advanced by said John Haenni to said Gabe Durst." A citation was issued thereupon to Hartenstein and Durst. The former answered by turning over to the court the note and deed of trust. Durst answered in writing, as respondent, denying the petition, and stating that "he denies that the said note mentioned in the said petition is a part of the assets of the estate of the said John Haenni, deceased, and denies that the said estate has any interest, right, or title to said note or in the said trust deed in said petition mentioned and described." He states, further, that the note and deed of trust were never delivered, but were left in the possession of Hartenstein, his attorney, to deliver to Haenni as soon as a loan was concluded that Haenni was negotiating to Durst, and that the loan had been abandoned. This answer was entitled: "In the Matter of the Estate of John Haenni, Deceased. Answer of Gabe Durst, Respondent." It is signed, "Gabe Durst, Respondent," and verified by him as an individual. The petitioners replied, denying all new matters set up in the answer. The county court heard the testimony on the issues thus joined. The petitioners introduced in evidence the note and deed of trust and other testimony concerning the recording of the deed of trust. The respondent, Durst, introduced considerable evidence to prove the facts stated in his answer. The court, thereupon, entered the judgment and order from which Durst, the administrator, appealed to the district court under section 7254, Rev. Stat., which is substantially as follows: "All questions of law and fact, relating to probate matters or arising in proceedings under this act, in any county, shall be determined by the county court of such county, and from any and all final judgments or decrees upon any such questions, appeals or writs of cer-

tiorari shall lie to the district court of the same county, and from the district court to the Court of Appeals or Supreme Court."

[1] Now, if the judgment of the county court appealed from is a final judgment, as contemplated by this statute, the judgment of the district court should be reversed, otherwise affirmed. To determine this question it is necessary to examine the judgment of the county court, together with the petition, the answer, and the reply, upon which it is based.

The judgment and order are substantially as follows: "Citations having been heretofore issued in this matter as prayed in said petition, directed to Gabe Durst and G. K. Hartenstein, Esq., his attorney, requiring them to appear in open court and show cause why the prayer of said petitioners should not be granted and allowed, * * * and the court having duly considered the testimony adduced, both oral and documentary, and the arguments of counsel heretofore submitted, and carefully and fully examined the written briefs filed in this matter, and being now well and fully advised in the premises, doth find as follows: That it appears * * * the administrator has failed to list in the inventory filed herein, as the property of the estate of said John Haenni, deceased, one certain promissory note, * * * secured by deed of trust duly recorded as above shown and set forth. Therefore it is ordered by the court that said petition be, and the same hereby is, sustained, and Gabe Durst, administrator, * * * is required to file an additional or amended inventory including the property last above named and specified, and any and all other property that may have come into his hands belonging to said estate."

Section 7253, Rev. Stat., under which the proceeding arose, is substantially as follows: "If any person interested in the estate of any deceased person complains to the county court in writing that any person * * * has in his possession or knowledge * * * any claim or demand * * * of the deceased, the said county court may cite such person to appear before it and may examine him on oath upon the matter of such complaint. If the person cited refuses to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the common jail of the county, there to remain in close custody until he submits to the order of the court."

When the appeal from the county court reached the district court, it was dismissed, and the judgment of the county court was thereby left undisturbed. The district court dismissed the appeal for the reason that the order appealed from was to the respondent in a representative capacity, and not personally, and was merely an interlocutory order in the course of administration, and not ap-

pealable under section 7254, *supra*. The judgment of the county court states that the administrator "has failed to list as the property of the estate of John Haenni, deceased, one certain promissory note," and, further, that "said petition be, and the same hereby is, sustained, and Gabe Durst, administrator, is required to file an additional or amended inventory including the property last above named and specified, and any and all other property that may come into his hands belonging to said estate." The petition charged that Hartenstein had in his possession a note given by Durst belonging to the estate; Durst denied that the estate had any interest in the note, and the petitioners replied, denying the new matter in Durst's answer. On this issue the case was tried. The judgment states that the citation ran to Hartenstein and Durst. Durst answered as respondent, and not merely as administrator, and although he commences his answer in these words, "Comes now Gabe Durst, administrator of the said estate," he does not say "as administrator."

The judgment of the county court is: (1) That the petition is sustained; (2) that the administrator has failed to list as the property of the estate one promissory note; (3) that the administrator inventory the same as belonging to the estate. This was a final adjudication of the matters in issue, and required no further proceedings or order of the court to put it into effect. It was not a judgment or order merely requiring the administrator to inventory property admitted and conceded to be the property of the estate. It was an adjudication of the issue of ownership and an order to inventory the property as the property of the estate. If it had been a proceeding to require the administrator to file an original inventory, or to correct, amend, or even add to, his original inventory, it would not have been brought under the statute above named. But if it had been under any other statute, and the same issues joined, and the same judgment rendered, it would have been a final judgment. This statute was enacted for the purpose of discovering property belonging to the estate, and, incidentally, to perpetuate testimony concerning the same, and for no other purpose. 2 Woerner on the American Law of Administration, § 325, p. 681.

[2] Although the issues joined and the judgment rendered were outside the contemplation of the statute under which the proceedings arose, or of any other statute concerning probate proceedings, and beyond the jurisdiction of the probate court, as has been distinctly held in the case of *Wright v. Wright*, 11 Colo. App. 470, 53 Pac. 684, in which case the court treated the judgment as appealable, yet, as Woerner, in his work aforesaid says, "If it be found that the tribunal is one competent to decide whether the facts in any given matter confer jurisdic-

tion, it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments, within the scope of the subject-matters over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. It matters not how erroneous the judgment; being a judgment, it is the law of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally would be to ignore practically, and logically to destroy, the court." 1 Woerner, § 145. Mr. Woerner says, concerning final and interlocutory judgments of this character, after a review of the authorities: "It is deducible from the decisions on this subject, as a general principle, applicable to most cases in the absence of statutory provisions directing otherwise, that any order, judgment, or decree of the probate court capable of being enforced, or taking effect without further order, may be appealed from; and that no action of the probate court can be appealed from which requires a subsequent order or judgment to give it effect." 2 Woerner, § 454, p. 1199.

In the case of *Clemes v. Fox*, 6 Colo. App. 377, 386, 40 Pac. 843, 846, it is said, concerning an order entered upon objection filed to the disallowance of a credit to himself by the administrator: "The order must be taken to be a final judgment, and conclusive upon the administrator and the claimant. It seems to come according to its effect, although possibly not by reason of its exact and appropriate terms, entirely within a well-considered class of cases which hold conclusions of this description, which in their nature and their substance are final, to be final judgments, although they do not come technically within the general definition. *Ex parte Spencer*, 95 N. O. 271; *Hemphill v. Collins*, 117 Ill. 396 [7 N. E. 496]; *Trustees v. Greenough*, 105 U. S. 527 [28 L. Ed. 1157]; *Williams et al. v. Morgan et al.*, 111 U. S. 684 [4 Sup. Ct. 688, 28 L. Ed. 559]. There are many decisions of a similar nature, but these serve to illustrate the line on which the courts have proceeded. The question underlying all of the cases which consider the subject of the finality of the judgment is, Did that which the court entered determine a matter disputed between the parties so that it is no longer open to contention? We must conclude the order of the county court disallowing the item did, as between the creditors and the administrator, directly decide the legitimacy of this expenditure and the legality of the charge. When the appeal was taken to the district court as to that portion of the order, it must be accepted as an appeal from a final judgment, which gave to the district court the right to

try it de novo and impart to whatever judgment it rendered the character of finality which warrants its review in this court."

In *Standley v. Manufacturing Co.*, 25 Colo. 376, 379, 55 Pac. 723, 724, it is said: "A judgment which fixes the rights of the parties in the action in which it is rendered, and leaves nothing further to be done before such rights are determined, is final. *Lipe v. Fox et al.*, 21 Colo. 140 [40 Pac. 353]; *Dusing v. Nelson*, 7 Colo. 184 [2 Pac. 922]; *Daniels v. Daniels*, 9 Colo. 133 [10 Pac. 657]. In the latter case, the court quotes with approval from *Sharon v. Sharon* [67 Cal. 185], 7 Pac. 456 [635, 8 Pac. 709], as follows: 'A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, and not from the final judgment in an action.' So that the real test to apply is that, if the judgment pronounced is in the nature of a final one, and is such upon the question adjudicated, then it becomes such; or, otherwise stated, where the judgment pronounced is final of the rights of the parties on the questions therein involved, and settled, and separable from any other that may be rendered in the action, it is as to such questions a final judgment. *Trustees v. Greenough*, 105 U. S. 527 [26 L. Ed. 1157]; *Guarantee T. & S. D. Co., v. Phila. R. & N. E. R. Co.* [69 Conn. 709], 38 Atl. 792 [38 L. R. A. 804]; *In re Farmers' Loan & Trust Co.*, Petitioner, 129 U. S. 206 [9 Sup. Ct. 265, 32 L. Ed. 656]."

As the county court assumed jurisdiction to determine the right of property, decisions holding such judgments to be final, are quite applicable from those states that give probate courts such jurisdiction by statute. In those states appeals are quite numerous in such matters, and the judgments are universally held final. In *Ruff v. Doyle*, 56 Mo. 301, a judgment was entered in a probate court in a proceeding under a statute permitting citations against an administrator and providing for a trial of the right of property claimed by the administrator, and allowing appeals in all cases "where there shall be a final decision of any matter arising under this law," and the court held a judgment therein to be final and appealable. In *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694, a judgment was entered in a probate court, in a proceeding instituted under sections 80, 81, Illinois Statutes, to try the right of property claimed by the executrix, and on appeal by the petitioner to the district court the latter court entered judgment against the executrix. She took the matter to the Court of Appeals, and from its judgment an appeal was taken to the Supreme Court. The opinion states: "It is first contended by plaintiff in error that the motions made in the circuit court to dismiss the appeal should have been sustained, because the order of the county court ap-

pealed from was not a final order, and because the court had not acquired jurisdiction to adjudicate upon her individual rights. * * * The proceedings under these sections is to a large extent informal. No provision is made for an answer, or any pleading further than a statement on oath, and no formal particularity is required to give the court jurisdiction. *Blair v. Sennott*, 134 Ill. 78 [24 N. E. 969]. Plaintiff in error, against whom the amended petition was directed, did not formally answer the charge against her, but there was a hearing before the court where she was represented, and she succeeded in establishing her claim to the individual ownership of the securities. * * * The order found that the securities were not the property of the estate, but were her individual property. That was the end of the proceeding, and a final determination of the issue raised by the amended petition, so far as the county court was concerned. The order was a final one, from which an appeal could be taken."

It is contended by appellees that a different doctrine is announced in the case of *Simms v. Guess*, 52 Ill. App. 543, where the court held a judgment interlocutory, only, which required an administrator to correct his inventory and add to it property that he claimed himself. This case was before the court in *Martin v. Martin*, supra, but not referred to in the opinion. The proceeding was upon exceptions to the original inventory, and not under such a statute as that in the case of *Martin v. Martin*, supra, nor such as that involved in the instant case. The opinion is based on the statement therein that the order was "not an adjudication of the right of property."

If the proceedings in this case had been for the purpose of requiring the administrator to file an original inventory, or to correct or amend his inventory, or to require him to add to such inventory, or file an additional one including property belonging to the estate which was admitted and conceded to be the property of the estate, then, in such a proceeding, an order upon the administrator would have been interlocutory and not final, because the right of property would not have been determined, and it would have been such an order as the district court in this case considered the county court had made; but an examination of the petition, the individual answer of the respondent, *Durst*, the reply thereto, and the judgment entered discloses an entirely different proceeding. And even if the county court had done nothing more than to merely order the administrator to file the amended inventory and to include the property in dispute, it would still have been a final order, because, as a condition precedent to making such an order, the court would have been compelled to determine the right of property. The issues were joined against *Durst* in his indi-

vidual capacity, as well as in his representative capacity, as very plainly appears from his answer and from the evidence introduced.

Appellees claim the petition asked only that the note be inventoried, but, as was done by the amended petition in the *Martin v. Martin* Case, the answer of Durst, in this case, as respondent, denying the ownership by the estate, made a different issue, a different issue was tried, and a judgment was entered on the issue that was tried.

In *May v. Leighty*, 36 Ill. App. 17, relied upon by appellees, the court said: "In connection with these notes as listed in the inventory, there is this statement made by the administrator: 'These notes the payors insist they are not liable for, as the same were not to be paid unless demanded by payee in his lifetime.' It is not claimed that this or anything of like import appears on the notes, or in any way attached to them.

* * * The administrator, prima facie at least, owed the estate four notes, which he had inventoried. When he made his report, he credited himself with these four notes, claiming he was not liable to pay them. The county court, instead of disallowing the credit as it should have done, adopted the anomalous proceeding of entertaining an exception to the credit by some of the heirs, and proceeded to try the question of the liability of appellant on these notes upon a hearing of such exception. * * * Where a claim against the administrator has been inventoried, and he becomes prima facie chargeable with the amount of the demand, upon his petition the county or probate court would be justified in appointing some competent person administrator pro tem., with authority to bring suit against the administrator as an individual, and prosecute it to final judgment. * * * The proceeding that was had in this case did not admit of any written pleadings and formation of defined legal issues. The issue that was sought to be made was not the real issue tried. The only direct issue sought to be made was whether May, as administrator, was entitled to a credit for the amount of his notes, which was not a question to be submitted to a jury, while the real issue was his liability, as an individual, upon these notes to the estate, which was an issue triable by jury. The judgment of the circuit court was much broader than the only issue which could be legally evolved out of the case as it was presented would warrant. The judgment of the circuit court is reversed, and the cause remanded to the circuit court, with directions to reverse the action of the county court and direct the county court to disallow the credit claimed by the administrator and appoint an administrator pro tem. to bring suit against Warren May on the four notes and prosecute the same to final judgment."

In the case of *Wright v. Wright*, supra, the court concludes that any attempt on the part of the probate court in this state, in pro-

ceedings of this character, to pass upon the right, or ownership, of property, and to require property to be inventoried about which there is a dispute as to the ownership, is clearly outside and beyond the jurisdiction of such court; but this in no way interferes with the conclusion upon the question as to whether a judgment in such an instance is final or interlocutory, because the judgment was in fact entered, whether the court exceeded its jurisdiction in entering it or not. In *Wright v. Wright*, supra, a citation was issued upon a petition, requiring a surviving partner of an intestate to show cause why he should not make an inventory and file a statement of the partnership affairs, under a statute similar in character and purpose to section 7253, supra. He appeared and denied that a partnership existed, and moved for a dismissal on the ground that the court had no jurisdiction to try the issue as to the existence of a partnership. The motion was overruled, and the court, on petitioner's evidence alone, found that a partnership existed, and ordered the inventory and statement to be made. On appeal to the district court, the same order was made. On appeal to the Court of Appeals, it was decided that "a county court, sitting for the transaction of probate business, was without power and authority to determine the rights of the parties in the manner attempted," and held that the statute under which the proceeding arose applied only to a partnership that was admitted and conceded, and the court said: "We conclude, therefore, that the probate court was without power or authority to try and determine the question of the existence of the partnership alleged, and it must be, of course, conceded that if such was the case, the district court was also without jurisdiction. In view of the fact that the final settlement of this estate cannot probably be had until the rights attempted to be adjudicated in these proceedings are determined, we suggest in the interest of a speedy termination of litigation, which is important in the administration of estates of deceased persons, that the proper practice would be to have first settled the question whether or not the alleged partnership did exist. This should be done by a suit in equity, to which all necessary persons in interest should be made parties and brought into court. If the question should be decided in the affirmative, then the interest of the decedent in the partnership would also be ascertained and determined, and thereafter the administratrix might if necessary avail herself of the provisions of the special statutes of 1885, above referred to."

It is therefore determined that when the note and deed of trust were turned over to the court by Hartenstein, and the ownership thereof by the estate was denied by Durst, the purpose of the proceeding was fulfilled, and the respondent should have been discharged, and some discreet person appointed

and directed to take charge of the note and deed of trust, and to enter an action in a court of competent jurisdiction against Durst to determine the validity of the note and deed of trust, the ownership thereof, and the amount due, if anything, thereupon; and thereafter, if such action were successful, the judgment or the amount recovered could be inventoried as the property of the estate.

The judgment of the district court is therefore reversed, with directions to discharge the respondent at the cost of the estate, and for further proceedings in the county court within its jurisdiction.

Reversed, with directions.

KING and HURLBUT, JJ., concur. CUNNINGHAM, P. J., dissents.

CUNNINGHAM, P. J. I am unable to agree with the majority opinion; and, inasmuch as that opinion, if permitted to stand, will constitute a rule of practice in this state. I regard it as of sufficient importance to justify my expressing, as briefly as possible, the reasons which impel me to dissent.

I shall not analyze the array of authorities cited, and copiously quoted from in the original opinion, since to do so would unduly prolong my opinion. However, I am confident that a careful analysis of those quotations, together with special statutes on which, in some instances, they are based, will clearly demonstrate that not one of these authorities supports the conclusions arrived at in the majority opinion, unless, perhaps, it be the case of *Wright v. Wright*, 11 Colo. App. 470, 53 Pac. 684, which ought not to be considered as controlling, in view of the fact that it does not appear that the principal question here involved, namely, whether the judgment in this case is or is not appealable, was pressed upon the attention of the former Court of Appeals in that case, or even adverted to. The opinions in the Illinois cases can have no possible bearing, in view of the fact that the Illinois statute is substantially different from our own. The sections referred to, I think, are numbers 81 and 82, instead of 80 and 81. They so appear in *Starr & Curtis' Annotated Statutes of Illinois*, issued in 1885. Section 81 of the Illinois act provides, *inter alia*, that the court may examine the person cited, on oath, "and hear the testimony of such executor and administrator and other evidence offered by either party, and make such order in the premises as the case may require." No such authority is cast upon or vested in the probate court by our act. The following, in section 82 of the Illinois act, in full: "If such person refuse to answer such proper interrogatories as may be propounded to him, or refuse to deliver up such property or effects, or in case the same has been converted, the proceeds or value thereof, upon a requisition being made for that purpose by an order of the said court, such court may commit

such person to jail until he shall comply with the order of the court therein."

It will be seen that the Illinois act gives the probate court authority to require the delivery of the property or effects in question, or, in case the same has been converted, judgment may be entered for the proceeds or value of the property so converted, and the court may commit the person to jail until he shall comply with the order or judgment of the court. No such authority is found in our act. Our statute simply permits the probate court to commit the party cited, *if he shall fail or refuse to submit to an examination or to answer interrogatories*. But it is admitted, over and over, in the majority opinion that the probate court in the instant case had no authority whatever to enter the order it did enter, namely, requiring the defending administrator to list the note in his inventory of the assets of the estate. In other words, the majority opinion admits that the probate court was absolutely without jurisdiction of any sort to make the order it did make. The court having no jurisdiction or authority to enter such judgment, then the parties appearing before it could not, by their pleadings and the proof, confer such jurisdiction.

A judgment rendered under such circumstances, being a nullity, may be collaterally attacked by any person interested, whenever and wherever it is brought in question. *Trowbridge v. Allen*, 48 Colo. 419, 110 Pac. 193; *Empire R. & C. Co. v. Coldren*, 51 Colo. 122, 117 Pac. 1005. It was said in *Coulter v. Routt County*, 9 Colo. 267, 11 Pac. 203, quoting from Judge Cooley: "When a statute is adjudged to be unconstitutional it is as if it never had been. * * * It constitutes protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." What is true of a void statute must necessarily be true of a void judgment. It therefore follows that Durst could, in any proceeding anywhere, whenever and wherever the same might be brought, have repudiated the void order of the probate court directing him to inventory the note. It is illogical to say that a judgment with no validity whatever, and which may be ignored with perfect impunity, under all circumstances, requires that the party against whom it purports to run should take an appeal therefrom, or be bound thereby. Durst, when the order was entered, had at least three remedies other than by appeal: (a) Finding his interests in probable conflict with those of the estate, he might have resigned as administrator; (b) he might have complied with the order, noting that he did so under protest; (c) he might have refused absolutely to comply with the order of the court, and, if committed for contempt, sued out a writ of habeas corpus, and summarily tested the question here presented on appeal, namely, the validity of the probate court's order. "A void judgment is in legal effect no judgment.

By it no rights are vested; from it no right can be obtained. Being worthless in itself, all proceedings upon it are equally worthless. It neither binds nor bars any one. All actions performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of the authority of it finds himself without title and without redress. * * * If it be null, no action upon the part of the plaintiff, no action upon the part of the defendant, no resulting equity in the hands of a third person, no power residing in any legislative or other department of government, can vest it with any of the elements of power or vitality." *Freeman on Judgments* (4th Ed.) § 117. Section 240 (R. S.) of our Code thus defines a judgment: "A judgment is the final determination of the rights of the parties in the action or proceeding." I confess that I am unable to understand how it can logically be contended that a void judgment is 'the final determination of the rights of the parties in the action or proceeding,' especially in view of the holding of our Supreme Court, to which I have already directed attention, permitting such judgments to be attacked whenever and wherever they are brought in question. It would seem to me that under our Code, whatever the authorities may be elsewhere, any order of the court that did not, because of its invalidity, determine the rights of the parties finally, or at all, was no judgment, and therefore could not be appealed from.

I cannot agree with the views expressed by my Brethren that the order of the trial court directing that the note be inventoried was a determination of the title to the note: First, because the order, when properly read, does not purport to determine that question; and, second, an absolutely void order can determine nothing. No execution could have been issued upon this order. The trial court could have committed the administrator for contempt, but this does not even indicate that the judgment was final. Legally, if it did so, it would have been an excessive and tyrannical exercise of authority (for which the law provides ample remedy other than by appeal), quite as much as if the trial court had pronounced the death sentence upon him and ordered his immediate execution. I am unable to discover any legal distinction between the order made in this case and an order made requiring the administrator to inventory property admittedly and concededly the property of the estate. My Brethren appear to think such a distinction exists, and admit that in the latter case the judgment or order of the trial court would not be final. Very properly it is stated in the majority opinion that: "This statute was enacted for the purpose of discovering property belonging to the estate, and incidentally to perpetuate testimony concerning the same, and for no other purpose." Whatever the probate court

attempted to do, therefore, after the coming in of the defendant's answer, had no more force and effect, and possessed no more virtue, than would a purported decree of a justice of the peace attempting to dissolve the bonds of matrimony. To hold that an appeal in this case was necessary, or even permissible, is just as illogical as to hold that an appeal from a purported decree of a justice of the peace in a divorce case was necessary, and unless taken would operate as a valid divorce. It is said in the majority opinion: "This was a final adjudication of the matter in issue, and required no further proceeding or order by the court to put it into effect." My answer to this is that you cannot put nothing into effect, and, in contemplation of law, the order of the trial court, being absolutely void, was nothing. "No writ of error will lie, and no appeal can be taken from a void judgment." *Levan v. Richards*, 4 Idaho, 671, 43 Pac. 574. "The final decree rendered in this case is void upon its face, but no execution could have been issued thereon, and it might have been vacated by the probate court on motion. Consequently no appeal will lie from the decree." *Hays v. Cockrell*, 41 Ala. 87; *McMillan v. City of Gadsden* (Ala.) 39 South. 569; *Leslie v. Tucker*, 57 Ala. 486; *David v. David*, 56 Ala. 49; *Pettus v. McKinney*, 56 Ala. 41; *Adams v. Wright*, 129 Ala. 305, 30 South. 574; *Wertheimer v. Ridgeway*, 157 Ala. 398, 47 South. 569; *Campbell & Martin v. Chandler*, 37 Tex. 33; *Alexander v. Segee et al.*, 101 Me. 561, 64 Atl. 1049.

The weight of authority may be, probably is, against my contention that a void judgment is not appealable, but the authorities are all in accord that an appeal is not necessary. However this may be, no appeal from a void judgment should be entertained unless the record shows a motion by the complaining party in the court from which the void judgment emanates, calling the court's attention to the invalidity of the judgment and its want of jurisdiction, and praying that the same be vacated. In *re Armstrong*, 72 App. Div. 620, 76 N. Y. Supp. 40. No such motion was filed in this case, nor does it appear from the record that the jurisdiction of the county court to enter the order appealed from was ever challenged.

Further, to my mind it appears absurd to hold that the administrator had a right to appeal from the order of the probate court to the district court, but that the district court on such appeal had no discretion in the matter whatever, but must of necessity discharge the respondent. No trial de novo, therefore, can be had on such an appeal, even under the conclusions reached by my Brethren. The proper procedure in this case, as I view it, has been established by the Michigan Supreme Court in *Palmer v. Circuit Judge of Jackson County*, 90 Mich. 1, 50 N. W. 1086. The judgment of the trial court should be affirmed, but in affirming it this court would

but discharge its duty by calling the attention of the probate court to the nullity of its order.

In *Walker v. Green*, 128 Pac. 855-857, recently decided by this court, it appears clearly that we have held that the voluntary listing of property as the assets of the estate by the administrator is not binding upon him. A fortiori where the listing is in invitum it cannot bind the administrator. In *Mitchell v. Bay*, 155 Mich. 550, 119 N. W. 916-918, it is held that an inventory is not conclusive either for or against an estate or an administrator; hence no harm necessarily results if items are not added. The contrary must be equally true, that to list in an inventory certain items, especially where the same is done pursuant to an order of the court made over the protest of the administrator, is not conclusive for or against the estate or the administrator. The matter here under consideration being, as the majority opinion well states, based upon an application for discovery merely, or for the perpetuation of testimony, and for no other purpose, the order of the trial court to list the property, even granting that the court had power to make such an order, is incidental to the main proceeding, the settlement of the estate, and is purely interlocutory. *Mitchell v. Bay*, supra.

To allow an appeal to the district court for the purpose of reviewing a proceeding of this sort would interminably procrastinate the settlement of estates and operate as a most oppressive burden upon the public. This consideration of itself, were the question a doubtful one, should induce us to hesitate long before recognizing this remedy; but the true nature of the proceeding appealed from is, in my opinion, purely ancillary and limited in scope to the placing before the court of evidence pertinent and indispensable to a proper determination in another and proper proceeding of the title to the note in question. *Erwin v. Ottawa*, 138 Mich. 271, 101 N. W. 537. If the majority opinion shall stand, there is nothing to prevent parties hereafter from taking an appeal every time a proceeding like the one here before us is had in the probate court, and thus delay, for a sinister purpose perhaps, the final settlement of estates, and this notwithstanding the fact that on appeal to the district court, under the announcement of this court made in the instant case, that court must perfunctorily and as a matter of course do one thing, can do but one thing, namely, discharge the respondent—discharge him from an order (which the majority opinion, without warrant as I think, persistently refers to as a judgment) which this court finds to be an absolute nullity, and therefore void for every purpose, and which, under the authorities I have cited from the Supreme Court of this state, may be collaterally at-

tacked by any person interested whenever and wherever it is brought in question.

I am fully persuaded that the reasoning of the majority opinion is unsound; that the judgment of the district court was entirely proper, and therefore ought to be affirmed.

(23 Idaho 325)

UNION SAVINGS, BUILDING & TRUST
CO. v. McCLAIN et al.

(Supreme Court of Idaho. Feb. 5, 1913.)

1. SUFFICIENCY OF EVIDENCE.

The evidence held sufficient to sustain the finding of facts.

2. OPENING CASE.

Held, that the court did not err in opening the case and permitting the parties to introduce additional evidence.

Appeal from District Court, Ada County; John F. MacLane, Judge.

Action by the Union Savings, Building & Trust Company against Matthew McClain and Eli Larson. From the judgment, plaintiff and McClain appeal. Affirmed.

P. E. Cavaney, of Boise City, for appellant McClain. Davidson & Davison, of Boise City, for appellant Union Savings, Building & Trust Co. Cavanah & Blake, of Boise City, for respondent Larson.

SULLIVAN, J. This action was brought by one of the appellants, the Union Savings, Building & Trust Company, a corporation, to quiet title to all of block 1 and Point Park in Boise City, park subdivision, as the same appears in the official plat of said subdivision filed in the office of the county recorder of Ada county. The defendant McClain, who is one of the appellants here, and Eli Larson, trustee, who is the respondent, filed answers and cross-complaints, in which they sought to have the title quieted to certain parts of said land in themselves. A trial was had to the court without a jury upon the issues thus made, and finding of facts was made upon the material issues made by the pleadings, and judgment and decree entered declaring the rights of each of the parties and describing the lands to which each was entitled.

[1, 2] The plaintiff, the Union Savings, Building & Trust Company, and the defendant Matthew McClain each appealed from said judgment. The main contention of the trust company on this appeal is that the findings are not supported by the evidence, and are contradictory, and of the appellant McClain that the evidence does not support the findings, and that the court erred in opening the case and taking additional testimony. We have made careful examination of the evidence and find it in some parts conflicting, but are fully satisfied that the evidence is sufficient to sustain the findings of the

court. We also conclude that the court did not err in opening the case and taking additional evidence.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent, each of the appellants to pay one-half of the costs of the appeal.

STEWART, J., concurs.

(23 Idaho 327)

NELSON v. HUDGEL

(Supreme Court of Idaho. Feb. 6, 1913.)

1. FRAUD (§ 50*) — VALIDITY — FRAUD—EVIDENCE.

Fraud is never presumed. It must be established by clear and convincing evidence, and this is especially true where a party assails the integrity of a written contract.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

2. CONTRACTS (§ 94*)—VALIDITY—FRAUD.

Where parties entering into a contract are mutually cognizant of the facts which enter into said contract, and each stands on the same footing with reference to the contract and the facts and circumstances under which such contract was entered into, and there is no fiduciary relation between them, the law will not aid or help either one of the parties upon the ground that he has not himself used diligence and common sense, if the means of information is equally open to both, and there has been a mistake without fraud or falsehood.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430; Dec. Dig. § 94.*]

3. BILLS AND NOTES (§ 373*)—INDORSEMENT—BONA FIDE HOLDER.

Where N. sues H. upon a check issued by H. upon a bank, payable to S., and it is shown that, as a consideration for said check, S. made certain statements and representations as to securities which would be deposited by S. with H. as security for the debt for which the check is given, and S. indorses and delivers said check to N. for a valuable consideration, and both N. and H. heard the same statements and representations made by S., and neither of said parties knew that such representations were false and made for a fraudulent purpose, and a written contract was made between H. and S. as to the deposit of the securities, and it was upon that instrument that H. issued and delivered the check, N. became the owner and holder of said check free from defenses available to prior parties among themselves, and may enforce the payment of the instrument for the amount thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 966-970; Dec. Dig. § 373.*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Lols Nelson against C. R. Hudgel on a bank check. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Morrison & Hindman and Harry S. Kessler, all of Boise City, for appellant. Robert R. Wedekind and Davidson & Bacon, all of Boise City, for respondent.

STEWART, J. The appellant instituted this action against the respondent to recover upon a check issued by the respondent dated December 23, 1910, upon the Boise City National Bank, requiring the bank to pay to the order of M. A. Swift \$1,293.75. It is alleged that the check was indorsed and delivered to the plaintiff and presented for payment, and refused. The defendant admits in his amended answer that the check was executed and delivered and not paid, and also alleges as a defense that on the 23d day of December, 1910, the husband of the plaintiff applied to T. A. Bisby to procure a loan of \$1,500 for the use and benefit of M. A. Swift and the plaintiff; that Charles H. Nelson, husband of plaintiff, falsely, fraudulently, and deceitfully represented and stated to Bisby that Swift would secure the payment of the loan by the assignment and pledge of certain securities, and that Bisby stated and represented to defendant that Swift was the owner of such securities, and that such representations and statements induced the defendant to make the loan and execute the check sued upon, and that the defendant had no knowledge of the falsity of such representations; that at such time Swift was not the owner or in possession of the securities represented, and that the plaintiff had full knowledge of the falsity of the facts regarding the loan at the time the check was executed; that the check was issued and given upon the express conditions and understanding that said securities were hypothecated and pledged as security. The cause was tried before the court and findings of fact and conclusions of law were made in favor of the respondent.

The trial court found the facts in favor of the defendant, and the particular findings involved on this appeal are, in substance: That on the 21st day of December, 1910, M. A. Swift was indebted to the plaintiff in the sum of \$1,500 upon a promissory note given by Swift to the plaintiff, which was past due, and upon demand of payment Swift stated that she did not have the money, but that she had certain securities which she would deposit as collateral to secure her note given to any one who would loan her sufficient money to pay the note due. That on the 23d day of December, 1910, Charles H. Nelson, the husband of plaintiff, applied to T. A. Bisby to procure a loan of \$1,500 for the use and benefit of M. A. Swift and the plaintiff. That the said Nelson represented and stated to Bisby that Swift would secure the payment of the loan by the assignment and pledge of certain securities, and that Bisby stated and represented to the defendant that Swift was the owner of such securities, and that such representations and statements induced the defendant to make the loan and execute the check sued upon, and that the defendant had no knowledge of the falsity of such representations. That at such time

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Swift was not the owner or in possession of the securities represented, and that the plaintiff had full knowledge of the facts regarding the loan at the time the check was executed, and that the check was issued and given upon the express conditions and understanding that said securities would be hypothecated and pledged as security, and that a written contract was entered into between M. A. Swift and C. R. Hudgel, wherein "C. R. Hudgel agrees to loan to M. A. Swift \$1,700.00 for 6 months at 12 per cent. per annum. M. A. Swift agrees to give a note for same and further agrees to give the following described papers as additional security: A contract from the state of Idaho for one hundred and fourteen acres of school land. One \$2,500.00 note. About \$8,000.00 worth of piano contracts. Contracts and money to be exchanged at the Boise City Nat. Sat. Dec. 24th at 10:30." That, at the time of making the representations as to the personal property owned and possessed by Mrs. M. A. Swift, Charles H. Nelson did not know of the truth or falsity of such representations, but relied upon the statements made by Swift. That such statements made by M. A. Swift were false. That neither the plaintiff, plaintiff's agent, nor the defendant in this case knowingly participated in any fraudulent dealings.

The court also found that Swift was not the owner of said property, and that she did not present and deliver to the bank or to the defendant the securities mentioned in the agreement. Other findings were made, but the foregoing findings of fact are the particular findings of the court that are involved upon this appeal. Judgment was rendered accordingly. This appeal is from the judgment.

The errors relied upon are two: First, that the evidence is insufficient to support the findings; second, that the findings do not support the judgment, for the reason that the findings are contradictory and inconsistent, and to the effect that neither the plaintiff nor her agent was guilty of fraud. As conclusions of law the court found, first, that the plaintiff received the check with notice that the check was procured from the defendant by Mrs. Swift under false pretenses, and with full knowledge of the manner and means employed to induce the said defendant to draw said check and deliver it to M. A. Swift and the plaintiff in this case; second, that the plaintiff is not entitled to recover, and that the defendant is entitled to judgment in his favor with costs of suit.

The first of these grounds would seem to be a conclusion of the facts upon the evidence, and not a conclusion of law, and is directly in conflict with finding No. 23, which finds that neither the plaintiff, the plaintiff's agent, nor the defendant in this case knowingly participated in any fraudulent dealing.

[3] From a careful consideration of the evidence in this case, we are satisfied that

there is none whatever which connects the plaintiff or her husband with any misrepresentation or statement which was made by them to the defendant, which was known to be false, and that the court was correct in finding that neither plaintiff nor the plaintiff's agent, Nelson, knowingly participated in any fraudulent dealing, either in procuring the loan or in securing the check. The facts are plain and certain, and are in no way contradicted by the evidence: M. A. Swift was indebted to the plaintiff on the 21st of December, 1910, in the sum of \$1,500. She did not have the money to pay such indebtedness, and upon demand of payment informed Nelson, the husband of the plaintiff, that she had securities which she would deposit as collateral to secure her note given to any one who would loan her sufficient money to pay the note due. Upon this statement being made to Nelson, Nelson and Swift went to Bisby, a loan agent, for such loan, and Bisby secured Hudgel, the respondent, as a person who would make the loan. Nelson and Swift met Hudgel, and Nelson repeated to Hudgel, in the presence of Swift, the proposition made by Swift to Nelson, that she had certain securities which she would deposit as collateral to secure a note which she would give for a loan sufficient to pay her note to Nelson. Up to that time the foregoing is all the connection Nelson had with the transaction. There is no evidence whatsoever to show that he, in fact, knew anything about the securities Mrs. Swift proposed to deposit as security, or that he ever saw the same, or that he had any information upon the subject whatever, or that plaintiff knew any facts about the securities. After this information had been given, the respondent and Swift commenced their negotiations, and, after she had stated to him the securities she would pledge as collateral security for her own note which she would give for the loan, a written contract was entered into between Swift and Hudgel describing the securities and the time of depositing the same, which were to be pledged by Mrs. Swift as collateral for her own note to be given to respondent for the loan. In this written contract it was provided that M. A. Swift was to give a note for \$2,500 and deposit as collateral a contract from the state of Idaho for 114 acres of school land, about \$8,000 worth of piano contracts, and that these were to be exchanged at the Boise City National Bank on the 24th of December, 1910, at 10:30 o'clock. This contract was dated December 23, 1910, and it was upon this contract that the respondent agreed to make the loan to M. A. Swift, for which the check in controversy in this case was a part of the sum to be loaned. This contract was signed by M. A. Swift and C. R. Hudgel, the respondent.

At or about the time the contract was made, Nelson stated to Hudgel that it would be a very great accommodation to him if he

would give him a check at that time for the amount due on the note that Mrs. Swift owed the plaintiff, in order that Nelson might meet some obligations he owed to the state of Idaho on some lands, and in order that he might leave Boise and reach home at Christmas, and in consequence of such request Hudgel issued the check sued upon in this action. This accommodation that Nelson asked of Hudgel was not based upon any false statement of Nelson to Hudgel, and could in no way mislead Hudgel or cause him to act upon any false statement of Nelson, but, on the contrary, it was shown that Hudgel relied wholly upon the written contract of Mrs. Swift that she would deposit the securities named in the contract. The defendant was in no way deceived by Nelson, because Nelson had no knowledge, so far as the record shows, that Mrs. Swift did not own or possess, or would not deposit these securities. Hudgel had as much information as Nelson with reference to the securities. What Nelson knew was merely the statement of Mrs. Swift. This same statement that was made to Nelson was made to Hudgel, and Hudgel knew all the facts that Nelson knew. The parties evidently were dealing at arm's length, with equal opportunities to know the truth or falsity of Mrs. Swift's statements both to Nelson and Hudgel. The information Nelson had came to him from the person who was best informed on the subject, Mrs. Swift. The information Hudgel had came from the person who was best informed on the subject, Mrs. Swift, and it was upon that information, put in writing, that he acted. It was evident from the actions of the parties that Hudgel believed the truth of the statements made by Swift, because such statements were placed in writing in a contract which was signed by Hudgel and Swift, and upon which the payments were made. There is no evidence whatever that plaintiff had any better knowledge of the financial responsibilities and business affairs of Mrs. Swift or the securities she had or would have than the defendant. The defendant was a resident of Boise. Mrs. Swift was also engaged in business at Boise at the time the contract was made, and had been for years. The securities mentioned were such that the defendant could have ascertained their genuineness by the use of the telephone or personally examined the records, and there was nothing in any way concealed or covered up which would preclude Hudgel's procuring all the information he desired as to whether the securities in fact were genuine and were in existence, or if Hudgel had inquired of Mrs. Swift, with whom he was contracting, and to whom he was making a loan, about these securities, where they were, or their general character, or if she had them in her possession or control, he could have ascertained to a certainty whether she was able to carry out the contract she pro-

posed. He apparently, however, acted upon her written contract, and accepted the statements therein made as the inducement for which he executed the check for the payment of the loan. In fact, he acted wholly upon the representations made by Mrs. Swift, and Mrs. Swift alone. Whatever statements may have been made by the parties prior to the execution of the contract as to the securities can only be of consequence in so far as such statements explain any ambiguities of the contract; but in this case the contract is plain and certain, and requires no explanation.

[2] It is a well-recognized rule of law, which applies to the facts of this case, that where parties are mutually cognizant of the facts acted upon, or stand upon the same footing with relation to them, and there exists no fiduciary relation between them, the law will not lend its aid to help the injured party for the simple reason that he has not himself used diligence and common sense, if the means of information is equally open to both parties, and there has been a mistake without fraud or falsehood, and there would probably be no remedy at law or in equity. Smith on the Law of Frauds, p. 214.

[1] There is also another rule of law which especially applies to this case, that fraud is never presumed, but must be established by clear and convincing evidence, and that this is especially true where a party assails the integrity of a written instrument. *Pickle v. Lincoln County State Bank*, 61 Wash. 545, 112 Pac. 654. Applying the foregoing rules of law to the facts in this case, it is clear that both the plaintiff and the defendant had the same information and honestly acted upon the same statements and representations, to wit, the statements and representations of M. A. Swift, and that the respondent knew as much about the truth and reliability of the statements and representations as Nelson or the appellant, and that the respondent entered into a written contract with the party making the statements and representations, and it was upon that written instrument that the respondent acted; and in making said contract there was no fraud or misrepresentation on the part of the plaintiff. There was no misrepresentation or fraud perpetrated upon the part of the plaintiff at the time the favor and accommodation was asked by Nelson of the respondent in giving the check in controversy before the securities were deposited, for the reason that the request was made solely as an accommodation, and the statements Nelson made were merely opinions as to what Mrs. Swift would do, and Hudgel had entered into a written contract with Swift that she would do the things contained therein, and accepted such provisions as a guaranty sufficient to satisfy him that the securities would be deposited, and was not misled by Nelson's making such request. Upon Hudgel's agreeing to give the check the

plaintiff surrendered the note she had against Mrs. Swift, and parted with the only evidence of debt she previously had, and accepted the check in good faith as the payment of such note, and the check was indorsed and turned over to plaintiff and the plaintiff became the owner thereof in good faith, without any fraud or deceit.

The evidence in this case clearly shows that the appellant was the holder in due course of the check sued upon in this action, under the provisions of section 3509, Rev. Codes. The check was indorsed by the payee, M. A. Swift, and delivered to the appellant, in consideration of which the appellant surrendered to M. A. Swift the note the appellant held for the sum of \$1,500, and after such transfer it was presented for payment. Under the provisions of the statute (section 3514, Rev. Codes), the plaintiff became the owner and holder of said check, free from defenses available to prior parties among themselves, and may enforce the payment of the instrument for the full amount thereof against all parties liable thereon. She certainly had no notice of any infirmity in the instrument or any defect therein.

The judgment therefore is reversed, and a new trial granted. Costs awarded to appellant.

SULLIVAN, J., concurs.

(23 Idaho 324)

LOTT v. OREGON SHORT LINE R. CO.

(Supreme Court of Idaho. Feb. 3, 1913.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to justify the jury in finding for the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. TRIAL (§ 252*)—INSTRUCTIONS.

Instructions examined, and held applicable to the evidence introduced and not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by Delbert F. Lott against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. L. Williams, of Salt Lake City, Utah, and D. Worth Clark, of Pocatello, for appellant. O. W. Poole, of Rexburg, for respondent.

AILSHIE, C. J. This is an appeal from a judgment awarding \$250 and costs to the respondent as damages for the killing of two horses, which were run down by appellant's train.

[1] 1. It is contended that the evidence is

not sufficient to support the verdict and judgment. There is some evidence in the record which would lead to the conclusion reached by the jury, and for that reason we would not feel justified in reversing the judgment. It may reasonably be concluded that the railroad company was negligent in not maintaining a cattle guard at the ends of its fences near the northern boundary of the city of Rexburg, where the accident occurred. *Kirn v. Cape Girardeau & C. Ry. Co.*, 149 Mo. App. 708, 129 S. W. 475.

[2] 2. The objection to the instructions is based upon the theory that there is no evidence to support a verdict, and that the instructions are not applicable to any evidence given in the case. Having determined that there was some evidence which would justify the verdict of the jury, we conclude that the objections to the instructions are not well taken.

The judgment is affirmed. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

(72 Wash. 221)

SHIGETA v. W. B. GAFFNEY INV. CO.

et al.

(Supreme Court of Washington. Feb. 21, 1913.)

LANDLORD AND TENANT (§ 154*)—CONTRACT—DUTY TO PLACE IN HABITABLE CONDITION—WAIVER.

A lessee, who took possession of a newly constructed building with a leaky roof, under a contract that the lessor should complete it according to certain specifications and that the lessee should thereafter keep it in repair, did not as a matter of law waive his right to insist upon a full performance of the contract by the lessor, where he took and retained possession in reliance upon the lessor's assurance that he would make the building habitable.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 558-566; Dec. Dig. § 154.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by T. Shigeta against the W. B. Gaffney Investment Company and others. From a judgment of dismissal, plaintiff appeals. Reversed, with directions.

Shank & Smith, of Seattle, for appellant. Farrell, Kane & Stratton, of Seattle, for respondents.

CHADWICK, J. This is an appeal from a judgment of dismissal entered upon the opening statement of counsel for plaintiff. The facts as we find them are taken from the pleadings, the attached exhibits, and opening statement. The defendants entered into an agreement with the plaintiff to erect a building in the city of Seattle in accordance with certain plans and specifications which had theretofore been agreed upon.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The building was to be held under a lease with stipulated rent reserved for a period of seven years. The agreement and lease was made in one writing, and provided that plaintiff should take possession of the building upon its completion, and that he would thereafter "and during the continuance of this lease keep said building including the roof and all sewer connections in good and substantial repair and condition," and also "that if at any time repairs to said building may be necessary or required and the party of the second part [plaintiff] shall have neglected or refused to make the same, the parties of the first part [the defendants] may order such repairs made at the cost and expense of the party of the second part, and the party of the second part will upon demand pay to the said parties of the first part and to their order such cost or expense."

Plaintiff was notified on the 11th day of January, 1910, that the building was completed and ready for occupancy. The building at that time was apparently completed, but when it rained it was found to be in a leaky condition. Plaintiff then demurred, and we take it from the statement that he refused to take the building. Thereafter defendant served another notice calling upon him to take the property, and plaintiff again protested. Finally it was agreed that defendants would get the building in proper shape. Plaintiff relied upon this assurance and, accordingly, on the 14th day of February moved into the building. Plaintiff also alleges and offers to prove that, when he discovered that the roof was still defective and would not turn water, defendants promised to fix it, and from time to time thereafter made such promises, and on one or two occasions rebated rent on account of the damage occasioned by the rains. He also offered to prove that the building was at all times when it rained uninhabitable; that his tenancy was only continued because of the promises of defendants to remedy the defects. Relying upon such promises, he kept possession until December 8, 1910, when he was forced to abandon the building.

The trial judge did not discuss the motion for judgment, and from the arguments made here we assume that his ruling was based upon that clause of the lease which binds the plaintiff to keep the premises in repair. The court evidently believed that plaintiff had taken possession and had therefore waived his right to insist that the building be completed according to the plans and specifications before he moved in. Before defendants can invoke that clause of the contract for their protection, they must show a performance on their part. They must show that they have built and tendered a habitable structure for the use of the plaintiff, and, if they tendered a building which because of defective construction fails to meet the obligations that they had assumed, they cannot

shift the burden of the loss by saying that plaintiff should not have relied upon their promise to perform, or their implied guaranty that the building was habitable at the time they notified plaintiff that it was ready for occupancy. Defendants' contract was to build; plaintiff's to repair. The defect here alleged is one of original construction, not one arising from waste, damage, or the ravages of time. This principle was recognized by this court in *Hardman's Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059, where we held that one leasing a room for a particular use was bound to put it in fit condition. The only difference between that case and this is that there, the lessee refused to take possession when notified. While here plaintiff was persuaded to take possession upon a promise to make the building habitable; that is, to perform the contract. It was not a new contract. It was simply a reaffirmation and assurance that the one which already existed would be performed.

Defendants seek to distinguish the *Hardman Estate Case* by saying that there the lease expressly specified the use to which the premises were to be put, and that we held that this amounted to a warranty that the room would be fit for the uses intended. The case will bear no such distinction. When an owner agrees to erect a building to be rented for a graduated rental ranging from \$400 to \$600 per month, the law will imply a warranty to put a roof on it. The specifications are not before us, but it is safe to assume that they provide for a roof that will shelter the building, and, if so, the cases are the same.

Several cases are cited by defendants, but they go to the defense of waiver. Whether plaintiff waived his right to insist upon a full performance of the contract is to be decided upon the evidence. It cannot be decided upon the pleadings and opening statement.

The judgment is reversed, with directions to the lower court to let the trial proceed.

CROW, C. J., and PARKER, GOSE, and MOUNT, JJ., concur.

(72 Wash. 211)

SCHMIDT et ux. v. CURTISS et al.

(Supreme Court of Washington. Feb. 21, 1913.)

ATTORNEY AND CLIENT (§ 137*)—FEES—"RETAINER."

Where plaintiffs employed defendants to conduct certain litigation, and, under a written agreement, paid defendants \$1,000 as a "retainer fee," from which defendants agreed to pay the cost of the litigation, and the expense of plaintiffs on a trip to Montana to look up testimony, etc., plaintiffs agreeing that when the litigation was ended defendants should be paid the reasonable value of their services in the litigation, the \$1,000 was a retainer only; and, in the absence of fraud in the making of the contract, defendants, on being discharged

and other attorneys substituted, were not required to return the same.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 294; Dec. Dig. § 137.*

For other definitions, see Words and Phrases, vol. 7, pp. 6196, 6197.]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Proceeding by John A. J. Schmidt and wife against F. M. Curtiss and A. C. Remele for the substitution of other attorneys for defendants in an action brought by plaintiffs against the Cook-Reynolds Company, and to compel defendants to return \$800 paid to them. From a judgment authorizing the substitution, but denying plaintiffs' right to a return of the money, they appeal. Affirmed.

R. L. Edmiston and R. M. Webster, both of Spokane, for appellants. Merritt, Oswald & Merritt, of Spokane, for respondents.

MOUNT, J. This proceeding was brought in the lower court by the appellants to substitute attorneys of record, and to require the attorneys previously employed to return to appellants \$800 paid to them. The trial court, by consent of the parties, ordered the substitution, but, after a hearing upon the merits, refused to order a return of the money paid as a retainer. This appeal followed.

It appears that the appellants and the respondents, in May, 1912, entered into a written contract, as follows: "This memorandum of agreement, made and entered into between John A. J. Schmidt and the firm of Curtiss & Remele, all parties of Spokane, Washington, witnesseth: Whereas the said John A. J. Schmidt desired to secure the services of Curtiss & Remele in the matter of commencing certain suit against the Cook-Reynolds Company of Lewiston, Montana, to set aside a certain deed to real property situated in Spokane, and to recover the value of a \$5,000 real estate mortgage which he has recently assigned to them, all in consideration for a contract on the part of the Cook-Reynolds Company to convey to him certain premises situated in the state of Montana; and whereas, the said John A. J. Schmidt claims that he has been defrauded by said Cook-Reynolds Company out of his premises in Spokane and his mortgage and in addition a \$200 cash payment: Now, therefore, in consideration of the services of said Curtiss & Remele, he thereby agrees to and does pay to them the sum of one thousand dollars, the receipt whereof is hereby acknowledged, which sum is accepted by Curtiss & Remele on the understanding that it is a retainer fee in said case, out of which sum they agree to pay the cost of litigation in the superior court, their expenses and the expense of Mr. Schmidt on a trip to Montana for the purpose of investigating conditions there pertaining to said case and looking up testimony which will be nec-

essary to be taken in that state, and it is also further agreed that when said litigation is ended, a final settlement shall be had between the parties and Curtiss & Remele paid the reasonable value of their services in said litigation." Thereafter the plaintiff paid to respondents \$1,000, and respondents brought the action agreed upon. Pursuant to the contract, Mr. Remele went from Spokane to Montana, in order to obtain the facts in the case. Thereafter this proceeding was begun; the appellants alleging that the contract was void on account of fraud practiced upon the appellants, who did not understand the terms of the contract. This issue was tried to the court, and a finding was made that "the contract between Curtiss & Remele and said J. A. J. Schmidt is valid, and that there was no fraud, overreaching, or undue influence of any kind whatsoever practiced by Curtiss & Remele in the procurement of said contract."

It is contended by appellants that this finding is not in accord with the evidence, and that the contract itself shows that the \$1,000 paid was in full for services during the litigation. We are satisfied that the finding is fully sustained by the evidence. The great preponderance thereof is to that effect.

Appellants also contend that the contract, upon its face, shows that the \$1,000 was in full for the services to be rendered in the case, and that when the respondents were discharged they should account for the balance, after paying expenses and a reasonable fee for the work done by them. But such is not the provision of the contract; for it expressly provides that the \$1,000 was paid and received as a retainer fee, and that, when the litigation is ended a final settlement shall be had between the parties, and respondents paid the reasonable value of their services. The meaning of a retainer fee is plain and well understood, and was explained to Mr. Schmidt at the time the contract was entered into. No part of this money was agreed to be returned to the appellants, and when the respondents were discharged they were therefore under no obligation to return any part of the retainer fee.

The judgment is affirmed.

FULLERTON, MORRIS, ELLIS, and MAIN, JJ., concur.

(72 Wash. 277)

YOUNG v. JONES et al.

(Supreme Court of Washington. Feb. 24, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 45*) — MISTAKE—EVIDENCE.

Where the testimony of every witness who was present when the terms for an exchange of real estate were agreed on by the parties, and also when the deeds were passed, save that of one of the parties sustained the memorandum executed by the parties and stipulating that each party should assume the mort-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gage on the real estate received by him in exchange, and a deed failed to so state, there was a mutual mistake in the deed which equity could reform, in the absence of countervailing equities.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. EQUITY (§ 67*)—"LACHES."

The doctrine of laches as a defense is grounded on the principle of equitable estoppel, which will not permit the late assertion of a right, where other persons, by reason of the delay, will be injured thereby.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

3. REFORMATION OF INSTRUMENTS (§ 32*)—DELAY IN INSTITUTION OF SUIT—EFFECT.

Where a grantee, in a deed of incumbered real estate, was notified of a mistake in the deed in failing to require him to assume the incumbrance, shortly after the discovery by the grantor of the mistake, a delay of three years after the discovery before suing the grantee for the reformation of the deed did not amount to laches, in the absence of fraud or bad faith on the part of the grantor, or of the acquisition during the delay of rights by third persons.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by C. W. Young against Alonzo C. Jones and others. From a judgment for plaintiff, certain of the defendants appeal. Reversed and remanded.

John B. Keener, of Tacoma, and Ralph Simon, of Seattle, for appellants.

ELLIS, J. This appeal presents the question of the right to reform a deed on the ground of mutual mistake. The plaintiff Young brought an action against the defendants to foreclose a mortgage upon certain real estate situated on Vashon Island in King county, executed on September 10, 1904, by the defendants Jones and wife to the defendant Tonneson for \$900, and by Tonneson assigned to the plaintiff, and demanding personal judgment against Jones and wife. In 1908 Jones owned this property, and the defendant Lofgren owned certain real estate, in Tacoma, upon which there was a mortgage for \$1,000. In February, 1908, Jones and Lofgren agreed to an exchange of these properties. The memorandum of the agreement was as follows:

"Agreement by and between A. C. Jones and Louis Lofgren as follows, to exchange properties now listed with E. F. Gregory on following basis: Warrantee deeds to each except present mortgages, also abstracts, said Jones to pay in addition \$500 in cash when papers are ready for transfer. Comition to be \$200 to E. F. Gregory Co. to be paid by Louis Lofgren. Louis Lofgren. A. C. Jones. 2-17-08.

"Rec'd fifty dollars on above Feb'y 17-08. Louis Lofgren."

On February 24, 1908, deeds passed between the parties in consummation of the agreement of exchange; the deed from Lofgren and wife to Jones providing for the assumption of the \$1,000 mortgage on the Tacoma property by Jones; the deed from Jones and wife to Lofgren warranting against all incumbrances, "except a certain mortgage for \$900 given to P. W. Tonneson, which party of the first part assumes and agrees to pay." Jones paid the \$500 cash to Lofgren, and Lofgren the \$200 commission. In the foreclosure suit which was commenced in February, 1911, Jones and wife filed a cross-complaint, alleging that, in making the last-mentioned deed, the words, "party of the first part," were used by mutual mistake, and should read, "party of the second part," to conform to the intention of the parties that Lofgren assume the mortgage, and asked that the deed be so reformed, and, in the event of any judgment being rendered upon the note and mortgage, that it be rendered against Lofgren and wife upon the assumption clause so reformed. The Lofgrens answered this cross-complaint, denying that they assumed, or agreed to assume, the mortgage, and resisting any reformation of the deed. After hearing the evidence, the court made appropriate findings for the foreclosure of the mortgage, and for personal judgment thereon against Jones and wife, and further found that the defendants Jones were not entitled to have the deed executed by them to Lofgren reformed or modified in any respect. A decree was entered foreclosing the mortgage, rendering a personal judgment against Jones and wife for the amount of the mortgage debt, with interest, costs, and an attorney's fee, directing a sale of the property to satisfy the judgment, and also adjudging that, in case the property be sold to satisfy the judgment, then the defendants Lofgren have judgment against the defendants Jones "for the principal sum of said note and mortgage sued upon herein, to wit, \$900, together with interest thereon accrued since September 10, 1907." The defendants Jones have appealed.

The evidence shows that the exchange was negotiated through one Kessinger, who was in the employ of the real estate firm of Gregory & Co. Both Jones and Kessinger testified, in substance, that they went to Lofgren's place of work, and it was finally agreed that Jones and Lofgren would exchange properties, each to assume the mortgage on the property he received, and Jones to pay Lofgren a difference of \$500; that, on Kessinger's suggestion, the memorandum was written by Kessinger and Jones, and signed by Jones and Lofgren; that Jones gave Lofgren a check for the \$50 earnest money, and Lofgren signed the receipt therefor at the foot of the memoran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dum. Lofgren admitted signing the memorandum and receipt, but stated that he thought it was only a memorandum providing for his payment of the commission. He denied the agreement as stated by Kessinger and Jones, and testified, in substance, that he then stated he did not want property with a mortgage upon it, and that the real agreement was that Jones was to take the Lofgren property and pay the mortgage of \$1,000 on it, and Lofgren was to take the Jones property, and Jones was also to pay the mortgage of \$900 on it, and a difference of \$500 cash; the Lofgren property being estimated at a value of \$5,000, and the Jones property at \$3,500. The deeds were prepared and executed in the office of Gregory & Co.; one S. R. Webb of that firm acting as notary. He testified as follows: "They were to exchange properties, and each was to assume the mortgage on the property he received, and Jones was to pay Lofgren a cash difference of \$500. My recollection is that Lofgren's property was put in at \$5,000, and Jones' at \$4,500. Lofgren was to pay our firm a commission of \$200. I gave these terms of the agreement and the description of both properties to our stenographer to draw the deeds. Both Lofgren and Jones fully understood that each was to assume the then existing mortgage on the property he was to receive. I took the acknowledgments of Lofgren and his wife and Jones and his wife to the respective deed. I recognize this * * * as the deed given by Jones and wife to Lofgren. Lofgren was to assume the mortgage on the Vashon property deed by Jones and wife to him. This deed is a mistake in that Lofgren does not assume to pay the mortgage on the Vashon Island property."

Jones testified that he looked over the deed, but did not discover the mistake. Eric Lofgren, a brother of Louis, testified to the effect that he and Louis, on February 2, 1908, went to Vashon Island to see the Jones place, and he then heard Louis tell Jones that Jones would have to pay both mortgages; that he (Louis) could not, under any other conditions, trade with Jones, as he wanted a place free from incumbrances. He also estimated the Lofgren property at a value of \$5,000, and the Jones property at \$3,500. One Heu de Bourck, who, it seems, initiated the deal by introducing Kessinger to Jones, testified that, as he understood the deal, Jones was to accept the Lofgren property and assume payment of the \$1,000 mortgage thereon, and give in exchange the Jones property, free of all incumbrances, and pay to Lofgren \$500 additional in cash; that he considered the Jones property worth \$2,500, but Jones had a short time before refused to take \$3,500 for it. It does not appear that either Eric Lofgren or Heu de Bourck was present when the final terms were agreed upon, or when the deeds were passed. It is

fairly inferable that they only testified as to matters developed in preliminary negotiations. Jones further testified that in May, 1908, he received a notice from a Tacoma bank that the interest on the \$900 mortgage would soon be due; that he notified the bank that Lofgren had assumed the mortgage; that some days later he received a letter from E. R. York, attorney for the holder of the mortgage, stating that there was some dispute as to who should pay the interest; that he at once called on York and was informed that, in the deed which he had given to Lofgren, he (Jones) had assumed and agreed to pay the mortgage; that he then protested that it was a mistake, and that he would never pay it; that he then had his attorney, J. B. Keener, prepare a corrected deed, which was tendered to Lofgren, who refused to accept it; that, believing that Lofgren would pay the mortgage, he took no further steps in the matter till in February, 1911, when the foreclosure action was commenced.

[1] We think that the evidence, which we have thus fully reviewed, strongly preponderates in favor of the appellants. The testimony of every witness who was present when the terms of exchange were finally agreed upon, and also when the deeds were passed, save that of Lofgren himself, sustains the memorandum as speaking the intention of the parties. The evidence is clear and convincing that it was the intention of both parties that Lofgren should assume the payment of the \$900 mortgage, and that the recital in the deed to the contrary was a mutual mistake. In such a case, a court of equity will, in the absence of countervailing equities, grant a reformation. 4 Pomeroy's Equity Jurisprudence (3d Ed.) § 1376; Elliott v. Sackett, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678; Coggins v. Carey, 106 Md. 204, 66 Atl. 673, 10 L. R. A. (N. S.) 1191, 124 Am. St. Rep. 468; Dennis v. Northern Pacific Ry. Co., 20 Wash. 320, 55 Pac. 210.

[2, 3] The decision of the trial court seems to have been determined largely by the fact that the appellants waited almost three years, after discovering the mistake, before taking any action to reform the deed. The doctrine of laches as a defense is grounded on the principle of equitable estoppel, which will not permit the late assertion of a right, where other persons, by reason of the delay, will be injured by its assertion. The case before us presents no such aspect. No right of a third party is involved. The respondents Lofgren had notice of the appellants' claim almost as soon as the mistake was discovered. There is no evidence that the respondents or any one else will be placed in any worse position by a reformation because of the delay. No adverse equities have arisen in the interim. The fact of appellants' claim was at all times known to those claiming adversely. There was no evidence of fraud, deceit, or bad faith on the appellants' part.

In such a case, mere delay, short of the period fixed by the statute of limitations, will not bar the action. The question is dependent upon the inherent equities of the particular case. 20 Cyc. 725, 726; *Eno v. Sanders*, 39 Wash. 238, 81 Pac. 696; *Dennis v. Northern Pac. Ry. Co.*, 20 Wash. 320, 55 Pac. 210; *Gay v. Havermale*, 27 Wash. 390, 67 Pac. 804; *Brun v. Mann*, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232; *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775; *Neppach v. Jones*, 20 Or. 491, 26 Pac. 569, 23 Am. St. Rep. 145. The appellants are entitled to the reformation sought. They are not barred by laches to assert their right.

The decree, as relating to the issue between the appellants and the respondents *Lofgren*, is reversed. The cause is remanded, with direction to so modify the decree as to grant the reformation of the deed in question, and to provide that, in case a sale of the property to satisfy the mortgage debt leave a deficiency, the appellants have judgment over for such deficiency against the respondents *Lofgren*.

CROW, C. J., and MAIN and MORRIS, JJ., concur.

FULLERTON, J. In my opinion, the evidence in favor of a mistake in the deed is not so clear and convincing as to warrant a reformation. I therefore dissent from the conclusion reached by the majority.

(72 Wash. 209)

C. W. RAYMOND CO. v. LITTLE FALLS FIRE CLAY CO.

(Supreme Court of Washington. Feb. 21, 1913.)

APPEAL AND ERROR (§ 413*)—NOTICE OF APPEAL—PARTIES TO BE SERVED.

The creditor who brings a suit, in which the defendant is decreed insolvent and a receiver is appointed, and the purchaser at the receiver's sale are parties, who are entitled to notice of appeal by one from the order denying his petition, filed in the proceeding, for specific property of insolvent or for a preference, and adjudging him to have only the rights of a general creditor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2136-2139; Dec. Dig. § 413.*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Suit by the West Coal Grocery Company against the Little Falls Fire Clay Company. From an order, the C. W. Raymond Company, which appeared and filed a petition, appeals. Dismissed.

Rickabaugh & McElroy, of Tacoma, for appellant. E. R. York and Hayden & Langhorne, all of Tacoma, for respondent.

MORRIS, J. The respondent, in a suit instituted by the West Coast Grocery Company, was decreed insolvent, and a receiver was appointed. Appellant appeared in this proceeding and filed a petition, praying that the receiver be restrained from disposing of a patented brickkiln, which it was claimed the insolvent company had constructed under a license, as embodied in a contract the terms of which had not been complied with; or, in the alternative, that the receiver be directed to pay appellant \$2,000, the amount of the license it claimed due under the contract. The court denied the petition, and directed the sale of the kiln with other assets of the insolvent company, from which order the C. W. Raymond Company appeals.

Motion is made to dismiss the appeal upon the ground that necessary and interested parties were not served with notice. This motion must be granted. The parties upon whom respondent contends notice should have been served are the West Coast Grocery Company, a large creditor of the insolvent company, and plaintiff in the proceedings in which the receiver was appointed, and the Standard Clay Company, the purchaser at the receiver's sale of the property and assets of the insolvent company. Under the decree of the court the appellant shares in the insolvent estate as a general creditor. It contends, and if its appeal was here sustained it would be held, that under its contract of license the receiver must pay it the sum of \$2,000, thus depleting the fund upon which the West Coast Grocery Company looks for a payment of the amount due it from the insolvent company. The West Coast Grocery Company is, therefore, not only a party to the action, but has substantial interests involved in the decree and affected by this appeal. It was therefore entitled to service of the notice of appeal, as a party to the action whose interests were to be determined by the appeal. Whether this would require service of notice of the appeal in a receivership proceeding upon creditors who are not parties to the action, but have only filed claims with the receiver, is not here determined, as that question is not involved in this ruling. The Standard Clay Company, by becoming a purchaser at the receiver's sale, voluntarily submitted itself to the jurisdiction of the court, and thus became a party to the action. *Rice v. Ahlman*, 126 Pac. 66; *Robertson Mtg. Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312. In the last case it was held that a purchaser at a sheriff's sale acquires substantial interests in the property involved in the appeal, and is entitled to service of notice. These two cases are controlling as to the Standard Clay Company's right to notice.

The appeal is dismissed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

(72 Wash. 206)

MATHIS v. WESTERN FURNITURE MFG. CO.

(Supreme Court of Washington. Feb. 21, 1918.)

1. PLEADING (§ 309*)—PRODUCTION OF INSTRUMENT REFERRED TO IN PLEADING.

Rem. & Bal. Code, § 284, providing that unless a copy of the instrument or account sued on is served upon the opposite party when demanded, it cannot be given in evidence, does not apply to actions brought under the factory act; and hence, in a factory employé's action for injuries, his failure to serve a copy of the notice required by such act upon defendant's attorneys within 10 days after demand for same, did not preclude him from proving service of such notice.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 942; Dec. Dig. § 309.*]

2. MASTER AND SERVANT (§ 121*)—INJURY TO FACTORY EMPLOYÉ.

The master was liable for injuries received by a factory employé while operating a machine in the usual manner, where the injury could not have happened had the machine been properly guarded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

3. DAMAGES (§ 132*)—EXCESSIVE RECOVERY—PERSONAL INJURIES.

A recovery of \$3,250 for cutting the thumb on the right hand of a factory employé, lacerating the flesh and so injuring the bone as to result in a stiff thumb down to the first joint, is excessive, and should be reduced to \$1,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Paul F. Mathis against the Western Furniture Manufacturing Company. From judgment for plaintiff, defendant appeals. Modified and affirmed conditionally.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant.

MORRIS, J. Action under the factory act to recover damages for injury alleged to have been sustained because of appellant's failure to guard a jointer or buzz planer.

[1] The appeal presents three questions. It is first urged that respondent was precluded from giving evidence of the service of the notice required by the act because he did not serve a copy thereof upon appellant's attorneys within 10 days after demand for same. In support of this claim of error appellant relies upon the provisions of section 284, Rem. & Bal. Code, reading as follows: "It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he

believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account, when the one delivered is defective; and the court may in all cases, order a bill of particulars of the claim of either party to be furnished." This section has no application to actions brought under the factory act. Its manifest purpose is to embrace cases where the action is founded upon a written instrument, or items of an account are put in issue. The notice required by the factory act to be given of the time, place, and cause of injury complained of is not an instrument in writing within the meaning of section 284. The right of action does not accrue upon the notice, but on the failure to properly guard. The giving of notice is simply a condition precedent to the commencement of action, while the written instrument or items of an account referred to in section 284 embrace the right of action itself and not any precedent condition to the right to commence suit. The object of the statute requiring the service of a copy of a written instrument or items of an account is to enable the defendant to protect himself against surprise on the trial. *Turner v. Great Northern Ry. Co.*, 15 Wash. 218, 46 Pac. 243, 55 Am. St. Rep. 883. This object is fully complied with, when the notice required by the factory act is served. That it was served in this instance can hardly be doubted.

[2] It is next urged that respondent's contributory negligence, and not the failure to guard the knives of the jointer, was the proximate cause of the injury, citing *Laidley v. Musser Lumber & Mfg Co.*, 45 Wash. 239, 88 Pac. 124, where it was held there could be no recovery for injuries sustained by an experienced sawyer, by reason of his contributory negligence, where he attempted to pull a piece of lumber out of a clogged up chute and gave it a jerk, causing it to suddenly give way and bring his arm in contact with a moving saw. The cases are not at all similar. In the *Laidley* Case it was not the failure to guard the saw that caused the injury, but the negligent act of shoving the arm into the clogged chute and jerking the arm up against the saw. Had the plaintiff in that case been operating his machine in the usual manner, he would not have been injured. In this case respondent was injured while operating the machine in the usual manner, and received an injury which, had the machine been properly guarded, could not have happened. There is a plain distinction between the two cases.

[3] The last contention is error in the assessment of damages. The case was tried by the court without a jury, and \$3,250 awarded as damages. This amount is said to be excessive for the injury sustained. The injury was the cutting of the thumb on the right hand, lacerating the flesh and so injuring the bone that the result is a stiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thumb down to the first joint. We have no doubt the injury was a painful one, and that respondent will be handicapped because of his stiffened joint, resulting in a partial loss of the use of the thumb. Such an injury, however, does not warrant a judgment for \$3,250. What would be a proper sum is difficult of ascertainment, and for this reason appellate courts on such an assignment of error give great weight to the verdict of a jury or the findings of a court. It is, however, as much our duty to set aside such a verdict or finding when we believe it to be unjust as it is to give heed to any other prejudicial error, and we cannot escape this duty, much as we dislike it. This award seems to us unreasonable and unjust, and respondent must accept a reduction to the sum of \$1,000, or submit to a new trial.

If within 20 days from the going down of the remittitur respondent accept such a reduction, the judgment so modified will stand; otherwise a new trial is ordered. The other assignments of error are overruled, and as so modified the judgment will stand.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(72 Wash. 204)

BULLOCK v. STANLEY et ux.

(Supreme Court of Washington. Feb. 21, 1913.)

TRIAL (§ 139*)—QUESTION FOR JURY—WEIGHT OF TESTIMONY.

The question of the weight of testimony is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Mary P. Bullock against Frank M. Stanley and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Carkeek, McDonald & Kapp, of Seattle, for appellants. Elias A. Wright, of Seattle, for respondent.

PER CURIAM. This is a suit upon an assigned account. There was a verdict and judgment for the plaintiff. The defendants have appealed.

The appeal presents two questions. The first contention is that the evidence of the indebtedness is insufficient to support the verdict. This contention is wholly wanting in merit. The verdict has substantial evidence to sustain it, and the question of the weight of the evidence was one for the jury. The respondent claims through an assignment made by P. S. Combs & Co., a copartnership. The assignment is in writing, and was put in evidence. Upon the trial it was shown that prior to the date of the assignment P. S. Combs had purchased the interest

of his copartners in the business, including the account in controversy; that they had retired; that he had taken his son into the copartnership, and that the partnership at the date of the assignment was composed of P. S. Combs and his son. Combs testified that this assignment was also in writing. The writing was not produced, and the admission of the parol testimony to prove the assignment is the second error assigned. It is contended that its absence was not sufficiently accounted for. Considering the time that had elapsed between the date of the first assignment and the trial, which was nearly three years, we think the evidence offered as to the loss of the assignment was sufficient to admit parol testimony.

The judgment is affirmed.

(72 Wash. 261)

STATE v. DAVIS.

(Supreme Court of Washington. Feb. 24, 1913.)

1. ASSAULT AND BATTERY (§ 95*)—EVIDENCE—SUFFICIENCY.

Where the evidence for the state tended to show a wanton, cruel assault with a knife on the prosecuting witness, with whom accused had no previous acquaintance, that it was made to avenge some real or fancied grievance of accused's younger brother against the prosecuting witness, and was made while the witness was in a reclining position, and before he could assume or attempt to assume a defensive attitude, it justified the submission of the cause to the jury, although accused's evidence alone would not have supported a conviction.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 141; Dec. Dig. § 95.*]

2. ASSAULT AND BATTERY (§ 95*)—CRIMINAL OFFENSES—QUESTIONS FOR JURY.

Since, under the statute, the infliction of grievous bodily harm upon another is an essential element of assault in the second degree, the question whether the particular injury inflicted amounts to grievous bodily harm is one of fact for the jury rather than one of law for the court, and hence the court erred in charging that the injury shown by the evidence was grievous bodily harm within the meaning of the law.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 141; Dec. Dig. § 95.*]

3. HOMICIDE (§ 145*)—ASSAULT—INTENT TO KILL.

Where a person assaults another, and inflicts upon him a dangerous wound likely to, but which does not, cause death, the jury cannot infer from the act alone that he intended to kill, since, while a person is presumed to intend the natural and probable consequences of his act, the presumption never extends beyond the actual consequences.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 262-264; Dec. Dig. § 145.*]

4. ASSAULT AND BATTERY (§ 84*)—EVIDENCE—ADMISSIBILITY.

On a trial for assault claimed to have been committed to avenge a grievance of accused's younger brother against the prosecuting witness, but not claimed to have been committed in the brother's defense, evidence as to a previous altercation between the brother and the prosecuting witness not in accused's presence was incompetent, although what the brother

told accused concerning such difficulty might have been material to show accused's condition of mind, and as bearing on the question of his intent and purpose.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 132; Dec. Dig. § 84.*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

E. Davis was convicted of assault in the second degree, and he appeals. Reversed and remanded.

Samsel & Engeset, of Everett, for appellant.

FULLERTON, J. The appellant was informed against for the crime of assault in the first degree, the information reading as follows: "Comes now Ralph C. Bell, as the duly elected, qualified, and acting prosecuting attorney for the county of Snohomish, state of Washington, and by this his information charges and accuses the above-named defendant, E. Davis, with the crime of assault in the first degree, in that on or about the 26th day of August, 1910, in the county of Snohomish, state of Washington, the said defendant, E. Davis, did unlawfully, and with intent to kill one Elmer Moss, assault said Elmer Moss with a deadly weapon, to wit, a knife then and there held in the hands of him, the said defendant, E. Davis, and did then and there willfully inflict grievous bodily harm upon the said Elmer Moss with and by means of said deadly weapon aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington." To the information the appellant pleaded not guilty, and was put upon his trial before a jury, which returned a verdict finding him guilty of assault in the second degree. From the judgment and sentence pronounced against him upon the verdict he appeals.

[1] Of the errors assigned the first to be noticed is the assignment to the effect that the evidence is insufficient to justify the verdict returned by the jury. In support of this assignment the appellant quotes largely from the testimony of himself and the testimony introduced on his behalf, and it may be that, if this testimony stood alone, there would be merit in the contention. But the evidence was conflicting. That on the part of the state tended to show that the assault was wanton and cruel. It appeared that the prosecuting witness had just passed his sixteenth birthday while the appellant was some two years his senior; that there was no previous acquaintance between the appellant and the prosecuting witness, nor any quarrel between them preceding the assault; that the assault was made to avenge some real or fancied grievance a younger brother had against the prosecuting witness, and not any quarrel of the appellant's own; that it was made with a shoe knife, although

the prosecuting witness was without weapons of offense or defense of any kind, and was made upon the prosecuting witness while he was in a reclining position upon the ground, suddenly, and before he could assume or attempted to assume a defensive attitude. There was therefore clearly a sufficient dispute in the evidence to require the submission of the cause to the jury.

[2] The court, among other instructions, gave the following to the jury: "You are further instructed that assault in the second degree, for the purposes of this case, is defined by the law as follows: 'Every person who, under circumstances not amounting to assault in the first degree, shall willfully inflict grievous bodily harm upon another with a weapon, shall be guilty of assault in the second degree.' Therefore, if you shall believe the evidence beyond a reasonable doubt, as that doubt is defined to you in these instructions, that the defendant, Elbert Davis, in the county of Snohomish, state of Washington, on or about the date alleged, willfully inflicted grievous bodily harm upon Elmer Moss with a weapon and are not satisfied beyond a reasonable doubt that he intended to kill him, then you must find the defendant guilty of assault in the second degree. In this connection you are instructed that the harm and injury suffered by Elmer Moss, as testified in this case, was grievous bodily harm within the meaning of the law." The appellant complains of the last clause of the instruction, contending that the question whether or not the wounds inflicted by the appellant upon the person assaulted amounted to grievous bodily harm within the meaning of the law was a question of fact for the jury, and not one of law for the court. Logically this contention seems to be sound. Since the subdivision of the statute under which the information is drawn makes the infliction of grievous bodily harm upon another an essential element of assault in the second degree, it is, of course, necessary to charge in the information that the injury inflicted was grievous bodily harm, and, since the plea of not guilty puts in issue all of the material allegations of the information, it must follow that the question whether the particular injury inflicted amounts to grievous bodily harm is a question of fact for the jury to determine rather than a question of law for the presiding judge. The court should, therefore, have defined the term "grievous bodily harm" to the jury, and left it to them to say whether the particular wounds inflicted upon the prosecuting witness came within the definition of the term.

To the same effect are the authorities. In *Murphey v. State*, 43 Neb. 34, 61 N. W. 491, the defendant was convicted of the crime of assault with intent to inflict on the person of another great bodily injury, and appealed from the judgment of conviction. Discussing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the grounds for reversal suggested by counsel in the course of the argument on the appeal, the court used this language: "The term 'great bodily injury,' as employed in the statute, is perhaps not susceptible of a precise legal definition. It is, however, an injury of a graver and more serious character than an ordinary battery; and whether a particular injury is within the meaning of the statute is generally a question of fact for the jury, and not of the law. See *State v. Gillett*, 56 Iowa, 459 [9 N. W. 362]. That a great bodily injury, within the meaning of the statute, may be inflicted without the use of a 'dangerous' or even 'offensive' weapon, is quite apparent from the facts of this case, to which reference will hereafter be made." In *State v. Gillett*, 56 Iowa, 459, 9 N. W. 362, complaint was made of the instruction which the court said: "The prosecuting witness, Zeaman Magoon, at the time of the injury complained of, lived with the defendant, and at the time of the trial was about eight years old. He testified that the defendant whipped him with a crupper to harness, with a buckle on the end of it. He was examined some time afterward, and injuries, covered with scabs, some of which were suppurating, were found on his back and side. The court gave the jury an instruction as follows: 'A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, and the indictment charges that defendant intended to inflict such an injury on the boy Magoon. It is not only necessary for the state to prove that the defendant committed an assault, but it must go farther and prove the intent with which he committed it, and that it was to inflict a grave and more serious injury than an ordinary battery or whipping. If the proof should show an assault and battery, but fail to show the ulterior intent charged, the conviction could only be for assault and battery.' The giving of this instruction is assigned as error. It must be conceded that the instruction does not furnish the jury the means of determining what is the extent of an injury which will constitute a great bodily injury, for the limits of an assault and battery, with which it is compared, and which it is declared to exceed, are not defined. And yet it must be admitted that the instruction defines a great bodily injury as accurately and completely as it is susceptible of definition as a matter of law. Whether an injury is a great or only a slight bodily injury is essentially a question of fact, and it is difficult to see how any greater aid can be furnished the jury in determining that question than was done by the court in this case." For other authorities touching the general question, although perhaps not so directly in point, see *Smith v. State*, 58 Neb. 531, 78 N. W. 1059; *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Ann. St.

130 P.—7

Rep. 154; *People v. Miller*, 91 Mich. 639, 52 N. W. 65; *George v. State*, 21 Tex. App. 315, 17 S. W. 351; *Bishop*, Stat. Cr. 318; *Roscoe's Cr. Ev.* p. 609 (8th Ed. p. 772).

[3] The court gave the following instruction to the jury: "You are further instructed that every man is presumed to intend the usual, ordinary, and natural results of his voluntary acts, even though there be no direct or positive proof of such intention. Therefore if you shall believe from the evidence beyond a reasonable doubt that the defendant, Elbert Davis, in the county of Snohomish, state of Washington, at or about the time alleged, inflicted the harm upon the said Elmer Moss which has been testified to, then you have a right to presume that the defendant intended to do so; and, if you shall believe from the evidence beyond a reasonable doubt that the usual, ordinary, and natural result of the defendant's voluntary acts would likely result in death, then you have a right, if consistent with all the testimony in this case, to infer that he intended to cause death." This instruction is also erroneous. While it is true that a man is presumed to intend the natural and probable consequences of his acts, it is true, also, that the presumption arising from the acts alone never extends beyond the actual consequences of the acts. If one person willfully assaults another and inflicts upon him a dangerous wound, the jury would have the right to infer from the act that he intended to inflict the dangerous wound, or, if one person willfully assaults another and inflicts upon him a dangerous wound likely to cause death and death ensues therefrom, the jury have the right to infer from the act and its consequence that he intended to kill the person assaulted, but, if a man assaults another and inflicts upon him a dangerous wound likely to cause death, but death does not ensue, the jury have no right to infer from the act alone that he intended to kill, because such was not the consequence of the act. *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; *State v. Williams*, 36 Wash. 143, 78 Pac. 780. So in the instruction in question it was error to instruct that the jury might infer from the mere assault and the infliction of the wound that the defendant intended to kill the prosecuting witness, because death was not the consequence of the act. Intent in such cases is gathered from all the circumstances of the case, of which the assault and wounding are only a part.

[4] While the appellant's brother, Truman Davis, was on the witness stand, he was asked concerning an altercation he had had with the prosecuting witness some little time before the encounter between the prosecuting witness and the appellant. Objections were interposed and sustained to this line of examination, we think properly, on the ground that it was immaterial. It was not shown nor offered to be shown that the as-

sault made by the appellant was made in defense of his brother, and consequently the altercation between the brother and the prosecuting witness would afford no justification for the appellant's acts. It is said, however, that such acts were admissible as tending to show the appellant's condition of mind, and as affecting the question of his intent and purpose in making the assault. But, again, it was not shown that he was a witness to the altercation; on the contrary, the evidence showed the fact to be otherwise, and that his knowledge of it could be but secondhand. What he was informed concerning it, and not the actual occurrence, was therefore the material inquiry. To show what the brother told the appellant concerning the difficulty between himself and the prosecuting witness might have been material, but not so the actual occurrence, unless it was further shown that the appellant witnessed the actual occurrence.

Complaint is also made that the court did not submit the appellant's theory of the encounter to the jury, but no fault can be justly found with the instructions in this respect.

The judgment is reversed and the cause remanded for a new trial.

MOUNT, MAIN, ELLIS, and MORRIS, JJ., concur.

(72 Wash. 214)

FRICK et al. v. WASHINGTON WATER POWER CO.

(Supreme Court of Washington. Feb. 21, 1913.)

DAMAGES (§ 158*)—PERSONAL INJURIES—ISSUES—AGGRAVATION OF DISEASED CONDITION.

Where, in an action against a carrier for injuries to a passenger, she alleged that prior to the injury she was an able-bodied woman in good health, but that, by reason of the injury sustained, she acquired appendicitis, retroversion of the womb, and certain other injuries requiring a surgical operation, from which she never fully recovered, but there was evidence that she suffered from a diseased appendix and had retroversion prior to the injury, she was not entitled to recover damages under her complaint for an aggravation or an acceleration of a diseased condition previously existing, unless it appeared that she had no knowledge thereof prior to the accident.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Blanche Frick and husband against the Washington Water Power Company. From a judgment for plaintiffs for less than the relief demanded, they appeal. Affirmed.

Graves, Kizer & Graves, of Spokane, for appellants. Post, Avery & Higgins, of Spokane, for respondent.

MOUNT, J. The plaintiffs brought this action to recover damages from the defendant

on account of alleged personal injuries sustained by Mrs. Frick when a passenger upon one of defendant's street cars. The complaint alleged that about midnight on the evening of November 24, 1910, while the plaintiffs were passengers upon one of defendant's cars, said car was so negligently operated that it left the track and struck the sidewalk curb with such force that the plaintiff Mrs. Frick was violently hurled against the seat in front of her, striking her abdomen against the upright back of the seat, inflicting permanent internal injuries upon her, so that her appendix became inflamed and diseased, and she suffered retroversion of the womb to such an extent that a surgical operation became necessary, and was undergone for the removal of the appendix and for the restoration of the womb to its proper position, and as a result thereof said plaintiff was rendered sterile, and by reason thereof suffered and continued to suffer great pain and anguish; that "prior to said accident said plaintiff was a strong, able-bodied woman, in good health." These allegations were all denied by the answer. When the case came on for trial to the court and a jury, the defendant conceded "that, if the plaintiff Blanche Frick received the specific injuries alleged in the complaint at the time and place there stated, the defendant would be liable for reasonable damages on account thereof; but defendant denies that she received said injuries or any of them." The negligence of the defendant was thereby conceded, so that the only question left for the jury to determine was whether the plaintiff was injured at the time of the accident, and the extent of the injuries, and the amount of damages. The case was tried out upon that question. The jury returned a verdict in favor of the plaintiffs for \$1,000. The plaintiffs thereafter moved the court for a new trial for errors of law occurring in the trial. This motion was denied, and the judgment entered upon the verdict. The plaintiffs have appealed.

It is argued that the court erred in refusing to give certain instructions requested by the plaintiffs, and in giving certain other instructions. Defendant has moved to dismiss the appeal, for the reason that no proper exceptions were taken to these instructions. We think the exceptions taken were sufficient, under the rule in Coffey v. Seattle Electric Co., 59 Wash. 686, 109 Pac. 202.

The plaintiffs requested the court to give the following instructions: "If the jury believe from the evidence that plaintiff Mrs. Frick was injured through the negligence of the defendant, and if the jury further concludes from the evidence that, at the time of such injury, plaintiff Mrs. Frick was in a delicate condition of health, or possessed an organic predisposition to disease or injury, and that such injury augmented, aggravated, and accelerated such diseased con-

dition or ill health, then your verdict will be for the plaintiff, unless you find that these conditions not only might have arisen even though the defendant had not been negligent, should you find it negligent in the premises. If one is reasonably responsible for the act, he is chargeable for the direct results of the act, however surprising. The rule is, if by reason of the delicate condition of health the consequences of a negligent act are more serious, still, for those consequences, the defendant is liable, although they are aggravated by imperfect bodily conditions. The duty of due care and of abstaining from the unlawful injury of another applies to the sick, to the physically frail or weak, and to the infirm, as fully as to the strong and healthy; and, when the duty is violated, the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause—the one that necessarily sets the other cause in motion. The street cars of the defendant company are not operated for the sole use of healthy and robust people, but are for the use of the sick, the infirm, and the decrepit as well. They may lawfully be patronized by every person, without regard to age, sex, or physical condition; and the defendant company is chargeable with the knowledge that people of different bodily conditions travel on its cars, and that among these are the weak, the decrepit, and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happens to one of the latter class, full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease, and that such tendency to disease or predisposition may greatly aggravate a bodily injury. Thus a street railway company has reasonable grounds to expect that, if one of that class, who are diseased, or afflicted with a tendency to disease, is injured by reason of the negligent operation of its cars, the disease might develop and result in far more serious consequences to the injured person than would have resulted to a robust person. Hence, if you find that the plaintiff Mrs. Frick had a tendency to appendicitis, or that her fallopian tubes were affected by disease, and that she was injured as she alleges, and that such injury aggravated, augmented, and accelerated her diseased physical condition, resulting in the necessity for the operations afterwards performed, and the suffering occasioned thereby, then and in that case I charge you that the negligence of the defendant was the proximate cause of the injury, for which plaintiff seeks to recover damages."

The court refused to give these requested instructions, but gave the following: "From this statement you will see that the ultimate questions of fact for you to determine are therefore: First, whether or not the injuries

of which Mrs. Frick complains, namely, a diseased appendix and a retroverted womb, were caused by the accident in question; and, if you find that they were, then, second, what sum will fairly compensate her for such injuries? * * * It is charged in the complaint in this case that one of the results of the accident referred to in the complaint, so far as Mrs. Frick is concerned, is the disease of appendicitis. It is claimed by the defendant that Mrs. Frick had appendicitis before this accident. It is alleged in the complaint that before the accident plaintiff was in all respects a strong and healthy woman. It is not alleged in the complaint that plaintiff had a chronic or catarrhal appendicitis, and that the accident aggravated the disease and produced a condition of acute appendicitis, necessitating an operation. I charge you that, if you find from the evidence that plaintiff Mrs. Frick had and suffered from a diseased appendix before and down to the accident, then plaintiffs cannot recover in this action on account of their claim for appendicitis or the expense of the surgical operation therefor and you shall not allow the plaintiffs any damages on account of the claim of appendicitis, or the surgical operation for appendicitis. It is charged in the complaint that one of the results of the accident referred to in the complaint was retroversion of the womb. It is claimed by the defendant that retroversion of the womb could not be caused by this accident; that, if the plaintiff Mrs. Frick had retroversion of the womb, she had it before this accident. If you find that Mrs. Frick had a retroverted womb prior to the accident, and that she knew thereof, then plaintiffs cannot recover in this action on account of their claim for a retroverted womb, or the expense of the surgical operation therefor, nor, under the circumstances, could plaintiffs recover if the accident aggravated the condition, since, if Mrs. Frick knew that she had a retroverted womb at and prior to the time of the accident, then it was her duty to so allege, and not allege that she was a perfectly sound and healthy woman. If, however, you find that Mrs. Frick had a retroverted womb at and prior to the time of the accident, and she was ignorant thereof, then, before plaintiffs would be entitled to damages on that account, they must show that the condition of retroversion was aggravated by the accident. If you find that she had a retroverted womb, and that it was not aggravated by the accident, then plaintiffs will not be entitled to any damages on account of the retroverted womb or any expense attending and resulting from the operation of restoring it to its proper position. On the other hand, if she had a retroverted womb at and prior to the time of the accident, and she was ignorant thereof, and the accident aggravated the condition, causing her pain and distress, then plaintiffs would be entitled to damages for such aggravation. You must,

so far as you can, separate the results of the infirmities of Mrs. Frick, if any, which existed before the accident from the results of the accident. It is only the accident and the natural results of the accident that you are to consider, if you arrive at the question of damages in this case. If you find the fact to be that Mrs. Frick had retroversion of the womb before the accident, and the same was aggravated by the accident, in considering the question of damages, you are only to consider the aggravation, and not the natural and probable consequences, of the retroversion of the womb, which existed before the accident."

Substantially the same instructions were given with reference to the removal of the fallopian tubes. The court then instructed the jury: "If, in accordance with the instructions I have already given you, you find for the plaintiffs, then I instruct you that plaintiff is entitled to recover for all loss of time, for all physical injuries, and for all physical suffering that she has endured as the direct and proximate result of any injuries received by her as a result of such accident, and likewise, if you find from a preponderance of the evidence in the case that any injuries received by her are permanent in their nature, she is entitled to recover therefor. In addition thereto, the plaintiffs are entitled to recover for any reasonable sums which they have necessarily expended for hospital bills, for nurses and surgeons, in endeavoring to be cured of any hurts and injuries she received on account of said accident, and in this connection I instruct you that these items include any sums that plaintiffs may have incurred liability for, whether they have actually paid the same or not. You must bear in mind that, if you find a verdict for the plaintiffs, your verdict must be compensatory; i. e., it must not exceed such amount as will fairly compensate plaintiffs in money for the injuries sustained."

The requested instructions first above quoted were taken substantially from the case of *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743, and afterwards approved by this court in *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183. While they correctly state the law as applied to those cases, we are satisfied they are not applicable to this case, because here the issue was clearly presented by the pleading whether Mrs. Frick was a sound and healthy person prior to the injury, and the case was tried out to the jury upon that one issue. The plaintiffs sought to show by their evidence that Mrs. Frick, prior to the accident, was sound physically, while the sole defense was that she had a diseased appendix, diseased fallopian tubes, and a retroverted womb prior to the injury, and that her suffering, subsequent to the injury, was the natural and necessary result of such diseased condition, and that her injury, if any was received, was in no wise responsible

for her pain and suffering or for the operation which was afterwards performed upon her. The issue was simple and well defined. While the rule is that a diseased person may recover damages for an injury which aggravates or accelerates a diseased condition, there must be some issue upon which that question may be tried. The issue here was that the plaintiff Mrs. Frick was "a strong, able-bodied woman, in good health," and it was claimed all through the trial, until these instructions were requested, that her affliction was caused solely by the accident. The object of making this issue, of course, was to magnify the damages. It does not seem just that the plaintiffs may adopt one theory in a complaint which is required to state the facts, and try the case upon that theory until it comes to instructing the jury, and then require the court to instruct the jury upon some other theory. This is precisely the position the appellants are assuming in the case at this time. The issues which are made by the complaint and which are tried to the jury are issues upon which the court must frame his instructions; and, if instructions are requested which state the law upon some other issues, the court is not bound to give them, for the court is required to confine the instructions to the scope of the allegations and proof. *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490. This Michigan case is criticised by the appellants; but we think it states a plain rule of common honesty, and is applicable here, where the statute requires that the "complaint shall contain a plain and concise statement of the facts constituting the cause of action." Rem. & Bal. Code, § 258.

Appellants insist that the allegation in the complaint that Mrs. Frick was a strong and healthy woman prior to the accident is an immaterial allegation, because she is entitled to the same amount of damages whether she was a strong and healthy woman or diseased and predisposed to weakness and infirmity; citing 13 Cyc. 31. She was, no doubt, entitled to recover all the damages which she suffered; but damages accomplishing the same result to a person in perfect health would certainly be greater than to a diseased person. In this case, the plaintiffs were standing upon the allegations of perfect health, and in all fairness should abide the result upon the issue as made by them. The instructions given were based upon the real issue made by both the pleadings and the proof. The jury found for the plaintiffs, necessarily finding either that Mrs. Frick was in perfect health before the accident or that she was diseased and did not know it. In the latter event, the jury made allowance for all damages on account of accelerated disease, as they were instructed they might do. We think the requested instructions were properly refused, and that the ones given stated the law, as applied to the issues

in this case, and in our opinion were all that the issues justified.

The judgment is therefore affirmed.

FULLERTON, MORRIS, ELLIS, and MAIN, JJ., concur.

(72 Wash. 200)

BARDSHAR v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. Feb. 21, 1913.)

STREET RAILROADS (§ 99*)—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

A chauffeur was guilty of contributory negligence, barring recovery by his employer against a street railway company for a collision between the employer's automobile and defendant's street car, where the chauffeur drove the automobile upon the track without taking any precaution to ascertain whether a car was approaching.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Action by F. H. Bardshar against the Seattle Electric Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Willett & Oleson, of Seattle, for appellant. Jas. B. Howe, and A. J. Falknor, both of Seattle, for respondent.

MORRIS, J. Appellant seeks to recover for damages to his automobile, resulting from a collision with one of respondent's street cars at First avenue and Union street, Seattle, about 8:30 p. m. September 13, 1910, and takes this appeal from a judgment of nonsuit, based upon the contributory negligence of the chauffeur.

The automobile was proceeding south on First avenue from Pike street approaching Union street one block to the south; it was passed by one of respondent's cars on the west or south-bound track. This south-bound car stopped on the south side of Union street to take on awaiting passengers. The chauffeur desiring to cross First avenue at Union street slowed down his automobile, and drove on behind the south-bound car, reaching Union street. He made the turn to the east, as required by an ordinance of the city, by going to the south of the street intersection. At this point he was behind the standing car a distance variously estimated by appellant's witnesses from 15 to 30 feet. As the front wheels of the automobile ran onto the west rail of the east or north-bound track it was hit by a car coming north, and received the damage complained of. The chauffeur testified that from the time the south-bound car passed him in the middle of the block between Pike and Union there was no car ahead of him, and nothing to obstruct his view, and that he could see down First avenue as far as Pioneer Square, some eight blocks away. His examination then continues: "Q. How many cars did you see com-

ing? A. I didn't look down that way. Q. You didn't look to see if there were any cars coming? A. No; I did not. Q. You did not observe whether there were any cars coming? A. No. Q. If you had looked you could have seen this car coming? A. I suppose so. * * * Q. Now, you say that you were 15 or 20 feet, something like that, from the car that was standing still? A. The south-bound car? Q. Yes; was it standing still when you started to go across? A. Yes. Q. And it blanketed your view? A. Down First avenue? Q. Yes. A. Yes. Q. Now you knew that the cars frequently operated up and down those tracks? A. Yes; I knew that. Q. And that the out-bound car came on the opposite track? A. Yes. Q. How far is it between the in-bound track and the out-bound track; four or five feet, isn't it? A. Yes; about that. Q. The front of your machine, then, if you made a right-angle turn and was crossing directly up Union street, would be on the up-bound track before you could see down First avenue around the standing car? A. Yes." Upon these facts, and others of similar import, testified to by the chauffeur and the other occupants of the automobile, we think the lower court was right in holding they established contributory negligence.

Much is said in appellant's brief about the rule of look and listen as applied to street car crossing, and the oft-declared rule of this court that failure to do so is not per se negligence in law. Our position as to the proper application of this rule in cases of this character has been fully set forth in *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, and other cases there cited, and it is not necessary to again discuss it. We there said, after stating our view, that failure to look and listen before crossing the tracks of an electric railway in a public street was not negligence per se: "But such a rule does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection; nor does it mean that those who have eyes to see but see not, and ears to hear but hear not, are exercising due care. In determining the question of contributory negligence, due care or ordinary prudence is the only known test. What would be due care under certain circumstances would not be due care under other and different circumstances; and, in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened and say such failure of itself alone constitutes negligence in law. Other facts, existing and present and affecting the situation, must be given their due weight in determining the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and upon answering that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

question in the negative, say it is negligence per se, and there can be no recovery. But the test is, Did the pedestrian, under all the circumstances, use such a degree of care, caution, and prudence as an ordinary, prudent, and careful pedestrian would use under like circumstances? and in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657 [22 L. R. A. (N. S.) 471]. The same rule has been applied to the drivers of wagons in crossing the track. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Criss v. Seattle Elec. Co.*, 38 Wash. 820, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Cœur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Helber v. Spokane St. R. Co.*, 22 Wash. 319, 61 Pac. 40." Other jurisdictions adopting the same rule that such failure is not negligence per se have made the same application of it as we have in the *Helliesen Case*. *Denis v. Lewiston, B. & B. St. Ry. Co.*, 104 Me. 39, 70 Atl. 1047, and cases there cited; *Terlen v. St. Paul City Ry. Co.*, 70 Minn. 532, 73 N. W. 412. These cases dispose of appellant's contention that upon this point the judgment cannot be sustained. If appellant could escape the effect of the legal principles upon which these cases are based, he would be met by the rule lately announced in *Stueding v. Seattle Electric Co.*, 128 Pac. 1058, where it was held that one who passes behind a standing street car where there is a parallel track, without using his senses for his own protection and safety, is guilty of contributory negligence. Upon principle the two cases cannot be distinguished. It was there said: "The same rule obtains where the traveler takes observation from a point where he knows that his view is restricted, and then heedlessly passes into the zone of danger." This language is peculiarly applicable to the facts in this case, in view of the testimony of the chauffeur that from the time when the down car passed him it "blanketed" his view down the street, and that without taking any observation or precaution to ascertain whether or not a car was approaching upon the up track, he drove his machine upon the rails.

Other points are discussed in the briefs, but they are not material upon the point presented by the ruling complained of, since that involves only the contributory negligence of the chauffeur.

The judgment is affirmed.

CROW, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(73 Wash. 233)

ATKESON et ux. v. JACKSON ESTATE.
(Supreme Court of Washington. Feb. 21, 1913.)

1. CARRIERS (§§ 235, 280*)—PASSENGER ELEVATORS—DUTY OF CARRIER—"COMMON CARRIER OF PASSENGERS."

The operator of a passenger elevator is a "common carrier of passengers," and, as such, must use the highest degree of care for their safety, consistent with the practical operation of the elevator.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 866, 967, 1085-1092, 1098-1106, 1109, 1117; Dec. Dig. §§ 235, 280.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1319, 1320.]

2. CARRIERS (§ 318*)—DEATH (§ 75*)—PASSENGER ELEVATORS—ACCIDENT TO PASSENGER—SUFFICIENCY OF EVIDENCE.

In an action against an owner of an apartment house for the death of a child, whose head was crushed between the floor of an automatic electric elevator and a protruding floor beam, evidence held to sustain a finding of negligence in failing to equip the elevator cage with a door or gate, and a finding that the child's mother was not guilty of contributory negligence.

[Fl. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.* Death, Cent. Dig. §§ 93, 95; Dec. Dig. § 75.*]

3. CARRIERS (§ 305*)—PASSENGER ELEVATORS—ACCIDENT TO PASSENGER—PROXIMATE CAUSE.

In an action against the owner of an apartment house for the death of a child, whose head was crushed between the floor of an automatic electric elevator, which decedent's mother was operating, and a projecting floor beam, resulting from the child having fallen so that its head protruded beyond the cage, which was negligently permitted to remain without a door, it is immaterial what caused the child to fall; defendant being bound to foresee the child might fall while in the elevator.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1132, 1136-1139, 1245-1246; Dec. Dig. § 305.*]

4. DEATH (§ 95*)—INFANTS—DAMAGES.

Under Rem. & Bal. Code, § 184, authorizing recovery by parents for injury or death of the child, parents of an infant girl are not prevented from recovering a substantial amount for her negligent death, though, on account of their present, comfortable pecuniary circumstances, they were able and had intended to give her such education as would probably have rendered the cost of her maintenance greater than any earnings by her during her minority.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

5. DEATH (§ 95*)—INFANTS—DAMAGES.

Where a child killed is of tender years, proof of special pecuniary damages is not essential to entitle her parents to recover more than nominal damages.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

6. DEATH (§ 99*)—INFANTS—DAMAGES—EXCESSIVENESS.

\$1,000 was not excessive recovery by parents for death of their two year old girl, where she was of sound health and as well developed mentally as the ordinary child of her age.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Action by James B. Atkeson and wife against the Jackson Estate. Judgment for plaintiffs, and defendant appeals. Affirmed.

John W. Roberts, of Seattle (Ramey & Smith, of Seattle, of counsel), for appellant. A. R. Rutherford and Milo A. Root, both of Seattle, for respondents.

FULLERTON, J. This action was brought by the respondents against the appellant to recover for the alleged negligent killing of their minor child. After issue joined the action was tried by the court, sitting without a jury, and resulted in findings and a judgment in favor of the respondents for the sum of \$1,000 and the costs of suit. This appeal is prosecuted from the judgment entered.

The record discloses that the appellant owns a five-story apartment house, situated in the city of Seattle. For the use of its patrons, the house is equipped with the usual stairways, and with an automatic electric elevator. The elevator was so constructed as to be used by the patrons of the house without the aid of an elevator operator. The elevator cage could be brought to any floor of the building by pushing an electric push button on that floor. When the cage reached the floor, the door to the elevator shaft could then be opened, the passengers could enter the cage, and could direct the cage to the floor on which they intended to alight by pushing another push button, located inside the elevator cage, numbered to correspond with such floor. The elevator cage and the shaft or well in which it operated were constructed in the usual way. The elevator cage was held in place by guide shoes, placed at the top and bottom of the cage on each side, which ran over guide strips extending from the bottom to the top of the well. The floors on each of the several stories on the side of the well containing the doors extended into the well some $2\frac{1}{2}$ or 3 inches beyond the perpendicular wall, so that, as the floor of the cage came even with the floors of the building, it would be so far flush therewith as to leave an inconsiderable space between the two; while, when between the floors, there would be a space between the cage and the wall of the elevator well of from 3 to 4 inches. There was no means of closing the opening leading into the cage, so that, as the cage ascended and descended, the only obstacle preventing a passenger from falling out of the cage door was the wall of the elevator shaft.

On October 6, 1911, the respondents hired a suite of rooms on the fourth floor of the appellant's house. Their family consisted of a little girl two years and two months old and a babe in arms. At the time of their entrance into the building, they were instructed as to the manner of operating the elevator by the persons in charge of the

building, and informed that they could use it as one of the means of ingress and egress from their rooms to the street. Between the date named and November 7, 1911, a period of some 32 days, the mother used the elevator on an average of, perhaps, four times a week, passing up and down with her two children, carrying the younger one usually in a baby buggy. On the day last named she left the building with her children for a trip downtown to do some marketing, returning later with a number of packages, some of which she carried in her arms and some in the baby carriage. When she reached the elevator, she opened the elevator well door, entered the elevator cage as usual, placed the baby buggy at the far side of the cage, and instructed her daughter to hold onto it. She then closed the door and pushed the button for the floor on which her rooms were situated. As the elevator started, which was somewhat suddenly, the little girl fell forward, with her head protruding through the cage door or opening. The mother reached for her at once; but before she could seize her the elevator had reached the second floor, and had caught the girl's head between the floor of the cage and the protruding floor beam, crushing her skull and killing her.

The trial court found: "That by reason of the manner in which the floors projected into the said elevator well, and by reason of the manner in which the edges were constructed, and by reason of the lack of a gate, door, or other protection inside of said cage, and by reason of the fact that said elevator was without any operator, but was required to be operated by the passengers, and by reason of the fact that many of the tenants of the apartment house for whose use said elevator was maintained by defendant were women and children, the court finds that the defendant was guilty of negligence in maintaining said elevator for the uses and purposes and in the manner that it was then maintaining said elevator; and that the death of said Mildred Atkeson [the child killed in the elevator] was the direct and proximate result of said negligence."

[1, 2] The appellant contends that the record does not justify the conclusion that the matters herein enumerated convict it of actionable negligence. It contends, with reference to the projection of the floors of the building into the elevator well, and with reference to the want of a gate or door to the opening in the elevator cage, that the evidence shows that in these respects the elevator does not differ from those in common use generally, and that, if it be negligently constructed in this respect, then all elevators are negligently constructed, a conclusion that is not warranted from the mere fact that a child met its death on this elevator; and it argues, with reference to the entire charge of negligence, that all of the matters therein

set forth were as obvious and apparent to the respondents as they were to the appellant or its officers, and that, since they made use of the elevator, knowing and appreciating its dangers, they cannot, because of the doctrine of contributory negligence, recoup for any injury they may have suffered thereby from the negligence of the appellant.

It must be conceded that, in so far as the evidence discloses, the elevator shaft or well and the elevator cage did not differ in manner of construction from those in common use. In the numerous elevator wells in the city of Seattle, and in those elsewhere of which the elevator constructors and builders had knowledge, the floors protruded into the elevator well at the landing places, as did the floors in this instance; and in only two instances was it shown that there was a gate or door to the entrance into the elevator cage. It was shown, also, that elevators operated by electric power did not differ materially in mechanical construction from those operated by power generated in the more ordinary ways; and that in none of the electrically controlled elevators of which the witnesses had knowledge was there a door or gate by which the entrance to the elevator cage could be closed. All the expert witnesses, however, who testified on the subject of elevator construction, stated that there was no mechanical reason why such a door could not be installed; and that it, if properly fitted, would protect passengers in the elevator from all such accidents as happened to the child in this instance.

But, notwithstanding the fact that the elevator in question does not differ in construction materially from the elevators in common use, we think the trial court correctly decided that the manner in which this elevator was constructed and operated in this particular instance constituted negligence. It must be remembered that in this state the operator of an elevator is a common carrier of passengers, and is held to the degree of care imposed upon common carriers generally; they must exercise, with reference to the elevators under their charge, the "highest degree of care compatible with their practical operation." *Perrault v. Emporium Department Store Company*, 128 Pac. 1049; *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610. And consistent with this rule it is not too much to say that the appellant should have had a door or gate by which the entrance to the elevator cage itself could have been closed.

It is not our intention to hold that all elevators now operated, whose cages are without gates or doors, are negligently constructed or operated. That question is not before us. What we mean to hold is that elevators, intended for the use principally of women and children, which have no regular elevator operator, and have no gate or door by which to close the entrance to the elevator cage,

are negligently constructed and operated. It is no argument against this conclusion to say, as the appellant does say, that the users of the elevator might not close the door. Electric elevators, and doubtless other forms also, could readily be so arranged as to be incapable of being operated until the door or gate should be closed; and, besides, to fail to close such a door would be negligence of the operator, and not that of the owner. Without pursuing the argument further, therefore, we conclude that there was sufficient evidence of negligence on this branch of the case to justify the conclusion reached by the trial judge.

Was the mother of the child guilty of contributory negligence? On this question, also, we think the trial judge reached a correct conclusion. The mother testified that she did not realize that there was danger of an accident such as befell her child, and we can find no inherent improbability in her statement. Her experience with elevators was shown not to be wide, and it is perfectly natural that she would be oblivious to dangers that are perfectly apparent to persons of a wider experience, and particularly to those who have to do with machinery and the accidents caused thereby. Elevators to which she had theretofore been accustomed all had regular elevator operators, persons who could and did protect against accidents such as befell her child; and we think it too much to charge her with a want of appreciation of the difference between such elevators and the one in question here, especially as the appellant's officers did not sufficiently appreciate such difference as to warn her thereof.

[3] It is next argued that the cause of the accident is unknown; and hence the respondents' case must fail under the authority of *Hansen v. Seattle Lumber Company*, 31 Wash. 604, 72 Pac. 457, *Armstrong v. Town of Cosmopolis*, 32 Wash. 110, 72 Pac. 1038, *Whitehouse v. Bryant Lumber, etc., Co.*, 50 Wash. 563, 97 Pac. 751, and the kindred cases following the principle of those cases. This contention is based on the statement of the mother of the child, to the effect that she did not know what caused the child to fall. But the liability or nonliability of the appellant does not depend on this fact. What caused the child to fall was an immaterial inquiry. The appellant was bound to anticipate that a child of her tender years was likely to fall while in the elevator from any one of a number of causes, and to guard against the danger arising from such fall, whatever may have been its cause. The appellant's liability, in other words, rests on the fact that it made no provision to guard against the dangers arising from a person falling while in the elevator, not upon the particular cause of the fall. The cases cited do not oppose this principle. In neither of them was there any evidence showing or

tending to show that the negligence charged against the defendant therein was the proximate cause of the injury to the plaintiff; while here, as we say, the proofs fix the proximate cause of the injury as the want of a proper guard to the opening into the elevator cage, and that for this the appellant was primarily responsible.

[4] This action is founded upon section 184 of the Code (Rem. & Bal.), which reads as follows: "A father, or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." In *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400, 30 Pac. 714, we held that the measure of the damages recoverable under this section "is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance. To which may be added, in proper cases, the expense of nursing and medical treatment, and in some jurisdictions even funeral expenses." It was shown in the evidence, and, indeed, the court found, that the parents of this child were in comfortable circumstances financially, capable of giving the child an education; and that it was their purpose to educate her, to the extent at least of that afforded by graduation from a state high school. Using the somewhat meager wording of the statute, our holding thereunder, and the testimony on behalf of the respondents as here outlined as a premise, the appellant makes the contention that there can be no recovery in favor of the respondents in excess of mere nominal damages. It is argued that, since a girl in this state reaches the age of majority at her eighteenth birthday, and since statistics show that the average age of girls who graduate from the high schools in the state of Washington is in excess of 18 years, it is idle to say that a girl so graduating prior to that age has an earning capacity in excess of her cost of maintenance; that every father, who has reared a girl to that age and given her an education equivalent to that of graduation from the state high school, knows that the cost of her maintenance must, of necessity, exceed her earning capacity; and that any different claim is pure fiction.

But this reasoning does not seem to us to be controlling. It may be that, had the daughter reached her majority, and had the respondents maintained their present financial condition and carried out their expectations concerning her, the expense of her care, nurture, and education would have exceeded her earnings on their behalf. But, since adversity and misfortune are sometimes the accompaniments of life, as well as prosperity and success, there is another side to the picture. It is possible that the respondents may

lose the property they have accumulated, and at the same time their health and ability to earn money. If such a misfortune should befall them, might it not be said that the daughter's earnings, had she lived, would have greatly exceeded her cost of maintenance? And who shall say that such a misfortune may not befall them? And if the probability exists, why may not a recovery be based thereon? There is, of course, no certain measure of damages in cases of this character; but, notwithstanding this difficulty, the great weight of authority is that a substantial recovery may be had. *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842; *City of Chicago v. Hesing*, Adm'r, 83 Ill. 204, 25 Am. Rep. 378; *C. & A. R. R. Co. v. Becker*, Adm'r, 84 Ill. 483; *Grottenkemper et al. v. Harris*, Adm'r, etc., 25 Ohio St. 510; *Brunswick et al. v. White*, 70 Tex. 504, 8 S. W. 85; *O. & M. Ry. Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 760; *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171; *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991; *Beaman v. Mining Co.*, 23 Utah, 139, 63 Pac. 631; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Boyden v. Fitchburg R. Co.*, 70 Vt. 125, 39 Atl. 771; *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; *Cleary v. City R. Co.*, 76 Cal. 240, 18 Pac. 269. Some of the cases here cited are founded on statutes differing slightly from our own, and some lay down slightly differing rules for the measure of damages than is announced by the case cited from this court; but in principle they hold that it is the purpose and intent of the statutes to provide for the award to the parents of substantial damages in all cases where the death of their child is caused by the negligence of another.

[5] On another principle, also, there can be a substantial recovery in this case. Where the child killed is of tender years, proof of special pecuniary damages is not necessary to maintain the action or warrant a recovery for more than nominal damages. This we held in *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620: "We are satisfied that the great weight of authority sustains the doctrine that judgment can be obtained, in the absence of proof of special pecuniary damage. It is true that a great many of the cases which sustain this position are in states where exemplary damages are allowed in cases of this kind; but the general doctrine is stated on the broad ground that proof of special damages is impracticable, and that no specific loss occasioned by the death of a child is necessary, for the reason that calculations of this kind are within the special province of the jury, and that the jury is as well calculated, knowing the age of the child, her health, her habits, her character, and the station in life of her parents, to judge of the pecuniary loss to the parents, as witnesses who might be called to testify."

To the same effect is *Ihl v. Forty-Second St.*, 47 N. Y. 317, 7 Am. Rep. 450, where the following language was used: "The absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in consulting the plaintiff, or in directing the jury to find only nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services, had he lived. These calculations are for the jury; and any evidence on the subject, beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion."

[6] The evidence tended to show that the child in the case at bar, when she met her death, was of sound health and vigorous body and as well developed mentally as the ordinary child of her age. We think, therefore, that the parents were entitled to recover substantial damages for her loss, and that the trial court did not err in its award.

The judgment is affirmed.

MOUNT and ELLIS, JJ., concur.

(72 Wash. 296)

NILSSON v. MARTINSON et ux.

(Supreme Court of Washington. Feb. 24, 1913.)

1. WORK AND LABOR (§ 7*)—RIGHT TO RECOVER—FAMILY RELATION—EVIDENCE.

Defendants placed plaintiff, who was father and father-in-law of them, respectively, in possession of an 80-acre tract of land belonging to them, on which they had constructed a comfortable house for him to live in, paid the taxes, and met all the expenses of the land, and permitted him to appropriate the proceeds of his agricultural activities thereon. Plaintiff made no demand for pay for his services in clearing a part of the land between 1904 and 1911, until after he voluntarily moved therefrom. *Held*, that a mere statement by defendants, on one occasion, that they were paying plaintiff for the work he was doing was insufficient to entitle him to recover money for his services in clearing the land.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.*]

2. APPEAL AND ERROR (§ 1064*)—REVIEW—INSTRUCTIONS—PREJUDICE.

Where plaintiff, under the facts, could not recover in any event, the court will not reverse a judgment for defendants because of error in the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

3. TRIAL (§ 217*)—INSTRUCTIONS—ABSTRACT STATEMENT.

An instruction that the jurors should follow their own consciences and whatever they believed to be the truth, irrespective of anything else in the case, was improper as a mere abstract platitude, encouraging the jury to reject testimony it had no right to reject, and to ignore all other pertinent instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 483, 485; Dec. Dig. § 217.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Melker Nilsson against A. P. Martinson and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Carl J. Smith, of Seattle, for appellant. Edward Judd, of Seattle, for respondents.

CHADWICK, J. Plaintiff brought this action to recover the value of labor performed in clearing and reducing to cultivation about four acres of an 80-acre tract of land belonging to defendants. He alleges that the work was done at the request of defendants, and is of the reasonable value of \$993. Defendant A. P. Martinson, the only defendant served with process, answered, denying the allegations of the complaint, and alleged that plaintiff had gone on the land at his own request; that he cleared small parts where the soil was the richest and best, and raised hay and vegetables, all for his own use and benefit; that no contract to pay was ever made or implied between the parties; that in February, 1911, plaintiff notified defendant that he was too old to do the work he had been doing; that accordingly defendant moved his family onto the land, and plaintiff made his home with defendant's wife, who is the daughter of the plaintiff, for about eight months, when plaintiff left, and a short time thereafter brought this suit.

[1] The testimony of the plaintiff wholly fails to show any request on the part of the defendant, or any demand for any sum whatever for the work plaintiff had done between the years 1904 and 1911. It shows that he used the land as his own, and never accounted, nor offered to account, to defendant for any of the products of the land, although the evidence shows that crops of hay and potatoes were raised in the year 1905 and in each year thereafter. The only evidence relied on to sustain plaintiff's case is his statement that "he promised he would always give pay for all the work that was performed on his ranch." This was in May, 1904, and before any work was done under the alleged contract. There is also the tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

timony of an unmarried daughter: "Q. Did you overhear any conversation or conversations between Mr. Martinson and your father regarding that land? A. Yes, sir. Q. You may state to the jury what was said by Mr. Martinson, and what was said by Mr. Nilsson, as well as you can remember. A. It was one day, it was very hot, and my father came home from work, he was clearing land, and he sat down, and he says, 'It is very hot work,' and Mr. Martinson and Mrs. Martinson was there, and said,—and he says, 'We are paying you for the work you are doing.' Q. What land was it your father worked on? A. On Mr. Martinson's land. Q. When, about, was that conversation with reference to the beginning of the work, or towards the end of the work? A. Well, it was just about the beginning. Q. The beginning? A. Yes. * * * Q. Now, this first conversation between your father and Mr. Martinson, when was that? A. Well, I couldn't really remember when it was. Q. What year? You have been here in the courtroom and heard the witnesses testifying. You heard it stated he first took hold of this land in the summer of 1904. A. Yes, sir. Q. When was it compared with that time, before or after that time? A. It was after that time. Q. How long would you say? Was it that summer? A. No, sir; I believe it was in 1906. Q. You think, when Mr. Martinson made that expression to him when he came in hot and tired, it was in the summertime? A. Yes, sir. Q. You think it was about two years after your father had been working on the land? A. Yes, sir; I think so." This is wholly inadequate to prove a contract or to sustain the allegations of the complaint. Plaintiff had 80 acres, rent free. Defendant, who is his son-in-law, had built a comfortable house for him to live in, paid the taxes, and met all the expenses of the land. Plaintiff had cows and chickens, raised hay and potatoes, and had for his pay all that he could make out of the land. He was, according to his own showing, being paid for his work. There is nothing even suggesting that he understood that he was to be paid in money. No contract, express or implied, is proved, or attempted to be proved. All this upon the plaintiff's case.

The defendant's evidence puts the case beyond the peradventure of a doubt. We shall not review it. No other verdict could have been rendered by the jury. It would have been the duty of the court to direct a verdict, had a motion been made. This brings us to the errors assigned. The only assignments now material go to certain instructions given by the court to the jury. They are alleged to be bad, and they are bad. Those objected to are based upon a theory of the law that finds no warrant in the pleadings or the evidence, and, if plaintiff had any case at all, would put an unwarranted burden of proof upon him.

[2] No purpose will be served by quoting them, for, notwithstanding their inapplicability, they will not be regarded as harmful. "If it affirmatively appears from the record that in no event can the complaining witness recover upon the facts errors in instructions, however flagrant, may be regarded as harmless." Elliott, App. Proc. § 542. A verdict will not be disturbed for erroneous or inaccurate instructions, where "the court could have properly instructed the jury to find as they did. * * *" Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; Barth v. Clise, 12 Wall. 400, 20 L. Ed. 393. "It would be idle to reverse the judgment and send the case back for a new trial, if it be certain that the plaintiff cannot recover in the action." Brobst v. Brock, 10 Wall. 528, 19 L. Ed. 1002. See, also, 3 Cyc. 385, and cases cited.

[3] The court instructed the jury that: "This is the important thing, gentlemen of the jury, in this land of ours, when a case is submitted either to the jurors or the trial court, that the jurors or the trial court should follow their own consciences, irrespective of anything else in the case; follow your conscience or whatever you believe to be the truth in the case." We feel warranted in saying that we agree with counsel for respondents that the instruction complained of is "an abstract platitude which had no particular bearing on the case," and was "superfluous." Such instructions should not be given. They tend only to confusion. If not actually telling the jury that it must be convinced to a moral certainty, which would in many cases make verdicts impossible, it does encourage the jury to reject testimony which it has no right to reject, and to ignore all of the pertinent instructions theretofore given. The instruction, wherever questioned, has been held to be error, and would be now, if it were possible to send the case back for a new trial.

Affirmed.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

(72 Wash. 243)

WORLEY v. METROPOLITAN MOTOR CAR CO., Inc., et al.

(Supreme Court of Washington. Feb. 24, 1913.)

1. CHATTEL MORTGAGES (§ 139*)—MORTGAGES AS BONA FIDE PURCHASERS—CONDITIONAL SALES—"INCUMBRANCER IN GOOD FAITH."

A person loaning money to another, to be used in the purchase of an automobile, and who, subsequent to its delivery, took a chattel mortgage on the automobile, without notice of the agreement that title should remain in the vendor, was an "incumbrancer in good faith," within Rem. & Bal. Code, § 8670, making conditional sales of personal property absolute as against purchasers, incumbrancers, and subsequent creditors in good faith, where the property is delivered to the vendee, unless within 10 days after such delivery a memorandum of the sale, stating its terms and conditions, is filed;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and hence, where a memorandum of such sale was not so filed, it was void as against the chattel mortgagee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 238; Dec. Dig. § 139.*]

2. CHATTEL MORTGAGES (§ 43*)—CONDITIONAL SALE—CONTRACT AS MORTGAGE.

Under Rem. & Bal. Code, § 3670, making conditional sales of personal property absolute as against purchasers, incumbrancers, and subsequent creditors in good faith, where the property is delivered to the vendee, unless within 10 days after such delivery a memorandum of the sale, stating its terms and conditions, is filed, a contract of conditional sale must be made before or at the time of delivery, and cannot be thereafter antedated and made to answer the purposes of a chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 83; Dec. Dig. § 43.*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action to foreclose a chattel mortgage by Elizabeth Worley against the Metropolitan Motor Car Company and another. From the decree of foreclosure and the order of sale, the defendant named appeals. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellant. Palmer & Askren, of Seattle, for respondent.

CHADWICK, J. [1] Plaintiff loaned defendant \$800 on the 26th of April, the money to be used as part payment on an automobile to be purchased from the appellant, Metropolitan Motor Car Company, and to be secured by a mortgage thereon. The car was received by the appellant on the 26th day of May, and was delivered to defendant King on or about June 1st. Some time thereafter—the manager of the appellant company says a few days; the defendant King says some time after June 28th—Mrs. King executed a conditional bill of sale. Plaintiff had ordered a chattel mortgage to be prepared. After some delay and one or two trips to the lawyer's office, Mrs. King found the lawyer in, and executed the mortgage. The proofs show that the mortgage was prepared in anticipation of her coming, and, although dated July 11th, was in fact executed and filed for record on August 4th. The conditional bill of sale was never filed for record. Appellant took possession of the car in December, and in January plaintiff began this action to foreclose her mortgage. From a decree of foreclosure and order of sale, the Metropolitan Motor Car Company has appealed.

The turning point in this case may be resolved as follows: Is a chattel mortgage, subsequent in time, entitled to priority over an unrecorded conditional sale?

The right to retain title in personal property sold and put in the possession of a vendee is because of attendant abuses generally covered by statute. Secret interests were not favored at common law, and are not now. Consequently, where the right is recognized, it is usually provided that some record or publication of the fact be made, so

that others who deal with the vendee will not be misled by apparent ownership. Our statute covering conditional sales seems to have been drawn with these principles in mind: "All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." Section 3670, Rem. & Bal. Code. It is the contention of the appellant that respondent is not a subsequent creditor in good faith; that the act was designed to protect only subsequent creditors, and then only when acting in good faith, citing American Multigraph Sales Co. v. Jones, 58 Wash. 620, 109 Pac. 108. It also contends that respondent is not a creditor in good faith, because she knew that the machine was not in the possession of the defendant at the time the loan was made, and might never be; and, further, that the mortgage was taken to secure an antecedent debt, without any new consideration, and therefore she is not entitled to the protection accorded bona fide purchasers and incumbrancers for value as against prior liens and equities. Whatever the general rule may be as to priority between creditors, we think this case must be decided by reference to the statute, and that alone. The provision that all conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute is equivalent to the expression "shall be void"—that is, of no legal force or effect as to purchasers, incumbrancers and subsequent creditors in good faith—unless the requirements of the statute are followed.

Appellant seeks to overcome these provisions by reference to the case of Wittler-Corbin Machinery Co. v. Martin, 47 Wash. 123, 91 Pac. 629, and the general principles of equity as enunciated in Geo. M. McDonald Co. v. Johns, 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57. In the first case the only question was whether the conditional sale contract was sufficient in its terms to put a subsequent purchaser or incumbrancer on notice. The court held that it was, and that a subsequent mortgagee and purchaser did not take in good faith. The other case held that, as between two mortgages, each given to secure a pre-existing debt, the first in time was entitled to priority, although recorded subsequently. Neither of these cases has any bearing here; for the question is: Is respondent an incumbrancer in good faith,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

within the meaning of the conditional sale statute?

One of the purposes of the statute was to avoid the rules which had theretofore protected latent equities and ownerships; otherwise it would not have provided that the sale should be absolute, unless the contract be filed. A purchaser, incumbrancer, or subsequent creditor in good faith is therefore one who takes without notice; and if it appear that the contract was not recorded, he is entitled to rely upon the elementary principle of the law that possession indicates title. It is not shown that respondent had notice, either actual or constructive, of appellant's reserved title; consequently she is an incumbrancer in good faith. It was held, in *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707, that a purchaser in consideration of a pre-existing debt was a purchaser in good faith, and entitled to protection over an unrecorded contract of sale with title reserved. It is true that the court found that the purchaser had waived a lien, and this was enough to sustain her title; but the opinion goes further and finds no reason for the distinction which some courts draw between those who purchase in consideration of or secure a pre-existing debt and those who come after. A case in point is *Knowles Loom Works v. Vacher*, 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 305, where a similar law was construed by the court, and the distinction between a purchaser "in good faith" and a purchaser "in good faith and for valuable consideration" is noted. The court said: "This review of the cases shows that, while it has been held that under our statutes requiring the subsequent mortgage to be not only in good faith, but also for a valuable consideration, a mortgage to secure an antecedent debt cannot supplant a prior unrecorded mortgage; and, while it has been also held that an assignee under a voluntary assignment cannot set aside a previous mortgage, because it is unrecorded, there is no authority for the contention that a subsequent chattel mortgage, given for a pre-existing debt, is not superior to a prior unrecorded mortgage under our legislation, which prescribes that the only condition necessary to confer supremacy shall be that the subsequent incumbrance be taken in good faith. * * * The language of the act of 1889, 'subsequent purchasers and mortgagees in good faith,' is clear. It has no relation to the consideration of the mortgage, except as to its honesty. A past consideration in that respect is as good as a present consideration. Such a mortgage is plainly one in 'good faith,' and that puts it within the protection of the statute. The object of the statute is to get rid of secret and latent equities. Public policy, as asserted in the extension of the registry laws, requires that the public record should show the ownership of personal property, and a construction which is favor-

able to that and should be given to the act. The failure to record tends to make transactions in personal property insecure; and therefore the mortgagee, who has created that condition against which the statute is aimed, has no just claim to outrank the creditor who subsequently secures his debt. The fact that the mortgage was taken for the benefit of the mortgagee and others does not impair its efficacy, nor assimilate it to the title, which is taken under a voluntary assignment for the benefit of creditors. The mortgagee acquired title for his own benefit, and gave, as between him and the mortgagor, a valuable consideration for it."

[2] So far we have treated this case as appellant assumes it to be, but it may be seriously questioned whether appellant has in fact a conditional sale contract at all. It is not certain that the contract was signed within 10 days after possession was given over to the vendee. If it was not, appellant can claim no rights under its contract. This is the logic of *American Multigraph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108. The contract of conditional sale must be made before or at the time of delivery; for it is in virtue of the statute that title is reserved. After delivery, title is *prima facie* in the vendee; and a conditional sale contract cannot be thereafter antedated and made to answer the purposes of a chattel mortgage. *Houser & Haines Mfg. Co. v. Hargrove*, 129 Cal. 90, 61 Pac. 660; *Hyer v. Smith*, 48 W. Va. 550, 37 S. E. 632. The statute was passed for the protection of vendors, and not in aid of general creditors, although the creditor attempting to secure himself may have sold the thing covered by the contract. After title has passed by delivering the article, the remedy, as against third parties, is to secure the debt by chattel mortgage.

Judgment affirmed.

CROW, C. J., and PARKER, GOSE, and MOUNT, JJ., concur.

(72 Wash. 122)

VITUCCI IMPORTING CO. v. CITY OF SEATTLE.

(Supreme Court of Washington. Feb. 21, 1913.)

1. MUNICIPAL CORPORATIONS (§ 827*)—SEWERS—OBSTRUCTIONS—NEGLIGENCE—DAMAGES.

A municipal corporation is not an insurer of the proper working of its sewers; and to charge it with damages caused by an obstruction therein negligence must be proved.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1772-1776; Dec. Dig. § 827.*]

2. MUNICIPAL CORPORATIONS (§ 839*)—SEWERS—DEFECTS—NOTICE—INSPECTION.

A city is not entitled to notice of a defect or obstruction in one of its sewers as an essential of liability for damages, when it is such that it would have been discovered by reason-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

able inspection; it being the duty of the city to use ordinary care in causing its inspection.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1789; Dec. Dig. § 839.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—SEWERS—NEGLIGENCE—EVIDENCE.

A person damaged by an obstruction in a sewer, causing an overflow in his basement, shows a prima facie case of negligence when he proves that there was an obstruction, the amount of consequential damages, and that there existed no extraordinary conditions, such as excessive floods or freshets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the Vitucci Importing Company against the City of Seattle. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. E. Bradford and C. B. White, both of Seattle, for appellant. John E. Ryan and Grover E. Desmond, both of Seattle, for respondent.

MAIN, J. This is an action for damages to personal property. The appellant, the city of Seattle, is a municipal corporation of the first class. The respondent, the Vitucci Importing Company, is a private corporation, organized and existing under the laws of the state of Washington. At a certain point in the city of Seattle, Jackson street and Occidental avenue, both public thoroughfares, intersect at right angles. A sewer system is maintained and controlled by the city. In the center of Jackson street is laid a main sewer, 20 inches in diameter. Radiating from this main sewer are lateral sewers for the accommodation of the adjacent property. At the southeast corner of these two streets stands a building which is devoted to wholesale purposes. In this building respondent occupied storeroom No. 406, fronting on Occidental avenue, and the basement thereunder. An adjacent storeroom and basement were occupied by the Miller Furnace Company. Between the two basements there stood a board partition. The respondent was engaged in the wholesale grocery business, and had stored in the basement occupied by it a certain quantity of merchandise. On October 24, 1911, the main sewer, at a point a short distance west of the intersection of Jackson street and Occidental avenue, became obstructed. This arrested the flow of sewage and caused it to set back and pass up the lateral used for the accommodation of the building a part of which respondent occupied, thence into the basement occupied by the Miller Furnace Company, and from there through the wooden partition into the basement occupied by the respondent, and caused damage to the amount of \$594.83. Thereafter, and within the required time, the respondent presented its claim for damages for this amount to the city of Seattle. This be-

ing rejected, suit was instituted. The cause was tried to the court and a jury.

Upon the trial the respondent, after making certain preliminary proof, introduced evidence showing the obstruction of the sewer, the amount of the consequent damages, and that there had been no extraordinary conditions such as excessive rains or freshets, which could have caused the obstruction, but did not introduce any evidence showing failure of a reasonable inspection on the part of the city, or notice thereto of the obstruction. The appellant challenged the legal sufficiency of this evidence and moved for a dismissal of the action, which was denied. Thereupon the appellant introduced certain evidence, but did not controvert the facts above indicated as established by the respondent. Neither did it introduce any evidence showing inspection of the sewer prior to the injury. At the conclusion of the evidence the appellant moved for a directed verdict. This was overruled. Thereupon the respondent moved for a directed verdict, which was granted. Motion for judgment notwithstanding the verdict and motion for a new trial being seasonably made and overruled, an appeal was taken to this court.

The record in the case presents three questions: (1) What is the measure of the city's duty in keeping its sewers in repair and free from obstructions; (2) is notice an essential element of liability; and (3) do the facts established make a prima facie showing of negligence?

[1] As to the measure of duty, it is well settled that a municipal corporation is not an insurer of the condition of its sewers; and that, to charge it with damages occasioned by an obstruction therein, negligence must be proven. This proposition is not controverted. It is so well known as not to require the citation of authority in its support.

[2] On the second question, that of notice, the authorities are not harmonious. Numerically speaking, the weight of authority appears to be to the effect that notice, either actual or constructive, is an essential element upon which to predicate liability. The opposite view, however, is supported by very respectable authority, and seems to be sound in reason. The sewers are constructed and maintained by the city, and are under its exclusive control. It is the city's duty to exercise ordinary care in causing an inspection of them from time to time, in order that needed repairs may be made therein and obstructions removed therefrom. The individual whose property may be subjected to destruction by a defective sewer has neither the duty nor the right of inspection; neither does he have the authority to repair. The first knowledge that he has or can have that an obstruction exists in the sewer is when his property suffers damage which is caused thereby. There appears no good reason why

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the city should be entitled to notice, either actual or constructive, of a defect or obstruction in one of its sewers as a necessary element of liability, when such defect or obstruction is such that it would have been discovered by reasonable inspection. Manifestly, the liability of a municipal corporation for defects or obstructions in its sewers should be measured by a different rule from that which applies to defects or obstructions on its streets or sidewalks. *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Vanderslice v. City of Philadelphia*, 103 Pa. 102. The latter case states the principle as follows: "The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the city liable."

[3] The third inquiry is, Do the facts above stated make a prima facie showing of negligence on the part of the appellant? These facts establish (1) the obstruction, (2) the amount of consequential damage to the respondent's property, and (3) that there existed no extraordinary conditions, such as excessive floods or freshets, that could have overloaded the sewer and thereby caused the obstruction. It is argued that these three elements presumptively establish negligence, and cast upon the appellant the burden of showing that it had exercised ordinary care in performing its duty of inspection. We think these facts make a prima facie showing of negligence, and cast upon the appellant the duty of showing that reasonable inspection had been made. Had the appellant met this burden, and by competent evidence established that it had exercised ordinary care in the matter of inspection, this would have been a complete defense to the action. The city could not be held liable for defects or obstructions which a reasonable inspection would not have discovered. Whether or not there had been an inspection was a fact peculiarly within the knowledge of the appellant; and it would be an unreasonable rule that would require a citizen, as a necessary element of his cause of action in cases of this character, to establish by affirmative evidence the nonexistence of a fact of which he did not have knowledge, and which in

many cases he would be unable to ascertain, and which is entirely within the knowledge of the city. If there had been an inspection, the city knew it; and it should have met the prima facie case by showing that fact. There is nothing in the opinion in *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498, which is stare decisis as against the conclusions here reached.

There being no dispute as to the amount of the damage, and the appellant having introduced no evidence to meet the presumptive showing of negligence on the part of the respondent, the trial court did not commit reversible error in sustaining the motion for a directed verdict.

The judgment will therefore be affirmed.

MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.

(72 Wash. 255)

KEELER v. PARKS et al.

(Supreme Court of Washington. Feb. 24, 1913.)

1. ACTION (§ 62*)—PREMATURE COMMENCEMENT—COMMUNITY PROPERTY.

Complainant in November, 1911, commenced an action in her maiden name to set aside a deed procured by the individual defendant to the defendant corporation, on the ground of interest acquired therein while she was the wife of the individual defendant, and alleged that in April, 1911, the individual defendant was granted a divorce by a decree which made no disposition of community property, and a supplemental complaint filed June, 1912, alleged that in May, 1912, a final judgment of divorce was entered in accordance with the interlocutory decree. Defendant pleaded the interlocutory decree and statutes showing that the marital relation was not dissolved before the final decree entered in May, 1912. *Held* that, as the marriage relation had not been dissolved at the commencement of the action, it was prematurely brought.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 718-723; Dec. Dig. § 62.*]

2. PLEADING (§ 274*)—SUPPLEMENTAL PLEADING—OFFICE.

Under Rem. & Bal. Code, § 308, the office of a supplemental pleading is to show facts which occurred after the former pleadings were filed; to enlarge or change the kind of relief to which a party may be entitled upon a cause of action existing at the time of the commencement of the suit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 832; Dec. Dig. § 274.*]

3. PLEADING (§ 279*)—SUPPLEMENTAL PLEADING—DIFFERENT CAUSE OF ACTION.

It is not allowable for a supplemental complaint to set up a class of facts which are at complete variance with, and antagonistic to, the facts existing when the action was commenced; so that, where the cause of action was premature, it could not be the basis for a supplemental complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 836-841; Dec. Dig. § 279.*]

4. PLEADING (§ 279*)—SUPPLEMENTAL COMPLAINT—DEPARTURE FROM COMPLAINT.

Where complainant brought an action in her maiden name as a divorced woman, seeking to set aside a deed of real property which the individual defendant during the existence of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.-Key-No. Series & Rep'r Indexes

their relation of husband and wife had, after contracting to purchase the land with community funds, caused the land to be conveyed to defendant corporation, and to be adjudged the owner of an undivided one-half interest therein, and by her reply admitted that she was not divorced when the action was begun, she could not, after the divorce became effective, by supplemental complaint, depart from the cause of action pleaded, and recover on the ground that the contract for its purchase vested the equitable title in the community, and that under the statute a married woman could maintain an action against her husband, or any other person, for the protection of her property rights, and that upon entry of a decree of divorce, where no disposition is made of the community property, the former members held title thereto as tenants in common.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 836-841; Dec. Dig. § 279.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Mabelle Keeler against R. B. Parks and Parks Bros. & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

Hamlin & Meier, of Seattle, for appellant. Wm. Hickman Moore and Morris & Shipley, all of Seattle, for respondents.

GOSE, J. The appellant, who was the plaintiff below, brought this action in her maiden name, to set aside a deed conveying certain real property to the defendant corporation. A judgment dismissing the action without prejudice was entered upon the pleadings, on the ground that the action had been prematurely commenced, and that at the time of its commencement no cause of action existed in her favor.

The action was commenced in November, 1911. It is alleged in the original complaint that the appellant and the respondent R. B. Parks were husband and wife at all times mentioned in the complaint until the 22d day of April, 1911; that in 1906 the respondent, her then husband, acting for the community, entered into a contract for the purchase of the land in controversy; that the payments were made from community funds conformably to the requirements of the contract, so that the community became entitled to a conveyance of the property on the 12th day of February, 1911; that the respondent husband, intending to cheat and defraud the appellant out of her community interest in the property, without her knowledge caused it to be conveyed by the holder of the legal title to the respondent corporation, he then being its treasurer; that thereafter, and on or about the 21st day of April, 1911, in an action in the superior court of the state of California in the county of San Francisco, the appellant "was duly granted a decree of divorce from the said defendant R. B. Parks," which decree restored her maiden name, by which she sues, and that no disposition was made of the community property. The prayer is that the property be adjudged the "joint property" of the appellant and her former

husband, and that the respondent corporation be directed to convey to her "an undivided one-half interest" in the property, and that her title thereto be quieted. In June, 1912, the appellant filed a supplemental complaint, wherein she alleged that, in the divorce action in the state of California, wherein her husband was the plaintiff and she was the defendant, it was adjudged, on or about the 27th day of April, 1911, that the husband had established grounds for the dissolution of the marriage bonds, and that "an interlocutory decree" was entered directing a final judgment of divorce, and that thereafter, and on or about the 3d day of May, 1912, a final judgment was duly entered in accordance with the provisions of the interlocutory decree. She prayed relief as in the original complaint. The respondents in separate answers, after denying certain averments of the complaint, set forth portions of both the interlocutory and final decrees in the divorce action in *hac verba*. The former recites that the respondent husband, the plaintiff therein, "is entitled to an interlocutory decree" adjudging that he has established grounds for the dissolution of the marriage bonds, subject to the provisions of the statute, "and that upon the expiration of one year from the entry of this decree, final judgment granting said decree and restoring said parties to the status of single persons be entered herein." The final decree which was entered on the 2d day of May, 1912, recites: "Wherefore it is hereby ordered, adjudged, and decreed, and this court does hereby order, adjudge, and decree, that the marriage between said plaintiff and said defendant be and the same is hereby dissolved, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony and all obligations thereof, and restored to the status of single persons, and it is further ordered that said defendant is permitted to resume her maiden name, to wit, Mabelle A. Keeler." The affirmative answers set forth the provisions of the statutes of the state of California, defining the effect of an interlocutory decree in divorce actions, and directing the time when the final decree may be entered. It is then alleged that the statutes pleaded have been construed by the court of last resort in the state of California to mean that the marriage relation is not dissolved by the entry of the interlocutory decree, but that it is only dissolved when the final decree has been entered; that at the time this action was commenced, in November, 1911, the marriage relation had not been dissolved; that no cause of action had accrued in favor of the appellant, and that her action "was prematurely commenced." The appellant replied, admitting that at the time of the commencement of the action the bonds of matrimony existing between herself and her husband had not been dissolved.

*For other cases see same topic, and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-3] The motion for a judgment dismissing the action upon the pleadings was properly sustained. The pleadings show that the action was premature. A state of facts that had not ripened into a cause of action when the suit was commenced cannot be supplemented by a class of facts that came into being later so as to make a cause of action. In other words, it is not allowable, in a supplemental complaint, to set up a class of facts which are at complete variance with, and antagonistic to, the facts which existed when the action was commenced. The original complaint is based upon a state of facts which did not then exist. The office of a supplemental pleading is to show facts "which occurred after the former pleadings were filed." Rem. & Bal. Code, § 308. "To entitle the plaintiff to file a supplemental bill, and thereby to obtain the benefit of the former proceedings, it must be in respect to the same title, in the same person, as stated in the original bill. Thus, if a person should file an original bill, as heir at law of the mortgagor, to redeem, and it should turn out, upon an issue and hearing of the cause, that he is not the heir at law, and he afterwards purchases the title of the true heir at law, he cannot file a supplemental bill to have the benefit of the former proceedings; for he claims by a different title from that asserted in the original bill. His true course would be to file an original bill." Story, Equity Pleadings (10th Ed.) § 339.

In *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232, an action was commenced to foreclose a mortgage for an alleged default in the payment of interest, which by the terms of the note matured the whole debt. Thereafter a supplemental complaint was filed, in which it was alleged that the principal debt had matured and was unpaid. After holding that there had been a valid tender of the interest, the court said: "Of course, if the first action was premature, which we are constrained to hold, it is manifest that it could not be the basis for the supplemental complaint which was filed in the case." See to the same effect, *Otto v. Griffin*, 54 Wash. 506, 103 Pac. 789; *Commercial Bank v. Hart*, 10 Wash. 303, 38 Pac. 1114; *Augir v. Foresman*, 23 Wash. 595, 63 Pac. 201; *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Andrews v. Andrews*, 3 Wash. T. 286, 14 Pac. 68; *Maynard v. Green* (C. C.) 30 Fed. 643. In *Augir v. Foresman* a writ of attachment was sued out upon a note which had not then matured conformably to the provisions of the statute, permitting the issuance of the writ when the requisite facts exist and nothing but time is wanting to fix an absolute indebtedness. Thereafter the writ was dissolved, and it was held that the action abated, although the note had matured before the order was made. In *Lawrence v. Pederson* the court, in speaking of the of-

fice of a supplemental pleading, said: "The office of a supplemental complaint is merely to enlarge or change the kind of relief to which a party may be entitled upon a cause of action existing at the time of the commencement of the suit." In *Andrews v. Andrews* the wife sought to vacate a judgment entered against her husband by confession, on the ground that the indebtedness upon which the judgment was confessed was fictitious, and to set aside a sale of real estate upon an execution issued upon the judgment, alleging that the real estate was community property. After the cause was at issue, she asked leave to file a supplemental complaint showing her divorce from her husband, a judgment against him, and her purchase of his interest in the community real estate at an execution sale under her judgment, alleging that her judgment became a lien prior to the time the judgment lien of the other defendant attached. This was refused, and her action was dismissed. In affirming the judgment, it was held that the proposed supplemental complaint "would have effected a revolution in the issues to be determined, and would have amounted to a substitution of a new cause of action."

[4] The appellant argues that the contract for the purchase of the land vested the equitable title in the community; that under the statute a married woman may maintain an action against her husband, or any other person, for the protection of her property rights, both separate and community, where the requisite facts exist, and that upon the entry of a decree of divorce when no disposition is made of the community property, the former members of the community hold title to the community property as tenants in common. The vice of the argument lies in the fact that the appellant did not commence her action as a married woman, nor did she seek to have the property restored to the community. She alleged that she was a divorced woman, and prayed that a decree be entered directing a conveyance of an undivided one-half interest in the property to her. In her supplemental complaint, she pleads that the final judgment was entered after the commencement of her action, and in her reply admits that she was not divorced when her action was commenced. It is one of the fundamentals of the law that one cannot plead one cause of action and recover upon another which is the antithesis of the cause first pleaded. If she had a cause of action in the beginning, which we need not decide, she failed to plead it, but seeks to recover upon a different one, which later came into being.

Other issues tendered were not passed upon by the trial court, and will not be considered on this appeal.

The judgment is affirmed.

CROW, C. J., and PARKER, CHADWICK, and MOUNT, JJ., concur.

(72 Wash. 197)

SAEGER et ux. v. BALDWIN.

(Supreme Court of Washington. Feb. 21, 1913.)

HIGHWAYS (§ 7*)—ESTABLISHMENT—EVIDENCE—"PUBLIC HIGHWAY."

An owner of land agreed on the abandonment of a highway that two owners of neighboring lands could pass over his land to reach a public highway. A road was opened for them, and improved. Thereafter a third person began to use the road, and subsequently the two owners ceased the use thereof because they acquired another access to a public highway. The third person's use continued for about 10 years. During the time the road was used about \$25 of public money was expended in repairing it, but the county subsequently refused to recognize it as a public highway. *Held*, that the road was not a public highway within Rem. & Bal. Code, § 5657, making roads public highways when they have been worked and kept up at the expense of the public for not less than seven years.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10, 12-14, 16, 18; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

Department 2. Appeal from Superior Court, Mason County; John R. Mitchell, Judge.

Action by C. H. Saeger and wife against C. C. Baldwin. From a judgment for plaintiffs, defendant appeals. Affirmed.

Marlon Garland, of Shelton, and Troy & Sturdevant, of Olympia, for appellant. T. P. Fisk, of Shelton, for respondents.

PARKER, J. The plaintiffs seek to have the defendant enjoined from trespassing upon their land by passing over it on what he claims to be a public highway. A trial upon the merits resulted in judgment in favor of the plaintiffs as prayed for, from which the defendant has appealed.

For a period of some 14 years prior to the commencement of this action, respondents had been the owners of a 40-acre tract of land along the north line of which runs a county road. Appellant owns a 40-acre tract of land adjoining respondents' land upon the south, which he has owned for about eleven years. Prior to about 14 years ago, a road ran across the land now owned by appellant in an easterly and westerly direction, which road was abandoned upon the establishment of the county road to the north of respondents' land. Shortly after the abandonment of the old road and the establishment of the new one, respondents consented that two of their neighbors to the south, a Mr. Ellison and a Mr. Barger, could use a roadway over their land to reach the new county road on the north. Respondent C. H. Saeger testified as to this agreement or understanding with his two neighbors as follows: "After the county road was moved north of my place, Mr. Barger, who lived south of Ellison's place, had no road. I made an agreement with him and Mr. Ellison, that a private road should be made

across my land and across Ellison's land for the use of Barger and Ellison. It was understood that it was to be a private road. After the road was fixed so as to be used, Ellison fenced up the part on his land, and would not let Barger out over him, and I then refused to let Ellison use the road over my land. It was agreed that the old road should be used until I should fence and clear my land, and that then I would give a lane along the west side of my land." The road was opened and improved sufficient for use by these neighbors near the west line of respondents' land, being in some places as much as 80 feet therefrom. Thereafter, some 10 or 11 years before the commencement of this action, appellant commenced to use this road, and thereafter, but evidently long before the commencement of this action, Ellison and Barger, who had acquired egress to a county road upon the west from their places, ceased the use of the road here in question. This resulted in no one except appellant having any special interest in the use of this road. Appellant continued to use it until a short time before the commencement of this action when it was closed by respondents' building a fence across it and it is to prevent appellant's interference with the fence and the continued use of the road that this action was commenced. For many years prior to the commencement of this action the road was used practically exclusively for travel to and from appellant's place. This in any event was true after Ellison and Barger ceased to use it. Respondents caused a gate to be maintained across the road for a period of time which was less than seven years prior to the commencement of this action. Some small amount of work was done upon this road at the expense of the county. Without attempting to state in detail the evidence on this subject we deem it sufficient to say that during the entire period from the commencement of the use of it by Ellison and Barger up until the time of the commencement of this action, the expenditure made by the county upon it, including the alleged working out of some poll tax, in no event exceeded \$20 or \$25, and even this expenditure, at least in considerable part, was based upon very doubtful authorization by the proper authorities of the county. The evidence also tends to show that the county has in recent years refused to recognize it as a public highway.

Counsel for appellant rest the right to have this road kept open for travel upon the theory that it is a public highway; that is, that it has been created such by prescription, and also by the use and maintenance thereof by expenditure of public funds thereon for seven years under section 5657, Rem. & Bal. Code. We are of the opinion that neither of these contentions can be suc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cessfully maintained. The seven-year statute relied upon makes such roads public highways only when they "have been worked and kept up at the expense of the public" for a period of not less than seven years. It seems clear to us that, even conceding that public money has been expended upon this road to the extent claimed, it would not be sufficient to create it a public highway. It is suggested that in any event section 5657 is not prospective in its effect, but only relates to roads which had public money expended upon them in their maintenance prior to the passage of that section. We find it unnecessary, however, to decide that question. Nor do we think the public use of this road has been such as to create it a public highway by prescription. In the case of *Megrath v. Nickerson*, 24 Wash. 235, 238, 64 Pac. 163, 164, we held that: "To establish a highway by prescription, there must be an actual public use, general, uninterrupted and continuous, under claim of right, for the term of years necessary to establish the right." It seems clear to us there has been no such use here shown.

The judgment is affirmed.

MOUNT, MAIN, GOSE, and CHADWICK, JJ., concur.

(72 Wash. 248)

LEWIS COUNTY v. MONFORT.

(Supreme Court of Washington. Feb. 24, 1913.)

1. COUNTIES (§ 57*)—ACTS OF COUNTY COMMISSIONERS.

There are two exceptions to the rule that the judgment of a board of county commissioners is conclusive upon questions within its jurisdiction; the first being based upon Rem. & Bal. Code, § 3909, authorizing a review of its orders, and the second in cases where the board acts ministerially without discretion.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 74, 75; Dec. Dig. § 57.*]

2. COUNTIES (§ 57*)—COUNTY COMMISSIONERS—CONCLUSIVENESS OF ACTS.

The determination by a board of county commissioners, for the purpose of fixing the classification of the county, that it contained a certain population, was conclusive, so as to prevent the county from recovering back salary paid to a county clerk, based upon such determination; the board having acted in a quasi judicial capacity in making such determination.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 74, 75; Dec. Dig. § 57.*]

3. COUNTIES (§ 75*)—COUNTY OFFICERS—SALARIES.

Where the law fixed the salary of a county officer, the board of county commissioners has no discretion to change it; and its order, attempting to authorize a salary in excess of that provided by law, will not justify the receipt of the excess salary.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 116, 117, 134; Dec. Dig. § 75.*]

4. COUNTIES (§ 75*)—OFFICERS—SALARY—OVERPAYMENT.

The acceptance of a smaller salary by a county clerk than that previously paid to him,

pursuant to a classification of the county by the county commissioners, after it had been adjudicated in a case to which he was not a party that such classification was erroneous, would not prevent him from retaining the increased salary voluntarily paid him before such adjudication.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 116, 117, 134; Dec. Dig. § 75.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by the County of Lewis against D. W. Monfort. From a judgment for plaintiff, defendant appeals. Reversed, with directions to sustain demurrer to the complaint.

W. H. Thompson, of Seattle, for appellant. Forney & Ponder, of Chehalis, for respondent.

GOSE, J. The plaintiff, the county of Lewis, brought this action to recover a portion of salary theretofore paid to the defendant as county clerk of that county. The complaint alleges that the defendant was elected county clerk of Lewis county at the general election held on the 3d day of November, 1908, for the term commencing on the 11th day of January, 1909; that prior to the date of the election the county had been legally ascertained to be a county of the thirteenth class; that on the 17th day of February, 1909, the board of county commissioners of Lewis county, acting illegally, found that the county, on the 1st day of November, 1908, had, and then had, a population of more than 36,000 inhabitants, and caused an order to that effect to be entered upon its records, and "attempted" by such order to raise the classification of the county from the thirteenth to the seventh class, the order to take effect as of the 1st day of November, 1908; that on the 1st day of March, 1909, the board of commissioners entered an order, directing the county auditor to draw warrants for salaries of the various county officers as provided by law for counties of the seventh class from and after January 1, 1909; and that, pursuant to such order, the county auditor issued salary warrants to the defendant as directed, up to and including the 5th day of December, 1910. It is further alleged that the order mentioned was made without due deliberation, upon insufficient and unreliable data, without due or proper investigation, inadvisedly, and through mistake; and that the county, at the time the order was entered, and at no time thereafter, had a population of 35,000 inhabitants. The complaint further alleges that on the 19th day of December, 1910, in an action then pending in the superior court of Lewis county, wherein one Frase was plaintiff and the county auditor of Lewis county was the defendant, a decree was entered, whereby it was adjudged that the county did not have a population greater than 32,127 on the 1st day of November, 1908, or at any subsequent time, as shown by the federal census of 1910, and restrained the county auditor from issuing salary warrants

in excess of the amount provided by law for counties of the tenth class; and that since the entry of such judgment the defendant has accepted warrants for his salary at \$125 per month. The salary of the county clerk in counties of the thirteenth and tenth classes is \$1,500 per annum, and for counties of the seventh class it is \$1,800 per annum. A demurrer to the complaint was overruled. The defendant electing to stand upon his demurrer, a judgment was entered against him for the salary paid him in excess of that provided for in counties of the thirteenth class.

Stripped of its elaboration, the complaint means that the order entered by the board of county commissioners, determining the number of inhabitants in the county on the 1st day of November, 1908, was made upon insufficient evidence. This court has held that the board of county commissioners has jurisdiction to determine the population of a county for the purpose of fixing its classification; and that it may ascertain that fact by proof, just as it may determine any other fact arising in the discharge of its duties. *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135. In the course of the opinion it is said: "In the absence of any law pointing out how that population should be ascertained, the board of county commissioners can determine the fact by proof, just as it can determine any other fact necessary for the discharge of its duties." In *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797, in commenting on the same question, we said: "It was thus determined that, for the purpose of ascertaining the class to which a county properly belonged and fixing salaries, the county commissioners and superior court were authorized to determine the population as it existed when the county officers were elected; and that they should be compensated accordingly." In *State ex rel. Sheehan v. Headlee*, 17 Wash. 637, 50 Pac. 493, it was held that a board of county commissioners, in passing upon a claim against the county, acts as a quasi judicial body; and that the allowance of a claim is an adjudication which is conclusive. The same general principle has been applied to the acts of a county board of equalization. *Edison Elec., etc., Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132; *Doty Lbr. & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912B, 870.

In *Alameda County v. Evers*, 136 Cal. 132, 68 Pac. 475, the claim of the coroner for services, which, upon the face of the claim, was a legal charge against the county, was allowed by the board of supervisors, and a warrant drawn upon its order was paid. In a suit by the county to recover the money so paid, it was alleged that the services were not performed; that the coroner made the claim knowing it to be false, and that by such false statements he willfully misled the board of supervisors; and that they allowed the claim, relying upon the false statements

which it contained, and believing that the services had been performed by him, as therein stated. A demurrer to the complaint was sustained, and the ruling was affirmed upon appeal. The court said: "In other words, after the claim of defendant has been duly passed upon and allowed by the board of supervisors, acting in a judicial capacity, it is now sought in this collateral proceeding to prove that the finding of the board on a question of fact was not correct. The very question which the board had the right to determine, and which it was its peculiar and exclusive province to determine, was as to whether or not the services set forth in the claim had been performed. It was the duty of the board, in its judicial capacity, to carefully examine this question. It had the right to the advice and assistance of the district attorney of the county, and the right to bring witnesses before it and examine them on questions of fact. From the decision of the board of supervisors on questions of fact, in regard to matters of which it has jurisdiction, there is no appeal. If the board exceeds its jurisdiction, or allows claims which are illegal upon their face, or in direct violation of law, there is a remedy. There, no doubt, may be cases in which a court of equity, in a direct proceeding, would entertain a suit to set aside the allowance of a claim, where such allowance has been procured by fraud; but this is not such case. In this case it is sought by plaintiff to recover by proving that the services for which the money was paid were never performed. Defendant procured the money by proving before the proper tribunal that the services had been performed. Plaintiff now seeks, without attacking the judgment of the tribunal which allowed the claim, to recover back the money by proving that the services were never in fact performed. We are aware that in several of the states such doctrine has been sanctioned; but the rule has been long settled the other way in this state, and we see no reason to change it."

In *Mitchell v. Clay County*, 69 Neb. 779, 96 N. W. 673, the object of the action was to recover money received by a former county officer in excess of the compensation allowed him by law. Upon an exhaustive review of its own decisions, it was held that the board of commissioners acts quasi judicially in passing upon claims against the county, where it is called upon to pass upon facts or exercise discretion in fixing the amount to be allowed; but where the course to be pursued or the amount to be allowed is fixed by law, it has no discretion, the acts are ministerial, and it must follow the law. The pith of the decision is contained in the following language: "Hence it would seem clear that a settlement with a county officer, which, in substance, is an adjustment of his accounts, does not become quasi judicial, so as not to be reviewable otherwise than by appeal, because claims were filed for

sums claimed to be due such officer, and allowed for the purpose of enabling warrants to be drawn therefor. If, in such case, the compensation to be allowed the officer is fixed by law, the allowance of the claim is only formal. On the other hand, if the amount to be allowed is in the discretion of the board, or if, in fixing such amount, the law requires the commissioners to decide questions of fact, their action is quasi judicial." See, to the same effect, *Crouch v. Pyle*, 70 Neb. 60, 93 N. W. 1049; *Santa Cruz County v. McPherson*, 133 Cal. 282, 65 Pac. 574; *Board of Commissioners v. Wolff*, 166 Ind. 325, 76 N. E. 247.

[1] There are two well-defined exceptions to the rule that the judgment of a board of county commissioners is conclusive upon questions within its jurisdiction. The first is based upon the statute, and the second is where the board acts ministerially and the law leaves it no discretion.

The statute (Rem. & Bal. Code, § 3909) provides for appeal and certiorari from the order of the board of county commissioners. It expressly provides that such remedy shall not prevent a party from enforcing his claim in the courts by a direct action, after it has been presented and disallowed, in whole or in part, by the board of commissioners. Hence, in *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137, where a claim for salary was presented to the board of county commissioners and disallowed, a direct action brought by the claimant in the superior court against the county was sustained.

In recognition of the second exception, in *Tacoma v. Lillis*, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372, cited by the respondent, it was held that a city may recover money paid to a member of the city council in excess of the salary allowed by law. So, in *Chehalis County v. Hutcheson*, 21 Wash. 82, 57 Pac. 341, 75 Am. St. Rep. 818, a judgment enjoining the payment of salary warrants was affirmed, on the ground that the warrants were issued under the provisions of a statute which was in conflict with the Constitution. The court said that the board of commissioners had no authority to make the contract upon which the warrants were later issued, but recognized the distinction between those cases where there was no power or authority vested by law in the board and cases where there was power, which was irregularly or erroneously exercised. A like view was taken in *James v. Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957. In *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71, a case upon which the respondent places some stress, the court held that payments made by the board of commissioners to a public officer, "which are positively and absolutely forbidden by

the statutes of the state and by the Constitution thereof, may be recovered back." *Weeks v. Texarkana*, 50 Ark. 81, 6 S. W. 504, and *Village, etc., v. Fish*, 156 N. Y. 363, 50 N. E. 973, voice a like principle. In *Krieschel v. County Commissioners*, 12 Wash. 428, 41 Pac. 186, an order restraining the removal of the county seat was affirmed where it conclusively appeared that the number of legal votes cast upon the proposition to remove the county seat was not ascertained by the board of county commissioners, and that the board had not canvassed the election returns.

[2, 3] In the case at bar the board of commissioners acted upon a subject-matter within its jurisdiction. The question which it determined was one of fact only, i. e., the population of the county. When that fact was determined, the law fixed the classification. The character of the evidence and the question of its weight and sufficiency were confided by law to the judgment of the board. The power to decide carries with it necessarily the power to decide wrong. After the board had determined the population of the county, the appellant received and collected salary warrants conformably to the order. The board, in finding the fact and entering the order, acted in a quasi judicial capacity; and the order is a full protection to the appellant in this suit. As was said in the *Alameda County Case*: "If the board exceeds its jurisdiction, or allows claims which are illegal upon their face, or in direct violation of law, there is a remedy." And, as said in the *Olay County Case*, where, in determining the amount to be allowed, "the law requires the commissioners to decide questions of fact, their action is quasi judicial." The distinction is this: Where the law fixes the salary of a county officer, no discretion is left to the board of county commissioners; and any order that it may make in an attempt to allow a salary in excess of that provided by law affords no justification to the officer for receiving the excess salary. But when the law gives the board the power to determine a fact, it acts in a quasi judicial capacity in reaching a conclusion; and its order affords protection to those who act upon it.

[4] The acceptance of the smaller salary, after an adjudication in a case to which the appellant was not a party does not militate against his right to retain the salary voluntarily paid him. *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293.

The judgment is reversed, with directions to sustain the demurrer.

CHADWICK, PARKER, MOUNT, and MAIN, JJ., concur.

(17 N. M. 445)

CITY OF ALBUQUERQUE v. GARCIA
et al.

(Supreme Court of New Mexico. Jan. 23, 1913.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 47*)—LANDS DEDICATED TO "PUBLIC USE."

A city has no power to condemn a community acequia, in actual use for conducting water, for the irrigation of lands, and to appropriate the same to the use of the public as a street, or for widening a street, as the statute authorizing cities to condemn and take lands for "public use" as a street, neither in terms, nor by necessary implication, authorizes the taking of property already dedicated to a public use; and an irrigation ditch, used for conducting water for the irrigation of lands, when in actual use as such, is so dedicated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

Appeal from District Court, Bernalillo County; before Justice H. F. Reynolds.

Action by the City of Albuquerque against Antonio Garcia and others. Judgment for plaintiff, and defendants appeal. Reversed, with orders to dismiss complaint.

This was a proceeding instituted in the district court of Bernalillo county by the city of Albuquerque, for the purpose of condemning a community acequia which runs through and across certain streets and alleys in said city, and through which said acequia the defendant Metz and his codefendants conducted water for the irrigation of land; the city alleging that it was its desire and purpose to widen and improve the streets through which said irrigation ditch was conducted. Condemnation was awarded, appraisers were appointed, and the return of appraisal was filed with the clerk of the district court, and from the judgment of condemnation this appeal is prosecuted.

M. U. Vigil and W. C. Heacock, both of Albuquerque, for appellants. Felix H. Lester and Hugh J. Collins, both of Albuquerque, for appellee.

ROBERTS, C. J. (after stating the facts as above). By this proceeding the city of Albuquerque has attempted to condemn the entire ditch running longitudinally through certain of the streets of said city; and the principal question presented by the record relates to the power of the city to condemn an irrigation ditch, in actual use as a community ditch, for conducting water for the irrigation of lands, and to appropriate said ditch to the use of the public as a street, thereby destroying said ditch. The authority for the condemnation is claimed under subsection 91 of section 2402 of the Compiled Laws of 1897, and chapter 97 of the Laws of 1905.

Appellees, in support of the right to condemn, insist, first, that the irrigation ditch

in question was not devoted to a public use; and, second, that the sections of the statute above referred to, authorizing cities to condemn property, by necessary implication, authorized the condemnation of property already devoted to a public use. The questions will be considered in their order.

1. New Mexico, being one of the arid states of the Union, and the successful cultivation of crops depending almost exclusively upon the ability of the landowner to procure water for the irrigation of his lands, the right to do so, and to, for such purpose, construct ditches and canals across lands of his neighbor, has been recognized for many years by the lawmaking power of the territory (now state). In 1851 the territorial Legislature passed an act declaring that "the irrigation of the fields should be preferable to all others," and forbidding any inhabitant of the territory to construct any building to the impediment of the irrigation of lands or fields. Section 1, C. L. 1897. In 1874 an act was passed, giving to all the inhabitants of the territory of New Mexico the right to construct either private or common acequias through the lands of others, requiring, however, compensation to be made for all damages done. See section 23, C. L. 1897; and the next succeeding section provides for the condemnation of a right of way for such ditch or acequia. By section 3 of chapter 49, S. L. 1907, the right to condemn lands for irrigation ditches was conferred upon "the United States, the territory of New Mexico, or any person, firm, association or corporation."

The ditch in question, as shown by the complaint, was a community acequia, and under section 8, c. 1, C. L. 1897, was a corporation. By the sections quoted from the statutes of New Mexico, it is apparent that the owners of this ditch, whether private parties, or a corporation under said section 8, had the right to condemn a right of way for a ditch. It appears that the ditch had been in use for, perhaps, 50 years, but the record does not disclose in what manner or method the right of way for the said ditch was originally acquired; nor is it material, for, as said by the court in *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359, 15 N. W. 684: "The question for the court, when it arises in a judicial investigation in such cases, is, not how the land was acquired, but how it is used, or, whether it is necessary for a public purpose. In *re Water Com'rs*, 66 N. Y. 413." Therefore the court is not concerned as to how the right was originally acquired to conduct water through the acequia in question.

In 1904 the state of Utah had a statute conferring upon any person or corporation the right to condemn a right of way for an irrigation ditch across private property. The plaintiff, Nash, sought by condemnation to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

enlarge a private ditch owned by Clark and others. Condemnation was awarded, and the case was taken to the Supreme Court, and the contention there urged was that the use to be made of the property sought to be condemned was strictly private and in no sense a public use; and that, both under the Constitution of the United States and the Constitution of Utah, which provide that "private property is not to be taken or damaged for public use without just compensation," condemnation could not be awarded, because the constitutional provision meant that private property could not be taken for strictly a private use, and the question, as determined by the court, as stated, was: "Was the condemnation of appellant's land in this case, in law and in fact, for a public use?" The court say: "In view of the physical and climatic conditions in this state, and in the light of the history of the arid West, which shows marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state, would be to give to the term 'public use' altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution." *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, 1 Ann. Cas. 300. The court, in the case above cited, sustained the judgment of the lower court awarding condemnation, and from the said court an appeal was taken to the Supreme Court of the United States, where the judgment of the lower court was sustained and the reasoning upheld. See *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

Our territorial Supreme Court, in the case of *Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N. M. 177, 61 Pac. 357, said: "It is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico, and other western states where irrigation is necessary, is a public purpose."

These cases would seem to dispose of the question as to the public use of the acequia in question adversely to the contention of appellees. It is our view, therefore, that the use to which the irrigation ditch in question was devoted was a public use; and consequently the city would not have the right to condemn the same and thereby destroy it, unless such right was expressly or by necessary implication conferred upon the city by the Legislature.

2. The Legislature, as the supreme and sovereign power of the state, may doubtless interfere with property devoted to a public use for one purpose and apply it to another; but the legislative intent to do so must be stated in clear and express terms, or must

appear from necessary implication. Subsection 91 of section 2402, C. L. 1897, under which the power of condemnation is claimed by the city, reads as follows: "That municipal corporations shall have the power and right of condemnation of private property for public use in the following cases, to wit: For the laying out, opening and widening of streets and alleys and highways or approaches to streets, * * * both within their corporate limits and for a distance of two miles outside of the same." Chapter 97 of the Session Laws of 1905, under which authority is also claimed by the city, provides for the condemnation of property by railroad, telegraph, telephone companies, etc. Section 1, in so far as the same is material, reads as follows: "In case lands or other property are sought to be appropriated by any railroad, telephone, telegraph company," etc. This is followed by specific provisions applying only to the companies named; but section 15, which we apprehend is the section claimed by appellees to confer upon the city additional authority to condemn property, in so far as the same is material, reads as follows: "In addition to the purposes hereinbefore specifically mentioned for which property may be condemned under the provisions of this act, it may also be condemned for * * * public buildings and grounds for the use of any county, incorporated city, or city and county, village, town or school district, * * * raising the banks of streams, removing obstructions therefrom, roads, streets and alleys, public parks, and all other public uses for the benefit of any county, incorporated city, * * * which may be authorized by law, * * * for canals, ditches, flumes, aqueducts, pipes, for irrigation." It will be observed that no express power is conferred upon the city to condemn property already devoted to a public use in either of said sections, for any purpose whatever.

If it be argued that chapter 97, supra, confers such power upon cities by the language used in section 1, "in case lands or other property are sought to be appropriated," and such argument were sound, the result would be that any corporation, municipal or private, or person, upon whom the right of condemnation was conferred by said chapter, could condemn property already devoted to a public use by another corporation or person; and in the case now under consideration, if the city of Albuquerque should prevail and condemn the ditch in question, the owners of the ditch, under the very chapter which the city invokes, could likewise condemn the right of way taken from them by the city and re-establish their ditch where it now is. The city of Albuquerque would have the power, under this construction, to condemn all the property of the Atchison, Topeka & Santa Fé Railroad Company within its limits; to condemn the county courthouse, were the same within its boundaries.

We do not believe the language capable of the construction sought to be placed upon it by appellees.

In the case of *Boston & Albany Railroad Co. v. City Council of Cambridge*, 166 Mass. 224, 44 N. E. 140, the court had before it the construction of a statute conferring power upon the city of Cambridge to "take and hold by purchase or otherwise any and all such real estate as it may deem advisable," and "to lay out, maintain, and improve the same as a public park or parks." Under this power the city sought to lay out a park, embracing lands in actual use by a railroad company. The court say: "The general words of the statute, conferring power to 'take and hold by purchase or otherwise any and all such real estate and lands within said city as it may deem advisable; and to 'lay out, maintain and improve the same as a public park or parks,' was not intended to authorize the taking in fee of lands already devoted to public use as parts of the actual location of a railroad, any more than to authorize the taking of the courthouse, the jail, or the house of correction, and the lands of the county of Middlesex under the same, also situated within the city."

The case of the *Matter of City of Buffalo*, 68 N. Y. 167, will be found very instructive upon this proposition. Justice Folger, speaking for the court, says: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid, if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the Legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the fact of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner."

It is admitted that the use of the city and the use of the community acequia of the right of way in question cannot stand together; that the taking of the right of way sought to be appropriated by the city will absolutely destroy the use to which it was theretofore subjected by the community acequia. The question of the right to condemn property, already devoted to a public use, by a city has been frequently before the courts for consideration; and such right has been uniformly denied, where the statute was in general terms, as are the statutes of New Mexico, upon which the city of Albuquerque bases its rights.

The following cases fully support the position taken upon this question: *City of Bridgeport v. N. Y. & New Haven R. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *City of Seymour et al. v. Jeffersonville, Madison & Indianapolis R. R. Co.*, 126 Ind. 466, 28 N. E. 188; *Van Reipen v. Jersey City*, 58 N. J. Law, 262, 33 Atl. 740; *Boston & Albany R. R. Co. v. City Council of Cambridge*, 166 Mass. 224, 44 N. E. 140; *Milwaukee & St. Paul R. R. Co. v. City of Faribault*, 23 Minn. 167; *St. Paul Union Depot v. City of St. Paul*, 30 Minn. 359, 15 N. W. 684; *N. J. Southern R. R. Co. v. Long Branch Com'rs*, 39 N. J. Law, 28; *City of Moline v. Nelson H. Green et al.*, 252 Ill. 475, 96 N. E. 911, 37 L. R. A. (N. S.) 104.

That the Legislature did not intend, by implication, to confer the power upon cities to condemn acequias, used to conduct water for irrigation purposes, is made more manifest by the provisions of subsection 89, § 2402, C. L. 1897, which gives to the city the right to make all needful and necessary police and other regulations for the flowing and use of water in public acequias for irrigation purposes within the corporate limits of such city. Also section 2485, C. L. 1897, which confers upon towns the right, by ordinance, to compel ditches to be so constructed and cared for as to prevent the streets or highways from being flooded or injured thereby. This legislation would seem to imply that it was the intention of the lawmaking power of the state to confer upon cities and towns the right to regulate, rather than destroy, the acequia; and it should not be held that the Legislature intended to confer the right to destroy, unless such power is expressly conferred, or arises by necessary implication.

From what we have said, it follows that the lower court erred in awarding condemnation, and the cause is therefore reversed, with instructions to the lower court to dismiss the complaint as to appellant; and it is so ordered.

HANNA and PARKER, JJ., concur.

(3 Okl. Cr. 630)

HILDEBRANDT v. STATE.(Criminal Court of Appeals of Oklahoma.
Feb. 22, 1913.)*(Syllabus by the Court.)***INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.**

For evidence fully sustaining a conviction for keeping a place for the purpose of violating the prohibitory liquor law of Oklahoma, see opinion.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Appeal from Garfield County Court; Winfield Scott, Judge.

H. G. Hildebrandt was convicted of violation of the prohibitory liquor law, and his punishment assessed at a fine of \$400 and confinement in the county jail for 120 days, and he appeals. Affirmed.

W. O. Cromwell, of Enid, for appellant. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

FURMAN, J. Appellant was charged with keeping and maintaining on the 4th day of February, 1912, a place located on the Chicago, Rock Island & Pacific right of way known as the Anheuser Busch Brewing Company's cold storage building, at the corner of Second and East Park streets, in the city of Enid, Okl., where malt, spirituous, vinous, and fermented liquors and imitations thereof, to wit, whisky and beer, capable of being used as a beverage, were received and kept for the purpose of unlawfully bartering, selling, giving away, and otherwise furnishing the same to others. It was proven that on the day alleged appellant occupied the building in question and exercised control over it, and that on said date the place was raided by the officers, and a man was found in one of the rooms of the house pouring whisky from a large bottle into small ones. Appellant was also present in the building at the time the raid was made. Whisky was also taken from the person of another man found in the building. In the building were found a number of barrels filled with empty bottles. Boxes and a lot of empty bottles were also found in the office of appellant. Wholesale and retail liquor dealer receipts for the payment of the United States internal revenue tax from July 1, 1911, to July 1, 1912, were found posted on the walls of the building. They were issued to appellant and designated this building as his place of business.

The agent of the Wells Fargo Express Company at Enid testified that on appellant's order he had delivered whisky to various persons. It was also proven that the building occupied by appellant had the general reputation in that community of being a bootlegging joint, and that it was a place at which men who were in the habit of drinking resorted.

Appellant offered no testimony. We think

the evidence of appellant's guilt is conclusive. All of the questions presented by appellant having already been decided repeatedly by this court adversely to the contention of appellant, it is not necessary to discuss them again.

This court is not hunting for excuses or splitting hairs to set aside the verdicts of juries and the judgments of courts, and thereby keep guilty men out of jail. Instead of complaining at the sentence which he received, appellant should be exceedingly grateful that he was not sentenced to jail for six months and fined \$500. When appellant has served the time in jail prescribed by the judgment, he will be released from imprisonment upon the payment of his fine. If the fine is not then paid, he must be confined in jail until the fine is fully satisfied as the law directs.

We find no prejudicial error in the record. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(3 Okl. Cr. 667)

ROBINSON v. STATE.

(Criminal Court of Appeals of Oklahoma. Feb. 22, 1913.)

*(Syllabus by the Court.)***1. ROBBERY (§ 24*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.**

In a prosecution for conjoint robbery, the evidence is held sufficient to support the verdict and judgment, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.*]

2. INDICTMENT AND INFORMATION (§ 110*)—ACCUSATION—FOLLOWING LANGUAGE OF STATUTE.

Where the statute states the elements of a crime, it is generally sufficient, either in an indictment or information, to charge such crime in the language of the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

3. CRIMINAL LAW (§ 1151*)—WRIT OF ERROR—DISCRETION OF TRIAL COURT—CONTINUANCE.

The refusal of a continuance in a criminal case, applied for on grounds not enumerated in the statute, is a matter within the discretion of the trial court; and nothing but an abuse of this discretion will warrant the appellate court in interfering with the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

4. ROBBERY (§ 23*)—EVIDENCE—COMPLAINT BY VICTIM.

In a prosecution for conjoint robbery, a witness for the state was permitted to testify that immediately after the alleged robbery the victim complained to him that he had been robbed by the defendant, without testifying as to the particulars of his statement.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 29-31; Dec. Dig. § 23.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(Additional Syllabus by Editorial Staff.)

5. ROBBERY (§ 23*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for robbery, committed between 1 and 8 o'clock, a question to a witness as to the condition of the victim of the robbery, as to being drunk or sober, when he returned to his place "along towards dark," is not competent.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 26-31; Dec. Dig. § 23.*]

6. CRIMINAL LAW (§ 670*)—RECEPTION OF EVIDENCE—OFFER.

When objections to a question to a witness are sustained, if it is intended to reserve the question as to the competency of the testimony for review, an offer of what the testimony would have been must be made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593-1596; Dec. Dig. § 670.*]

7. WITNESSES (§ 388*)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE.

The exclusion of impeaching testimony as to statements of a witness was proper, where no foundation was laid therefor by asking the witness as to the statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.*]

8. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—FLIGHT OF ACCUSED.

An instruction that, if the arrest and transportation of defendant was without authority, he had a right to escape, and that circumstance should not be taken against him, was properly refused, where defendant's explanation of the reason for his attempt to escape was his dislike for the officer who had arrested him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

9. CRIMINAL LAW (§ 666½*)—TRIAL—PRELIMINARY PROCEEDINGS—PREVENTING INTERVIEW WITH COUNSEL.

The refusal to permit defendant's counsel to interview an imprisoned witness, except in the sheriff's presence, is not ground for reversal of a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1576; Dec. Dig. § 666½.*]

10. INDICTMENT AND INFORMATION (§ 180*)—VARIANCE—DESIGNATION OF ACCUSED.

The contention that there was a fatal variance between the information, alleging that the robbery was committed by defendant and a person unknown, and the evidence is not sustained, where the complaining witness referred to the third party as the "stranger" throughout the testimony, and no evidence is adduced that his name was known at the time of filing the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 551-556; Dec. Dig. § 180.*]

Appeal from District Court, Muskogee County; R. C. Allen, Judge.

Pat Robinson was convicted of robbery, and appeals. Affirmed.

The plaintiff in error, Pat Robinson, hereinafter referred to as the defendant, was, by information, charged with the crime of conjoint robbery, committed upon Roland Wallace, in Muskogee county, on the 24th day of November, 1910. The information

was filed in the district court of Muskogee county on the 24th day of April, 1911. May 13th the defendant filed a demurrer to the information, which was overruled. Thereupon the defendant filed an application for continuance, which was overruled, and the case was called for trial, and on the same day the jury returned a verdict of guilty and assessed his punishment at five years in the state prison. Motion for new trial was duly filed, and on May 23d, said motion was overruled, and judgment and sentence was rendered and entered in accordance with the verdict. To reverse the judgment, an appeal by case-made was perfected.

A brief statement of the testimony is as follows:

Roland Wallace testified that he first met the defendant at Robinson's meat market, in Briartown, on the evening of November 23d, and while there he had his money, three \$10 bills and two \$5 bills in his hand, in the presence of the defendant; and the next day about 9 o'clock, while he was at work picking cotton on Mr. Beshears' farm, about one mile from Briartown, Porter Starr, the defendant, and a stranger approached him in the field and demanded some whisky, which they claimed he had taken. Upon his denying it, the defendant said: "You have got to come and go with us and straighten this up; we have got to have our whisky." Wallace went to Briartown with these parties. Arriving there, they were informed that Finis Kaysinger, the man that said that Wallace had taken the whisky, had gone out into the country. The defendant said that they would follow him in Henry Starr's wagon. They all got into the wagon and drove out about a mile and a half to a point near the Briartown cemetery; here Wallace said he would go no further and got out of the wagon, also the defendant and the stranger; and they insisted that Wallace take a drink of whisky, and when Wallace turned the bottle up to take his drink the defendant and the stranger, with open knives held against his side, demanded that he either pay them or dig up the whisky. Wallace told them he did not have the whisky, and they told him to throw down his pocketbook. They took the money, and the defendant told Wallace "to get to hell out of there"; that he could feel the points of the knives when he threw down the purse; that it contained \$40 in greenbacks and some silver; that this money was taken by force; that he returned to Briartown and complained of the robbery.

E. V. Beshears testified: That he lived about a mile southeast of Briartown. Roland Wallace was working for him November 24th. About 9 o'clock Pat Robinson and two other fellows came there, and he heard the defendant say: "Come on; you have got the grip of whisky, and must go and fix it up." That Wallace said something about not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wanting to go, and then they all went off together.

H. M. Pickering testified he was a brother-in-law of Beshears, and was picking cotton for him that day. His testimony as to what occurred in the field is substantially the same as Mr. Beshears.

Sam Robinson testified: That he had a store at Briartown. Saw Wallace have three \$10 bills in his hand. That the defendant and a stranger were present in his store at the time. That about 3 o'clock in the afternoon on the day on which the robbery occurred Wallace returned and complained of having been robbed by the defendant. That they left his store about 10 o'clock that morning.

Oscar Goodwin testified that he saw Roland Wallace in Briartown on the night of November 23d; that he had a roll of money with a \$10 bill on the outside, in the store there, and the defendant was present at the time.

Finis Kaysinger, as a witness, denied that he ever told the defendant or his accomplice that Roland Wallace had taken their whisky.

The testimony in behalf of the defendant is substantially as follows:

Henry Starr testified: That he met Wallace and the defendant in Briartown, and they were having a dispute about some whisky that Wallace claimed that one Ike Stanford had taken, and they started out in his wagon to see him. They met Stanford, and took two pints of whisky away from him. On their way back they stopped by the roadside and sat down and they all commenced to play cards. After playing a while, Wallace said that he would not play them all; that he would play any one of them single-handed, and Ed Ward was chosen to play him. That after a while the game broke up in a row. That Wallace had lost his money. That the money was not taken from him by force, or by the drawing of knives by the defendant and Ward.

The defendant, testifying on his own behalf, stated: That he had lost some whisky, and Wallace had been accused of taking it, and that they started with him to find Ike Stanford to settle the dispute; Wallace having laid it on him. That they stopped by the roadside and began to play cards. They were all drinking. Wallace said that he would not play them all, so Ed Ward was chosen to play him. The game broke up in a row; Wallace claiming that he was cheated, and that Ward had taken his money. He denied robbing Wallace, or that he had a knife or gun at the time. On cross-examination he admitted that he was arrested in Quinton about ten days later, and that he escaped from the officer by jumping out of a car window, while the train was running; also that he had been convicted of burglary and served a term of two years.

The record shows that Porter Starr, called

as a witness on behalf of the defendant, having been first duly sworn and called as a witness, refused to testify.

Wallace Wilkinson, of McAlester, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

DOYLE, J. (after stating the facts as above). [1, 2] It is contended, first: "That the court erred in overruling the defendant's demurrer." The learned counsel, in his brief, says: "The objection to the information is, first, that it falls to state how, or by what means or force, the plaintiff in error put the said Roland Wallace in fear, or whether or not the said Roland Wallace was in fear at the time of the seizing of his money; and, second, that the money was not described." The objection is not well taken. The information charges that the defendant, acting conjointly with a person unknown, did feloniously, by use of force, and by putting in fear, without the consent and against the will, seize and take from the person and immediate possession of the said Roland Wallace \$41, good and lawful money of the United States. The information follows closely the language of the statute, and we have no doubt whatever of its sufficiency.

[3] It is next contended that the court erred in overruling the application for continuance. The affidavit for continuance sets forth that the defendant is informed and believes that if John Maldwell was present he would testify that he let Roland Wallace have three \$1 bills on or just before the day of the alleged robbery; that if Henry Davis was present he would testify that he passed along where the defendant, Ed Ward, and Roland Wallace were playing cards on that day; that if West Shaw was present he would testify that he saw Ed Ward with three \$1 bills, such as the defendant contends that said Ed Ward won from Roland Wallace, immediately after said game of cards was played; that these witnesses lived near Briartown, in Muskogee county.

As a further ground, the affidavit states that "the defendant contends that Ed Ward and this defendant and the prosecuting witness, Roland Wallace, were in a poker game on that day, near Briartown, and that Ed Ward won all of the money that Roland Wallace had, which was three \$1 bills and 50 cents in silver, and that no robbery occurred at said time, and that said Roland Wallace was not robbed. Defendant further says that Ed Ward cannot be found in the state of Oklahoma; that Porter Starr is in jail, charged with robbery; that the said Starr has indicated that he desires to go on the witness stand and testify in behalf of this defendant, but that the sheriff of this county refuses to permit the attorney for the defendant to see and talk with the said Porter Starr; that on the 6th day of May, 1911, the sheriff of this county caused the

defendant to be arrested upon a charge of murder, committed in this county, on the 4th day of May, 1911, at Old Starr Village, at the home of Bob Davis, that the defendant is now being wrongfully held upon said charge, and has been refused a preliminary examination; that he is charged with murdering Jim Work at the above-named place, and that on the same day, and at the time the said Jim Work was killed, the defendant was at Whitefield, about 10 miles from where Work was killed; that there exists a great deal of prejudice in the county of Muskogee against this defendant on the account of his being charged with the killing of the said Jim Work, who was a deputy sheriff, and that said prejudice will be to the detriment of this defendant in his trial in this case; that if this case is continued until after he has a preliminary hearing in the charge of murder against him, then he will be able to prove by many witnesses that he was not present, and did not kill said officer, Jim Work; and that on that account this cause ought to be continued."

The rule is well settled that the refusal of a continuance in a criminal case, particularly for reasons not enumerated in the statute, is largely a matter within the discretion of the trial court; and nothing but the abuse of this discretion will warrant the appellate court in interfering with the judgment. We think the application for a continuance was properly refused.

[4] Several assignments are based on rulings of the court on the admission and exclusion of testimony. Error is claimed upon the admission of certain testimony given by the state's witness Sam Robinson, to the effect that Roland Wallace had complained to him that he had been robbed by the defendant. The objection is based upon the ground that the alleged statement was made out of the presence of the defendant, and that it was not a part of the *res gestæ*. The state's evidence was that the robbery occurred about three-quarters of a mile from town, and that Wallace immediately proceeded to town, and as soon as he arrived there complained of the robbery. We think, upon this state of facts, the evidence was admissible. "Statements made by the owner or possessor of goods after an alleged robbery or larceny of them may be affected by several principles: (1) The failure of the person to make complaint would be conduct indicating a nonbelief in the genuine occurrence of the injury charged, and would seem to be clearly admissible against him. Accordingly, to repel in advance this inference, it would be proper to show for the prosecution, as in a charge of rape, that the person was not silent, but did in fact complain with reasonable promptness. Upon this principle, however, as in the case of rape, only the fact of the complaint, and not the details of the statement, would be admissible. * * * (2) On the theory of

the exception to the hearsay rule for spontaneous exclamations (or *res gestæ* statements), it would seem that, after some evidence of the robbery or larceny had been offered, the details of complaints or outcries made shortly after the robbery should be receivable." 2 Wigmore on Evidence, § 1142. And see 3 Wigmore on Evidence, § 1762; *People v. Wallin*, 55 Mich. 497, 22 N. W. 15; *People v. Murphy*, 56 Mich. 546, 23 N. W. 215; *State v. Horan*, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036; *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523.

[5] It is next insisted that the court erred in sustaining the objection to a question asked the witness Beshears, who testified that Roland Wallace returned to his place along towards dark on the day the robbery was committed. Witness was then asked: "What was his condition as to being drunk or sober?" Objection was made and sustained. The proof shows that the robbery was committed between 1 and 3 o'clock; hence evidence of the victim's intoxication "along towards dark" would clearly not be competent.

[6] Sam Robinson, to whom witness made complaint of the robbery immediately upon his return to Briartown, was not asked anything as to Wallace's condition then. No offer was made to show what Beshears' answer would have been to the question objected to. When objections to a question are sustained, if it is intended to reserve the question as to the competency of the testimony sought to be introduced for review upon appeal, an offer of what the testimony of the witness would have been, had he been permitted to answer, must be made.

[7] Several impeaching questions were asked and objections sustained. The rulings of the court were correct, for the reason that there was no foundation whatever laid for such impeaching testimony. Wallace, as a witness, was never asked as to the statements referred to. This was a necessary prerequisite to the admission of such evidence. 2 Wigmore on Evidence, §§ 1019, 1025, et seq. Several other objections of this character are urged, but they are all without merit.

[8] The eleventh assignment of error is that the court erred in refusing to give to the jury requested instruction No. 1, which instruction is to the effect that, if the arrest and transporting of the defendant from Quinton to Muskogee was without authority of law, then the defendant had a right to escape, if he could, and that circumstance should not be taken against him.

The record shows that he was arrested upon the direction, by telegram, of the sheriff of Muskogee county, who had a warrant for his arrest. However, a sufficient reason for its refusal is shown by the defendant's testimony, in respect to his escape, as follows: "Q. Why did you get away from him? A. Because we had had lots of trouble, and I didn't want to go with him. Q. Resented

being arrested by a man you didn't like? A. Yes, sir. Q. You didn't like the officer that had you arrested? A. No, sir; I did not like him. Q. And you disliked him so much that you jumped out of the window of a moving train to get away from him? A. Yes, sir."

The reason why evidence of flight or an escape, after the commission of a crime, is admitted in evidence is, as has often been said, based upon observations of human conduct summed up in the saying that the "wicked flee when no man pursueth." In other words, the fact of the escape is evidence of a consciousness of guilt. Of course, the presumption may be rebutted by evidence explaining the defendant's reason for the escape. Then it is for the jury to decide whether it was due to a consciousness of guilt, or to the reasons given by him. 1 Wigmore on Evidence, § 276.

In this case the defendant gave as his reason for the escape his resentment at being arrested by an officer he did not like. Nowhere did he say he fled from the officer's custody because the arrest was illegal. Whether or not the arrest was in fact illegal is immaterial in this case. The question was, What were the motives which influenced the defendant in making his escape? Was it consciousness of guilt, or resentment at being arrested by an officer he did not like? It is evident from the record in this case that the defendant's dislike for officers of the law was not confined to the one who first apprehended him in this case. The court very properly refused the instruction.

[9] Error is also assigned upon the refusal to permit the defendant's counsel to interview Porter Starr, an imprisoned witness, except in the sheriff's presence. No authority is cited to support this assignment. In support of the ruling of the court is cited the case of *Rex v. Simmonds*, 7 C. & P. 176, 32 E. C. L. 559. We think the court's ruling was correct.

[10] Finally, it is contended that there was a fatal variance between the allegations of the information and the evidence in this: That the information alleges that the robbery was committed by the defendant and a person unknown, citing the case of *Moss v. State*, 4 Okl. Cr. 247, 111 Pac. 950. This contention is not supported by the record, which shows that the complaining witness referred to such party as "the stranger" throughout all his testimony. In the *Moss* Case it is said: "If there was no evidence adduced by either side tending to show that the name was known at the time of the filing of the information, the presumption of the verity of the allegation becomes conclusive upon the court and the jury."

The other errors assigned have not been presented in the brief, and they do not seem to merit consideration.

Having fully considered the assignments discussed by counsel, our conclusion is that

the defendant had a fair and impartial trial, and has nothing to complain of at the hands of the court or the jury.

The judgment is therefore affirmed; mandate to issue forthwith.

ARMSTRONG, P. J., and FURMAN, J., concur.

(3 Okl. Cr. 876)

MATTHEWS v. STATE.

(Criminal Court of Appeals of Oklahoma.
Feb. 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 784*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where a case depends on circumstantial evidence alone, the court should instruct the jury that they should acquit the defendant, unless the circumstances proven are of such a conclusive character as to exclude every other reasonable hypothesis save that of the defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

2. EQUAL JUSTICE TO ALL.

The accident of birth and the artificial distinctions of society are not recognized by the law, and this court cannot consider any man's wealth or social position, or look at the color of his skin, but must dispense the same even-handed and exact justice to all alike.

3. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

For circumstances held not to be sufficient to sustain a verdict of grand larceny, see opinion.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

Appeal from District Court, Logan County; A. H. Huston, Judge.

Willie Matthews and another were convicted of grand larceny and their punishment assessed at confinement in the penitentiary for five years, and defendant Willie Matthews appeals. Reversed and remanded.

McGuire & Smith, of Guthrie, for appellant. Smith C. Matson and Joseph L. Hull, Asst. Attys. Gen., for the State.

FURMAN, J. [1] This is a case depending entirely upon circumstantial evidence. The court did not give an instruction with reference to circumstantial evidence, neither was such an instruction requested by counsel for appellant. We think that an instruction upon circumstantial evidence should have been given. But as no exception was reserved to the action of the trial court in failing to give such an instruction, we cannot reverse the conviction upon this ground. But upon an examination of the entire testimony we are not satisfied that the circumstances proven are of such a conclusive character as to exclude every other reasonable hypothesis save that of the guilt of appellant. The only question seriously insisted upon in the brief of counsel

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for appellant is that the verdict is contrary to the evidence.

[2] Appellant is only a poor, friendless, negro boy, but under the law it is our sworn duty to give and apply to his case the same careful consideration and the same legal principles which we would extend to the case of any other citizen of Oklahoma. The accident of birth and the artificial distinctions created by wealth and society are not recognized by the law. The law places all human beings upon a footing of equality before this court. All are traveling upon the same common level of time to that undiscovered country where all must stand upon the same common level of justice before the Great Judge of the quick and of the dead. This court therefore has neither the desire nor the moral or legal right to consider any man's social condition, wealth, race, or nationality or to look at the color of his skin. The rich, the influential, and the strong can be depended upon to take care of and protect themselves. It is the weak, the poor, and the humble who need the strong arm of the law for their defense. The decisions of courts should be based upon right, and not upon might. It is true that the jury in the first instance are the exclusive judges of the credibility of the witnesses, but their action, even in this respect, is subject to review upon appeal, and this court upon appeal should always consider as to whether or not there is a legitimate basis for the conclusion at which a jury has arrived. In this case, even if all of the circumstances testified to by the witnesses for the state are true, the court must consider as to whether or not these circumstances are of such a conclusive character as to exclude every other reasonable hypothesis save that of the guilt of appellant. We see no reason why we should not accept as true everything testified to by the witnesses for the state, but we are of the opinion that the circumstances of this case are by no means conclusive as to the guilt of appellant. There is no direct evidence of appellant's guilt. The strongest circumstance against him is that when he was arrested in company with his codefendant, Miles, and charged with the commission of this offense, he made some untrue and contradictory statements. In fact, had it not been for this, we are satisfied he would have been acquitted. We think that Miles, his codefendant, was properly convicted. But we do not think it would be just to send this boy to the penitentiary because he was found in company with Miles, and that some of his statements were found to be untruthful.

[3] Appellant was tried for grand larceny and not for lying. He deserved a good whipping for lying, but a lie, unless told under oath, is not a penitentiary offense. It is true that where a person charged with an offense resorts to false statements, this is highly calculated to arouse suspicion, and may, in connection with other circumstances, justify

a jury in finding him guilty. The fact that a man has lied about a matter is always a circumstance against him, to be considered in connection with all of the other facts and circumstances of the case. In the case before us we have an ignorant negro boy who is not shown to have had any previous connection with this matter, found in company with a thief who had just given him one of the stolen bills to have it changed at a store. When they were arrested together and confronted by the officers, appellant became frightened, and did not tell the truth in all that he said. That he did act wrong we freely concede. Even the wisest and best men come far short of perfection. It will not do to judge any man by an angelic standard. If so, none, no not one, could escape. Courts and juries should make due allowances for the weakness and frailties of human nature, and should always consider the evidence in a case in connection with the intelligence and condition of the defendant. There should be no hesitation as to the infliction of punishment when a defendant is clearly proven guilty, no matter who he may be, but in determining as to whether a defendant is guilty great care should be exercised. The poorer, more friendless, and ignorant the defendant, the greater the care should be to see that no unfairness is done him.

If we will read the twelfth chapter of Genesis we will find that Abram, the father of the faithful, and who was called "The friend of God," when he became frightened not only told a lie himself, but commanded his wife to do the same thing. The account given in the Bible of this matter is as follows:

"11. And it came to pass, when he was come near to enter into Egypt, that he said unto Sarai his wife, Behold now, I know that thou art a fair woman to look upon:

"12. Therefore it shall come to pass, when the Egyptians shall see thee, that they shall say, This is his wife: and they will kill me, but they will save thee alive.

"13. Say, I pray thee, thou art my sister: that it may be well with me for thy sake; and my soul shall live because of thee.

"14. And it came to pass, that, when Abram was come into Egypt, the Egyptians beheld the woman that she was very fair.

"15. The princess also of Pharaoh saw her, and commended her before Pharaoh: and the woman was taken into Pharaoh's house.

"16. And he entreated Abram well for her sake: and he had sheep, and oxen, and he-asses, and men-servants, and maid-servants, and she-asses, and camels.

"17. And the Lord plagued Pharaoh and his house with great plagues because of Sarai, Abram's wife.

"18. And Pharaoh called Abram, and said, What is this that thou hast done unto me? why didst thou not tell me that she was thy wife?

"19. Why saidst thou, She is my sister:

so I might have taken her to me to wife: now therefore behold thy wife, take her, and go thy way.

"20. And Pharaoh commanded his men concerning him: and they sent him away, and his wife, and all that he had."

See Genesis, chapter 12, eleventh to twentieth verses.

Abram acted in a much more reprehensible manner than this appellant did. This shows conclusively that fright, as well as guilt, is often the cause of falsehood. We think this is a reasonable explanation of all of the circumstances in evidence against appellant. Of course if it had been shown that appellant had been acting in connection with his codefendant, Miles, prior to the time the false statements were made, this explanation would not be reasonable, and the false statements made in connection with the other facts might have sustained the verdict.

The fact that appellant has no influential friends interested in his behalf, and that it will make no difference to the community as to whether or not this negro boy is sent to the penitentiary, does not in the least appeal to us. There is a question of moral and legal right involved which we cannot ignore. We therefore feel it to be our duty to set aside this verdict so far as appellant is concerned and grant him a new trial.

The judgment of the lower court is therefore reversed, and the cause remanded.

ARMSTRONG, P. J., and DOYLE, J., concur.

(35 Okl. 454)

SHAWNEE GAS & ELECTRIC CO. v. CORPORATION COMMISSION OF OKLAHOMA.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

GAS (§ 14*)—SUPPLY TO PRIVATE CONSUMERS—REGULATION OF CHARGES.

Section 18, art. 9, of the Constitution does not confer upon the Corporation Commission jurisdiction and power to prescribe the rates and charges for service to be rendered by a gas company furnishing gas within the limits of a city under franchise from the city, and that, too, whether the city has authority conferred upon it by Comp. Laws 1909, § 693, to regulate the charges therefor or not. Neither is such jurisdiction conferred by Comp. Laws of 1909, § 8812.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10, 11; Dec. Dig. § 14.*]

Application by the Shawnee Gas & Electric Company against the Corporation Commission of Oklahoma for writ of prohibition. Writ granted.

Flynn, Chambers, Lowe & Richardson, of Oklahoma City, and Edward Howell, of Shawnee, for petitioner. Chas. West, Chas. L. Moore, and E. C. Patton, all of Oklahoma City, for defendant.

TURNER, J. This is an application for a writ of prohibition. From the petition and return thereto it appears that on September 28, 1906, the Shawnee Gas & Electric Company was granted a franchise by the city of Shawnee, for a period of 21 years, to furnish natural gas to the city and its inhabitants at a rate fixed by the city of not to exceed 35 cents per thousand cubic feet, with a minimum monthly charge of 50 cents; that said franchise was accepted, and the company proceeded to lay its mains, build its plant, and avail itself of the privileges granted by the franchise, which it did at rates not exceeding the rates therein provided, confining its business under the charter to within the limits of said city; that thereafter came Shawnee City Waterworks and persons resident in the city and customers of petitioner, Shawnee Gas & Electric Company, and filed their several complaints with the Corporation Commission, representing thereto that the charges made by petitioner for natural gas were excessive, and asked the Commission to compel said company to reduce its rates and fix the price to be charged by said company at not to exceed 35 cents per thousand cubic feet, which the Commission did, on December 13, 1910, after hearing duly had, and issued order No. 409, purporting to fix said rates within said city on a schedule lower than those fixed in said franchise, and at not exceeding 35 cents per thousand cubic feet, and when the Commission sought to execute the same, this proceeding was commenced.

It is contended by petitioner that said order is void as beyond the power of the Commission to make. This for the reason, it is urged, that petitioner is a public service corporation; that the city had the governmental power to fix said rates, which it did, in section 2 of the charter, by legislative grant contained in Comp. Laws Okl. § 693, then, and conceded yet to be, in force, which reads: "The council may provide for, and regulate the lighting of the streets, the erection of lamp posts, and the council shall have the power to make contracts with, and authorize any person, company or association to erect gas or electric works in said city and give such person, company or association the privilege of furnishing gas or electricity to light the streets, alleys and lanes of said city for any length of time, not exceeding twenty-one years. But no such grant shall be so conditioned as to prevent the council from granting to other persons, or companies, or corporations, the right to use the streets for lighting purposes; all such grants shall be subject at all times to reasonable regulation by ordinance, as to the use of streets and prices to be paid for gas or light." And which having been thus conferred and exercised prior to the adoption of the Constitution, the right thus fixed falls within the protection of the proviso in section 18, art. 9

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereof. That petitioner is a public service corporation is conceded, but whether the city at the time of the granting of the franchise relied on was vested, in virtue of section 693, supra, with power to fix said rate it is unnecessary to decide, for the reason that whether it was or was not, if the Corporation Commission was without power derived from constitutional grant to regulate petitioner's rates, the order complained of purporting so to do is void for want of jurisdiction, and this writ should run.

This sends us first to its general grant of power to fix rates and charges for services, which is found in section 18, art. 9, and which, so far as the same affects the question here involved, reads: "The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in matters relating to the performance of their public duties and their charges therefor and of correcting abuses and preventing unjust discrimination, and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time alter or amend. * * * The authority of the Commission (subject to review on appeal as hereinafter provided), to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rule, regulation or requirement, for corporations or other persons, shall be subject to the superior authority of the Legislature to legislate thereon by general laws. Provided, however, that nothing in this section shall impair the rights which have heretofore been or may hereafter be conferred by law upon the authority of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limit of the city, town, or county granting the franchise." When the granting clause, supra, of said section says, as it does, that the Commission shall have the power of "supervising, regulating and controlling all transportation and transmission companies doing business in the state, in matters relating to the performance of their public duties and their charges therefor," it had no reference

to gas companies and hence vested the Corporation Commission with no jurisdiction over petitioner in the matter of regulating its rates, or for any other purpose. This for the reason that petitioner was neither a transportation or a transmission company within the definition of such companies laid down in article 9, § 34. No further grant of power is made down to the proviso in said section; the sole further intent down to that point being to make the power already granted over those companies subject to something, which is done by adding that the power "to prescribe rates for transportation and transmission companies, shall, subject to regulation by law, be paramount but" that "its authority to prescribe any other rule, regulation or requirement for corporations or other persons [no such authority is granted here] shall be subject to the general authority of the Legislature to legislate thereon by general laws." So much for the enacting clause, comprehensively called its purview. Within that purview nothing is said indicating a grant of power to the Corporation Commission over any kind of a public service corporation for any purpose, and hence petitioner, not being within the purview, was not intended to be included within its terms and placed within the jurisdiction of the Commission for any purpose.

But next we come to the proviso. 2 Louis' South. on Stat. Con. § 352, says: "The proper function of a proviso being to limit the language of the Legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision on which it is engrafted. Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly construed and limited to objects fairly within its terms"—citing authority. Now, if the intent of this proviso is to limit the preceding language under construction, which we have said has no application to petitioner, how can it with reason be so construed as to include petitioner within its terms? Why, rather, is it not to be strictly construed, as required by the rule, supra, so as to exclude from the general operation of the grant such corporations only as are fairly within its terms? Thus construed, the proviso could not exclude petitioner from the general operation of the grant contained in the enacting clause, for the reason that petitioner was not therein included. In the volume last cited, at page 675, the author says that Story, J., " * * * said that he was led to the general rule of law which has always prevailed, and become consecrated as almost a maxim in the interpretation of statutes, that 'When the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is strictly construed, and takes no case out of the enacting clause which does not fall within its terms.'"

We are therefore of opinion that gas companies are not within the purview of the en-

actments under construction, but, as to the fixing of their rates, were purposely left to be dealt with by the Legislature. In other words, all that part of the section within said proviso inhibits a construction of said section that will confer upon the Commission authority to fix rates for a gas company furnishing gas within the limits of a city under franchise from the city, and that, too, whether the city has authority conferred upon it by Comp. Laws 1909, § 693, to regulate rates and charges therefor or not. This construction does not leave this proviso without a subject on which to operate. For what of the numerous street railway and telephone lines, and perhaps other public service corporations, whose rates had been fixed by similar franchises granted by the cities, towns, and counties throughout the state prior to the adoption of the Constitution? These, it would seem, fall within the protection of the proviso, but not the petitioner company for the reasons stated.

As to the remaining questions for determination, we quote from an unpublished opinion of Hayes, J.:

"Since said section 18 does not confer the power upon the Commission to regulate and prescribe the rate to be observed by gas companies and other public service corporations, other than transportation and transmission companies, the Commission has no such authority, as is contended in this case by the appellees, unless the same may be found in some other section of the Constitution, or in some statute. Section 18, art. 9, of the Constitution authorizes the Legislature to confer upon the Commission additional authority to that conferred by the Constitution itself, in the following language: 'The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the state has the right to prescribe the rates and charges in connection therewith. * * *'. But this section does not in itself confer any additional power upon the Commission relative to prescribing and regulating rates and charges for public service corporations. No other sections of the Constitution have been relied upon by appellees as conferring jurisdiction upon the Commission in this case, and we know of none that does so.

"Appellees contend, however, that such is the effect of section 8812, Comp. Laws 1909, which reads as follows: 'Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its service, or the consideration by it given or taken or offered, or the commodities

bought or sold herein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this act, said business is a public business, and subject to be controlled by the state, by the Corporation Commission or by an action in any district court of the state, as to all of its practices, prices, rates and charges, and it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to needs of the public, considering the facilities of said business.' The foregoing statute constitutes section 13 of an act of the First Legislature, approved June 10, 1908, entitled, 'An act to define a trust, monopoly, unlawful combination in restraint of trade; to provide civil and criminal penalties and punishment for violation thereof and damages thereby caused; to regulate such trusts and monopolies; to promote free competition for all classes of business in the state; and declaring an emergency.' Sess. Laws, 1907-08, p. 750. Neither the foregoing section nor any other section of the act in specific terms confers upon the State Corporation Commission any jurisdiction over public service corporations. The general purpose and scope of the act is clearly and fully outlined in the title. Neither in the title nor in the body of the act is any specific reference made to the regulation of rates and charges of public service corporations. Section 1 makes acts, agreements, and contracts or combinations in the form of trust or in restraint of trade or commerce illegal. Section 2 makes it the duty of the Attorney General, when he shall have sufficient evidence that the law relative to the establishment and maintenance of trusts and monopolies is being, or is about to be, violated 'by any person, firm, corporation or association engaged in any quasi public business or having a virtual monopoly of any commodity or business with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this act,' to file information in the Supreme Court, and by proceeding as against a nuisance enjoin and restrain said combination or arrangement. Section 3 gives the parties who are injured in their business or property by reason of anything forbidden or declared unlawful by the act their remedy for damages. Section 4 makes the provisions of the act applicable to foreign corporations, and prescribes as a penalty for the violation thereof that upon order of the Corporation Commission or a competent court, after due notice and in due course of law, such corporation shall have its license to do business in the state revoked. Section 5 makes it un-

lawful for foreign corporations or associations engaged in the production, manufacture, distribution, or sale of any commodity of general use, or rendering any service to the public, to discriminate between any person, firm, or association. Section 6 prescribed the penalty for the violation of the act. Sections 7, 8, and 9 relate to procedure for the enforcement of the act. Section 10 makes certain combinations of business unlawful, and section 11 prescribes a penalty for any corporation that shall own, hold, or control, in any manner whatever, the stock of any competitive corporation engaged in the same kind of business in or out of the state, in violation of the Constitution and laws of the state. Section 12 makes the property of any corporation of the state, or of any foreign corporation, liable for any fines, penalties, or costs assessed against it for the violation of the laws of the state. In none of these sections is there any attempt to confer upon the Corporation Commission jurisdiction to prescribe rates and charges to be observed by any corporation. The sole provision in the act bearing upon this subject is to be found in the foregoing quoted section 13. This section provides that whenever a business shall have certain characteristics, it shall be a public business, and shall be subject to the jurisdiction of the Corporation Commission to regulate its practices, rates, and prices; but it does not provide that all public business shall be subject in these respects to such jurisdiction. * * * The first part of said section attempts to define the class of business which the latter part of the section subjects to the jurisdiction of the Corporation Commission and the district courts. It appears to us clear that what was intended was to bring within the jurisdiction of the Commission the regulation of charges and rates for services connected with those businesses that violate the act and are connected, not with business strictly of a public character, such as common carriage, supply of water and gas, but with that class of business in which the owners, without any intent of public service, have placed their property in such a position that the public has an interest in its use.

"The distinction between the class of business and its service intended to be defined by and included in said section and the business and service of public corporations is, we think, well made by Mr. Justice Brewer, who delivered the opinion of the court in *Cotting v. Godard*, 183 U. S. 79 [22 Sup. Ct. 30, 46 L. Ed. 92], in the following language: 'In the one [referring to property devoted to public service] the owner has intentionally devoted his property to the discharge of a public service. In the other, he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which

is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself; in the other, that he submits to only those necessary interferences and regulations which the public interest required.' It was this second class of business with which we think section 13 was dealing and intended to place under the jurisdiction of the Corporation Commission and the district courts of the state as to all practices, rates, and charges. If this section grants to the Corporation Commission power to prescribe prices, rates, and charges to be charged by any public service corporation, it confers that power as to all public service corporations, for the language that includes one includes all, and no exception is made. The act confers, not only upon the Corporation Commission jurisdiction to prescribe rates and charges under the conditions therein named, but confers also a like and concurrent power upon the district courts of the state. But the power to prescribe and regulate rates and charges to be observed by some public service corporations, to wit, transportation and transmission companies, was conferred exclusively upon the Corporation Commission by section 18, art. 9, supra, which was not subject to be altered, amended, or repealed until the second Monday in January, 1909. Section 35, art. 9, Const. It would therefore follow for this reason, if said section includes public service corporations, it would have to be declared in part at least unconstitutional. It would also have to be declared unconstitutional for a second reason. The function of prescribing a schedule of rates and charges to be made by public service corporations in the future for services rendered by them to the public is a legislative function. *Reagan et al. v. Farmers' Loan & Trust Co. et al.*, 154 U. S. 362 [14 Sup. Ct. 1047, 38 L. Ed. 1014]; *Interstate Commerce Commission v. Cincinnati, N. O. & T. R. Co.*, 167 U. S. 479 [17 Sup. Ct. 896, 42 L. Ed. 243].

"Section 1, art. 4, of the Constitution provides that all the powers of government of the state shall be divided into three separate departments, and except as is provided in the Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others. The Constitution nowhere authorizes the district courts of the state to prescribe rates and charges to be observed by public service corporations nor does it empower the Legislature to grant to said courts such jurisdiction. If the section under consideration be construed to include public service corporations, it would, in part

at least, be void, because of its attempting to confer legislative power upon the judicial department. It is a well-settled rule of construction that where a statute is reasonably susceptible of two different constructions—one that will sustain its validity and one that will render it unconstitutional and void—the former is to be adopted."

From all of which we conclude that none of the provisions, supra, confer upon the Corporation Commission power to make the order, and for that reason the same is void. But believing as we do that in view of what we have said the Commission will make no further attempt to enforce the order, the writ will be withheld until the further order of the court.

All the Justices concur.

(35 Okl. 489)

LONG v. SHEPARD.

(Supreme Court of Oklahoma. Jan. 17, 1913.
Rehearing Denied Feb. 5, 1913.)

(Syllabus by the Court.)

1. PLEADING (§§ 129, 307, 310*)—EXHIBITS—EFFECT.

It is not good practice, unless so required by statute, to make a mere exhibit a part of the petition.

(a) It is better to make a direct statement of the facts in the order in which they occur; this being the orderly method a good pleader will observe.

(b) However, when an exhibit is made a part of the petition, although not required by statute, and the other allegations in said petition, when taken in connection with the contents of the exhibit, state a cause of action, reference may be had to such exhibit, in order to determine whether a cause of action has been stated to such an extent as to withstand a general demurrer.

(c) Though an instrument may not be required by statute to be attached as an exhibit, yet if it is attached as a part thereof, and its execution is alleged in the petition, and its substance therein pleaded, so far as necessary and applicable to the cause of action sued on, and its execution is not denied under oath on the trial, its execution will be taken as admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275, 930-934, 944, 946, 947; Dec. Dig. §§ 129, 307, 310.*]

2. PLEADING (§ 345*)—MOTIONS—JUDGMENT ON PLEADING.

When, under the allegations of the petition and the admissions in the answer, the plaintiff is entitled to judgment on the pleadings, it is error to deny a motion made for such purpose.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

3. PLEADING (§ 348*)—MOTIONS—JUDGMENT ON PLEADING.

When, under the pleadings, it is averred that L., by a clause in a deed executed prior to the Act April 28, 1906, c. 1876, § 19, 34 Stat. 144, and before the restrictions were removed from the allotment of the grantor, wherein it was stipulated in said deed that said grantor agreed "to execute a good and sufficient deed of conveyance to said defendant for said eighty acres of land when his restrictions upon the power to alienate said land were removed," and said written contract is attached to the petition as a part thereof, and its execution is not de-

nied, and it is further averred that after removal of restrictions said L. executed to S. a deed to said 80 acres of land, pursuant to said stipulation, said deed, as to said 80 acres of land, is void; and judgment to that extent should have been entered on the pleadings, upon motion, in favor of L.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

Error from District Court, Hughes County; John Caruthers, Judge.

Action by Daniel A. Long against John E. Shepard. Judgment for defendant, and plaintiff brings error. Reversed and remanded with directions.

O. Dale Wolfe and Willmott & Wilhoit, all of Wewoka, for plaintiff in error. Rogers & Harris, of Wewoka, and Crump, Skinner & Bailey, of Holdenville, for defendant in error.

WILLIAMS, J. This proceeding in error is to review a judgment of the lower court, wherein the plaintiff in error, Daniel A. Long, as plaintiff or complainant, filed a bill or petition against the defendant in error, John E. Shepard, as defendant or respondent, praying for the cancellation of a deed to 120 acres of land, covering a part of the allotment of said plaintiff, on the ground (1) that the same was obtained by fraud, and (2) that it was executed and obtained in violation of section 19 of the act of Congress of April 26, 1906, c. 1876, 34 U. S. Stat. 144, which is as follows: "And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be, and the same is hereby, declared void."

In the bill or petition filed by plaintiff on March 17, 1909, he alleges that he is a citizen of the Creek Nation, and, as such, had allotted to him said land; that on April 26, 1905, being seised in fee simple of said tract of land, he executed and delivered a warranty deed (which he attached as an exhibit), covering 80 acres of said tract, to defendant, agreeing by the terms of said deed "to execute a good and sufficient deed of conveyance to said defendant for said eighty acres of land when his restrictions upon the power to alienate said land were removed," this being prior to the date of the removal of his restrictions; that on August 1, 1907, said plaintiff executed and delivered to said defendant another deed of conveyance for said 80 acres of land, the plaintiff renewing "the understanding and agreement that plaintiff would make, execute and deliver to defendant a good and valid deed of conveyance for said eighty acres of land as formerly agreed;" that on August 9, 1907, he executed another deed to said defendant, covering said 80 acres of land and also the other 40 of said 120 acres, but the same was done under false representations, such as constituted fraud, etc., and such as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to avoid said conveyance as to said 40 acres of land.

It is further specifically averred in said bill as follows: "That before the removal of restrictions upon the alienation of any of the land described and included in said deed, * * * the defendant made and entered into a contract and agreement with the plaintiff for the making and execution of a deed to said 80 acres of land herein described as the east half of plaintiff's allotment, and included in said fraudulent deed of August 9, 1907, as soon as the restrictions upon the alienation thereof were removed; that in pursuance of said contract and agreement, on the 9th day of August, 1907, the defendant procured and received from plaintiff, and plaintiff made and executed to the defendant, a deed for said 80 acres of land, which deed is absolutely void. That, should this court so require, this plaintiff hereby offers, and is ready and willing, to do equity by making, executing, and delivering a good and valid deed to defendant for said 80 acres of land according to the contract and agreement between the parties herein referred to, and hereby offers and tenders such deed; that defendant contracted and agreed to pay the sum of thirteen hundred dollars (\$1,300.00) to plaintiff for said 80 acres of land; that eight hundred and sixty dollars (\$860.00) thereof has been paid, and the sum of four hundred and forty dollars (\$440.00) is the balance of the unpaid purchase price, which sum is due and wholly unpaid. Wherefore, plaintiff prays judgment for the cancellation of said deed of the 9th day of August, 1907; * * * that the same be delivered up, canceled and declared null and void and of no effect, and that the record of said land in the office of the register of deeds be purged, cleared, and discharged of said fraudulent conveyance and deed; but, if for any reason said deed cannot be canceled, in its entirety, then that it be canceled and be held null and void and of no effect as to the additional 40 acres of land herein described as fraudulently procured and included in said void deed; that plaintiff be adjudged to be the absolute owner in fee simple of said 40 acres of land, and that the defendant be required to deliver up possession of the same, with damages for the unlawful detention, use, and possession thereof in the amount of \$3 per acre per annum from the 1st day of January, 1908, and for all damages for injury to said freehold or estate; that, if plaintiff be required to reconvey said 80 acres of land to defendant, said plaintiff be given judgment against defendant in the sum of \$440, with interest thereon at the rate of 6 per cent. per annum from the 9th day of August, 1907, until paid, and that the same, together with all damages for the use, possession, unlawful detention, and injury to said 40 acres of land, above described, be declared a lien on

said 80 acres of land until paid; for all costs of this action, and for all other proper relief, both at law and in equity, which this plaintiff may be entitled to."

Defendant answered by general denial and also averred: "That long prior to the 9th of August, 1907, he had loaned and furnished plaintiff large sums of money, and that plaintiff had agreed that when the restrictions were off his land, and he could make a good title, that he would convey to this defendant fee-simple title to his surplus allotment in the Creek Nation; that on the 9th day of August, 1907, said plaintiff, by his warranty deed of that date, conveyed to the defendant herein by his warranty deed; * * * that the plaintiff understood fully at the time of the execution of the deed that he was selling 120 acres of land, and that the consideration was on that date, or soon thereafter, paid in full; that the plaintiff, on the 9th day of August, 1907, and at all times thereafter, understood that he had sold 120 acres of his land, and made no complaint as to the transaction until about the time of the filing of this suit." Defendant's answer was not verified.

The deed alleged to have been executed on the 1st day of August, 1907, was averred to be in the possession of defendant, and for that reason a copy was not attached. From the pleading it appears that the deed of August 9, 1907, was made by virtue of a written stipulation, contract, or agreement entered into before the removal of restrictions.

Plaintiff moved for judgment on the pleadings, which was denied. The court's action is now before this court for review.

[1] It is not good practice to make a mere exhibit a part of the petition; it being better to make a direct statement of the facts in the order in which they occur. This is the orderly method which a good pleader will observe. Where, however, an exhibit is made a part of the petition, and the other allegations therein, taken in connection with the contents of such exhibit, state a cause of action, reference may be had to such exhibit for such purpose, as against a general demurrer. *Whiteacre v. Nichols*, 17 Okl. 387, 87 Pac. 865; *Grimes v. Cullison*, 3 Okl. 268, 41 Pac. 355; *Wey et al. v. Bank of Hobart*, 29 Okl. 313, 116 Pac. 943; *Pefley v. Johnson*, 30 Neb. 529, 46 N. W. 710; *Emerie v. Tams*, 6 Cal. 156; *Whitby v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382; *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102; *Hays et al. v. Dennis*, 11 Wash. 360, 39 Pac. 658. This ruling agrees with the liberal code procedure, which was devised to do away with technical defenses.

The question now arises as to whether an answer setting up a general denial is sufficient to put in issue the execution, as well as the validity, of the deeds attached as exhibits to plaintiff's bill or petition, without said answer having been verified.

Every pleading in a court of record must be subscribed by the party or his attorney. Section 5647, Comp. Laws of Okla. 1909; section 3985, Stats. of Okla. Ter. 1893. In all actions allegations of the execution of written instruments, and indorsements thereon of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney. Section 5648, Comp. Laws of Okla. 1909; section 3986, Stats. of Okla. Ter. 1893.

Though such instrument may not be required by the statute to be attached as an exhibit, yet, if execution is alleged in the petition, and the substance of it stated therein, so far as necessary and applicable to the cause of action, and its execution was not denied under oath on the trial, its execution will be taken as admitted.

[2, 3] In this case the allegation of the instruments, as to the deed, to wit, April 26, 1905, is made in the petition. The matters relative to the clause therein contained, as to the agreement or stipulation to execute a good and sufficient deed of conveyance to said defendant for 80 acres of land when his restrictions upon his power to alienate said land were removed, are well pleaded in the petition. Likewise the allegation of the execution of the deed of August 1, 1907, and the allegation of the agreement are sufficiently pleaded in the petition.

The judgment of the lower court is remanded, with instructions to enter judgment in favor of the plaintiff in error for the cancellation of the deed of August 9, 1907, as to said 80 acres of land that were covered by the deed of April 26, 1905, but in favor of the defendant in error as to the other 40 acres of land contained in said deed of August 9, 1907. All the Justices concur.

(37 Okl. 39)

R. P. SMITH SONS & CO. v. RAINES DRY GOODS CO.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

PRINCIPAL AND AGENT (§ 24*)—EVIDENCE OF AGENCY.

The fact that one purports to act as agent for another, stating at the time that he is the other's agent, is not of itself sufficient evidence upon which to submit the question of agency to the jury.

[Ed. Note.—For other cases, see *Principal and Agency*, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.*]

Commissioners' Opinion, Division No. 1. Error from Blaine County Court; George W. Ferguson, Judge.

Action by R. P. Smith Sons & Co. against the Raines Dry Goods Company. Judgment

for defendant, and plaintiff brings error. Reversed and remanded.

J. P. Wishard, of Watonga, for plaintiff in error. C. F. Dyer, of Geary, for defendant in error.

AMES, C. The only question which is involved in this appeal is one of agency. The defendants were engaged in business at Rush Springs, Okl. The plaintiff was a corporation located in Chicago. The defendants tried to effect a composition with creditors. They called a meeting. At this meeting certain lawyers appeared and purported to represent the plaintiff and agreed to the settlement. By the settlement the defendant's stock of merchandise was delivered to a trustee, and the creditors agreed to accept it in discharge of their claims. Some time afterwards the plaintiff sued the defendant on its account, and the defendant pleaded this settlement in payment. The issue tried was whether the attorneys had authority to act for the plaintiff. The attorneys did not testify in the case, nor was any authority produced. The only fact tending to show authority was that they had appeared at the meeting and represented the plaintiff and stated at the meeting that they had authority to do so. The officers of the plaintiff testified positively that the attorneys had no authority to represent them in any way, that they had never agreed to the settlement, and that they had never received any part of the proceeds of the sale. The question of agency was submitted to the jury. This was error. *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okl. 275, 114 Pac. 333.

The case should be reversed and remanded.

PER CURIAM. Adopted in whole.

(37 Okl. 36)

GILLIAM v. NEWLAND.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(*Syllabus by the Court.*)

1. PARTNERSHIP (§ 329*)—SETTLEMENT—QUESTION FOR JURY.

When one partner sells his interest in the business to the other partner, and a dispute arises between them as to the terms of the contract, it being oral, and the evidence being in conflict as to whether the indebtedness to the firm of the retiring partner was to be liquidated in the sale, the issue should be submitted to the jury.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 782-786; Dec. Dig. § 329.*]

2. TRIAL (§ 277*)—INSTRUCTION—EXCEPTION.

The following exception appearing in the case-made immediately after the charge of the court is sufficient to challenge the correctness of an instruction, "Comes now the defendant and excepts to all that part of the court's charge contained in paragraph 2"; paragraph 2 being directed to one proposition only.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 687, 688; Dec. Dig. § 277.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Carter County; S. H. Russell, Judge.

Action by S. A. Newland against W. A. Gilliam. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Sigler & Howard, of Ardmore, for plaintiff in error. J. F. Bledsoe, of Oklahoma City, and H. H. Brown, of Ardmore, for defendant in error.

AMES, C. [1] The plaintiff and the defendant were partners in the grocery business. The plaintiff sold his interest to the defendant, and this suit was brought to recover the purchase price agreed upon. The defendant admitted the purchase, and the issue tried was the terms and conditions of the sale. The actual merchandise invoiced about \$1,400, and the amount which the plaintiff sued for was exactly one-half of the invoice, the plaintiff claiming that the defendant had agreed to pay him that amount for his interest in the business. The defendant admitted the purchase for that amount, but claimed that the agreement was that the defendant should collect the accounts receivable and pay the accounts payable, and give the plaintiff the benefit of any surplus or charge him with the burden of any deficit. The plaintiff at the time of the dissolution had overdrawn his account about \$1,400, while the defendant's account was overdrawn only about \$700, leaving a balance in favor of the defendant. Various other items were also involved which it is unnecessary at this time to consider. The court gave to the jury the following instruction: "If you believe from the evidence that the amount of indebtedness of plaintiff and defendant, respectively, were known to the plaintiff and the defendant, or could have been ascertained, in the absence of fraud or concealment on the part of either, by an examination of the books of the firm at the time of the sale, then you are instructed that said accounts were merged in the sale of the plaintiff's interest in the partnership business to the defendant, and that defendant is not entitled to any credit or offset in this action for the difference between his and plaintiff's accounts if you find there was a difference." This instruction took from the jury the power to determine whether or not under the agreement of the parties the plaintiff would remain liable for his account, and compelled them as matter of law to disregard this item. The contract of the parties was not reduced to writing, and the evidence is not satisfactory as to what it really was. The testimony being conflicting, and there being facts and circumstances in the case tending to support the theories of both parties, the whole issue should have been submitted to the jury. If, as claimed by the defendant, he was entitled to collect the accounts and

apply them on the bills payable, he might have had a right to collect the accounts due by the plaintiff. There is evidence, at all events, tending to support this claim, and the court should not have taken this issue from the jury.

[2] But it is claimed that there was no sufficient exception reserved to this instruction, and therefore we cannot consider it. The case-made contains the instructions of the court in full. Immediately following the instructions the following appears: "Comes now the defendant and excepts to all that part of the court's charge contained in paragraph 2." Is this a sufficient exception? In *Eisminger v. Beman*, 32 Okl. 818, 124 Pac. 289, *McCabe & Steen Construction Co. v. Wilson*, 17 Okl. 355, 87 Pac. 320, and *Glaser v. Glaser*, 13 Okl. 389, 74 Pac. 944, it was held that a general exception to each and all of the instructions reserved in the manner in which this exception was reserved was insufficient. That was because the exception was general, and did not call the court's attention to the particular error asserted, or give the court an opportunity to correct the error. Here, however, the exception is specific, and the reason on which those cases was based does not apply. We think the exception here taken comes within the spirit of our statutes, if not within their exact letter, and that upon the reason and under the authorities cited in *Hurst v. Hill*, 32 Okl. 532, 122 Pac. 513, the exception was properly saved.

The judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(35 Okl. 342)

FLATHERS v. FLATHERS.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 568*)—DISMISSAL—INSUFFICIENCY OF RECORD.

A proceeding in error commenced in this court on a case-made, where it does not appear from the record or otherwise that the defendant in error was present, either personally or by counsel, at the settlement, or that notice of the time was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error. (Following *First National Bank of Collinsville v. Daniels*, 26 Okl. 383, 108 Pac. 748.)

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.*]

Error from District Court, Ellis County; G. A. Brown, Judge.

Action between Benjamin M. Flathers and Emily J. Flathers. From the judgment, Benjamin M. Flathers brings error. Dismissed.

C. B. Leedy, of Arnett, for plaintiff in error. W. H. Springfield, of Gage, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

WILLIAMS, J. The defendant in error has moved the dismissal of this proceeding in error, on the ground that the case-made was signed, as shown by the certificate of the trial judge, on July 14, 1911, when the notice served on said defendant in error, as the same appears in the record, stated that the same would be presented at the designated place for signing and settlement on July 15, 1911. Neither does the record disclose that any appearance on the part of the defendant in error was made, nor that any suggestions as to amendments were filed, for the purpose of having them incorporated in said record, and the record does not disclose that any amendments were allowed or disallowed.

In *Kansas City, Mexico & Orient Railway Co. v. William Brandt* (No. 2,178) 126 Pac. 787, decided by this court on November 14, 1911, but not yet officially reported, the syllabus is as follows: "Where the certificate of the trial judge to a case-made fails to show that the case-made was signed and settled at the place designated in the notice to defendant in error as the place of signing and settling the same, and it is made to appear by the uncontroverted affidavit of defendant in error that he was present at the designated time and at the place designated in the notice during the entire day, for the purpose of urging the incorporation into the case-made of amendments theretofore suggested by him within the time allowed by order of the court, and that the case-made was not presented at such place on the designated date, the case-made will be held a nullity, and the proceeding in error dismissed. * * * See, also, *Lister et al. v. Williams*, 28 Okl. 302, 114 Pac. 255; *Harrison et al. v. Penny*, 28 Okl. 523, 114 Pac. 734; *First National Bank of Collinsville v. Daniels*, 28 Okl. 383, 103 Pac. 748.

All the Justices concur.

(36 Okl. 772)

LAWTON v. SHEPARD.

(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 11, 1913.)

(Syllabus by the Court.)

EVIDENCE (§ 483*)—OPINION EVIDENCE.

Opinion evidence of a witness properly qualified is competent to prove the identity of a hog.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2256-2266; Dec. Dig. § 483.*]

Commissioners' Opinion, Division No. 1. Error from Pawnee County Court; N. E. McNeill, Judge.

Action by R. A. Shepard against J. M. Lawton. Judgment for plaintiff, and defendant brings error. Affirmed.

E. M. Clark, of Pawnee, for plaintiff in error. Wm. Blake, of Tulsa, for defendant in error.

AMES, C. This action of replevin for the recovery of a hog of the value of \$18.50 originated in the justice court of Pawnee county. The plaintiff won. The defendant appealed to the county court, where the plaintiff again won. The appeal is without merit. The brief of the plaintiff in error does not comply with rule 25, and no authorities are cited. The principal point raised is that opinion evidence as to the identity of the hog was incompetent, and that it should have been confined to a description of his marks, color, and brands. We do not concur in this contention.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(36 Okl. 444)

YALE THEATER CO. v. CITY OF LAWTON et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. INJUNCTION (§ 105*)—VIOLATION OF ORDINANCE—IRREPARABLE INJURY.

A prosecution for violation of a municipal ordinance will not be enjoined on the mere ground that the ordinance is void, because such invalidity constitutes a complete defense to the prosecution, and is thus available in a court of law.

(a) However, equity will restrain, by injunction, criminal proceedings under an invalid ordinance, which, if allowed to proceed, would destroy property rights and inflict irreparable injury.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

2. APPEAL AND ERROR (§ 954*)—INJUNCTION (§ 161*)—REVIEW—DISSOLUTION OF TEMPORARY INJUNCTION.

The dissolution of a temporary injunction is usually in the discretion of the court, and will not be held erroneous, except in case of manifest abuse or on clear showing of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.* *Injunction*, Cent. Dig. § 347; Dec. Dig. § 161.*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by the Yale Theater Company against the City of Lawton and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Key & Michalson, of Lawton, for plaintiff in error. C. C. Black, of Lawton, for defendants in error.

WILLIAMS, J. On October 29, 1912, the plaintiff in error, as plaintiff, began an action in the lower court against the defendants in error, city of Lawton, A. R. McLennan, commissioner of finance, M. A. Nelson, commissioner of public property, and George Short, commissioner of public safety, as defendants, praying that "an injunction issue against the defendants * * * and

their agents and employes, restraining them and each of them from enforcing" parts of a certain ordinance.

Upon application, "a temporary injunction" was granted, restraining said defendants, "their servants and agents from enforcing" said ordinance, or certain parts thereof; and it was further ordered "that the 4th day of November, 1912, is hereby set for the time for hearing and determining said petition for injunction."

On November 2, 1912, defendants filed a motion to vacate the "temporary restraining order," and on November 4, 1912, the court having heard the motion "to have the temporary injunction heretofore issued dissolved," the same was taken under advisement. On November 9th the court sustained the motion "to dissolve the temporary injunction." The decree or judgment recites that the motion filed "to dissolve and set aside the temporary restraining order" was sustained.

On November 12, 1912, a motion for a new trial was filed and overruled; the plaintiff being granted an extension of 17 days in which to make and serve its case-made, and the defendants 5 days in which to suggest amendments to the case-made, the same to be settled on three days' notice by either party. See *Reynolds v. Phipps et al.*, 31 Okl. 788, 123 Pac. 1125.

The defendants in error move to dismiss this appeal, on the ground that the temporary injunction was a temporary restraining order, and that the same spent its force on November 4th, the day set for hearing as to the granting of the temporary injunction, as no action was taken by the court to make it further effective, or to continue it in force; and that on November 9th, when the court entered an order purporting to dissolve the same, there was no order in force then to be dissolved. If this was a restraining order and not a temporary injunction, the contention is well taken. *Ex parte Grimes*, 20 Okl. 446, 94 Pac. 668.

Assuming, for the purpose of this case, that it had the effect of a temporary injunction, should the order be affirmed?

[1] In *Thompson v. Tucker*, 15 Okl. 486, 83 Pac. 413, 6 Ann. Cas. 1012, paragraph two of the syllabus is as follows: "A prosecution for violation of a municipal ordinance will not be enjoined on the ground that the ordinance is illegal, as that fact is a defense to the prosecution." The same rule is announced in *Golden v. Guthrie*, 3 Okl. 128, 41 Pac. 350.

It also seems to be settled that equity will restrain, by injunction, criminal proceedings under an invalid ordinance, which, if allowed to proceed, would destroy property rights and inflict irreparable injury. *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *Southern Express Co. v. Ensley (C. C.)* 116 Fed. 756; *Mont-*

gomery v. Louisville, etc., R. Co., 84 Ala. 127, 4 South. 626; *Platte, etc., Canal, etc., Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Poyer v. Des Plaines*, 123 Ill. 112, 13 N. E. 819, 5 Am. St. Rep. 494; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Newport v. Newport, etc., Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484; *Boyd v. Frankfort*, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240. See, also, *Davis, etc., Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; *Ignaz v. Knoxville*, 1 Tenn. Ch. App. 1.

The bill seeking the injunction must set out facts which will enable the court to say whether the injury will be irreparable; and that such will be the character of the injury must clearly appear. *Orange City v. Thayer*, 45 Fla. 502, 34 South. 573.

In *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342, it appeared that a railroad had acquired a vested right in the streets of a city for certain purposes. It was held that the enforcement of a penal ordinance interfering with this right would be enjoined.

[2] The dissolution of a temporary injunction is usually in the discretion of the court, and will not be held erroneous, except in case of manifest abuse or on clear showing of error. *Cunningham v. Ponca City*, 27 Okl. 858, 113 Pac. 919; *Bristow v. Carriger et al.*, 24 Okl. 324, 103 Pac. 596, 25 L. R. A. (N. S.) 451.

The appeal is dismissed. All the Justices concur.

(35 Okl. 360)

FISHER v. LOCKRIDGE, County Judge.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 19*)—REVIEW—ABSTRACT PROPOSITIONS.

Abstract or hypothetical questions disconnected from the granting of actual relief, or from the determination of which no practical relief can follow, except the awarding of the costs, will not be determined on appeal, but the cause will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

Action by Alex Fisher for writ of mandamus against Ross F. Lockridge, county judge for Pottawatomie county. Writ quashed, and petition dismissed.

Burwell, Crockett & Johnson, of Oklahoma City, and B. F. Williams, of Norman, for plaintiff. Shartel, Keaton & Wells, of Oklahoma City, and F. H. Riley, of Shawnee, for respondent.

WILLIAMS, J. On July 27, 1912, the plaintiff commenced an action in this court for the issuance of a writ of mandamus to require the respondent to certify to his disqualification in a certain cause pending in the county court of Pottawatomie county,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

specifically alleging certain grounds as to his disqualification.

On July 31, 1912, an alternative writ of mandamus was issued returnable on September 3, 1912. Respondent having made return to said writ, and the plaintiff having filed reply thereto on September 3, 1912, by agreement of all parties J. H. Everest, Esq., of Oklahoma City, Okl., was appointed referee to take evidence and report same together with his findings of fact and conclusions of law. The referee having made a report to this court, said cause was set for hearing on December 3, 1912, upon the exceptions of the respondent to the referee's report at which time, after hearing, the same was submitted for determination. The term of office of the respondent expired on the first Monday of January, 1913, at which time his successor qualified, without this court having reached a determination in said cause. Abstract or hypothetical questions disconnected from the granting of actual relief, or from the determination of which no practical relief can follow, except the awarding of the costs, will not be determined on appeal, but the cause will be dismissed. Grey's Oklahoma Digest, and authorities cited in section 6, at page 31.

The plaintiff's alternative writ will be quashed, and the plaintiff's petition dismissed at his cost. All the Justices concur.

(35 Okl. 471)

BUTLER v. COREY.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 252*)—LIEN ON CROPS—LIABILITY OF PURCHASER.

A landlord entitled to rent may recover from the purchaser of any crop grown by the tenant, who has notice, either actual or constructive, of the lien, the value of the crop purchased, to the extent of the rent due.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1002, 1022-1026, 1029; Dec. Dig. § 252.*]

2. PRINCIPAL AND AGENT (§ 159*)—WRONGFUL ACT—LIABILITY OF AGENT.

An agent, who converts the property of a third person, is liable for such conversion; and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599-613; Dec. Dig. § 159.*]

Error from Caddo County Court; B. F. Holding, Judge.

Action by Earnest C. Corey against Roy Butler. Judgment for plaintiff, and defendant brings error. Affirmed.

Ballinger & Maxwell, of Anadarko, for plaintiff in error. Pruett & Livesay, of Anadarko, for defendant in error.

DUNN, J. This case presents error from the county court of Caddo county, and is an action brought by E. C. Corey, as plaintiff,

against the plaintiff in error, as defendant, to recover the value of certain broom corn, which, it is alleged, he converted, upon which plaintiff had a lien for rent. At the conclusion of the evidence the court instructed the jury to return a verdict for plaintiff, which was accordingly done, on which judgment was rendered. From the denial of a motion for a new trial, defendant has appealed to this court.

While counsel for defendant present and argue a number of propositions, in our judgment, in view of the undisputed evidence and the law applicable thereto, there is no merit therein. The record discloses that a man named Hatton was a tenant on land owned by Corey; that he raised a crop of broom corn thereon in 1908; that Corey had a lien thereon for his rent, and that Butler had both actual and constructive notice thereof; that in the face of these facts he purchased the broom corn.

Section 4100, Comp. Laws 1909, provides: "The person entitled to rent may recover from the purchaser of the crop, or any part thereof, with notice of the lien, the value of the crop purchased, to the extent of the rent due and damages."

A similar statute to this has been construed by the Supreme Court of the state of Kansas in a number of cases, among which may be noted the following: Scully v. Porter, 57 Kan. 322, 46 Pac. 313; Maelzer v. Swan, 75 Kan. 496, 89 Pac. 1037; Mangum v. Stadel, 76 Kan. 764, 92 Pac. 1093—all of which hold, in substance, that the purchaser of a crop, with notice of the lien, either actual or constructive, does so with liability to the landlord in the amount of its value for whatever may be due for rent.

Nor did the court commit error in denying defendant the right of proving that he was purchasing the crop merely as an agent, for the reason that an agent or servant, who converts the property of a third person, is liable in trover for such conversion; and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his principal or master. See 28 Am. & Eng. Ency. of Law, p. 688, and cases cited.

The judgment of the trial court is accordingly affirmed.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(35 Okl. 488)

PHILLIPS et al. v. KOOGLER.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 568*)—CASE-MADE—SETTLEMENT—DISMISSAL.

A proceeding in error, brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant was

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.*]

Error from District Court, Atoka County; Robert M. Rainey, Judge.

Action between Jesse W. Phillips and others and D. C. Koogler. From the judgment, Phillips and others bring error. Dismissed.

J. W. Jones, I. L. Cook, and W. S. Farmer, all of Atoka, for plaintiffs in error. J. G. Ralls, of Atoka, for defendant in error.

DUNN, J. This case comes to this court on appeal from a judgment of the district court of Atoka county. The sufficiency of the case-made to support the petition in error filed is challenged by a motion, which must be sustained for the reason that it does not appear from the record or otherwise that the defendant was present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed.

No answer is made to the motion; and, the record before us sustaining the same, the proceeding is dismissed. See First Nat. Bank of Collinsville v. Daniels, 26 Okl. 383, 108 Pac. 748, and cases therein cited.

HAYES, C. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., absent.

(35 Okl. 439)

SCHOLLMMEYER v. VAN BUSKIRK.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 339*)—REVIEW BY TRANSCRIPT—TIME OF TAKING—WRIT.

When a judgment of the lower court is sought to be reviewed by transcript, the proceeding in error must be commenced in this court within six months from the date of its rendition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887; Dec. Dig. § 339.*]

2. APPEAL AND ERROR (§ 528*) — RECORD—MOTION FOR NEW TRIAL.

A motion for a new trial is not a part of the record brought up by a transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.*]

Error from Oklahoma County Court; John W. Hayson, Judge.

Action between J. H. Schollmeyer against Jacob Van Buskirk. From the judgment, Schollmeyer brings error. Dismissed.

John Shirk and H. L. Danner, both of Oklahoma City, for plaintiff in error. Grant Stanley, of Oklahoma City, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to review, by means of a transcript, a judgment rendered in the trial court on May 24, 1912. [1] A proceeding in error, commenced in this court after the expiration of six months from the rendering of said judgment or the overruling of a motion for a new trial, must be dismissed. [2] The action of the lower court in overruling a motion for a new trial is not brought to this court by means of a transcript. Richardson et al. v. Beidleman et al., 126 Pac. 816, 818.

The proceeding in error must be dismissed. All the Justices concur.

(35 Okl. 473)

BROCHERS v. NICKEL.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

AUCTIONS AND AUCTIONEERS (§ 8*)—SALES—TITLE OF PURCHASER.

Where, at the public sale of A.'s goods, with the knowledge and consent of all concerned, B.'s goods are knocked down and sold to the highest bidder, and where, in compliance with the terms of the sale, a note and mortgage evidencing the indebtedness and securing the purchase price is executed by the purchaser, payable to A., and delivered to and accepted by him, held, that thereupon title and right of possession to the property passed to the purchaser.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. §§ 25-40; Dec. Dig. § 8.*]

Error from Washita County Court; L. R. Shean, Judge.

Action by C. H. Nickel against C. A. Brochers. Judgment for plaintiff, and defendant brings error. Affirmed.

Massingale & Duff, of Cordell, for plaintiff in error. Brett & Rice, of Cordell, for defendant in error.

PER CURIAM. This is an action in replevin brought by C. H. Nickel, defendant in error, against C. A. Brochers, defendant in error, to recover a binder of the value of \$10. There was judgment for plaintiff before the justice, and again on trial anew in the county court of Washita county, and defendant brings the case here.

The court did not err in refusing to instruct the jury at the close of the testimony, to return a verdict for defendant. The evidence discloses that, prior to the suit, one Fitaler had had a public sale in that county of certain of his personal property to the highest bidder, the terms of which was that all sums of \$10 or under owing by the successful bidder were to be paid in cash, and on all over that amount a credit of 8 or 10 months was to be extended, with interest, after the instrument evidencing the indebtedness became due; that, known to all concerned, defendant brought this binder there, to be sold with the other property under the terms of the sale; that, plaintiff being the highest

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bidder, the same was knocked down to him for \$10, whereupon, his purchases exceeding that amount, pursuant to the terms of the sale, he executed and delivered to Fitzler a note and mortgage for that amount, payable to Fitzler, prepared for plaintiff's signature by the clerk of the sale, and then left for town a short distance away; that, although defendant demurred to accepting anything but cash for his binder, on the return of plaintiff that same evening, at the instance of defendant, a slight correction was made in the note in the hands of Fitzler, whereupon both plaintiff and defendant departed for their respective homes, leaving the binder at the place of sale, to be sent for by plaintiff; that on a subsequent day, upon Fitzler refusing to indorse the note to him, defendant repossessed himself of the binder, and, refusing to surrender same to plaintiff on demand, this suit was brought. Upon the execution and delivery by plaintiff to Fitzler of the note and mortgage, in compliance with the terms of the sale, title and right of possession to the binder passed to the purchaser.

Affirmed. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 407)

JOHNS et al., Grady County Com'rs, v. LOUTHAN.

(Supreme Court of Oklahoma. Feb. 4, 1913.)

(Syllabus by the Court.)

OFFICERS (§ 100*)—CHANGE OF SALARY.

The judgment of the court below is affirmed upon the authority of Board of County Com'rs v. Henry, 33 Okl. 210, 128 Pac. 761.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. § 100.*]

Error from District Court, Grady County; Frank M. Bailey, Judge.

Action between Ed. F. Johns and others, County Commissioners of Grady County, against M. B. Louthan. Judgment for defendant, and plaintiffs bring error. Affirmed.

John H. Venable, of Chickasha, for plaintiffs in error. R. D. Welborne, of Chickasha, for defendant in error.

KANE, J. The only question involved herein is whether the salary of the defendant in error, who was elected sheriff of Grady county in November, 1907, was affected by the fee and salary bill which became effective some time after his election and qualification, and prior to the expiration of his term. It is admitted that, if the statute which was in force at the time of his election and qualification governs until the expiration of his term, he will be entitled to \$275 more than he would be if the later act applied. The court below took the view that, by virtue of that part of section 10, art. 23, of the Constitution, which provides that "in

no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office," the salary of the sheriff was governed by the act in force at the time of his election and qualification. This is correct. It was so held by this court in Board of County Com'rs v. Henry, 33 Okl. 210, 128 Pac. 761.

Upon the authority of that case, the judgment of the court below must be affirmed. All the Justices concur.

(35 Okl. 463)

JONES v. JONES.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 568*)—DISMISSAL.—SETTLEMENT OF CASE-MADE.

A proceeding in error brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant was present, either personally or by counsel, at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.*]

Error from District Court, Beaver County; R. H. Loofbourrow, Judge.

Action between W. I. Jones and Winona Jones. From the judgment, Winona Jones brings error. Dismissed.

Claud T. Smith, of Beaver, B. J. Dick, of Buffalo, J. W. Culwell, of Beaver, and Charles Swindall, of Woodward, for plaintiff in error. Dickson, Rush & Dickson, of Beaver, and Gray & McVay, of Oklahoma City, for defendant in error.

DUNN, J. Counsel for defendant in error have filed a motion to dismiss this appeal, for the reasons, among others, that it does not appear from the record or the purported case-made, or otherwise, that the defendant was present, either personally or by counsel, at the settlement, or that notice of the time and place thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed by the court. These grounds are sufficient, and require the dismissal of the case-made, if true. An inspection of the record shows that it supports the claims made, and under the law there is no alternative but to sustain the motion. The proceeding in error is accordingly dismissed. See J. K. Cobb & Co. et al. v. Hancock, 31 Okl. 42, 119 Pac. 627; Richardson v. Thompson, 124 Pac. 64; First Nat. Bank of Collinsville v. Daniels, 26 Okl. 383, 108 Pac. 748, and cases therein cited.

HAYES, C. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., absent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(35 Okl. 339)

COOK v. FULLER.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

*(Syllabus by the Court.)***EXEMPTIONS (§ 42*)—PIANO—"HOUSEHOLD AND KITCHEN FURNITURE."**

A piano comes within the term of "household and kitchen furniture," as the same is used in our personalty exemption statute (section 3346, Comp. Laws of Oklahoma 1909; Session Laws 1905, p. 255).

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 47-50; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3361-3365.]

Error from District Court, Pottawatomie County; Roy Hoffman, Judge.

Action by S. Cook against Mrs. B. A. Fuller. Judgment for defendant, and plaintiff brings error. Affirmed.

A. M. Baldwin and A. J. Carlton, both of Tecumseh, for plaintiff in error. Edw. Howell, of Shawnee, for defendant in error.

WILLIAMS, J. The only question for determination is as to whether a piano is included within the term of "all household and kitchen furniture."

Section 3346, Compiled Laws of Oklahoma 1909 (Sess. Laws 1905, p. 255), is as follows: "The following property shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife. Second, all the household and kitchen furniture. Third, any lot or lots in a cemetery held for the purpose of sepulture. Fourth, all implements of husbandry used upon the homestead. Fifth, all tools, apparatus and books belonging to and used in any trade or profession. Sixth, the family library and all family portraits and pictures, and wearing apparel. Seventh, five milch cows and their calves under six months old. Eighth, one yoke of work oxen, with necessary yokes and chains. Ninth, two horses or two mules, and one wagon, cart or dray. Tenth, one carriage or buggy. Eleventh, one gun. Twelfth, ten hogs. Thirteenth, twenty head of sheep. Fourteenth, all saddles, bridles and harness necessary for the use of the family. Fifteenth, all provisions and forage on hand, or growing for home consumption, and for the use of exempt stock for one year. Sixteenth, all current wages and earnings for personal or professional services earned within the last ninety days."

In *Alsop & Thompson v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53, in an opinion by Mr. Justice Stayton, concurred in by Chief Justice Willie and Justice Gaines, the clause exempting "all household and

kitchen furniture" was construed to include a piano. In the opinion he reviews *Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755, and points out that the conclusion of the court therein reached depended upon the particular provision of the statute, in that it, after naming certain specific articles of household furniture as exempt, further added, "all other household furniture not herein enumerated not exceeding \$200 in value"; and that, as a piano as a rule would cost in excess of \$200, obviously it was not the intention of the Legislature to include a piano in said exemption.

In *Dunlap v. Edgerton*, 30 Vt. 224, a piano was held not to be "an article of household furniture necessary for upholding life."

In *Kehl v. Dunn*, 102 Mich. 581, 61 N. W. 71, 47 Am. St. Rep. 561, the clause exempting to each householder all household goods, furniture, or utensils not to exceed the value of \$250 was construed not to include a piano, citing as authority *Tanner v. Billings*, supra, and *Dunlap v. Edgerton*, supra.

In *Conklin v. McCauley*, 41 App. Div. 452, 58 N. Y. Supp. 879, in an opinion by Hatch, J., paragraph 4 of the syllabus is as follows: "Replevin for a piano, which was seized under execution, and which plaintiff claimed as a part of her necessary furniture, under Code Civ. Proc. § 1391, exempting necessary furniture to the value of \$250, may be maintained without express proof of the value of other articles of furniture owned by plaintiff, where there was sufficient proof on the subject to justify a finding that the other articles were of little value." In the opinion it is said: "The proof given upon the trial tended to establish, and the jury were authorized to find, that the article in question constituted necessary household furniture, as it appeared that the plaintiff made use of the same in connection with the education of her children, and that the piano was an article of necessity for that purpose." This opinion was concurred in by Goodrich, P. J., and Cullen, Bartlett, and Woodward, JJ. Cullen and Bartlett are now members of the Court of Appeals of said state; the former being Chief Justice.

Under the authority of the Texas and New York cases, the judgment of the lower court is affirmed. All the Justices concur.

(35 Okl. 726)

BROWN et al. v. FIRST NAT. BANK OF TEMPLE.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 835*)—REHEARING—WAIVER OF OBJECTIONS.**

No objection having been made to the form of the verdict until the filing of the motion for a new trial, and no specification of error raising such objection having been presented in

*For other cases see same topic, and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 8, 1913.

this court until on the hearing of the petition for rehearing, *held*, that such defect or irregularity, if any existed in the form of the verdict, was waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3246; Dec. Dig. § 835.*]

2. PARTNERSHIP (§§ 139, 157, 217, 218*)—CONTRACTS—VALIDITY—CONSENT OF PARTNER—EVIDENCE.

One partner cannot bind his copartner by any contract not reasonably within the scope of the partnership unless with such copartner's knowledge and assent.

(a) Such knowledge and assent must be established by evidence affirmatively showing it or from which it may be clearly inferred.

(b) Where one partner has subscribed the name of the firm to a note payable to a bank for money to be used for purposes not reasonably within the scope of the partnership, such purpose being then and there known to the officers of the bank, the other partner does not become liable as a matter of law to pay such note to the extent of items included therein not reasonably within the scope of such partnership by failing to express his dissent when demand of payment is made of him.

(c) The mere fact that a partner upon being informed that his copartner has given a firm note for items including his individual debt does not deny his liability to that extent thereon does not per se amount in law to a ratification or adoption of the note for the whole debt.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 206-211, 213, 240, 282-291, 419-425, 426-428; Dec. Dig. §§ 139, 157, 217, 218.*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by the First National Bank of Temple, Okl., against R. L. Brown and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

T. B. Orr and Stevens & Myers, all of Lawton, and Shartel, Keaton & Wells, of Oklahoma City, for plaintiffs in error. Hamon & Ellis, of Lawton, for defendant in error.

WILLIAMS, J. 1. This proceeding in error is to review a judgment in favor of the defendant in error, the First National Bank of Temple, wherein, as plaintiff, it sued R. L. Brown and L. O. Montgomery as partners engaged in the ginning business.

[1] The jury returned a general verdict in favor of the plaintiff against said defendants, but without a finding against the partnership. No objection on that ground was made at the time of the returning of the verdict. In the motion for a new trial the assignment is made that the verdict is contrary to law. For the first time in the petition for rehearing is the question in any form raised in this court as to this alleged defect or irregularity in the verdict. In *Heaton v. Schaeffer*, 126 Pac. 797, in an opinion by Rossar, Commissioner, the syllabus is as follows: "In a suit against a partnership, where only one member of the firm is served, it is error to render an individual judgment against the member served. In such case judgment should be rendered against the firm, and such judgment could be enforced against the partnership property

and the individual property of the member served." The plaintiff in error relies upon this authority for a reversal of this case. In *Stanard v. Sampson et ux.*, 23 Okl. 13, 99 Pac. 796, the syllabus is in part as follows: "A general verdict not having been returned, but answers to specific questions, both sides having filed and presented motions for judgment thereon, in the absence of a timely objection with proper exceptions, and the assigning of such action as error in a motion for a new trial, the same will not be reviewed here. When the special answers or findings are returned, the jurors each being polled *ad seriatim* answered that the same as read by the clerk were his. No objection was made by either party or request that such special findings or answers should be signed, and each party filed and presented a motion for judgment in his or their favor on such special findings. Held, that this was a waiver of the irregularity in the foreman not signing the answers or findings as required by the statute." In the opinion the court said: "The plaintiff was entitled to have a general verdict returned; but when he sat by, and permitted the general verdict to be dispensed with, and the answers to be returned into open court to the specific questions submitted, and to be recorded, without any objection, and afterwards filed a motion for judgment in his favor thereon, he cannot be permitted by such conduct to induce the court to commit an irregularity, and then speculate upon its result by seeking a judgment thereon in his favor, and be heard here on petition in error to complain, especially when there was no motion for a new trial filed and presented in the lower court seeking the correction of such alleged error. * * * In *Wilson v. Durant*, 1 Ind. T. 532, 42 S. W. 282, it is said: "The appellants' motion in arrest of judgment was based upon the fact that the verdict of the jury, which is set forth in the foregoing statement, found 'the issues at law' in favor of the defendants. No exception was taken when the verdict was rendered, which was on March 14th, as to its form; and the court's attention was not called to it until the motion in arrest of judgment was heard, March 18th. * * * The counsel for appellants in this case insist that their clients are not in the attitude of persons who sit silently by and permit the court to commit error, but, on the contrary, they contend that, by proper motion and in apt time, they did all in their power to prevent the alleged error, and that the judgment should therefore be reversed. The record fails to disclose any objection to this form of verdict until four days after it had been rendered. If, at the time the verdict was rendered, counsel had called the attention of the court to the words 'issues at law,' the proper correction would doubtless have been promptly made by striking out the words 'at law,' and asking the jury whether

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the verdict as thus amended was their verdict. This not having been done, the trial court, having, as the judge certifies in the bill of exceptions, submitted to the jury a single and simple issue of fact, not an issue of law, might, without prejudice to the plaintiffs, treat the words 'at law' as surplusage, and enter a judgment according to the verdict viewed in this light. No error prejudicial to appellants was committed by the trial court in pursuing this course." In the light of the foregoing authorities, it is not essential to determine whether, had the plaintiff in error at the time of the return of the verdict objected to its form and saved his exceptions thereto, the rendering of the judgment on the verdict in such form would constitute error prejudicial to his rights such as to bring about a reversal of this case.

[2] 2. The court instructed the jury as follows: "The fact that a partnership is engaged in a particular trade or business being known is sufficient notice to third persons of the limitations, which the nature and customs of that trade or business place upon the power of each partner, and third parties dealing with a partner in matters outside the scope of its usual business, to charge the firm therein must show him to have possessed special authority so to act. Therefore, if you find that the plaintiff bank, or its active managing officers, knew the kind and character of business being carried on by Brown & Montgomery, and that advances or loans by way of overdraft were made to L. O. Montgomery for the purpose of purchasing bank stock, oil mill stock, opera house stock, and furnishing money in endeavoring to secure county seat location were not within the scope of the business, and that amounts for said purposes were included in the overdraft and later in the note sued on, before plaintiff can recover, it must be shown that the defendant L. O. Montgomery was authorized to make the said loans or receive said advancements and create the indebtedness accruing therefor, or that the defendant Brown afterwards ratified the acts of L. O. Montgomery, as the term ratified is hereinafter defined." The defendant (plaintiff in error) R. L. Brown requested the court to give the following instruction: "The mere fact that a partner, after knowledge that another partner has given a note in the name of the firm in a transaction outside the scope of the partnership business, keeps silent and does not repudiate the act, does not of itself amount in law to ratification or adoption. Ratification is in the nature of an affirmative act, which in such a case cannot be established by a mere omission to avow. The partner is not bound, as a matter of law, to deny his liability until he is prosecuted." This instruction was refused and exception saved. The general charge to the jury does not substantially include or cover this instruction. In *Reubin v. Cohen et al.*, 48 Cal. 545, it is said: "At

the instance of the plaintiff, the court below instructed the jury 'that if Sperling was informed of the fact of the giving of these notes by his copartner, Cohen, in the name of the firm, and omitted to repudiate or disaffirm, within a reasonable time, what had been done by Cohen, he will be held to have ratified and adopted what he, Cohen, had done in the firm name.' The indebtedness for which the notes were given was the indebtedness of Cohen in the first instance, and not that of the copartnership firm of Cohen & Sperling. The instruction, assuming as it does that Sperling did not assent to the transaction at the time the note was delivered, and, of course, that he was not then bound thereby, nevertheless asserts the rule of law to be that if he was afterward informed of the fact that the firm notes had been so given he would become bound thereby, unless he should thereupon, or within a reasonable time, 'repudiate or disaffirm' them. It may be conceded that his failure to object under such circumstances would be evidence tending in some degree to show assent upon his part to the giving of the notes, and so the jury were substantially told in the instruction next preceding the one we are now considering. But to say that a mere failure to actively repudiate the transaction amounts per se in point of law to a ratification or adoption of the notes is unwarranted by recognized principles defining the powers and obligations of copartners." In *Barnard et al. v. Lapeer & Port Huron Plank Road Co.*, 6 Mich. 274, it is said: "No rule is better settled than that one partner cannot bind his copartner by any contract not within the immediate scope of the partnership, unless with such copartner's knowledge and consent. Each partner is an agent for all the members of the firm in the transaction of all business of such firm; but as to matters foreign to such business he is regarded as a stranger. The general business of the firm being that of manufacturing lumber, and the ownership of land as incident thereto, the subscription to stock in a corporation, or to articles of association for the creation of one, was not an incident to such partnership. Incidental benefits would not authorize one partner to bind his fellow, and no authority so to bind him is shown. And the knowledge and assent required to bind the copartner must be established by evidence affirmatively showing it, or from which it may be clearly inferred. This is sought to be established from the fact that assessments were made, and their payment demanded of the firm, which were unresponded to; and it is urged that it was Barnard's duty, upon such demands, to repudiate any interest in the company, and that his silence should be construed into a recognition of his relation as a stockholder. Now, a demand either through the mail or personal is sufficient to bind a stockholder, but not to create one. If the person of whom demand is made be not one, it is

not his duty to disclaim the character of stockholder. It is enough that he does not respond to such demand. The simple admission that demand was duly made of the firm is not one of a personal demand of Barnard, nor is of anything more than a fact; its effect being a question of law. There is no evidence, nor any admission, in the case that knowledge of the demand ever came to Barnard; and certainly none that he ever, by any word or act, recognized any connection with the company." See, also, to the same effect *Mercein v. Andrus & Mack*, 10 Wend. (N. Y.) 463; *Van Dyke v. Seelye et al.*, 49 Minn. 557, 52 N. W. 215; *Johnson v. McClary et al.*, 131 Ind. 105, 30 N. E. 888.

The court having instructed the jury that, before the plaintiff (defendant in error) could recover against the plaintiff in error Brown, it must be shown that the plaintiff in error L. O. Montgomery "was authorized to make the said loans or receive said advancements and create the indebtedness accruing therefor, or that the defendant Brown afterwards ratified the acts of L. O. Montgomery, as the term 'ratified' is hereinafter defined," when the plaintiff in error requested the foregoing instruction as to ratification, the same should have been given. Nowhere in the general charge does said requested instruction as to ratification or adoption seem to have been substantially covered. The defendant in error insists that the clause of the instruction, "the mere fact that a partner, after knowledge that another partner has given a note in the name of the firm in a transaction outside the scope of the partnership business, keeps silent, and does not repudiate the act, does not of itself amount in law to ratification or adoption. Ratification is in the nature of an affirmative act, which in such a case cannot be established by a mere omission to avow"—is erroneous in that such omission to avow may create an estoppel. It may be that under a proper state of facts that an omission to avow the want of authority of the other partner to incur such liability might create an estoppel, where such silence caused the party to make further advancements or loans or to forego taking action for his protection, when such delay or inaction would prejudicially affect his rights against the other partner. But under the record in this case such a question of estoppel is not presented, and the question is not here determined.

As to all money loaned or advancements made to said partnership through L. O. Montgomery in due course of business the said B. L. Brown was liable therefor, though it was afterwards diverted from said business by Montgomery, unless the bank at the time

of making the loan had knowledge that it would be so diverted, and as to such items where there was no conflict in the evidence the jury should have been instructed to find in favor of the plaintiff. As to items where there was a conflict in the evidence, the same should have been submitted to the jury under appropriate instructions for a finding. As to the advancements that were made for matters outside of the scope of the partnership with the knowledge of the bank that they were not to be used within such scope of said partnership as to whether or not a ratification was made by the plaintiff in error, the same should also have been submitted under proper instructions. If with the money that was advanced by the bank, with the knowledge that it was to be used to buy oil mill stock and bank stock, such stock was bought and issued in the name of the partnership or firm, and the evidence showed that the plaintiff in error knowingly accepted the fruits of such transaction, these were matters that the jury should take into consideration in determining the ratification or liability on his part. Did he accept the fruits of said stock, or did he repudiate the purchase of the same and the holding of the same in the partnership name when the knowledge came to him? If he did the latter, he did not become owner thereof, and the partnership would have held the title as trustee for the other partner. The letter of June 26, 1908, to J. C. Tandy, Temple, Okla., who appears to have been vice president of the defendant in error bank, should have been admitted in evidence. In that letter the plaintiff in error says: "He (plaintiff in error L. O. Montgomery) has done everything against my advice, and, of course, he sees his error now. This fall I will have a bookkeeper that I can depend on to give me a detail statement of the business every week. We are in the gin business and not in the seed cotton business, nor any other kind that I know of and when it comes to losing money it is not me. I went into the gin business only with him and he had no right to use the company otherwise. Mr. Tandy you will have to help look after Lee for I know he is a good man for your bank." It was competent for the purpose of determining whether or not the plaintiff in error Brown ratified the act of L. O. Montgomery in borrowing money from the defendant in error bank to be used out of the scope of said partnership business.

It follows that the judgment of the lower court must be reversed, and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion. All the Justices concur.

(37 Okl. 8)

**BANK OF CARROLLTON, MISS., v.
LATTING.**

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

**1. PRINCIPAL AND SURETY (§ 34*)—DELIVERY
OF NOTE—CONSIDERATION.**

The signing of a note as surety, some days after the principal had executed the same, and after the delivery and acceptance thereof, and after the consideration had passed, without any agreement that the surety's name would be secured to the note, is without consideration.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 67; Dec. Dig. § 34.*]

2. PRINCIPAL AND SURETY (§ 34*)—CONSIDERATION.

When a note has been fully executed and delivered, and, subsequently thereto, a new party signed it as surety, there must be an independent consideration to make it obligatory upon the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 67; Dec. Dig. § 34.*]

3. BILLS AND NOTES (§ 226*)—INDORSEMENT—CONSIDERATION.

The defendant's contract (whether it be that of guaranty or suretyship), having been entered into after the note had once been delivered and accepted by the payee, and the transaction had become fully executed, required proof of a distinct consideration to support it; and, in the absence of evidence tending to establish a new consideration, the undertaking is nudum pactum.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 534-541; Dec. Dig. § 226.*]

Commissioners' Opinion, Division No. 1. Error from Grady County Court; N. M. Williams, Judge.

Action by Bank of Carrollton, Mississippi, against R. G. Latting, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

Bond & Melton, of Chickasha, for plaintiff in error. T. J. O'Neill, of Chickasha, for defendant in error.

SHARP, C. On May 17, 1906, the Carrollton Cotton Oil Company, a corporation, engaged in the manufacture of cotton seed products at Carrollton, Miss., was overdrawn in its account with the plaintiff, the Bank of Carrollton. On said day said milling company executed to said bank its demand note for \$948.86; that being the amount of its overdraft. This note was signed, "The Carrollton Cotton Oil Co., R. G. Latting, Jr., Sec. & Mgr.," by Mr. Latting, and on the day of its execution was delivered to the bank. Latting was at the time a stockholder in the mill company, and was also its secretary and manager. Some 10 days after the note was executed and delivered to the bank's cashier, at the cashier's request, Mr. Latting signed the note individually. At the same time it appears that Latting told the cashier of certain collaterals owned by the mill company that he would put up as collateral security for the company's note. This, however, was not requested by the bank, but was volun-

teered by Latting acting for the mill company. These collaterals consisted of some accounts, and two bills of lading for two car loads of cotton seed, issued to the mill company by the Southern Railway Company. The giving of the note took up the mill company's overdraft. This, it appears, was all the bank at the time required in the way of a settlement of the mill company's indebtedness. As testified to by Mr. Latting: "The cashier of the bank called my attention to the fact that the mill had overdrawn some \$900 or more, and asked me to close it up with a note, which I did."

[1] The transaction between the principal, the mill company, and the creditor, the bank, upon the execution and delivery of the note, thereupon became an executed one, and apparently the bank was satisfied with the manner in which the transaction was closed. It had extended credit to the mill company by permitting it to overdraw its account, and accepted its demand note in settlement of the overdraft. It does not appear that, at the time of the execution and delivery of the note, any request for security in any form was made. The subsequent undertaking of the defendant, Latting, was therefore a collateral one. The indebtedness was that of the mill company. There must, of legal necessity, be a sufficient consideration in order to render valid the contract of suretyship or guaranty. This consideration is usually either of benefit to the principal or surety, or of detriment to the creditor. But where the consideration between the principal and the creditor has passed and become executed before the contract of the surety or guaranty is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract. The rule is a very general one, and authorities in support thereof are manifold. *Briggs v. Downing*, 48 Iowa, 550; *Farnsworth v. Clark*, 44 Barb. (N. Y.) 601; *Simmang v. Farnsworth* (Tex. Civ. App.) 24 S. W. 541; *Baker v. Wahrmond*, 5 Tex. Civ. App. 268, 23 S. W. 1023; *Bluff Springs Mercantile Co. v. White* (Tex. Civ. App.) 90 S. W. 710; *Martin v. Stubblings*, 20 Ill. App. 381; *Anderson v. Norvill*, 10 Ill. App. 240; *Davidson v. King*, 51 Ind. 224; *Beall v. Ridgeway*, 18 Ala. 117; *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314; *Kissire v. Plunkett-Jarnell Grocery Co.* (Ark.) 145 S. W. 567; *Comstock v. Breed*, 12 Cal. 236; *Levorene v. Hildreth*, 80 Cal. 139, 22 Pac. 72; *Lewin v. Barry*, 15 Colo. App. 461, 63 Pac. 121; *Jackson et al. v. Cooper* (Ky.) 39 S. W. 39; *Sawyer v. Fernald*, 59 Me. 500; *Cutler v. Everett*, 33 Me. 201; *Tenney v. Prince*, 4 Pick. (Mass.) 387, 16 Am. Dec. 347; *Ford v. McLain*, 164 Mo. App. 174, 148 S. W. 190; *Macfarland v. Helm*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; *Pfeiffer v. Kingsland*, 25 Mo. 66; *Wil-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

llams v. Williams, 67 Mo. 661; Barnes et al. v. Van Keuren, 31 Neb. 165, 47 N. W. 848; Leonard v. Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Gilman v. Kibler, 5 Humph. (Tenn.) 19; Clark v. Small, 6 Yerg. (Tenn.) 418; Russell v. Buck, 11 Vt. 166; In re Estate of Goddard, 66 Vt. 415, 29 Atl. 634; Randolph on Commercial Paper, § 920; Brandt on Suretyship and Guaranty, § 26; 6 Am. & Eng. Enc. L. 691, 692.

[2] It is insisted, however, by counsel that the transaction of May 17th, together with that which subsequently took place when the note was signed by Latting, constituted a single transaction, and was therefore not completed until the date of the latter occurrence. This contention finds no support in the evidence. That the mill company complied fully with the bank's demand on the day that the note was given is unchallenged. There was no request or agreement on that date that Latting should personally indorse the note, or that the mill company should deposit collateral. It is therefore unnecessary for us to give further consideration to this contention. The note was executed and made payable in the state of Mississippi and the Supreme Court of that state, in Clopton, Ex'r, v. Hall, 51 Miss. 482, in a case where the surety signed the note several months after its original execution, said: "If such indorsement was contemporaneous with the making of the note, it will connect itself with that contract, and will be supported by its consideration; but if subsequent thereto, and not done in pursuance of an agreement for the credit of the maker, and for the security of the payee, it must rest upon a consideration of its own; otherwise it is nudum pactum. Moles v. Bird, 11 Mass. 436 [6 Am. Dec. 179]; Hunt v. Adams, 5 Mass. 358 [4 Am. Dec. 68]; White v. Howland, 9 Mass. 314 [6 Am. Dec. 71]; Miller v. Gaston, 2 Hill (N. Y.) 190; Hough v. Gray, 19 Wend. (N. Y.) 202; Leonard v. Sweetzer, 16 Ohio, 4."

[3] It was there held that the burden of proof as to the consideration of a note rests upon the plaintiff, where it is not by law implied, and that the subsequent signing of a note by a surety, after its delivery, constitutes a separate agreement, and the consideration is not imported by the indorsement itself, but it must be shown aliunde. This, we believe, to be the general rule in such cases, when there is an issue as to the consideration. Norton on Bills and Notes, 260; Pratt et al. v. Hedden, 121 Mass. 116. Nor does the letter written by the defendant to the bank's cashier, of date August 21, 1906, in any manner affect his liability, as it was as much nudum pactum as the note. Savage v. First Nat. Bank, 112 Ala. 506, 20 South. 398.

It not appearing that there was any consideration for the defendant's contract of

suretyship or guaranty, the judgment of the trial court should be affirmed.

Commissioner AMES did not participate in the consideration of this cause.

PER CURIAM. Adopted in whole.

(35 Okl. 469)

MAPLES et al. v. SMYTHE.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

FORCIBLE ENTRY AND DETAINER (§ 29*)—EVIDENCE.

Where, in forcible entry and detainer, giving the evidence its strongest probative force, there is no evidence reasonably tending to prove that defendant was in possession of the premises in controversy at the commencement of the suit, *held*, that the court did not err in sustaining a demurrer to the evidence at the close of plaintiffs' testimony.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 134-140; Dec. Dig. § 29.*]

Error from Creek County Court; Josiah G. Davis, Judge.

Action by Elizabeth Maples and others against William Smythe. Judgment for defendant, and plaintiffs bring error. Affirmed.

McDougal, Lattimore & Lytle, of Sapulpa, for plaintiffs in error. Pryor, Rockwood & Lively, of Sapulpa, for defendant in error.

TURNER, J. On March 12, 1909, Elizabeth Maples, E. J. Maples, and A. A. Maples, plaintiffs in error, sued William Smythe, defendant in error, before a justice of the peace in Creek county in forcible entry and detainer for "a certain brick house at 204 North Birch street, city of Sapulpa; and the lands consisting of what was all of block 3 in the old plat of the townsite of the city of Sapulpa." After answer filed, in effect a general denial, there was trial and judgment for defendant. On trial anew in the county court, to which the cause was appealed, at the close of plaintiff's testimony a demurrer was sustained to the evidence, and judgment rendered and entered accordingly, and plaintiff brings the case here, assigning as error the action of the court in sustaining the demurrer.

To maintain the issues on their part plaintiffs, after proof of three days' notice to quit, proved that, after one Egan had been in peaceable possession of the premises in controversy for some eight years, he turned it over to D. P. Maples, who fenced the same, and built thereupon a small brick house, and died in May, 1908, after years of peaceable possession; that plaintiff Elizabeth is his widow and the other two plaintiffs his children; that while Maples lived Egan acted as his agent and rented the same to one Sherry, who occupied the same for two months with a stock of goods which he, after the death of

Maples, sold out and turned over, together with possession of the premises, to Charlie Smythe, who occupied the house until January, 1909. But here the evidence falls. As set forth in the brief of plaintiff in error, the most that can be said of it is that defendant was never in actual possession, but, Charlie Smythe having moved out, the premises were unoccupied at the time this notice was given and suit commenced. The only evidence set forth in the brief tending to couple defendant with the possession was that he had told a witness that he, William Smythe, had "staked his brother, Charlie Smythe, in the premises several times and that no rent would be paid," and that thereupon notice to quit was served on defendant and this action commenced, which notice was in March after Charlie had quit in the preceding January. The same witness further testified that defendant on a former trial of some kind somewhere had testified that he claimed at a time not given to be in possession of said premises under a quitclaim deed from one Kidd. If other evidence exists coupling defendant with possession of the premises at the time of the commencement of this action, it is not contained in the abstract set forth in plaintiffs' brief, and we decline to inspect the record to find it. Applying the rule invoked by defendant that actions of this kind may be maintained only against one in possession at the commencement of the action and not against one who does not in fact hold the land (19 Cyc. 1142, 1163), there being no evidence reasonably tending to prove such possession in plaintiff at that time, the judgment of the trial court is affirmed. All the Justices concur, except WILLIAMS, J., not participating.

(37 Okl. 18)

HUDDLESTUN v. D. M. OSBORNE & CO.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO FILE BRIEFS.

Where plaintiff in error fails to comply with the rules of this court, requiring him to serve a brief on counsel for defendant in error and at the same time to file 15 copies of his brief with the clerk of the court, his case, on being reached for submission, will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 1. Error from Washita County Court; L. R. Shean, Judge.

Action by D. M. Osborne & Co. against Fred M. Huddlestun. Judgment for plaintiff in the justice court was affirmed on appeal, and defendant again brings error. Dismissed.

M. L. Holcombe, of Clinton, for plaintiff in error. Snodgrass & Darnell, of Arapaho, for defendant in error.

SHARP, C. The petition in error was filed in this court March 23, 1911. Thereafter a motion to dismiss the appeal was filed by defendant in error, which motion was by the court overruled on June 18, 1912, of which action of the court counsel for plaintiff in error was informed. The case was regularly assigned for submission at the December, 1912, term of the court, but plaintiff in error has filed no brief; neither has he asked for an extension of time in which to file brief.

Upon the authority of *Douglas v. Clayton Townsite Co.*, 29 Okl. 9, 115 Pac. 1016, and other cases cited in the opinion of the court, the appeal should be dismissed.

PER CURIAM. Adopted in whole.

(35 Okl. 425)

CONELLY CONST. CO. v. ROYCE.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

FRAUDS, STATUTE OF (§ 88*)—SALE OF CHATTELS—DELIVERY.

A delivery and acceptance, at any subsequent time, of any part of the goods or chattels which are the subject of an oral agreement and within the statute of frauds takes the contract out of the statute of frauds and makes valid the entire contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 163; Dec. Dig. § 88.*]

Error from District Court, Beckham County; G. A. Brown, Judge.

Action by Lloyd Royce against the Conelly Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Forrest, of El Reno, for plaintiff in error. W. B. Merrill, of Elk City, for defendant in error.

TURNER, J. On August 20, 1909, defendant in error, Lloyd Royce, sued the Conelly Construction Company, plaintiff in error, in the district court of Beckham county, in damages for the breach of a parol contract to deliver 2,000 cubic feet of sand at \$1.25 per cubic yard, alleging part performance and acceptance by defendant for which, he says, defendant is justly indebted to him for the sand accepted, \$41.25. After answer in effect a general denial, there was trial to a jury and judgment for plaintiff for \$341.75, and defendant brings the case here.

There is no merit in the contention that this contract is within the statute of frauds (section 1089, Comp. Laws of Okl.), which reads: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: * * * An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences or some of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

them, or such things in action, or pay at the same time some part of the purchase money. * * * This for the reason that the petition alleges and the proof shows sufficient part performance, by the subsequent delivery and acceptance of part of the sand, to take it out of the statute. In *Gabriel v. Kildare El. Co.*, 18 Okl. 318, 90 Pac. 10, 10 L. R. A. (N. S.) 638, 11 Ann. Cas. 517, the court, construing this statute, in the syllabus, said: "A delivery and acceptance, at any subsequent time, of any part of the goods or chattels which are the subject of an oral agreement and within the statute of frauds takes the contract out of the statute of frauds and makes valid the entire contract." *Tinklepaugh-Kimmel Hdw. Co. v. Minneapolis, etc., Co.*, 20 Okl. 187, 95 Pac. 427; *Logan v. Brown*, 20 Okl. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298; *Grant et al. v. Millam*, 20 Okl. 672, 95 Pac. 424.

There is no merit in the remaining contentions.

Affirmed. All the Justices concur.

(43 Okl. 79)

EVINGER v. DUKE, County Superintendent.
(Supreme Court of Oklahoma. Feb. 4, 1913.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 36*) —
CHANGE OF BOUNDARIES.

Syllabus same as first paragraph of syllabus in *Board of County Commissioners of Garfield Co. v. Worrell*, 126 Pac. 785.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 59½; Dec. Dig. § 36.*]

Error from District Court, Kay County;
Wm. Bowles, Judge.

Action by C. F. Evinger against E. A. Duke, County Superintendent. Judgment for defendant, and plaintiff brings error. Affirmed.

Sam K. Sullivan and H. S. Braucht, both of Newkirk, for plaintiff in error. J. F. King, of Newkirk, for defendant in error.

HAYES, C. J. Plaintiff in error, on behalf of himself and others similarly situated, brought this action in the court below to obtain an injunction against defendant in error as the county superintendent of Kay county, enjoining him from changing the boundaries of consolidated school district No. 1 of Kay county. Plaintiff is a resident and taxpayer of said consolidated school district No. 1, and a patron of said school. On the 28th day of June, 1909, common school districts Nos. 49, 50, and 51 of Kay county were, as is by statute provided, organized into consolidated school district No. 1. After the organization of said consolidated school district, a petition was filed with the county superintendent, asking that he change the boundaries of same so as to release certain

territory formerly known as school district No. 51, and to form such territory into a school district.

It is alleged that the defendant has given notice that on a day fixed he will take action upon the application for detaching said territory from consolidated school district No. 1, and that he has openly declared his intention of sustaining the application and of detaching said territory and reorganizing the same into the school district heretofore known as school district No. 51. Plaintiff alleges that, if the aforesaid acts threatened by the defendant as county superintendent are done, they will work great and irreparable injuries to him and others similarly situated, and that they have no adequate remedy at law. The trial court granted a temporary injunction in conformity with the prayer of plaintiff's petition, which was thereafter, upon motion, dissolved; and it is from the order dissolving the temporary injunction that this appeal is prosecuted.

We may lay aside all questions raised by this appeal, except the one that challenges the power of the county superintendent, after a consolidated school district has been established under the provisions of the statute, thereafter to alter or change the boundaries of said district by detaching territory therefrom for the purpose of attaching it to other school districts, or for the formation of a separate or new district. This question was considered and determined in *Board of County Commissioners of Garfield County v. Worrell* (not yet officially reported) 126 Pac. 785, where it was held that by virtue of section 1, c. 107, p. 202, Sess. Laws 1910, and section 8, c. 33, art. 1, Sess. Laws 1905 (section 8176, Comp. Laws 1909), a county superintendent is granted power to change the boundaries of consolidated school districts in his county when the interests of the people thereof may require it by making them conform to existing topographical or physical conditions. Counsel for plaintiff have in an able and thorough brief contended that no such authority is conferred by the statutes upon county superintendents, and their position is not entirely without reason and authority to support it; but, after giving all of their argument careful consideration, we are not convinced that our former conclusion is incorrect.

The proposition involved is solely a question of statutory construction. If the statute as construed by this court in *Board of County Commissioners of Garfield County v. Worrell*, supra, does not in the minds of the Legislature sufficiently meet the demands of the public in the organization, maintenance, and alteration of consolidated school districts, that body is now in session and the defects of the statute as construed can be remedied by additional legislation.

The judgment of the trial court is affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(35 Okl. 440)

ADAMS v. BOARD OF COM'RS OF GARVIN COUNTY et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

*(Syllabus by the Court.)***1. COUNTIES (§ 196*)—LEVY OF TAXES—VALUITY—INJUNCTION.**

The excise board of a county, without a petition as provided for by statute, made a levy to be used for the purpose of eradicating cattle ticks therein. The said county was located partly above and partly below the quarantine line as established by the State Board of Agriculture. Plaintiff, a taxpayer, brought action to enjoin said board from allowing claims and the county treasurer from paying warrants drawn on such fund on the ground that under section 2, c. 115, p. 255, Sess. Laws 1910-11, a levy on all taxable property in the county is subject to taxation for this purpose only when petitioned for by a majority of the voters thereof or of any municipal township, and the court refused to grant the injunction. *Held*, error; that the levy was without authority of law and was void.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

2. STATUTES (§ 245*)—CONSTRUCTION—LEVY OF TAX.

Where a statute imposing a tax is susceptible of two constructions, and the legislative intent is in doubt, the doubt should, as a rule, be resolved in favor of the taxpayer.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326; Dec. Dig. § 245.*]

Error from District Court, Garvin County; R. McMillan, Judge.

Action by E. Z. Adams against the Board of County Commissioners of Garvin County and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

John M. Stanley and Andrew Wood, both of Pauls Valley, for plaintiff in error. Charles West, Atty. Gen., and Charles L. Moore, Asst. Atty. Gen., for defendants in error.

DUNN, J. On October 8, 1912, plaintiff in error as plaintiff filed his petition for an injunction against the defendants in error in the district court of Garvin county, in which he alleges, in substance, that he is a legal resident and taxpayer of said county; that on June 4, 1912, the board of county commissioners of said county passed a resolution attempting to appropriate \$2,500 to be used to effect the eradication of cattle ticks in said county; that on August 16, 1912, the excise board of said county levied \$8,250, as taxes for the contingent fund for the fiscal year of 1912-13, which levy included the said \$2,500, to be used for tick eradication in the said county; that, in the pursuance of said action of the board, claims have been allowed and warrants issued against the said fund in the sum aggregating \$742.15; that other claims for labor and materials, etc., have been presented for allowance against the same and await the action of the board thereon; that Garvin coun-

ty is located partly above and partly below the live stock quarantine line established and maintained by the Oklahoma State Board of Agriculture; that the said board of county commissioners acted without authority of law in making an appropriation of funds for tick eradication; that the said excise board acted without authority of law in making the levy of taxes for the reason that the said levy had not been petitioned for by a majority of the taxpayers of Garvin county nor of any township therein as provided by section 2, c. 115, of the Session Laws 1911; that the paying out of moneys for the purposes mentioned is without authority of law and will result in irreparable injury to plaintiff and every other taxpayer in Garvin county; and that plaintiff is without an adequate remedy at law. Plaintiff prays that the board of county commissioners be enjoined and restrained from allowing any claims and that said defendant J. F. Trimmer, county treasurer, be enjoined and restrained from paying any of the warrants which have been or may hereafter be drawn on him as treasurer and for all other proper and equitable relief and for costs. On presentation of the petition above set forth, a temporary injunction was granted which was later dissolved, from which action plaintiff prosecutes his appeal to this court.

[1] The only law for levying a tax to provide a fund with which to co-operate with the State Board of Agriculture in the work of eradicating the cattle tick, by the excise boards of the different counties, is found in sections 1 and 2, c. 115, p. 255, Sess. Laws 1911. Those portions of these sections pertinent hereto read as follows:

"Section 1. The excise board of any county situated above the state quarantine line as fixed by the State Board of Agriculture, shall have power to levy a tax on all taxable property within the county to provide a fund with which to co-operate with the State Board of Agriculture in the work of eradicating ticks of the variety above mentioned, which fund may be used for any one or all of the purposes of constructing suitable dipping vats, or employing competent live stock inspectors, for purchasing material for disinfection or for anything which in the opinion of the board of county commissioners promises to further the protection of the live stock interests of the county.

"Sec. 2. When so petitioned by a majority of the voters of any county or municipal township within the county, such majority to be measured by the number of votes cast at the last general election, the excise board of any county shall make a levy on all taxable property of the county, such as will be necessary to bear the actual cost of co-operating with the State Board of Agriculture as provided for in section 2, of this act, and to establish and construct one sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stantial dipping vat or as many of said vats of necessary dimension as may be advised by the State Board of Agriculture," etc.

Although several propositions are argued by counsel to sustain the judgment, from the view which we take of this case it will be necessary to pass upon but the one involved in a construction and application of the foregoing statutes. Counsel for plaintiff contend that the action of the excise board of Garvin county in levying a tax for the eradication of cattle ticks on its own motion and without the petition as required in section 2 of the act above quoted is void, and hence there is no fund available and against which to allow or out of which to pay any of the claims in question. In answer to this contention, counsel for defendants insist that the first section above quoted, providing that "the excise board of any county situated above the state quarantine line as fixed by the State Board of Agriculture, shall have power to levy a tax on all taxable property within the county to provide a fund with which to co-operate with the State Board of Agriculture in the work of eradicating ticks," etc., gives the county authorities of Garvin county the power, in their discretion, to provide a fund by taxation for tick eradication which would become mandatory only on a petition being presented in accordance with the next succeeding section. With this contention we are unable to agree.

[2] The statutes in question are clear and unambiguous and susceptible to but one construction. It is held by both the courts of England and the United States that statutes requiring or authorizing a levy of taxes or duties on subjects or citizens are to be construed most strongly against the government, and in favor of the subjects or citizens, and that their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690. In the case of *McNally v. Field* (C. C.) 119 Fed. 445, the court held in the syllabus that: "Where a statute imposing a tax is susceptible of two constructions, and the legislative intent is in doubt, the doubt should, as a rule, be resolved in favor of the taxpayer." To the same effect, see *Lewis v. Sutherland*, *Statutory Construction* (2d Ed.) § 535; *Cooley on Taxation* (3d Ed.) p. 454, and cases cited; *Mayor v. Hartridge*, 8 Ga. 30.

Garvin county is located partly above and partly below the state quarantine line as fixed by the State Board of Agriculture, and, when the board of county commissioners thereof is petitioned by a majority of the voters therein or of any municipal township in the county, all taxable property in the

county may be subjected to a levy for the purpose of co-operating with the State Board of Agriculture in constructing dipping vats or in any other way protecting the live stock interests of the county. In the case at bar as above declared, the levy was not made according to the law authorizing the levy, and is therefore void.

The balance of the questions presented are of practice, do not go to the merits of the action, and, after an investigation and consideration thereof, in our judgment are without substantial merit.

The order of the trial court dissolving the temporary injunction is reversed, and the cause is remanded to the trial court to take further proceedings in accord with this opinion.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(37 Okl. 5)

TURMAN v. BURTON et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 699*)—REVIEW—INSUFFICIENT RECORD.

Where none of the evidence appears in the record, and there is no statement of what it tended to prove, or that it raised the questions on which instructions are based, this court cannot as a general rule determine whether there was error in the rulings of the court as to the instructions or not.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by Charles Burton and Millie Burton against William S. Turman. Judgment for plaintiffs, and defendant brings error. Affirmed.

William S. Turman, pro se. John L. Maynard, of Okmulgee, for defendants in error.

SHARP, C. Plaintiffs below, defendants in error, sued defendant below, plaintiff in error, to recover judgment in the sum of \$1,164.25 and interest, an alleged balance due on the purchase price of certain lands situated in Okmulgee county. A jury trial being had, a verdict was returned in favor of plaintiff.

The only errors upon which a reversal is sought arise out of an instruction given by the court, and the refusal to give an instruction requested by defendant. The case-made does not contain the evidence nor any part thereof; neither is there a statement of what the evidence was or what it tended to prove. It is not claimed by the plaintiff in error

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the verdict rendered is not supported by sufficient evidence. From the answer and amendments thereto it appears that defendant plead payment at various times and in various sums of the amount claimed by plaintiff to be due and unpaid. From the brief of plaintiff in error it appears that on the trial the defendant introduced a number of receipts bearing the signature of one of the plaintiffs, and from the amounts therein contained it was claimed that defendant had discharged his indebtedness to plaintiffs. But plaintiff in error further states in his brief that, although the said plaintiff admitted his signature to the receipts, he denied having received the several amounts therein named, and charged that said defendant had altered said receipts so as to make them read for a larger amount than that contained therein at the time of their execution. This counsel says was the only question before the jury. This statement is concurred in by counsel for defendants in error. But how are we to say that the court erred in giving instruction numbered 4, and in refusing the defendant's requested instruction, when none of the evidence is before us? Are we to presume error merely from the fact that the court refused to give an instruction? On the contrary, we are committed to the rule that where a verdict and judgment are authorized by the evidence, and another would be unwarranted, the same will not be reversed on appeal on account of errors alleged to exist in the instructions. *Chapek v. Oak Creek National Bank*, 19 Okl. 80, 91 Pac. 1129; *Shawnee Nat. Bank v. Wootten & Potts*, 24 Okl. 425, 103 Pac. 714; *St. Paul F. & M. Ins. Co. v. Mittendorf et al.*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651; *Mitchell v. Altus State Bank*, 32 Okl. 628, 122 Pac. 688.

Courts of error do not sit to decide moot questions, but to redress real grievances. It can, of course, never be said that the jury were misled by the giving of an erroneous instruction, or the refusal to give proper instructions, where they have reached the correct result by their verdict. Hence courts of review in passing upon errors assigned in giving instructions, or refusing to give requested instructions, should look into the evidence, and see if the verdict is right, and, if found to be so, should look no further. In *Town of Leroy v. McConnell et al.*, 8 Kan. 273, the record was in very much the same condition as here. It was observed in the opinion by Kingman, C. J.: "One of the errors complained of is the giving of certain instructions, and the refusal to give others. It would be labor wasted to examine the instructions given, for, even if it were certain that they were not correct as legal principles, there would be the uncertainty as to whether they applied to the evidence in the case; and, if they did not, then, though there may have been error, it is not shown to be prejudicial

to the plaintiffs. The plaintiffs in error must show that such errors have been committed as have wrought prejudice to them, or may have done so, or there can be no reversal of the judgment. It is not necessary to bring up all the evidence in every case, but enough must be shown, either by the testimony or by statement in the bill of exceptions, for this court to see that the instructions are applicable to the evidence. The same remark applies to instructions refused. If they enunciate correct principles of law, and have no applicability to the case, then the court does right in refusing to give them; and, in the absence of the evidence, we are unable to say that such instructions ought to have been given. All presumptions are in favor of the rulings of the court below, and this presumption is not removed by any number of possibilities." See, also, *Missouri River, F. S. & G. R. Co. v. Owen*, 8 Kan. 410; *State v. English*, 34 Kan. 629, 9 Pac. 761; *Stetler v. King*, 43 Kan. 316, 23 Pac. 558; *Gray v. City of Emporia*, 43 Kan. 704, 23 Pac. 944. The objectionable instructions given, as well as the requested instruction refused, were each based upon the evidence, not upon the issues joined by the pleadings, and without the evidence before us we are unable to say that any error was committed. The instruction given may have been proper, the one refused, improper; or the requested instruction may not have been applicable to the evidence; or it may be that the testimony was such that the jury could have arrived at no other verdict, and the error, if error was committed, was not prejudicial. The court charged that the burden of proving payment was on the defendant; that, while a written receipt constituted prima facie evidence of payment, it was not conclusive, and was subject to explanation, and might upon proof be entirely refuted. Such is the law. While a receipt is prima facie evidence of all the facts and statements therein, it is open to explanation. *Solomon Railroad Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548; *St. Louis, Ft. S. & W. R. Co. v. Davis*, 35 Kan. 464, 11 Pac. 421; *American Bridge Co. v. Murphy*, 13 Kan. 35; *Stout v. Hyatt*, 13 Kan. 233; *Thompson on Trials*, § 3050; *Wigmore on Evidence*, §§ 2432, 2518; *Jones on Evidence*, §§ 70, 491. A party admitting his signature to a receipt is not thereby precluded from showing, either that he did not receive the amount therein named, or that there had been an alteration in the body of the receipt, whereby the amount named was increased. The court further instructed that the burden of proof was on the party attacking the validity of the receipt. It rests upon the plaintiff in error to show affirmatively that the trial court erred, and the record presented for our consideration, not containing the evidence, fails to disclose wherein the defendant's rights were prejudicially affected. Ver-

dicts of juries and judgments of courts are not to be thus lightly set aside.

Having thus concluded, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(35 OKL. 463)

OKLAHOMA RY. CO. v. STATE.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 18*)—FARES—ORDER OF CORPORATION COMMISSION.

Appellant's evidence examined, and held sufficient to overcome the prima facie presumption of the reasonableness, justness, and correctness of the order appealed from.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

Appeal from the State Corporation Commission.

From an order of the Corporation Commission fixing rates of the Oklahoma Railway Company, the latter appeals. Reversed.

Shartel, Keaton & Wells, of Oklahoma City, for plaintiff in error. Chas. West and Chas. L. Moore, for the State.

TURNER, J. This is an appeal from an order of the Corporation Commission requiring that appellant, operating an interurban railway through Britton to Edmond, shall charge 10 cents for all students attending the Wesleyan Female College from College Park station to Oklahoma City and from Oklahoma City to College Park station, and shall sell round-trip tickets to all others not exceeding 25 cents each, or single trip tickets not exceeding 15 cents each, to take effect on and after March 24, 1912. In support of the order W. A. Shelton testified before the Commission that he was president of said college; that they were trying to establish a school out there, to accomplish which it was necessary to have the patronage of Oklahoma City; that it was almost impossible so to do at a rate that cost the students 30 cents each day for the round trip from the city; that the college was in the corporate limits of Britton, which enjoyed a 10-cent rate; that the distance was about the same to College Park station as to Putnam City, which had that rate, and that said rate would, in his opinion, increase the attendance of the school and travel to and from the city; that the distance from Main street in Britton to the college was about a half mile; that the enrollment of the college was about 90, about half of which were boarding students and most of the remainder residents of Oklahoma City, and that the present 10-cent rate ends about two blocks north of Britton and somewhere near a mile and a half from College Park station. O. F. Sensebaugh, presiding elder of the Oklahoma City district of the

M. E. Church South, and a member of the board of trustees of the college, stated that the rate to and from the school had much to do with its patronage; that the school was indorsed by the annual conferences and others representing a membership of about 65,000 and a constituency of three or four times that in the state; that they expected to make it one of their great schools, and wanted to be given the best opportunity possible to do so. It was his opinion that it would be to the best interest of the company to grant the rate because of the increased patronage it would have, but did not know of any road whose rate for 9 or 10 miles was a dime on interurban cars. This was all the evidence adduced in support of the order.

In opposition thereto John W. Shartel testified: That College Park is on the interurban running from Oklahoma City to Edmond, the total length of which from the terminal station within the city to First street in Edmond is 15.1 miles, and the through rate on appellee's car 25 cents, with the following breaks: "From terminal station to Belle Isle station 4½ miles, 5 cents; from Belle Isle station to Britton station 5 cents; from Britton station past College Park station to the next break in fare, 2¼ miles north of Britton station, 5 cents; from said point 2¼ miles, 5 cents; from said last-named point to Edmond, 5 cents; the distance from College Park station to Oklahoma City terminal station being 9.6 miles." That College Park is on the third section towards its north end, and about three-fourths miles from the 20-cent rate, and that at that time said line was not paying over two-thirds actual operating expenses. That the rate to Putnam City is 10 cents for a distance of 8.2 miles which was two-tenths miles longer than that to Britton. That the rate to Bethany, which is four-tenths miles closer and a much larger school, is 15 cents and no reduction. That other suburban lines of the company were not paying a fair value, neither was appellant's road as a whole. That appellant had taken money which might have been paid to its stockholders on the main system and appropriated it to the upkeep of these outside lines waiting for the people to move in and build up the country. That a 10-cent rate to this school would result in charging 10 cents for 10 miles, and 15 cents for 5 miles from that point on to Edmond, or would result in having to cut out 5 cents on the Edmond run and hauling through for 20 cents.

As a part of the record, the Commission, pursuant to Const. art. 9, § 22, files for our consideration a written statement of the reasons upon which the order is based. The material part of it reads: "It is insisted by the defendant that this line is being operated at a loss. No figures were submitted to the Commission showing the earnings and expense, and evidence that only states conclusions is as a rule unsafe to predicate a find-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing of facts, therefore no finding will be made upon that point. The president of the college and the presiding elder for this district states that this college was established by the Southern Methodist Church, and is known as the Wesleyan Female College. This church represents a membership of about 65,000 people, and a constituency of about three or four times that amount in Oklahoma and adjoining states. They proposed to make it one of the great schools of the West, and it is insisted by these witnesses that, if proper rates were given from Oklahoma City, it would have a tendency to more than double the attendance. It does not cost the company but slightly more, if any, to operate cars filled with passengers than it does to operate them comparatively empty. The reduction of rates does not always reduce gross revenue. It has been the policy of the Commission going over the statistics in regard to passenger rates in general that the reduction of rates more often increases revenue than diminishes it. For an additional distance of slightly over one mile beyond Britton the defendant insisted on charging 5 cents additional fare. The Commission is of the opinion based on all the evidence and circumstances in this case that a rate of 10 cents from Oklahoma City to College Park station for all students attending the College would be reasonable, and that it would have a tendency and would in fact increase the travel without increasing the expense; that a rate for all other than students should be 15 cents for single trips or should be 25 cents for the round trip. Our conclusions in this case are argumentative, in that all interurbans, street railways, and steam railroads give commutation tickets to any number of people who regularly go to and from a given point." If there is any evidence reasonably tending to support the order, the prima facie presumption that the same is reasonable and just obtains by reason of Const. art. 9, § 22, otherwise not. *A., T. & S. F. Ry. Co. v. State*, 28 Okl. 476, 114 Pac. 721. Such there is not. The most that can be said in favor of the order is that it is based upon testimony merely expressive of a desire for the rate in order to build up the school. This is no substantial basis for the order. But opposed to this is the uncontradicted evidence of Mr. Shartel as follows: "That line is being operated, and, with the possible exception of June, July, and August, has been operated ever since it opened at a loss. By a loss I mean to say the payment of the actual operating expenses of the line itself without any return for interest on the investment or any allowance for depreciation. The line is being and has been run at a loss, and at the present time from Oklahoma City through Britton to Edmond is not paying over two-thirds of its actual operating expense. The giving of a rate of a cent a mile or a cent and a tenth or what-

ever it figures out for that distance out there would mean that for every 10 cents we take in we would be paying out at least 15." As stated by us in *A., T. & S. F. Ry. Co. et al. v. State*, 27 Okl. 820, 117 Pac. 330: "Courts are not permitted to disregard the uncontradicted evidence of competent, unimpeached witnesses. If an order requires evidence to support it and all the evidence introduced is to the effect that the order is unreasonable, and ought not to be made, it seems axiomatic to say it would be error to enter it." And so we say that, as this order is based upon testimony merely expressive of a desire for the rate and in opposition to uncontradicted evidence, in effect, that such a rate, if enforced, would compel appellant to operate at a still greater loss, the same is unreasonable and unjust.

It is therefore reversed, and the rate thereby sought to be displaced is ordered to stand. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 426)

BERRY et al. v. SUMMERS.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

INDIANS (§ 15*)—DEEDS—VALIDITY—REMOVAL OF RESTRICTIONS.

A full-blood member of the Creek tribe of Indians, prior to the removal of his restrictions, joined with his wife in the execution and delivery of a deed to a portion of his allotment. After the removal of his restrictions he executed and delivered a deed to the same land to his wife. *Held*, the first deed being void, the subsequently acquired title of the wife did not inure to the benefit of her grantee.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.*]

Error from District Court, Creek County; W. L. Barnum, Judge.

Action by J. B. Summers against I. K. Berry and Mrs. L. H. McClung. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Biddison & Campbell, of Tulsa, and W. P. Root, of Sapulpa, for plaintiffs in error. J. E. Thrift, of Bristow, for defendant in error.

DUNN, J. This case presents error from the district court of Creek county. The only question involved under the agreed statement of facts on which the same was tried is whether Hannah Frank is bound by her covenant of warranty in the deed executed and delivered by Noah Frank, her husband, and herself to L. B. Jackson, and by him made to plaintiff, J. B. Summers. The deed in question was to a portion of Noah Frank's tribal allotment of land. It was executed July 26, 1905, prior to the removal of restrictions on his right to alienate. After the removal of his restrictions he executed and delivered a deed to the said land to his wife, Hannah Frank and the question involved in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this case is whether the title which she then secured inured to the grantee under the first deed. The transactions covered by the agreed statement of facts occurred before statehood and while the laws of Arkansas as put in force in the Indian Territory by acts of Congress were operative. Counsel for plaintiff has not favored us with a brief, and we are not advised upon what theory the court rendered judgment in his favor, for the uniform holding of all of the authorities we have been able to discover on this proposition is that, in order for a deed to operate as an estoppel, it is essential that it should be valid as a transfer of grantor's interest. 3 Devlin on Deeds, §§ 1275, 1281a; *Altamus, etc., v. Nickell*, 115 Ky. 506, 74 S. W. 221, 103 Am. St. Rep. 333; *Pells et al. v. Webquish*, 129 Mass. 469; *Bledsoe v. Wortman et al.*, 129 Pac. 841, an opinion of this court of January 17, 1913. Under the provisions of section 16 of the Supplemental Agreement of the Creek Tribe of Indians (32 Stat. 503, c. 1323), the grantee, Noah Frank, could make no valid conveyance of his allotment. The deed which he made was absolutely void and in no wise prevented him after the removal of his restrictions from making another one. It divested him of no right or title in the land, and was invalid to transfer any of grantor's interest.

The case of *Pells et al. v. Webquish*, supra, from the Supreme Judicial Court of Massachusetts, was one where Mercy McGregory, an Indian, executed to Jesse Webquish, in contravention of the law relating to the tribe of Indians of which she was a member, a deed to a tract of land. The court dealing with the case, after holding that she was incapable of making such a contract and that its execution could not affect her interest in the estate or the interest of her descendants, said: "The deed being absolutely void, and the title remaining in Mercy McGregory, neither she nor her descendants were estopped from setting up title in the land, as against Jesse Webquish, although he afterwards became a proprietor; for the doctrine of estoppel has no application to the case of a party incapable by law of making a contract."

The case of *Altamus, etc., v. Nickell*, supra, was one wherein, under the statutes of Kentucky, conveyances of land held in adverse possession were denounced as null and void, and the court held where such a conveyance was attempted to be made, under a warranty deed, the grantee took no title, nor did the after-acquired title of the grantor inure to the benefit of the grantee; the court in its discussion saying: "The basis of the doctrine that after-acquired title attaches for the benefit of the vendee of one who has conveyed with warranty, but without title, is the warranty. In very ancient times, before the system of passing title by bargain and sale came into use, it was upon the im-

plied warranty. But running through the treaties on the subject, it will be observed that a warranty must have existed in fact, or be supplied as a fiction, to support the reasoning by which the passing of title by estoppel was maintained. It must have been such warranty as runs with the land, and must have been attached to, and have been a part of, the deed of conveyance. *Bigelow, Estoppel*, 396 et seq. If, then, the deed containing the warranty is void, every part of it must be ineffectual. To allow that the parties to a transaction prohibited as vicious might do by indirection and circumlocution that which they could not do directly would be to bring a reproach upon the administration of the law."

The case from this court, *Bledsoe v. Wortman et al.*, supra, which dealt with section 642, c. 27, Mansfield's Digest of Arkansas, which provides that if a grantor conveys real estate without title, but afterwards acquires the same, the estate then acquired shall immediately pass to the grantee, is in point. The grantor in the case was a member of the Cherokee Nation, and the same principle was involved in the decision as is involved in the case at bar. This court in that case said: "Said land prior to the time of its being selected by Fulsom as a part of his allotment being a part of the public domain of the Cherokee Nation, though he was a member of said tribe he could not execute any lawful conveyance thereto as such conveyance was void (1) on the ground that restrictions had not been removed as to such land, and (2) further because it was against public policy for him to execute a conveyance to a part of the public domain of said nation. The rule of estoppel as declared by said section 642 has no application to conveyances executed in the face of the law. Such conveyance being void when executed, said section 642 was not intended to breathe life into it."

The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to set the same aside and enter one in accordance with this opinion.

HAYES, C. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., concurs in the conclusion.

(37 Okl. 251)

POOS v. SHAWNEE FIRE INS. CO.[†]
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 150½, New, vol. 12, Key-No. Series) — STATUTES (§ 124*) — JURISDICTION — COUNTY COURTS — TITLE OF ACT.

The act of June 4, 1908 (section 2, art. 1, c. 27, Sess. Laws 1907-08), which, by conferring exclusive jurisdiction upon the county court in certain classes of civil actions, thereby incidentally and indirectly takes that jurisdiction away from the district court, is not in conflict

[†]For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 5, 1913.

with section 57, art. 5, of the Constitution, requiring the act of the Legislature to contain but one subject, which shall be clearly expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184-186; Dec. Dig. § 124.*]

2. Courts (§ 150½, New, vol. 12, Key-No. Series)—DISTRICT COURT—JURISDICTION.

Section 10, art. 7, of the Constitution, which confers upon the district court original jurisdiction in civil cases, except where exclusive jurisdiction is conferred upon some other court, does not prevent the Legislature from conferring jurisdiction upon both the county and superior courts, to the exclusion of the district court.

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by H. D. C. Poos against the Shawnee Fire Insurance Company. Judgment dismissing plaintiff's action for want of jurisdiction, and plaintiff brings error. Affirmed.

Eagleton & Biddison, of Pawnee, for plaintiff in error. Scothorn, Caldwell & McRill, of Oklahoma City, Victor O. Johnson, of Shoshone, Idaho, Lewis S. Wilson, of Raton, N. M., and Redmond S. Cole, of Pawnee, for defendant in error.

AMES, C. The plaintiff sued the defendant, on April 21, 1909, in the district court of Pawnee county for \$300. The defendant moved to dismiss the cause for want of jurisdiction over the subject-matter. The motion was sustained, and the plaintiff appeals.

By the act of June 4, 1908 (section 2, art. 1, c. 27, Session Laws 1907-08, p. 284), it is provided that the county court shall have exclusive jurisdiction in all sums in excess of \$200, and not exceeding \$500, with certain exceptions not here material. The plaintiff contends that this statute is unconstitutional, in so far as it makes the jurisdiction of the county court exclusive of that of the district court, and two questions are presented for our consideration: First, whether the title of the act of June 4, 1908, is sufficiently inclusive, under the requirements of the Constitution. Second, whether the subsequent act, conferring upon the superior court concurrent jurisdiction of this class of cases, reinvests the district court with jurisdiction also.

[1] Section 57 of article 5 of the Constitution (Williams' Constitution and Enabling Act, § 147) provides that "every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title. * * * If any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof." The title of the act is "An act to define the jurisdiction and duties of the county court, and to fix compensation for the judges thereof, and to provide for a

clerk of the county in certain counties, and to fix compensation therefor, and to provide for a county stenographer, who shall be ex officio clerk of the county court, fixing the compensation and fees therefor; and declaring an emergency." Section 10 of article 7 of the Constitution (Williams' Constitution and Enabling Act, § 195) provides that "the district court shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court, and such appellate jurisdiction as may be provided in this Constitution, or by law. * * *" By section 10 of article 7, the district court had jurisdiction of this action, unless the act of June 4, 1908, by conferring exclusive jurisdiction upon the county court, divested the district court of jurisdiction.

The argument is made that, as the title of the act of June 4, 1908, does not refer in any manner to the district court, so much of that act as affects the jurisdiction of the district court must fall, under the provisions of section 57 of article 5 of the Constitution. That the jurisdiction of the district court was affected by the act cannot be controverted. In fact, it was completely taken away. Was it necessary to so state in the title? It will be observed that the title of the act is to define the jurisdiction and duties of the county court; that in the body of the act this is done, and exclusive jurisdiction of this class of cases is conferred upon the county court. No reference is made to the district court. The effect of the act upon the jurisdiction of the district court is incidental, and arises out of the constitutional provision, above quoted, making the district court the residuary legatee, as it were, of all original jurisdiction not otherwise provided for. The judicial system of a state is a complete system, composed of several parts. It is not all vested in one tribunal. It is, however, a complete body; and whenever any part of that body is affected the entire body is affected. Just as a man cannot take a step without moving his entire body, so the original jurisdiction of any of our courts cannot be moved without affecting the jurisdiction of the district court, because it has original jurisdiction in all cases, except when exclusive jurisdiction is conferred on some other court. It is therefore true that the effect of this act upon the jurisdiction of the district court is entirely incidental, and grows out of that intimate relation between the district court and all other trial courts. Is it necessary for an act which thus incidentally affects the jurisdiction of the district court to point out this incidental effect in the title? The language of section 57 of article 5 must be borne in mind. It is that the act shall embrace but one subject, and that this shall be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

clearly expressed in its title. The act in this case embraces only one subject, to wit, the jurisdiction and duties of the county court, and this subject is clearly expressed in its title. This subject thus clearly expressed in the title does, however, incidentally affect another subject. Is it necessary for that other subject thus incidentally affected to likewise be expressed in the title? After a careful consideration, we have concluded that it is not, but that, where the act itself is plainly within the scope of its title, its incidental consequences, which necessarily follow as matter of law, need not be expressed. The purpose of section 57 of article 5 is to prevent surreptitious legislation. Assuming that those interested in the legislation are familiar with the Constitution, when they see such a title as this, they know that the district court has this residuum of jurisdiction; that an act defining the jurisdiction of the county court is bound to affect the district court's jurisdiction, and therefore the definition of the county court's jurisdiction is not surreptitiously slipping legislation through the legislative body.

This conclusion does not conflict with the decision of this court in *Holcomb v. C., R. I. & P. Ry. Co.*, 27 Okl. 687, 112 Pac. 1023, because the question there involved was whether an incidental phrase in this act had the effect of conferring appellate jurisdiction upon the district court, when there was no reference to the subject in the title. The district court does not derive its appellate jurisdiction from the Constitution. It is not a court of general appellate jurisdiction. It only has such appellate jurisdiction as may be conferred upon it. Therefore an act pertaining to the jurisdiction of the county court does not, by its title, suggest the possibility of conferring a new appellate jurisdiction upon the district court; and consequently, no one, no matter how thoroughly familiar with the law, would expect from the title to find such a grant in the act. We therefore conclude that the act of June 4, 1908, in so far as it confers this exclusive jurisdiction upon the county court, does not conflict with section 57 of article 5 of the Constitution.

[2] It is next argued that the act of March 6, 1909, creating superior courts and defining their jurisdiction, has the effect of restoring this jurisdiction to the district court also, because it gives the superior court concurrent jurisdiction with the county court; and therefore exclusive jurisdiction is not conferred upon some other court. Section 2 of that act (Session Laws 1909, p. 181) does vest in the superior court "concurrent jurisdiction with the county court in all civil and criminal matters, except matters of probate." Therefore the superior court and the county court both have jurisdiction over an action involving from \$200 to \$500. It will also be

remembered that under section 10 of article 7 of the Constitution the district courts have original jurisdiction, except where exclusive jurisdiction is conferred upon some other court. The argument is made that, while the act of June 4, 1908, conferring exclusive jurisdiction on the county court, took that jurisdiction from the district court, when the act of March 6, 1909, conferred jurisdiction upon the superior court concurrent with the county court that the county court no longer had exclusive jurisdiction; and, as exclusive jurisdiction was not conferred upon any other one court, that therefore the district court resumed its original jurisdiction, under section 10 of article 7. This argument is ingenious, but not sound. We think the word "exclusive," in section 10 of article 7, means exclusive of the district court, and not exclusive in one other court; and the net result of the two acts under consideration is to make the jurisdiction of the county court and the superior court concurrent, but exclusive of the district court.

Having concluded that the district court was without jurisdiction, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 498)

BROWN et al. v. BARKER et al.

(Supreme Court of Oklahoma. Oct. 22, 1912.
Rehearing Denied Feb. 18, 1913.)

(Syllabus by the Court.)

ESTOPPEL (§ 38*)—BY DEED—RIGHTS SUBSEQUENTLY ACQUIRED.

Where R. sold and conveyed to B. by warranty deed a town lot to which he had no title, and thereafter acquired by warranty deed from H. a perfect title thereto, *held* that the same inured eo instante to the benefit of his grantee, and that the lien of a judgment, rendered and entered against the grantor prior to the first deed, did not attach to the land.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 99-107; Dec. Dig. § 38.*]

Error from District Court, Hughes County; John Carruthers, Judge.

Action by Florence A. Barker and others against Frank P. Brown and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

L. S. Fawcett, of Holdenville, for plaintiffs in error. Lewis C. Lawson, of Holdenville, for defendants in error.

TURNER, C. J. On March 5, 1903, Keet & Roundtree Dry Goods Company, a corporation, recovered judgment against A. J. Rogers, one of the plaintiffs in error, defendant below, in the United States Court for the Indian Territory at Wewoka, for \$202.40, which is unpaid. On May 1, 1905, Jesse H. Hill sold and conveyed to him, by warranty deed duly recorded February 12, 1906, lot 10, in block 15, in the Lewis addition of Holden-

ille, then Indian Territory. On February 8, 1906, said Rogers and wife sold and conveyed said lot by warranty deed, duly recorded, February 12, 1906, to Frank P. Brown. On February 2, 1906, said Brown sold and conveyed said lot, with others, by warranty deed duly recorded, to Florence A. Barker, one of the defendants in error, for \$700 cash in hand paid, and took back a note secured by mortgage on the lots for \$300, payable February 1, 1908. On February 15, 1909, Florence A. Barker filed her petition in the district court of Hughes county against Frank P. Brown, the other plaintiff in error, A. J. Rogers, and Keet & Roundtree Dry Goods Company, setting forth the facts stated, and that she was ready and willing to, and would, pay said note but for the judgment aforesaid, which she alleges to be a cloud upon her title, and prays that said Brown and Keets & Roundtree Dry Goods Company be compelled to settle its validity, and that the same be removed. After answer filed by Brown and Rogers, in effect denying the lien of said judgment, and by Keet & Roundtree Dry Goods Company, in effect that the same was valid and subsisting, and praying that the purchase money in the hands of plaintiff be applied in satisfaction thereof, and much other prolix pleading by all concerned, there was trial to the court, and judgment in favor of Keet & Roundtree Dry Goods Company and against said Rogers, for the amount of said judgment and costs, which was ordered paid by plaintiff direct to said company in liquidation of its judgment and extinguishment of said lien, and Brown and Rogers bring the case here.

All parties in interest agree that the first question to be decided is: "Was the judgment obtained by Keet & Roundtree Dry Goods Company against the defendant A. J. Rogers, on the 5th day of February, 1903, a lien on lot 10, block 15, Lewis addition, when the complaint herein was filed, to wit, February 15, 1909?" The trial court held that it was; "that upon the conveyance of said lot to said Rogers, said judgment became a lien thereupon under the law then in force in said territory," and that the same was still valid and subsisting. In addition to the facts stated, the record further discloses that on May 27, 1902, Mrs. Holcomb, a single woman, conveyed by bill of sale to Katie Rogers, wife of said A. J. Rogers, the right of possession only to lots 2 and 3, in block 38, in Holdenville; that she and her husband at once took possession, and fenced said lots and built a house thereon, and occupied the same as their home; that when the Town-Site Commission came along by its survey these lots were cut down, and a part of each carved into the public domain: that the part so cut off, while it still remained within their original inclosure, was taken in allotment by another, and was afterwards brought back into the town site, together with a small portion of the allotment to which it belonged,

and designated as lot 10, in block 15, of Lewis addition; that while said lot was in this shape—that is, without either A. J. or his wife owning or asserting title or right of possession thereto (she having had scheduled and obtained patent to herself of what remained of lots 2 and 3)—to wit, on April 29, 1905, said Rogers and wife sold and conveyed lots 2 and 3 in block 38 and lot 10 in block 15 by warranty deed to Frank P. Brown for \$1,000, which was duly recorded May 17, 1905. Thus it will be seen that with this unsatisfied judgment outstanding against him, which from the date of its rendition was a lien upon his real estate (Mans. Dig. § 3912) A. J. Rogers sold and conveyed lot 10 by warranty deed to Frank P. Brown, and that he afterwards acquired title thereto by warranty deed from Jesse H. Hill, the owner of Lewis addition, of date May 1, 1905. As stated, the court held, applying said statute, that on that date the lien of said judgment attached to said lot. Not so, for the reason that eo instante upon the delivery of said deed the title thus acquired by Rogers inured to the benefit of Brown (Mans. Dig. § 642), leaving no time for the lien to attach to the land, and the title of the grantee was prior thereto. It was so held where the judgment was rendered intermediate the first and second deeds, and we see no reason why the same rule should not obtain here, independent of the question of fraud, which we shall consider later.

In *Watkins et al. v. Wassell*, 15 Ark. 73, in the syllabus it is said: "If one sells and conveys real estate to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, it inures to the benefit of the grantee; and if, between the date of the conveyance and the acquisition of the perfect title a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment." In *Lamprey v. Pike* (C. C.) 28 Fed. 30, the court said: "But with regard to the remainder of the property, which is much the larger portion, it appears that, long before this judgment was rendered, Mr. Frederick Ambs had made a conveyance to Peter Ambs of the whole land, except these four lots, and that this conveyance was put on record before this judgment was rendered. It is true that Frederick Ambs afterwards acquired the legal title to that property. He had a bond, however, for the title when he conveyed to Peter Ambs. It is insisted by defendant here that the title, in passing through Frederick Ambs, against whom there was this judgment, became affected with the lien of that judgment. But we are of a different opinion. We believe the true doctrine to be that in this case, by reason of the conveyance that Frederick Ambs made to Peter Ambs before he got the title, when he did get it, it inured to the benefit of Peter Ambs." See, also, *Skidmore et al. v. Pittsburgh, etc., Ry. Co.*, 112 U. S. 33, 5 Sup. Ct.

99, 28 L. Ed. 626; Cocke v. Brogan et al., 5 Ark. 693; Jones v. Green, 41 Ark. 363. 1 Black on Judgments (2d Ed.) 421 says: "The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person. And transitory seisin of lands by the judgment debtor, in trust for another, will not subject the lands to the judgment lien. To illustrate, in a recent case it appeared that A. agreed to purchase three lots from B. as agent for C., and the deed was made out to A., but he declined to receive it on the ground that he could not pay for the lots, and had agreed to let D. have them at the stipulated price. The agent refused to alter the deed, and D. paid the money to him, and A. conveyed the property to D. It was held that under these circumstances a judgment against A. was not a lien on the lands conveyed to D. The court observed that A. 'was vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit, and held the legal title in trust for D. Under such circumstances A. had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value.'"

No question is raised on the bona fides of the conveyance of lot 10 by Rogers and wife to Brown of date April 29, 1905, and none can be for the reason that, as neither Rogers nor his wife had title to said lot at that time, this creditor could not be defrauded by a conveyance of that which could not be subject to the payment of its debt. And no fraud is attempted to be predicated on that conveyance. As to the conveyance of May 1, 1905, by which Rogers got title from Hill to the lot, and which, we have just held, inured eo instante to the benefit of Brown, the court found, not that the same was a fraudulent conveyance in any sense, but "that soon after so obtaining said deed from said Hill for said lot No. 10 aforesaid, said Rogers left the Indian Territory, and went beyond the jurisdiction of the courts of said territory, and ever thereafter and at the present time remained out of said territory, and beyond the jurisdiction of said court at all times thereafter, before and after statehood of this state; * * * that said Brown is the son-in-law of said Rogers and wife; that said Rogers concealed the fact that he so owned said lot then, and failed and refused to have said deed from said Hill therefor recorded until after the said sale to said plaintiff, of all of which said Brown had full and complete notice at the time he so took said deed therefor from said Rogers." All of which is of no consequence in the view we have taken of the case; for if neither of the conveyances mentioned were fraudulent as to this creditor at their inception, they could not be rendered such by the fact that the grantee

in the second departed the state and failed to record it.

We are therefore of the opinion that, as the title to the lot in controversy passed from Rogers to Brown immediately upon the execution and delivery of the deed of May 1, 1905, from Hill to Rogers, there was no moment of time in which the lien of Keet & Roundtree Dry Goods Company could attach, and for that reason the judgment of the trial court is reversed, the cause to be proceeded with pursuant to the views herein expressed. All the Justices concur.

(35 Okl. 334)

MUSKOGEE ELECTRIC TRACTION CO.
v. REED.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 301, 549*)—NEW TRIAL (§ 26*)—PRESENTING QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL—DISCRETION OF COURT.

Errors alleged to have occurred at the trial in the lower court, unless the same are excepted to and thereafter assigned in the motion for a new trial and made a part of the record by means of case-made or bill of exceptions, will not be considered on review in this court.

(a) When no exceptions are saved to alleged errors occurring during the trial, though assigned in the motion for a new trial as grounds therefor, said motion is merely addressed to the discretion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755, 2441-2451; Dec. Dig. §§ 301, 549; * New Trial, Cent. Dig. §§ 37-39; Dec. Dig. § 26.*]

2. APPEAL AND ERROR (§ 237*)—REVIEW—QUESTIONS OF FACT.

Where the plaintiff permits issues joined to be submitted to the jury upon the evidence without objection and exception, the verdict on review in this court is conclusive, so far as such evidence is concerned, except as to "excessive damages, appearing to have been given under the influence of passion and prejudice."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.*]

3. DAMAGES (§ 95*)—ELEMENTS OF COMPENSATION—PERSONAL INJURIES.

In an action to recover damages for the injury to the person, the plaintiff is entitled to recover the expenses of the cure, or reasonably attempted cure, the reasonable probable cost of the future treatment or nursing, when the injury is permanent or irremediable, and the loss of time up to the verdict, and reasonable probable future loss from incapacity to do as profitable labor as before, and pain and suffering proximately caused by the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

(Additional Syllabus by Editorial Staff.)

4. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Where plaintiff's right thigh was broken, and she was confined to her bed for 8½ weeks, and her hospital and doctor's bill amounted to \$304, and at the time of trial she was walking on crutches, and complained of great pain, being unable to bear her weight on the fractured limb, which had become shorter than the other, and the question of her ultimate recovery was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

problematical, an award of \$5,000 damages was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Error from District Court, Muskogee County; John H. King, Judge.

Action by Barbara Reed against the Muskogee Electric Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

N. A. Gibson and H. C. Thurman, both of Muskogee, for plaintiff in error. Hutchings & German, of Muskogee, for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court, wherein the defendant in error, as plaintiff, sued the plaintiff in error, as defendant, to recover the sum of \$5,000 for damages on account of personal injuries alleged to have been occasioned by the negligence of the defendant. The parties hereto will be herein referred to in the order in which they appeared in the trial court. On March 14, 1908, the plaintiff, accompanied by her daughter, Lucile Pagett, who carried her baby in her arms, approached a west-bound electric street car of the defendant running on Broadway in the city of Muskogee. Said car stopped east of the east line of Third street; the front end of said car being about on a line with the sidewalk on the east side of Third street. The pavement on Third street was 30 feet wide, and the car 27 feet long. The plaintiff boarded the rear platform of said car, and, some time after she had both feet on the platform, the car was started. After it had proceeded in a westerly direction across an intersecting track running north and south in the center of Third street, the plaintiff fell from the car, striking the pavement on her feet, which turned under her, causing the injuries for which a recovery herein is sought. She fell facing in a southerly direction, with her head toward the west and her feet toward the east. Just before falling she was not holding to anything, and was unable to catch to anything whilst falling. At that time the car was moving very slowly, and proceeded not more than four or five feet from such place. As to the foregoing facts there was no conflict in the evidence. On the part of the plaintiff the evidence tended to show that when she fell from the car she was reaching for the baby in the arms of her daughter, who was standing on the pavement, for the purpose of taking it on the car. Neither the sufficiency of the evidence to warrant a recovery in favor of the plaintiff being challenged by demurrer thereto nor motion for a directed verdict, the cause was submitted to the jury under instructions, about which no complaint is made in this court. After a verdict in the sum of \$5,000 was returned duly signed by nine of the jurors in favor of the plaintiff, a motion for

new trial was filed in due time, assigning the following reasons why the same should be granted: (1) Verdict contrary to the law; (2) contrary to the evidence; (3) excessive; (4) due to prejudice and passion of the jury against the defendant; (5) not by a lawful jury. The only grounds presented in the brief are that: (1) The verdict is not supported by sufficient evidence; and (2) the same is excessive.

[1] It is well settled in this jurisdiction that errors occurring at the trial, not excepted to, will not be reviewed on appeal. *Saxon v. White*, 21 Okl. 194, 95 Pac. 783; *Capital Fire Ins. Co. v. Carroll et al.*, 28 Okl. 286, 109 Pac. 535; *Burnett v. Durant*, 28 Okl. 552, 115 Pac. 273. A motion for a new trial is intended for the purpose of bringing to the notice of the trial court errors and exceptions saved during the trial. When no exceptions are saved during the trial such motion presents nothing relative thereto for review in the appellate court; it being addressed merely to the discretion of the trial court. In *Schwinger v. Raymond*, 105 N. Y. 648, 11 N. E. 952, it is said: "The court below had the power to set aside the verdict as contrary to the evidence without any exception, but in this court we can consider no objection which is not based upon some exception taken at the trial, and the appeal to this court from the order denying defendants' motion for a new trial brings here only questions of law based upon exceptions taken at the trial. Therefore, however unjust this verdict may be upon the facts appearing in the case, we are powerless on that account to give the defendant any relief." See, also, to the same effect *Meyers v. Cohn*, 4 Misc. Rep. 185, 23 N. Y. Supp. 998.

[2] The plaintiff having elected to submit the issues to the jury upon the evidence without objection and exception, the verdict is conclusive in this court, except upon the ground that it is excessive and due to prejudice and passion. *Morgan & Wright v. McCaslin*, 213 Ill. 358, 72 N. E. 1066; *Railway Co. v. Shaw*, 220 Ill. 532, 77 N. E. 139; *Stanisfer v. Moser*, 42 S. W. 843, 19 Ky. Law Rep. 1022; *Wakely v. Johnson*, 115 Mich. 285, 73 N. W. 238; *Barrett v. Railway Co.*, 45 N. Y. 628; *Eckensberger v. Amend*, 10 Misc. Rep. 145, 30 N. Y. Supp. 915; *Paige v. Chedsey*, 4 Misc. Rep. 183, 23 N. Y. Supp. 879; *Nunn v. Bird*, 36 Or. 515, 59 Pac. 808; *Fassett v. Boswell*, 59 Or. 288, 117 Pac. 302.

[3, 4] The evidence shows that as a result of the injury sustained the plaintiff's right thigh was broken, being confined to her bed for 8½ weeks. Her hospital and doctor's bill amounted to \$304. The injury was a source of much pain and suffering. At the time of the trial she was walking on crutches, and complained of a great deal of pain, being unable to bear her weight on the fractured limb. One limb had become shorter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

than the other. The question of her ultimate recovery was problematical. Prior to the injury she had kept house, doing all of her work. Her two boys and married daughter lived with her. "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages." Comp. Laws of Okla. 1909, § 2881. "Detriment is a loss or harm suffered in person or property." Section 2882, Id. "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future." Section 2883, Id. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. These statutes seem to be substantially declaratory of the common law. In *Choctaw, O. & G. R. Co. v. Burgess et al.*, 21 Okl. 653, 97 Pac. 271, an action arising under the laws in force in the Indian Territory, in which jurisdiction the common-law rule as to measure of damages prevailed, it was held that in an action to recover damages for injury to the person, the plaintiff is entitled to recover the expense of the cure, or reasonably attempted cure, the probable costs of the future treatment or nursing, when the injury is permanent and irremediable, and the loss of time up to the verdict, and probable future loss from incapacity to do as profitable labor as before, and pain and suffering proximately caused by the injury. In the same case it was further held: "Appellate courts should sparingly exercise the power of granting new trials on the ground of excessive damages, and only when it appears that the verdict is so excessive as per se to indicate passion or prejudice." In *Independent Cotton Oil Co. v. Beacham*, 31 Okl. 384, 120 Pac. 969, it is said: "Compensatory damages is all the plaintiff is entitled to, and \$25,000, the amount of the verdict, to our mind, is clearly in excess of any sum that could properly be based solely upon the idea of compensation. The record is unusually free from errors, and there is nothing to indicate prejudice or passion on the part of the jury, except the size of the verdict, but we would be justified in inferring that there was prejudice and passion from the magnitude of the verdict. * * * It may be, however, that the jury was prejudicially influenced against the defendant by being permitted to take with them to the jury room for their consideration the second amended petition, answer, and reply, on which the case was tried. This often has been held to be error. * * * The pleadings, and particularly the petition, always set out the details of the injury with a harrowing particularity which is seldom entire-

ly supported by the evidence, and the jury may unconsciously have been misled by the statements contained in the pleadings, instead of confining their deliberations to the evidence, as was their duty. With a verdict that satisfied the judgment of the court, and a record otherwise free from error, we would be loath to set aside the verdict upon the last ground, and will not do so if the plaintiff within 15 days after the mandate is handed down files a remittitur for all in excess of \$10,000." In that case the plaintiff was about 20 years of age, by occupation a common laborer, and with an earning capacity of \$1.50 per day. If we were to conclude that the jury rendered an excessive verdict, in view of this authority, we would not reverse and remand the case, but order a remittitur, in which event, if the same was made, the case would be affirmed; but it is not clear to our minds that the jury was not justified in returning this verdict in the sum stated.

It follows that the judgment of the lower court must be affirmed. All the Justices concur, except DUNN, J., absent.

(35 Okl. 421)

RADER, Sheriff, et al. v. GVOZDANOVIC.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

PARTIES (§ 59*)—EXECUTION (§ 171*)—SUBSTITUTION—INJUNCTION.

Where, in a suit to restrain the execution of a judgment against him, on the ground that the land levied upon constituted the homestead of plaintiff and his family, and at the time the instrument merged in the judgment was executed the title thereto was in the United States, but that the same had subsequently been proven up, and where the court permitted an amendment by striking out the name of plaintiff and substituting therefor the name of his wife, *held*, that as such amendment did not change the claim, in view of Wilson's Rev. & Ann. St. 1903, § 4343, no error. *Held*, further, that the remedy by motion to quash was cumulative, and did not oust a court of equity of its jurisdiction to restrain the execution of the judgment, on the ground that it exerted no lien upon the land.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 90-94, 165; *Dec. Dig.* § 59; *Execution*, Cent. Dig. §§ 497-518; *Dec. Dig.* § 171.*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by Tomo Gvozdanovic against R. El. Rader, Sheriff, and others. Mary Gvozdanovic, the wife of plaintiff, was thereafter substituted in his place. Judgment for plaintiff, and defendants bring error. Affirmed.

W. S. Cline, of Newkirk, for plaintiffs in error. W. K. Moore, of Ponca City, for defendant in error.

TURNER, J. On May 4, 1909, Tomo Gvozdanovic filed in the district court of Kay

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

county his petition, and prayed for and obtained a temporary restraining order enjoining R. E. Rader, as sheriff of that county, from selling, under execution, a certain piece of land to satisfy a certain judgment, declared a lien thereon, which Stark Bros. had theretofore recovered against him in said court. After motion to dissolve, which seems not to have been passed on, defendants, who are plaintiffs in error, answered and justified under the writ, and for a second defense pleaded that the matter was *res adjudicata*, in that petitioner theretofore, in that case, had moved to quash said execution, on the ground, among others, that the same was his homestead, and the same had been overruled. On September 7, 1906, came petitioner and moved the court to substitute for him, as plaintiff, his wife, Mary, which was done; whereupon she filed an amended and verified petition, alleging, in substance, that the judgment sought to be enforced by the process complained of was not a lien upon the land, for the reason: "That the judgment which the said order of sale was issued to satisfy was rendered on the 1st day of December, 1905, on a written instrument signed by Tomo Gvozdanovic on the 31st day of August, 1894, which said instrument purported to give a lien on the aforesaid land, above described. That at the time that the said Tomo Gvozdanovic signed the said instrument on the 31st day of August, 1894, he was the head of a family and a married man"—and with his children was living on the land with this plaintiff, his wife. "That the said land was at that time, and is now, the homestead of the said Tomo Gvozdanovic and this plaintiff. That it was government land belonging to the United States at the time the instrument sued upon in this action was signed, and was not proved up and patent issued until the year 1903. That this plaintiff did not sign the said instrument which, it is alleged, became a lien upon the said land, and which the court attempted to foreclose in its judgment of December 1, 1905. That the said instrument so signed by Tomo Gvozdanovic was, on account of this plaintiff not signing the same with her husband, Tomo Gvozdanovic, absolutely null and void and of no effect, so far as creating a lien upon the land herein described, which was, and is now, the homestead of the plaintiff and Tomo Gvozdanovic. That no judgment has ever been rendered against this plaintiff, and no service of process has ever been served on her in an action against her, wherein it was sought to foreclose any lien upon the homestead in question. That she has never signed any instrument which gave, or purported to give, to Stark Bros. any lien upon her homestead. That a sale of the above-described property would result in great and irreparable damages to the plaintiff, and that she has no other speedy, adequate, or proper remedy

at law"—and prayed that the injunction be made perpetual.

After answer to said amended petition, in effect the same as to the petition of Tomo, there was trial to the court, which resulted as prayed, and defendants bring the case here. It is not assigned that the court erred in holding that the judgment exerted no lien upon this homestead. Defendants assign only that the court erred in sustaining the motion of Tomo and substituting his wife as party plaintiff; and that the judgment theretofore rendered, overruling his motion to quash this execution, was final and a bar to any further proceedings to execute the order of sale issued in said cause. They contend that plaintiff had an adequate remedy at law. As the amendment did not change the claim, the substitution made was proper. Wilson's Stat. of Okla. § 4343.

In *Hanlin v. Baxter*, 20 Kan. 134, Baxter sued Hanlin, before a justice of the peace, in damages, alleged to have been done by his cattle on certain land, the owner of which was not alleged. After Hanlin appeared and a jury had been accepted, Baxter obtained leave, over objection and exception, to substitute William O. for himself (John B. Baxter) as plaintiff in the amended bill of particulars. After judgment for William O. against Hanlin, the latter removed the cause by proceedings in error to the district court, which affirmed the proceedings and judgment of the justice. Further, on proceedings in error to the Supreme Court, Brewer, J., said: "Can a justice, under any circumstances, permit such an amendment? It may be remarked that, as no change was made in the allegation of the date of the trespass, or the premises upon which the trespass was committed, the cause of action was apparently the same; and the only change was that a different party was presented as entitled to recover for the damages done. It may be conceded that the circumstances are rare which will justify such an amendment; but that the power to make it exists must, we think, also be conceded. The authorities seem to warrant this"—and, after citing numerous authorities, affirmed the judgment.

There is no merit in the contention that the question adjudged by the action of the court in overruling Tomo's motion to quash this execution against him is *res adjudicata* as to him, much less as to her. That remedy being merely cumulative and available by either or both, it follows that to protect her homestead Mary had a right to resort to this remedy, the object of which is to restrain its sale under an execution on a judgment neither of which exerted a lien upon the land. *Love, Sheriff, et al. v. Cavett*, 28 Okl. 179, 109 Pac. 553.

The judgment is affirmed. All the Justices concur.

(20 Cal. App. 800)

DREYFUS v. RICHARDSON.

(Civ. 1,142.)

(District Court of Appeal, Second District, California. Dec. 31, 1912. Rehearing Denied by Supreme Court Feb. 28, 1913.)

1. BROKERS (§ 10*) — EMPLOYMENT — SOLE AGENCY—RIGHT OF OWNER.

An owner, who makes a real estate broker his sole agent for an indefinite period to procure a purchaser, may revoke the employment, unsupported by any other consideration than the mutual covenants implied in the contract of employment, at any time before a purchaser has been secured, and negotiate a sale himself, though, during the existence of the contract, he may not place the property in the hands of another broker for sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 11; Dec. Dig. § 10.*]

2. BROKERS (§ 46*) — COMMISSIONS — WHEN EARNED.

An owner making a real estate broker his sole agent to procure a purchaser sold the property to a purchaser who learned of the property from a third person, and who, without the knowledge of the agency, called at the office of the broker to procure a map, when he was for the first time told that the broker was the agent to procure a purchaser. The purchaser was adverse to dealing with the broker, and dealt directly with the owner. *Held*, that the broker was not the procuring and efficient cause of the sale, and could not recover commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 47; Dec. Dig. § 46.*]

3. BROKERS (§ 49*) — COMMISSIONS — WHEN EARNED.

A broker employed to procure a purchaser of real estate, who procures one who agrees to forfeit \$2,000, unless he consummates a purchase for \$40,000, does not thereby make a sale; for the contract is but the sale of an option to purchase.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

4. BROKERS (§ 49*) — COMMISSIONS — WHEN EARNED.

Where an owner employing a broker to procure a purchaser made a sale before a customer procured by the broker submitted any offer, the broker had not earned commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Louis G. Dreyfus against Julia M. Richardson. From a judgment for defendant, plaintiff appeals. Affirmed.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant. John J. Squier, of Santa Barbara, for respondent.

SHAW, J. This action was instituted to recover compensation for services alleged to have been rendered by plaintiff for defendant in the sale of certain real estate.

Plaintiff bases his right to recover upon three grounds, each of which, as a cause of action, is separately stated in the complaint. The first cause of action is based upon an exclusive agency given plaintiff, whereby defendant, in writing, authorized him to procure a purchaser for certain real estate own-

ed by her, it being alleged therein that plaintiff did procure two persons, to wit, Ellen C. Bothin and A. L. White, each of whom was ready, able, and willing to purchase the property at the price for which it was sold; that while the agreement was in force defendant employed another agent through whom she sold the property to said Bothin, all to plaintiff's damage in the reasonable value of the services rendered by him. It is alleged in the second cause of action that plaintiff, at the special instance and request of defendant, rendered services to defendant in procuring for defendant a purchaser for the real estate at the price of \$35,000, to whom and for said price defendant sold said property, in consideration of which she undertook and agreed to pay plaintiff the sum of \$1,750, alleged to be the reasonable value of the services performed. The third cause of action is founded upon an allegation that plaintiff, at the special instance and request of defendant, procured one A. L. White, who was ready, able, and willing to purchase the real estate at the price of \$35,000, in consideration of which defendant promised to pay plaintiff the sum of \$1,750, which was the reasonable value of the services rendered.

At the close of plaintiff's evidence defendant moved that a nonsuit be entered as to the third cause of action, upon the ground that there was no evidence tending to show that A. L. White was ever procured as a purchaser for the property at any price, or at all, or that he was at any time ready, able, and willing to buy the property at the price named, or at any price whatsoever. This motion was granted.

The jury called to try the case, and to whom the issues joined upon the first and second causes of action were submitted, rendered a verdict for defendant. Plaintiff appeals from the judgment entered in accordance therewith, and from an order of court denying his motion for a new trial.

Appellant's sole contention is that the verdict is not supported by the evidence. The facts which the evidence tends to establish, in so far as necessary to a determination of the question, are substantially as follows: Defendant, who resided in Riverside, Ill., owned a country place in Santa Barbara county, known as "Piranhurst." In October, 1908, she, by letter, authorized plaintiff to secure a purchaser therefor at the price of \$75,000. About a year later, no sale having been made, plaintiff wrote to defendant, suggesting that she reduce the price of the property to \$45,000 and make him her sole agent for the purpose of securing a purchaser thereof. Defendant, by letter dated October 14, 1909, assented to both propositions, thereby, as claimed by appellant, making him her sole and exclusive agent for the sale of the property. Plaintiff immediately caused to be put up at the place a sign announcing that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—11

the property was for sale by him as sole agent, and otherwise advertised the sale of the property, and thence on until the consummation of the sale in March, 1910, endeavored, without success, to find a purchaser. The fact that the property was on the market was, and had been for a long time, a matter of general knowledge in the community. In February, 1910, while H. E. Bothin and wife were temporarily guests of a hotel in Santa Barbara, his attention was attracted to the property by Mrs. Biddle, likewise a guest of the hotel. Thereupon he and his wife, with Mrs. Biddle, visited the property, and he concluded that he would buy it if it could be had at a satisfactory price; but learning from Mrs. Biddle and the gardener in charge of the place that it was held at \$45,000 he abandoned the idea and returned to his home in San Francisco. Later, about March 8th, he and his wife were again in Santa Barbara, when they called upon Mrs. Eaton, an old friend living near Piranhurst, and Mrs. Eaton, stating that she would like them for neighbors, asked why they did not buy Piranhurst. The party walked over and inspected the property, at which time Mr. Bothin asked Mrs. Eaton if she knew the defendant well enough to submit an offer of \$35,000, to which she replied that she did not, but spoke of Mr. E. P. Ripley as an old friend of defendant. Thereupon, by request of Mr. Bothin, she telephoned Mr. Ripley, without giving Mr. Bothin's name, asking if he thought defendant would accept a bona fide cash offer of \$35,000 for Piranhurst, and requested him, as an old friend of defendant, to transmit the offer, which Mr. Ripley did, receiving from defendant an acceptance of the offer, pursuant to which, through Mr. Ripley, the deal was closed. Plaintiff never saw or talked with Bothin, except on one occasion when, after Mr. Bothin had learned from Mrs. Biddle that the property was for sale, and without knowing the plaintiff was the agent therefor, but by reason only of the convenient location of his real estate office, he entered and asked for a map of the Montecito Valley, during which visit, not to exceed two minutes in duration, a son of plaintiff mentioned two or three places in the Montecito, among them Piranhurst, the location of which on a wall map he endeavored, without success, to point out to Bothin, who, disclaiming interest therein, got his map and, as plaintiff says, "moved out rapidly after that." The only offer which plaintiff ever secured was one made by A. L. White, whereby he offered to give \$2,000 for an option to purchase the property at the price of \$40,000, the option to be exercised in six months or a year; otherwise the \$2,000 to be forfeited. He could not say whether, under the circumstances, he would have paid \$35,000 cash for the property.

Upon these facts appellant claims, first, that defendant's sale of the property through

Mr. Ripley was a breach of her contract with plaintiff for an exclusive agency; second, that plaintiff was the procuring cause of the sale to Bothin, the purchaser of the property; and, third, that defendant's sale of the property to Bothin, without notice to plaintiff, prevented plaintiff from selling it to Mr. White.

[1] We attach little importance to the fact that defendant, without other consideration than the mutual covenants implied in the contract, made plaintiff her sole agent for an indefinite period. She not only had the right to revoke such agency at any time before he had secured a purchaser, since the agreement did not purport to give plaintiff an exclusive right of sale (*Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606), and conceding that during the existence of the contract she was prohibited thereby from placing the property in the hands of another agent with authority to sell the same (*Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 731), she, as owner, however, could, without revoking the contract, negotiate the sale thereof, or accept an offer to purchase the same. Mr. Ripley was not defendant's agent. As he states, with commendable modesty, he was an employé of the Atchison, Topeka & Santa Fé Railway Company, and, as he correctly says, was for the time acting merely as a messenger boy in transmitting to defendant an offer of a party to him at the time unknown. He possessed no authority from defendant to negotiate a sale of the property, or bind her by an agreement for a sale at any price, or even, so far as shown by the record, sign, as agent of defendant, the papers closing the deal, which act, however, was ratified by her. Had the purchaser hired a boy to deliver his offer to defendant at her hotel, it might with equal reason be claimed that the boy so employed was defendant's agent and the sale made through him. The sale was made directly by defendant, in accordance with her right so to do.

[2] The most that can be said in favor of appellant's contention that plaintiff was the procuring cause of the sale is that the evidence touching the question is conflicting. The first information that the property was for sale was obtained by Bothin from Mrs. Biddle. That he learned of the price at which the property was for sale through Mrs. Biddle or the caretaker, and not from plaintiff, must be accepted as true. After he had thus ascertained through others than plaintiff the facts necessary to enable him to determine whether he wished to acquire the property, he, without knowing of the relation existing between plaintiff and defendant, called at the former's office to procure a road map, when he was for the first time told that plaintiff was agent for this as well as other properties in the vicinity. This information imposed no obligation upon Bothin

to deal with defendant through plaintiff; indeed, it fairly appears that Bothin was averse to dealing with plaintiff, and the jury might well have concluded that he would not have made the purchase at all if required to conduct negotiations through plaintiff. While the fact that the property was for sale appears to have been a subject of conversation between plaintiff and Mrs. Biddle during social calls made by him, it does not appear when, where, from whom, or in what manner, Mrs. Biddle first obtained the information imparted to Bothin. Moreover, it conclusively appears that upon learning the price asked for the property he abandoned all idea of buying it. Several weeks thereafter, through the efforts of Mrs. Eaton, an old friend, he was induced to make to defendant direct an offer, which she accepted. The facts presented are not unlike those involved in the case of *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, and the recent case of *Cone v. Kell*, 18 Cal. App. 675, 124 Pac. 548, both of which constitute authority for holding that, under the facts in the case at bar, the jury were fully justified in concluding that appellant was not the procuring and efficient cause of the sale made by defendant.

[3, 4] There is not even a conflict of evidence upon the third cause of action, that by defendant's act in selling the property the plaintiff was prevented from selling the same to White, and as to which the court granted defendant's motion for a nonsuit. An option given to a person, whereby he agrees to forfeit the sum of \$2,000, unless he consummates a purchase of the property at a price of \$40,000, is by no means a sale of the property, but the sale of an option to purchase. *Pehl v. Fanton*, 17 Cal. App. 247, 119 Pac. 400. Moreover, defendant possessed the right to make the sale, and did make it, before any offer of White was submitted to her; hence, such act being in the exercise of her legal rights, it could not be deemed unlawful, even conceding that the offer of White to purchase an option was submitted to defendant, which it was not, and that, as suggested, he would have bought the property if he had known it could be had at the reduced price.

The judgment and order denying plaintiff's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(20 Cal. App. 733)

SHERMAN v. AYERS et ux. (Civ. 1,220.)

(District Court of Appeal, Second District, California. Dec. 28, 1912. Rehearing Denied Jan. 27, 1913.)

1. SALES (§ 178*)—PERFORMANCE.

There was no acceptance, within a provision of a contract of sale, providing that operation of certain machinery should constitute an acceptance, where the operation was merely

to procure information as to existing defects and determine whether the machine could be operated.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 451-455; Dec. Dig. § 178.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting in evidence, in an action on a contract to install machinery to recover the price, declarations by plaintiff's employees that certain machines had been improperly installed, and could not be put into condition, was harmless where the evidence conclusively showed that such declarations were in fact true, so as to prevent recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. SALES (§ 358*)—ACTIONS BY SELLER—ADMISSION OF EVIDENCE.

In an action on a contract to construct and sell a machine to recover the contract price, evidence as to the value of the plant installed in its uncompleted condition, the removal of which the purchaser had requested, was not admissible; plaintiff not being entitled to recover the value of the parts in the purchaser's possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by W. H. A. Sherman against C. W. Ayers and wife. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Stutsman & Stutsman, of Los Angeles, for appellant. Henry T. Sale, of Los Angeles, and Charles del Bondio, of Taft, for respondents.

ALLEN, P. J. In the original complaint it was alleged that plaintiff's assignors undertook the construction and installation of a certain electric engine, under and by virtue of a contract with defendant which specified what should be furnished and installed in connection with the engine, the total price for all of which was \$550. The contract contained a warranty as to material and workmanship connected with the installation. The complaint alleged that pursuant to the contract there had been installed, as by the contract specified, the engine and its equipment, and that no part of the consideration price had been paid. The answer denied that said engine and equipment had ever been installed as by said contract provided, and alleged that the same was defective in many essential parts and wholly failed to perform the work for which it was intended, and for that reason refused to accept the same; that plaintiff's assignors undertook the work of reconstruction and curing defects, but wholly failed to do so, and left the engine in a dismantled condition, with its various parts dispersed about the floor of the building where it is situate, and that defendant had repeatedly requested plaintiff's assignors to remove said plant from the premises because of its inferior character and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

their failure to carry out the contract. Under these issues theretofore framed the action proceeded to trial on the 23d day of March, 1911, before the court, a jury being waived. Thereafter in April an amended complaint was filed, which set forth various changes in the equipment to be furnished, and through which the contract price was increased to \$575. This amended complaint, filed after the trial, seems to have been filed by leave of court, presumably that the pleadings might conform to the proof. The court upon the trial found that the original contract was made as set forth in the complaint, but that the same had thereafter been altered and amended as in the amended complaint declared; that plaintiff's assignors did not furnish and install, in accordance with the written contract or the modification thereof, in a good and workmanlike manner, the engine and other equipment; that the same was wholly insufficient for the purposes intended; that plaintiff's assignors, after repeated efforts to put the plant in working order, abandoned the installation of the same, and took down the machinery and appliances and scattered the various parts about the building and premises; that by reason of their failure to perform the contract they were not entitled to recover judgment. There was a second cause of action about which there seems to be no serious controversy on this appeal, and need not be noticed. After the entry of judgment for costs in favor of defendant, plaintiff moved for a new trial, which was denied, from which judgment and the order denying a new trial plaintiff appeals.

The principal points raised upon the appeal relate to the insufficiency of the evidence to support the findings of the court. An examination of the record clearly shows that there was ample testimony adduced upon the trial tending to show that plaintiff's assignors never furnished and installed, as by their contract they were bound to do, the engine and equipment specified; that the equipment furnished and provided was defective and insufficient to perform the offices for which they were intended; that at no time after the same was placed in position did it perform the work which, by the guaranty in the contract, it was agreed should be performed; that plaintiff's assignors made repeated efforts at defendant's suggestion to try to cure the defects and to change and alter its installation in such a way as to produce favorable results. In this they seem to have wholly failed, and never did carry out the terms of the contract upon which the suit is brought.

[1] It is contended by appellant that a clause in the contract provided that operation should constitute acceptance, and that the use by defendant for a short time of the engine was tantamount to an acceptance. It is true that such contract did provide that operation should constitute acceptance, but

it certainly appears that no operation after a complete performance of the contract is shown. On the contrary, the whole of the operation, either by the employes of plaintiff's assignors, or by defendant after they left, was in an effort to procure, if possible, information as to any existing defects, and to determine whether or not the same could be made to operate. The evidence does not disclose such an operation as, under the authorities cited, constitutes an acceptance. The case of *Jackson v. Porter Land & Water Co.*, 151 Cal. 32, 90 Pac. 122, relied upon by appellant in support of the proposition that the operation was equivalent to an acceptance, is not an authority under the circumstances of this case. In that case the party had contracted for an engine of certain horse power; it was installed with lesser horse power; the purchaser had knowledge of that fact, and with such knowledge commenced and continued the operation of the pumping plant during an entire irrigating season, and then for the first time raised the question as to the horse power which should have been furnished. In the case at bar the defects were apparent, were recognized, and the attention of plaintiff's assignors was called to them. The operation was not one, under the circumstances, after completion and was not such as would justify a court in saying that the machinery had ever been operated, or that the attempt at operation was the equivalent of acceptance.

[2] Objections were made to the introduction of certain evidence as to the declarations of servants sent by plaintiff's assignors to repair defects, the effect of which declarations was that the machine had been improperly installed, and could not be put in condition. Conceding the error of the court in permitting the introduction of such testimony, nevertheless the case was tried to the court, and evidence is so complete and convincing to the effect that these declarations were true in fact, and that plaintiff's assignors did not comply with the contract, that no prejudicial error could result under the circumstances of the case by reason of the admission of such declarations.

[3] We see nothing in the evidence warranting the contention that the engine was ruined through any act, abuse, or neglect upon the part of the purchaser. The action being based upon an express contract, which the court finds was never performed upon the part of plaintiff's assignors, we see no error in refusing to allow plaintiff to show the value of the plant installed in its uncompleted and imperfect condition. It is true that defendant at the time of the trial still had possession of the parts, scattered about the building, but he had, shortly after discovering that it could not be made to work, and the failure upon the part of plaintiff's assignors to make it work, notified them to remove it. This they failed to do, and we do not conceive it to be the law that they could

recover in this action, under the pleadings, the value of any of these materials or parts so in defendant's possession. A careful examination of the record satifies us that the findings of the court have ample support from the evidence, and that the judgment is supported by the findings.

The judgment and order are therefore affirmed.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 708)

McTIGUE v. ARCTIC ICE CREAM SUPPLY CO. et al. (Civ. 1,103.)

(District Court of Appeal, First District, California. Dec. 27, 1912. Rehearing Denied Jan. 24, 1913. Denied by Supreme Court Feb. 25, 1913.)

1. CORPORATIONS (§ 375*)—LEASE OF PROPERTY—VALIDITY.

A lease of the entire business of a private corporation authorized by resolution adopted at a meeting of stockholders, representing more than two-thirds of the capital stock, was valid under the express provisions of Civ. Code, § 361a.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1525-1529; Dec. Dig. § 375.*]

2. CORPORATIONS (§ 379*)—"PARTNERSHIP"—REQUISITES—SHARING PROFITS AS RENT.

A lease by a corporation of its business and property for a period of five years, providing for the payment as rental of a sum equal to 25 per cent. of the profits, to be estimated by deducting the necessary cost of manufacturing and marketing the products of the business from its gross returns, and expressly providing that it should not be construed as creating a partnership or tenancy in common, but that the division of profits should be construed merely as a method of ascertaining the rental, did not create a partnership between the corporation and the lessee, within Civ. Code, § 2395, defining a "partnership" as an association of two or more persons for the purpose of carrying on business together and dividing the profits between them, notwithstanding section 2404, providing that an agreement to divide profits implies an agreement for a corresponding division of the losses, since there was no agreement to divide profits, and no intention to create a partnership.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1538; Dec. Dig. § 379.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

3. PAYMENT (§ 82*)—RECOVERY—ACTIONS—PARTIES.

Where a purchaser of a business refused to complete the purchase unless property in possession of a livery stable keeper, and upon which the keeper claimed a lien, was delivered, and, in order to consummate the sale, the seller authorized the purchaser to pay such claim from the purchase money, a recovery of the payment by the seller could not be denied on the ground that the payment was not made by it; the payment having, in effect, been made by it through the purchaser.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.*]

4. LIVERY STABLE KEEPERS (§ 8*)—CARE OF HORSES AND VEHICLES—LIEN.

Under Civ. Code, § 3051, providing that every person who, while lawfully in possession of an article of personal property, renders any

service to the owner thereof, by labor or skill, for its protection, improvement, safe-keeping, and carriage, has a lien thereon, dependent on possession, and that livery, boarding, or feed stable proprietors have a lien dependent on possession for their compensation in caring for, boarding, and feeding horses, a livery stable keeper had no lien, as against the owner, on horses and wagons, in his possession, for his services in caring for and keeping them under a contract with a lessee thereof, where he knew of the existence of the lease, and that under it the lessee had no authority to incur debts against the lessor or its property.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. §§ 7-10; Dec. Dig. § 8.*]

5. PAYMENT (§ 82*)—RECOVERY—"VOLUNTARY PAYMENT"—WHAT CONSTITUTES.

Where a purchaser of a business refused to complete the purchase unless property in the possession of a livery stable keeper, and upon which he claimed a lien, was delivered, and the seller, to prevent a failure to consummate the sale, which would have resulted in great loss and damage to it, paid the livery stable keeper's claim under protest, it was not a "voluntary payment," and, where the claim was unfounded, could be recovered back, since the general rule that, if a person knowingly submits to an illegal demand by paying it, the payment will be deemed voluntary, is subject to the qualification that where the person making the demand has obtained possession of the other's property, without any resort to judicial proceedings to test the validity of his demand, payment under protest will be considered compulsory, if the demand be unlawful, and if the delay necessarily incident to the recovery of the property, by legal process, would have resulted in serious loss.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7352-7354.]

Appeal from Superior Court, City and County of San Francisco; John Van Nostrand, Judge.

Action by Joseph W. McTigue against the Arctic Ice Cream Supply Company and others. From a judgment in favor of the defendant named, and an order denying a new trial, plaintiff appeals. Affirmed.

Wm. P. Hubbard, of San Francisco, for appellant. Wm. J. Hayes and S. J. Hankins, both of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sought to recover from the defendants Arctic Ice Cream Supply Company, a corporation, and George W. Morse, the sum of \$921.35, claimed to be due to the plaintiff under the terms of an oral agreement alleged to have been entered into with the plaintiff by the defendants Arctic Ice Cream Supply Company and Morse jointly, for the care, feed, and treatment of 12 horses belonging to the corporation, and which it was claimed were used by it in the transaction of its business at the time the indebtedness here sued on was incurred. Seven of the stockholders of the corporation defendant were joined as defendants in the action, but the demurrers of five of them, viz., Eggers,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Powers, Parker, Harbour, and Kellum, were sustained by the lower court; and subsequently, at the request of the plaintiff, the action as to these particular defendants was dismissed. The record does not show that the defendants Binglay and Parry appeared in the action, or that any judgment was rendered for or against either of them. The defendant Grace D. Ohninus, sued as a stockholder, joined in the answer of the defendant corporation.

The trial was commenced March 30, 1910, and upon May 26th of the same year the defendant George W. Morse filed his consent to a judgment against him in the sum of \$921.35. Judgment was rendered and entered accordingly; and, after a trial of the action against the defendants Arctic Ice Cream Supply Company and Grace D. Ohninus, judgment was rendered and entered on April 26, 1911, that the plaintiff take nothing by his action, and that the corporation defendant recover from the plaintiff on a counterclaim the sum of \$350.

Plaintiff's complaint alleges that the plaintiff was a livery stable proprietor, and, among other things, "that on or about the 26th day of July, 1908, plaintiff made and entered into an agreement with the defendant Arctic Ice Cream Supply Company, a corporation, and George W. Morse, wherein and whereby the plaintiff, as such livery stable proprietor, agreed with said defendants to keep, care for, feed, treat, and generally provide for all horses to be furnished by the defendants at the rate of \$20 per month; that under and by virtue of the terms of said agreement, between the 25th day of April, 1908, and the 24th day of July, 1909, the defendants furnished, and the plaintiff kept, cared for, fed, treated, and generally provided for, 12 horses;" and that for such services "there now remains due and unpaid from said defendants the sum of \$921.35." The defendants Arctic Ice Cream Supply Company and Grace D. Ohninus by their answer denied these allegations, and every other material allegation of the plaintiff's complaint.

Upon the trial of the case, it was not disputed that the plaintiff had rendered the services sued for, relating to the care and keeping of the horses; and, upon this phase of the case, the sole defense of the defendants Arctic Ice Cream Supply Company and Grace D. Ohninus was framed upon the theory that the corporation was under no legal obligation to pay plaintiff's claim, because the services sued for were rendered after the execution of a lease of the corporation's business to the defendant Morse. In support of this defense, there was offered and received in evidence a contract of lease made and entered into by the corporation defendant and the defendant George W. Morse, which lease it was shown was duly executed by the officers of the corporation, with the

consent, expressed by vote at a stockholders' meeting, of stockholders holding of record more than two-thirds of the issued corporate capital stock. By this lease the corporation demised and let unto the said George W. Morse, for the term of five years, the real and personal property and the ice cream business of the corporation. The lease provided that said George W. Morse should pay to the Arctic Ice Cream Supply Company as rental, on the 1st days of January, April, and October through each year of the life of the lease, a sum equal to 25 per cent. of the profits of the business. Such profits were to be estimated by deducting from the gross returns of the business the necessary cost of manufacturing and marketing its products. Although there was no agreement, expressed or implied, that the corporation should share the losses, if any, of the business, the lease concluded with the clause that: "Nothing herein shall be so construed as to constitute the business into a partnership or tenancy in common of said business; but the division of the profits hereinbefore provided shall be construed merely as the method of ascertaining the rental to be paid."

The evidence adduced at the trial, in addition to the lease above referred to, was practically without conflict, and fully supports the findings of the court made upon the main issues, which were to the effect that the plaintiff did not at any time enter into an agreement with the corporation defendant, or with said defendant and defendant Morse jointly, for the care and keep of said corporation's horses; that on or about the said 24th day of June, 1908, the corporation defendant leased its business and all of its personal property, including the horses mentioned in plaintiff's complaint, to the defendant George W. Morse for the period of five years, who thereupon went into the possession, use, and occupation of said business and personal property, and continued in such possession, use, and occupation until about the 1st day of February, 1909; that it was provided in said lease that said Morse would be responsible for all of the debts contracted by him in carrying on said business; that at no time did the defendant Morse, as such lessee, have any authority, under the terms of said lease or otherwise, to incur debts of any kind for and on behalf of the corporation defendant; that the plaintiff attended a meeting of the stockholders of the corporation defendant on the 16th day of June, 1908, and with other stockholders, representing more than two-thirds of the issued corporate capital stock, voted in favor of a resolution authorizing the directors of the corporation defendant to execute the lease in question to the defendant Morse; that the plaintiff at all times had full knowledge of the terms and conditions of said lease, and had full knowledge that the defendant Morse was in possession of said business and said

personal property as lessee, pursuant to the terms and conditions of said lease, and had no authority whatsoever to incur debts of any kind for or on behalf of the defendant corporation. No claim is made here that the evidence adduced at the trial does not support these findings. The only point relied upon by the plaintiff for a reversal of the judgment rendered in favor of the defendants, upon the issues raised by the complaint and the answer, involves the construction and validity of the contract entered into by the corporation defendant and the defendant Morse.

It is the contention of the plaintiff that the contract in controversy, although designated a lease, and containing covenants of forfeiture and re-entry and all of the usual covenants of a lease, was not in fact a lease, but was in its legal effect an agreement of copartnership. Plaintiff further contends that, whether such contract be construed as a lease or an agreement of copartnership, it is in either event void as an ultra vires act of the corporation. From this it is argued that the defendant Morse, in his dealings with the plaintiff, was, in the absence of a valid agreement to the contrary, merely acting in the capacity of an agent of the corporation, and therefore Morse's contract with the plaintiff, for the stabling of the horses, was the contract of the corporation.

[1] None of these contentions is tenable. It is the rule of law in this state that an ordinary private corporation may lease its entire business whenever such a course is necessary for the best interests of the corporation stockholders and creditors. The only legislative restriction placed upon the execution of such a lease is that the consent of the holders of at least two-thirds of the issued corporate capital stock must be first procured, and that such consent shall be expressed either in writing and acknowledged by such stockholders and made a part of the lease, or by vote at a stockholders' meeting called for the purpose of considering and consenting to such lease. Civ. Code, § 361a; *South Pasadena v. Pasadena Land, etc. Co.*, 152 Cal. 579, 93 Pac. 490; *Graham v. Pasadena Land & Water Co.*, 152 Cal. 596, 93 Pac. 498.

The evidence in this case shows that the lease in question was executed in conformity with the statutory requirements. In this connection it will be noted that the plaintiff does not claim that he was in ignorance of the existence and the scope and effect of the lease, or that his dealings with the defendant Morse were those of a creditor induced to give credit upon the strength of a real or an ostensible partnership. In the absence of such a claim, and in the presence of a decided preponderance of the evidence showing that the plaintiff relied solely upon the obligation and credit of the defendant Morse, we are not called upon to consider

the means and methods employed in the conduct of the business of the Arctic Ice Cream Supply Company, prior to and subsequent to the execution of the lease, in order to determine what would be the rights of a creditor of Morse, who was not informed as to the real relation of the parties to the lease. It may be conceded, as counsel for the plaintiff contends, that the decided weight of authority is to the effect that a corporation cannot lawfully enter into a copartnership agreement with another corporation, nor with an individual, unless expressly empowered to do so by the terms of its charter.

[2] The rule in this behalf, however, need not be further discussed or considered, because we are satisfied that the contract in question here has none of the essentials of a partnership agreement, and is in our opinion just what it plainly purports to be, viz., a lease. The fact that the lease provided that the rent reserved should be a sum equal to 25 per cent. of the net profits of the business did not, in and of itself, establish a partnership relation between the corporation defendant and the defendant Morse. *Smith v. Schultz*, 89 Cal. 527, 26 Pac. 1087.

A partnership is defined to be "an association of two or more persons for the purpose of carrying on business together and dividing the profits between them" (Civ. Code, § 2395); and it is true, generally, that, in the absence of a stipulation to the contrary, "an agreement to divide the profits of a business implies an agreement for a corresponding division of the losses." Civ. Code, § 2404. In the present case, however, there was no agreement to divide the profits, and consequently there was no corresponding obligation to share the losses of the business. In the absence of such an obligation, express or implied, it cannot be said that a partnership agreement existed in the general or in any sense of the term. Moreover, a convincing and conclusive test of the existence of a partnership agreement is usually to be found in the intention of the parties, as gathered from the instrument itself, which it is claimed creates the partnership. Nowhere in the instrument under discussion is there to be found any intimation or suggestion that the corporation defendant was to be a general partner of the defendant Morse. On the contrary, that instrument expressly declares that nothing therein shall be construed as constituting a partnership, and, upon the whole, clearly indicates that a partnership was neither contemplated nor created. The instrument in question was in form and effect a lease for a definite term of years; and, as was said in the case of *Smith v. Schultz*, supra, "the idea of a permanent lease for a definite term of years is at war with the notion of such an indeterminate and fitful relation as a partnership."

In addition to its answer, the defendant corporation pleaded a counterclaim against

the plaintiff, in effect, for moneys had and received in the sum of \$350. The allegations of the counterclaim were, in substance and effect, these: On or about the 1st day of February, 1909, the corporation defendant, apparently with the consent of the defendant Morse, entered into an agreement to sell its business and all of its personal property to one C. O. Swanberg for the sum of \$5,000. Prior to and at the time of the sale, the plaintiff had and held in his possession certain personal property belonging to the corporation defendant, which was included in the sale to Swanberg. Plaintiff refused to relinquish the possession of the property unless he was paid the sum of \$350, which he claimed was due to him for its care and keep from the corporation defendant. Swanberg refused to complete the sale unless this particular property was delivered to him. The failure to consummate said sale would, it was alleged, have resulted in great loss and damage to the corporation defendant; and, to save itself from such loss and damage, it was "compelled, * * * under protest, to permit said C. O. Swanberg to pay to plaintiff the sum of \$350, and deduct the same from the price originally agreed upon for the sale." In brief, the counterclaim is founded upon the theory that the plaintiff obtained the \$350 in question from the corporation defendant by "duress of goods." The lower court accepted this theory, and accordingly rendered judgment on the counterclaim in favor of the corporation defendant in the sum of \$350.

Upon the issue raised by the counterclaim, it was the finding of the lower court, in substance, that the corporation defendant was compelled, in order to save itself from loss and damage, and "under protest, to permit" one C. O. Swanberg to pay over to the plaintiff the sum of \$350. Upon this phase of the case, the record shows the evidence to be, in effect, as follows: On the day of the sale hereinbefore referred to of the corporation defendant's business to Swanberg, it so happened that four horses and several wagons used by Morse in carrying on the business of the Arctic Ice Cream Supply Company, and previously stabled with the plaintiff under a contract with Morse, were not put to work, and consequently remained in the stable. The plaintiff held this particular property, which was valued at \$350, under a claim of lien for services rendered in its care and keep, and refused to deliver it either to Swanberg or the corporation defendant, except upon payment of a sum of money equal to the value of the property, on account of the entire sum which plaintiff claimed was due to him under his agreement with the defendant Morse. The plaintiff refused to recede from this position, and Swanberg threatened to abandon the purchase of the corporation defendant's business and assets, unless the particular property in question was immediately released and delivered to

him. Thereupon the corporation defendant consummated the sale to Swanberg by permitting him, under protest, to pay plaintiff's claim and deduct the amount thereof from the purchase price of the property previously agreed upon between them.

The sufficiency of the evidence to support the findings of the trial court, upon this phase of the case, is assailed by counsel for plaintiff. In this behalf it is contended that plaintiff's claim was satisfied by Swanberg, and not by the corporation defendant; that, in either event, the payment of plaintiff's claim was a voluntary payment; and, finally, that the plaintiff, in retaining possession of the property in question, and making demand for a partial payment of the debt due to him from Morse, was simply exercising the right, given him by section 3051 of the Civil Code, of claiming and maintaining a lien upon property lawfully in his possession for services rendered in the care thereof.

[3] The first of these contentions may be disposed of with the statement that the evidence shows clearly that the payment of the plaintiff's claim by Swanberg was for and on account of the corporation defendant, and was therefore, in effect, a payment by the corporation defendant.

[4] Upon the facts of the present case, plaintiff was not entitled to a lien upon the property in question, as against the corporation defendant. While it is not disputed that the plaintiff rendered the services upon which his claim of lien was founded, the evidence upon the whole case shows, without conflict, that plaintiff's contract for the care and keep of the horses and other property, upon which a lien was claimed, was made solely with the defendant Morse. Plaintiff was fully informed of the existence of the lease from the corporation defendant to the defendant Morse, and knew that, under the terms of the lease, Morse had no authority to incur debts against the corporation defendant or its property. That the plaintiff knowingly gave credit solely to Morse, and did not look to the corporation defendant or its property for the payment of the claim in controversy, is evidenced by plaintiff's statement to that effect, which was made at a stockholders' meeting of the corporation, when the subject of Morse's care and keep of the corporation property was under discussion. Plaintiff's knowledge of the fact that Morse was only the lessee of the property in question, without authority to incur debts against the corporation or to create a lien against its property, brings the present case squarely within the rule declared in the case of *Lowe v. Woods*, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301, where it was said, in effect, that the lien provided by section 3051 of the Civil Code can be created only by the act of the owner of the property sought to be charged, or by the act of a person duly authorized to act for the owner.

[5] The contention that the satisfaction of plaintiff's claim constituted a voluntary payment is founded upon the theory that the corporation defendant, if it had been so disposed, might have contested plaintiff's right to a lien in an action at law, not only for the recovery of the possession of the property, but for damages, as well, for the detention thereof. From this it is argued that, inasmuch as the corporation did not see fit to stand upon its legal rights, but yielded to the demand of plaintiff, it brought itself within the general rule of law that, if a person knowingly submits to an illegal demand by paying that which is demanded, instead of invoking the remedy which the law affords against such demand, such payment will be deemed to be voluntary. This general rule, however, is subject to the qualification that in cases where the person making the demand obtains possession of the property of another, without first having had resort to judicial proceedings to test the validity of his demand, payment under protest will be considered compulsory, and the money so paid can be recovered back, if the demand be unlawful; and the delay necessarily incident to the recovery of the property by legal process would result in serious loss to the owner of the property. *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; *Mearkle v. County, etc.*, 44 Minn. 546, 47 N. W. 165; *De Graff v. Board*, 46 Minn. 319, 48 N. W. 1135.

In the present case, the evidence shows that the situation of the corporation defendant was such that, if it had failed to secure an immediate release of the property in question, it would have sustained serious, perhaps irreparable, loss, which could not have been avoided or remedied by resorting to an action at law, and therefore it cannot be held that the satisfaction of the plaintiff's demand constituted a voluntary payment.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

(20 Cal. App. 751)

PETERSEN v. CALIFORNIA COTTON MILLS CO. (Civ. 1,000.)

(District Court of Appeal, Third District, California. Dec. 30, 1912. On Rehearing, Jan. 28, 1913. Rehearing Denied by Supreme Court Feb. 23, 1913.)

1. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In a servant's action for personal injuries by being caught in revolving machinery, while standing on a ladder applying a compound on a revolving belt, evidence held to make it a jury question whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 229*)—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

In determining whether a servant exercised ordinary care, all of the circumstances of his situation when injured, including his physical surroundings, the apparent risk, the demands of his duty, and his superior's orders, should be considered.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.*]

3. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A servant is not necessarily negligent in acting upon the presumption that his employer has discharged, and will discharge, his duty toward him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 153*)—WARNING SERVANT.

A master must give suitable warning and instructions to a minor employé as to any danger which is not sufficiently obvious to one of such employé's intelligence or experience, who is in the exercise of ordinary care, especially where the minor is ordered to work in a new situation.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

5. NEGLIGENCE (§ 136*)—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Where reasonable men may differ as to the proper inference to be drawn from the facts, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

6. TRIAL (§ 365*)—SPECIAL FINDINGS—CONSTRUCTION.

Special findings should be construed, if possible, so as to harmonize them with each other and with the general verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 871-874; Dec. Dig. § 365.*]

7. TRIAL (§ 359*)—SPECIAL FINDINGS—INCONSISTENCY WITH GENERAL VERDICT.

Special findings will not be allowed to control over the general verdict, unless they exclude every theory which sustains the verdict, and are inconsistent therewith only when, as a matter of law, they authorize a judgment different from that authorized by the verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

8. MASTER AND SERVANT (§ 297*)—ACTION FOR PERSONAL INJURIES—SPECIAL FINDINGS—CONFLICTING FINDINGS.

An answer to a special interrogatory, finding positively that the master was negligent, would not be affected by another answer, involving the same question, "The preponderance of the evidence answers affirmatively," or, "We believe so," nor could a categorically negative answer be affected in the same way.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

9. TRIAL (§ 350*)—SPECIAL INTERROGATORIES—QUESTIONS OF LAW.

A special interrogatory as to what was the proximate cause of the accident was improper as involving a question of law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

10. TRIAL (§ 359*)—SPECIAL FINDINGS—CONTROL OF GENERAL VERDICT.

All presumptions favor a general verdict for plaintiff if there is evidence to support it, unless it is absolutely irreconcilable with the special verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

11. MASTER AND SERVANT (§ 296*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The court properly authorized the jury, in a servant's injury action, to consider on the question of the degree of care required to be exercised by plaintiff the fact that the servant was acting under the direct order of his employer; such instruction not relieving the servant from exercising due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

12. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In an employe's injury action, the court instructed that, if the jury found that the task at which plaintiff was working was one of special danger, then such knowledge of danger as plaintiff may have acquired at the usual tasks of his employment does not necessarily raise the presumption that he knew of the special danger; that a servant directed to undertake work outside of his ordinary employment was not presumed to be aware of its peculiar risks, and if his employer does not fully explain them before putting him to such new work, the servant may assume that it has no greater risk than the risks of his regular work. *Held*, that the instruction was not erroneous as assuming that there was any special danger in the new work, or that plaintiff's only source of knowledge was that acquired from his usual work, or that the employer was required to fully explain the danger regardless of any knowledge had by the servant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Christian Petersen against the California Cotton Mills Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

C. H. Wilson, of San Francisco, and Geo. E. De Golia, of Oakland, for appellant. Snook & Church, of Oakland, for respondent.

BURNETT, J. While in the employ of defendant, plaintiff was injured as a result of being caught by certain revolving machinery. His action for damages resulted in a verdict by a jury in his favor for the sum of \$4,000. The appeal by defendant is from the judgment and an order denying its motion for a new trial.

It is alleged in the complaint that plaintiff was ordered and directed by one Peter MacDougald, the foreman in the machine shop, to apply some compound on a belt which was revolving at a high rate of speed between pulleys attached to a beam at a height of about 16 feet from the floor; that the foreman placed a ladder against said beam, and directed plaintiff to mount it for the purpose of applying said compound; that

the task was very dangerous, since the ladder was not supplied with hooks to hold it firm, and it was but little over 16 feet long, so that when placed against said beam it stood almost perpendicular to the floor of the shop; that the foreman and defendant knew that it was not a proper or safe ladder with which to perform said task; that the plaintiff was not acquainted with and had no knowledge of the danger in mounting said ladder, and neither said foreman nor said defendant warned or instructed him that said ladder was unsafe or dangerous; that plaintiff obeyed the said order of the foreman, and, while applying the compound to the belt, the ladder slipped and slid sideways, without any fault of plaintiff, and thereby he was precipitated against a revolving shaft which was propelled by the said belt, and he was whirled about the shaft with great violence, and serious injury resulted: that the shaft was in two parts, and was coupled together by means of a collar fastened by set screws which projected about three-fourths of an inch from the surface; that the coupling was unsafe and dangerous by reason of said projecting screws; that this was known to defendant and unknown to plaintiff; and that defendant well knew that plaintiff was a minor of the age of 17 years or thereabouts and had never been employed as a machinist or mechanic, and did not know or appreciate the danger or risk in the use of, or contact with, the machinery in said shop or in the use of or handling of the appliances or tools in said shop, and well knew that the plaintiff was ignorant of the hazard and danger connected with said employment.

The plaintiff testified that he had been continuously at work for defendant for seven months; that he worked in the machine shop, that he was just a "roustabout"; and that he did everything that he was asked to do, "such as running errands, carrying tools, doing oiling, and other things like that." He said that immediately prior to the accident he was doing a job on the lathe, getting the center on some truck wheels. He described the accident as follows: "The accident occurred about 11 o'clock in the morning. As I was working at the lathe the first thing I heard was Mr. MacDougald yelling at me, and he asked me if I didn't hear that belt squeaking, and as soon as he yelled at me I ran over to see what he wanted, and he says, 'Get some compound, and put some compound on it,' and I did that; it was laying right near me, and I got the compound. Mr. MacDougald was the foreman of the shop, and had been the foreman during the seven months that I had worked there immediately prior to the accident. I had been in the habit of doing as he directed in the shop. There was a little noise in the shop. I was about six feet from him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

when he spoke to me. I then took the compound, as he told me to do, and went up the ladder and reached through to apply the compound onto the belt, and somehow or other the ladder slipped and I was thrown over onto the coupling, and my clothing was caught and I was whirled around and became unconscious. The foreman, MacDougald, placed the ladder there about ten minutes prior to the accident. I saw him place it there. The ladder was placed almost perpendicularly, the upper portion projecting slightly over the beam." He stated further that the belt was revolving at a high rate of speed; that he had never been up on that ladder before, or on any ladder to apply compound to that belt or shaft; that he had never examined the shaft or noticed how it was joined; that his usual work was confined to the floor; that the foreman did not caution him as to any danger; that his attention was never directed to the hazardous risk of any task he was performing in the shop; that when he mounted the ladder he did not know that he was in an unsafe position, or that it was dangerous to be in proximity to the shaft.

Considering the distance from the floor to the belt, the rapidity with which the latter was moving, the close proximity of the shaft, and the projecting screws, and also the position of the ladder, it is unquestionable that he was in a perilous position when he had ascended to the belt in obedience to the command of the foreman. It is equally undeniable, and it is not denied, that he should have been cautioned or warned of the danger by the foreman, unless he appreciated the situation and needed no such admonition. But, while admitting that "it was the duty of the defendant to instruct the plaintiff, if he were ignorant, as to the risks and dangers of his employment," it is insisted by appellant that "the law does not require a useless act," and that by reason of "instruction, observation, and prior experience" the plaintiff had knowledge of the danger, and therefore he is deemed in law to have assumed the risk, or, in other words, he "was guilty of contributory negligence in encountering a known danger." In support of this position quotation is made from the cross-examination of plaintiff, in which he described fully his work and experience in the shop, and displayed such knowledge of the mechanism as we might expect from one engaged as he was and for the stated length of time. To show that he was familiar with the danger incident to the operation of the various contrivances, such questions as the following were asked, to which we also give the answers: "What oiling did you do for the defendant? A. Only the oiling that was customary for the boys around the place to do; that is all I did. Q. Well, you oiled the bearings of the machines? A. Yes, sir. Q. Now, when you left the employ of the defendant, on the 7th of April, 1902, what

was the cause of your leaving? You had an accident? A. Yes, sir. Q. What was that accident? A. I had got my arm hurt. Q. The same arm? A. Yes sir. Q. How did it happen? A. I was down in the basement putting water on some bearings that were running hot, and they instructed me to stay there and watch them and put water on them all the time, and they placed—Mr. Rat-tray placed—a ladder so that I could climb up and reach, and, of course, that is the way I got hurt. Q. That ladder slipped, did it? A. Yes, sir. Q. Was it placed against a beam? A. No, sir; it was a stepladder. Q. This accident was the result of your being caught either by the pulley or belt or shaft, the first accident? I understand you to say you don't know how it occurred? A. I was unconscious. Q. But it happened by reason of your being caught on either the shaft or pulley or belt? A. Yes, sir." Referring to the accident complained of, which occurred nearly two years after the first accident, the witness testified as follows: "Q. You knew that you couldn't stop that pulley by your hand, by holding it? A. I did. Q. You knew, also, that you couldn't stop the shaft that was revolving? A. Yes, sir. Q. And you knew that if you attempted to stop it you would be hurt? A. Yes, sir. Q. And you knew if your clothing or anything got attached to the belt, it would pull your clothing, didn't you? A. Yes, sir. Q. And if you got attached to the shaft it would pull your clothing, too? A. Yes, sir. Q. And that you would get hurt? A. Yes, sir." We find similar questions and answers in reference to the pulley and set screws. He testified also that he knew how a ladder ought to be placed, and that if it was placed right it would not slide.

[1] This examination took place more than four years after the accident, and it is quite likely that the added knowledge and wisdom of the intervening time is somewhat reflected in the answers of the witness. Regardless of this, however, it would be surprising if he had shown ignorance of these things. He did not need the painful experience of the former accident to teach him that it was dangerous to come into contact with the pulley or the belt or the screws or the shaft, or that a ladder not properly placed is likely to slip. To obtain this knowledge the ordinary boy of 14 or 15, or even younger, would require much less time in the shop than was spent there by plaintiff. Indeed, most active boys of that age, enjoying the advantages of observation and education afforded in our cities, are cognizant of these mechanical devices, and of the simple elements of physics that are involved in their use and operation. We would be surprised to find upon the street a boy of 14 who would declare that he did not know that if he mounted a long ladder that was placed almost perpendicularly, and not braced, he was likely to fall, or that if, by the sliding of the ladder, he

was thrown upon a belt or shaft moving with great rapidity, injury would probably result to him. The Socratic method of the examination was admirable, and it revealed an intelligent and candid witness, but the conclusion that his answers required the withdrawal of the question of negligence from the jury is opposed to the principle enunciated in well-considered cases and is the result of a failure to give due prominence to certain significant features of the occasion. These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor, and presumably without the judgment of an adult; that he was ordered by his superior to do the work which was outside of and more hazardous than his usual employment; that he was expected to, and did, obey promptly; and that he had a right to assume that the ladder was placed with due regard for his safety. In view of these incidents, we think it cannot be said as a matter of law that no other rational inference can be drawn than that plaintiff was guilty of contributory negligence.

[2, 3] In determining the question what is ordinary care on the part of an individual, of course "all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings." And, as further stated by Labatt, § 4400: "A second principle, which is especially important in cases where the servant was injured as a result of his compliance with a direct order, and which naturally suggests itself as a material element under such circumstances, is that a servant is not necessarily negligent where he acts upon the presumption that his employer, and his employer's agents have done, are doing, and will do, their duty. * * * The juridical theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor."

[4] All the authorities, also, emphasize the importance of the distinction between adults and those of immature judgment. Referring to minors, Thompson, in his work on Negligence (section 4093), says: "The master is here, as in every other case, bound to act reasonably and justly, and this rule requires him to give suitable warning and instructions to a minor employé in regard to any danger, whether open or concealed, where the danger is not sufficiently obvious to the intelligence or experience of the employé, in the exercise of ordinary care on his part; this care being measured by the maturity of his faculties and the amount of his experience." And, in section 4094: "This rule ap-

plies not only so far as to require the employer to give general warnings and instructions to minor employés as to the dangers attending the duties they are expected to perform, but there is also a special duty resting upon the employer of giving instructions as to any new dangers whenever he orders the minor employé into a new situation which, without such warning and instruction, may be dangerous to him."

[5] It is, no doubt, true, as the learned author says, that "We meet with confusing and contradictory ideas growing out of the opposing tendencies of the minds of judges," and he cites a large number of cases from various jurisdictions illustrating this difference, but the apparent want of harmony arises rather from the application of the law to the peculiar facts than from disagreement as to the law itself. All the courts are in concord as to the doctrine that where reasonable men may differ as to the proper inference to be drawn from the facts, a case is presented for the determination of the jury. While the circumstances, of course, are variant, the action of the lower court in holding that the question of negligence was one for just and candid disputation is, we think, within the rationale of the decisions of the appellate courts of this state.

In *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138, it was held that: "Where it appears that an employé in a sawmill was seriously injured while running a scantling machine and saw, in attempting to remove slivers from under the saw, by reason of his sleeve catching on a concealed set screw fixed upon and projecting from a shaft below the saw, the fact that he had been employed in the mill for nearly two years, and had been working as assistant on the scantling machine, in putting the lumber in place to be cut by the saw, for about nine months, and had, during that time, in the absence of the foreman, run the machine for 18 days, does not warrant the appellate court in saying, as matter of law, that he was experienced in the work he was doing, and had knowledge of the set screw, and of the danger of placing his hand where he did while the machine was running, but his experience, and knowledge of the machine, is a question of fact for the jury." The concealed set screw was the controlling factor in that case, but the rule was approved as enunciated in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585, 3 Am. Rep. 506, as follows: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position without being chargeable with a want of reasonable care we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are con-

siderations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it."

In *Mansfield v. Eagle Box, etc., Co.*, 136 Cal. 622, 69 Pac. 425, the plaintiff was injured while operating a rip saw in a box factory. He was between 18 and 19 years of age, and had worked in the factory some 15 months before he was hurt, although having had little experience in running the rip saw—that was not his job—but when short of help the superintendent made the plaintiff run the saw on which he was hurt. He was engaged in cutting boards when the accident occurred. With his hand he was pushing a board on a table against and under the saw, which turned with a downward whirl towards him, when it seems the board slipped and his hand was caught by the saw. The court said: "Common prudence demanded that this inexperienced young man, commanded to work with a dangerous machine, with which he was not at all familiar, should have been fully and specifically instructed in the safest methods of doing the work. To put him to work without these instructions was negligence, and a jury might well have concluded from the facts in evidence that plaintiff's crippled hand was the proximate result of such negligence." No doubt, if categorically questioned, the plaintiff in that case would have answered that he knew a rip saw was a dangerous implement, and that if his hand came into contact with it while in motion he would get hurt, and, furthermore, that a board might slip or get caught in such a way as to throw his hand against the saw, as any intelligent youth of his age and experience would have some knowledge of these things, but the court properly held, under the circumstances, that it was proper for the jury to determine whether, on account of its failure to caution and instruct him as to the best method of operating the saw, defendant was legally liable for plaintiff's injuries.

In *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564, it was held by this court, in a case wherein a bright boy of 16½ years lost his life, that "the burden was upon the defendant to show that those in authority over the dredger, not only warned the boy of the danger attendant upon the discharge of the duties of a 'deck hand' having charge of the principal machinery of the dredger, but also to show that if such warning was given it was so given that the deceased fully appreciated and realized the danger by which he was surrounded." Therein many cases are cited, which may be consulted with profit, illustrating the principle

so aptly stated in *Foley v. California Horse-shoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87, that "the conduct of minors is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act, and it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability."

We deem it unnecessary to notice other citations of respondent, wherein, with no stronger showing than this, it was held that a case was presented for the jury. Indeed the number of circumstances here that might properly be considered factors in the perilous situation emphasized with peculiar force the imperative duty of defendant to warn and instruct plaintiff. Their relative importance we may not be able to determine—we cannot say how much each contributed to the injury—but it is reasonably certain that the fact that plaintiff, a minor and somewhat crippled from a prior accident, in an emergency was directed in a peremptory manner by his foreman to do a special perilous task outside of his ordinary employment, in a place rendered dangerous, not only by its location and the position of the ladder, but by the rapid movement of the machinery and the presence of the projecting set screws, presents a case quite unusual in its cumulative effect in favor of respondent's position.

[6, 7] Many special issues were submitted to the jury, and the answers to certain ones furnish to appellant the ground of an objection that some are indefinite and inconclusive, and that others are entirely inconsistent with the general verdict. In their construction the rule is undoubtedly as stated by Clementson in his work on Special Verdicts, pages 131 and 139: "Special findings should, if possible, be so construed as to harmonize them with each other and with the general verdict," and special findings will not control unless they exclude every theory which will sustain the verdict, and "are inconsistent only when, as a matter of law, they will authorize a judgment different from that which the verdict will permit."

[8] Respondent, in his brief, sets out all the special verdicts with categorical answers, from which it appears, as claimed by him, that the jury positively answered questions which covered all the material issues of the case, viz.: "That plaintiff was inexperienced; that he did not appreciate the dangers of his task; that his task was dangerous; that defendant did not instruct him as to the danger; that defendant failed to use ordinary care to instruct him as to such danger; that plaintiff's injury was caused by the negligence of defendant; that de-

fendant knew that plaintiff was inexperienced; that plaintiff was injured by the accident; that such injuries were permanent; and that plaintiff did not have sufficient intelligence and understanding, in view of all the facts of the case, to know the danger of his task." Other questions, covering a part of the same ground, were answered: "We believe so," "Not according to the evidence," "We think not," "The preponderance of the evidence answers affirmatively," and "No; we think not." The duplication arose from the fact that the court submitted questions proposed by both plaintiff and defendant. The court might better have rejected some of the questions, but it is perfectly apparent that thus far no inconsistency is shown, nor anything of which appellant can complain. In other words, the jury having answered positively that the defendant was negligent, the finding would not be affected, nor would either party be prejudiced, by the answer to another question of the same import that, "The preponderance of the evidence answers affirmatively," or, "We believe so." The same thing is manifestly true as to the questions answered in the negative. For instance, the jury gave the categorical answer, "No," to this question: "Did defendant instruct plaintiff as to the proper manner of safely applying compound on a belt, while mounted upon a ladder, in proximity to a revolving shaft with set-screw couplings?" And another similar question was answered, "Not according to the evidence."

[9, 10] Other questions and answers, to which appellant apparently attaches more importance, are as follows: (1) "Q. What was the proximate cause of the accident and injury complained of by plaintiff? A. The proximate cause of the accident and injury lay in the fact that the boy was ordered to do a duty outside of his regular work, and was caught by the revolving shaft and set screws." (2) "Q. Was plaintiff's injury due to the failure of defendant to warn or instruct plaintiff as to the danger of his employment? A. It seems to be due to the defendant's failure to warn plaintiff and the fact that he was doing something outside of his regular work." (3) "Q. Was the accident and injury complained of caused by the negligence of the defendant in furnishing a defective ladder for the use of plaintiff? A. We believe the ladder should have had spikes and hooks." (4) "Q. Was the accident and injury complained of caused by the negligence of defendant in operating the shafting and coupling described in the amended complaint with projecting screws? A. We so believe." As to the foregoing, it may be said generally that, considering the number and character of the questions submitted to the jury, it is surprising that the answers are not confusing, and it is clear that, when properly construed, they are entirely consist-

ent with the general verdict. No. 1 should not have been submitted, and it should be disregarded, as it involved a question of law. "To permit the jury to return conclusions of law rather than statements of fact would defeat the manifest purpose of the statute. Such conclusions are to be disregarded. They cannot be considered in determining the sufficiency of the verdict." *Clementson*, p. 116. Again, it is quite apparent that the jurors were not accustomed to the refinements of the law, and, being men presumably of average intelligence and disposed to look at a question from a practical, common-sense standpoint, they naturally concluded that various circumstances contributed to the injury, and they so expressed themselves. They very properly believed and substantially found that the fact "that the boy was ordered to do a duty outside of his regular employment," that "he was caught upon a revolving shaft with set screws," and "defendant's failure to warn plaintiff," should all be considered as important elements in determining the question of negligence. And the jurors were right in that. It is true that they did not make the distinction that is pointed out by Mr. Justice Henshaw, in *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 503, 111 Pac. 536, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, between "the proximate cause of the law" and "the proximate cause of the logician," or "the proximate cause in fact." As said therein: "Moreover, the proximate cause of the law is not the proximate cause of the logician, nor even always in strictness the proximate cause in fact, and a jury may easily be confused and misled by overniceties in these abstractions." The jury is not expected or required to make these fine distinctions. They are often difficult enough for the courts. Probably the responsibility of defendant for the injury is legally and primarily due to its failure to warn plaintiff of his danger, but there would have been no liability, of course, if no injury had occurred, and the jury were justified in finding that there would have been no injury had it not been for the other circumstances hereinbefore stated. The causal relation of these various facts and concepts is too apparent to require further comment. The situation will occasion no embarrassment if we keep in view and apply the rule that: "All presumptions are in favor of the general verdict for the plaintiff, which determines all issues in his favor, including the question of contributory negligence, where there is evidence to support it; and it must control, if the special verdict is not absolutely irreconcilable therewith." *Antonian v. Southern Pacific Co.*, 9 Cal. App. 732, 100 Pac. 877.

[11] The instructions seem to have covered every phase of the legal propositions involved in the case, and we find in them no substantial error. The concluding clause of

one, to which appellant objects, is as follows: "I charge you that, as to the degree of care to be exercised by the servant, you may consider the fact, if such be the fact, that such servant was acting under the direct order of his employer." This does not imply that the plaintiff was relieved of the duty to exercise care if he was acting under the direction of his employer. The circumstance of the order given by the foreman was a very important consideration, as we have already seen, and it had a just and legal bearing upon the degree of care required of the servant, and it was proper for the court to so instruct the jury. "The fact that the servant, at the time he was injured, was complying with a direct, specific, personal order of his master, or his master's representative, has, it is well settled, a material bearing upon the question whether he can hold the master responsible. Broadly speaking, the evidential significance of this fact will be found to be simply this: That as it goes to show that the servant's ignorance of the risk to which his injury was due is excusable, or that his action was not entirely voluntary, it tends to negative the availability of the various defenses which are essentially dependent upon proof that the servant voluntarily encountered a danger which was, or ought to have been, comprehended by him." *Labatt on Master and Servant*, § 433. "It is quite obvious that the fact that the servant has been ordered into a position of danger by his master or superior is an element to be considered in determining whether he has exercised ordinary care." *Thompson on Negligence*, § 5379. See, also, *Labatt*, § 439, and 26 Cyc. pp. 1221, 1245, and 1272.

[12] Objection is also made to the following instruction: "If you find that the task at which the plaintiff was working when the accident occurred was, under all the circumstances of the case, one of special danger, then I charge you that such knowledge of danger as plaintiff may have acquired at the usual tasks of his employment does not necessarily raise the presumption that he knew of such special danger. A servant directed to undertake work outside of that which he is engaged to do is not presumed to be aware of its peculiar risks, and therefore, if the master does not fully explain them to the servant before putting him at such new work, the servant is entitled to assume that it has no greater risk than those which attach to his regular work." This manifestly does not assume that there was any special danger, as the instruction is hypothetical in that respect. It does not assume that plaintiff's only source of knowledge was that acquired from his usual tasks, nor does it imply that the employer was called upon to fully explain the danger regardless of any knowledge that the plaintiff may have had.

As pointed out by respondent, the meaning conveyed was "that the plaintiff cannot be charged with knowledge of special dangers outside of his regular employment, by reason of knowledge acquired at his usual tasks, and that if the master does not explain such special dangers to him, he is entitled to assume that there are no greater risks attached to such special dangers than those which attach to his regular work." If there was any likelihood that the jury would misconstrue the instruction in the manner suggested by appellant, it was completely obviated by reason of other clear directions as to the duty of plaintiff to use whatever knowledge he may have derived from any source.

Some criticism is made of two or three other instructions, but we do not think it merits special attention. It may be said, also, that, after an examination of the rulings complained of as to the admissibility of evidence, it appears reasonably certain that if any of them was erroneous, the result could not possibly have been affected thereby to the prejudice of appellant.

We think no sufficient reasons exist for interference with the action of the lower court, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. In its petition for rehearing, appellant manifests a degree of disappointment that in the original opinion we failed to discuss specifically some of the assignments of error as to the instructions. The constraint of custom and propriety as to the elaboration of judicial opinions, no doubt, is quite obvious to the learned counsel, and we think it is hardly necessary to assure them that we examined, as carefully as we could, not only the exhaustive briefs, but the whole of the transcript in the case. Our conclusion, however, was, and is, that, viewing the entire record, we cannot say that any prejudicial error was committed.

This much we have added in consequence of the respectful attitude and the admirable presentation, both in matter and method, by appellant's counsel of their contentions.

The petition is denied.

We concur: CHIPMAN, P. J.; HART, J.

(30 Cal. App. 719)

MADEIRA et al. v. SONOMA MAGNESITE CO. (Civ. 1,006.)

(District Court of Appeal, Third District, California. Dec. 27, 1912.)

1. MINES AND MINERALS (§ 29*)—LOCATION—EXCESSIVE CLAIM.

Though the location of a mining claim exceeds more than 300 feet on each side of the middle of the vein, while Rev. St. U. S. § 2320

(U. S. Comp. St. 1901, p. 1424), provides that no claim shall exceed that limit, the claim is valid except as to the territory in excess of such limits.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

2. MINES AND MINERALS (§ 29*)—LOCATION—EXCESSIVE AREA.

A locator who exceeds the legal lateral limits in laying out the boundaries of his mining claim will be protected as to the legal area allowed, if his location is distinctly marked on the ground so that its boundaries can be readily traced, as required by Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1428).

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

3. MINES AND MINERALS (§ 20*)—LOCATION—MARKING BOUNDARIES.

Where a locator of a mining claim, who did not definitely mark it at the time of discovery, knew that defendant had located on the ground and was at work thereon in September, 1905, and made no further attempt to mark his location until March, 1906, he did not act within a reasonable time in definitely marking the boundaries of his location.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 40-44; Dec. Dig. § 20.*]

4. MINES AND MINERALS (§ 22*)—LOCATION—RECORDED NOTICE—CONSTRUCTIVE NOTICE.

A recorded notice of a location of a mining claim was not constructive notice of such location, where it did not identify the lode.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 45-50; Dec. Dig. § 22.*]

5. MINES AND MINERALS (§ 20*)—LOCATION—MARKING OF LOCATION.

The marking of a mining location upon the ground should be so certain that one prospecting in the same locality would locate the exact ground claimed without difficulty.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 40-44; Dec. Dig. § 20.*]

6. MINES AND MINERALS (§ 20*)—LOCATION OF CLAIM—MARKING BOUNDARIES—SUFFICIENCY.

The southwest corner of a located claim was marked on the ground by a copy of the location notice tacked on a board and nailed on a tree 276 feet beyond the proper point of location; the notice, after describing the lode, calling for "corner stakes and monuments on each corner." The southeast corner was marked by nailing the notice on a fence picket and placing an earth mound around it at a point 283 feet beyond its proper location, and the northeast corner was made 145 feet north of its proper location by building a rock monument and placing a stake in it which was not driven in the ground, while the northwest corner was made by breaking off the top of a small dead tree three or four inches in diameter and digging a mound of earth and piling small boulders about its base, which was 364 feet north of the proper location of the corner. *Held*, that the marking of the boundaries of the claim was insufficient.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 40-44; Dec. Dig. § 20.*]

7. APPEAL AND ERROR (§ 761*)—BRIEFS—SUFFICIENCY OF PRESENTATION.

Statements in the brief "that the court erred in permitting the witness to answer the following questions," citing pages of the tran-

script, without arguing the alleged errors, did not sufficiently present the error to require consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3096; Dec. Dig. § 761.*]

Appeal from Superior Court, Sonoma County; T. J. Denny, Judge.

Action by George Madeira and another against the Sonoma Magnesite Company. From a judgment for defendant, plaintiffs appeal. *Affirmed*.

Archibald Bernard, of San Francisco, C. C. Hamilton, of Los Angeles, T. J. Butts, of Santa Rosa, and J. P. O'Brien, of San Francisco, for appellants. R. L. Thompson, of Santa Rosa, and Edward Rice, W. L. Samuels, and Grant H. Smith, all of San Francisco, for respondent.

CHIPMAN, P. J. This is an action to determine the conflicting claims to certain mineral land situated in Sonoma county. Plaintiffs claim by virtue of an alleged location made by plaintiff Madeira on April 12, 1905, called the Madeira Magnesite mine. Defendant claims as grantee of certain alleged several locations, made by Arnold, Davis, and Woods, on September 14, 1905, embracing the land claimed by plaintiffs. The cause was tried by the court without a jury, and defendant had findings and judgment in its favor. Plaintiffs claim that the following findings are not supported by the evidence: "(2) That said attempted location of said Madeira covered the ground described in paragraph 3 of the complaint herein and other ground. (3) That the attempted location, viz., the Madeira Magnesite mine, was not at the time of the attempted location thereof on or about April 12, 1905, or for more than a year thereafter, and long after the location on the same ground of the Cecilia, Flora, Marie, Seymour, and Cyril claims of defendant, distinctly marked on the ground, or marked at all, so that its boundaries could be readily traced." Plaintiffs appeal from the judgment on transcript of all the proceedings in the case.

There are but two questions discussed in the briefs: First, assuming that Madeira made a location, was it void because of the excess of land included in it? And, second, was his location marked on the ground so that its boundaries could be readily traced?

Plaintiffs introduced a blueprint map of the original Madeira location and as it was corrected on a relocation by Madeira in June, 1906. With the aid of this map and the testimony of plaintiffs' witness Riley, who made the survey for plaintiffs, a fairly clear conception may be gained of what Madeira did, as shown by his testimony, in making his location in April, 1905. Austin creek passes along a considerable portion of the southerly end line of the claim and meanders along its easterly boundary trending easterly at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

northerly end line, as we understand the map; the points of the compass are not indicated. A trail ran along near this creek which was the means used by Madeira in passing from one part of the claim to another to locate his corners. As near as we can understand the process from his testimony, he made right angle offsets where he could and estimated the distances by stepping off the land. The country, he testified, is very rough and hilly and covered with a dense growth of chaparral along the east line impassable and generally difficult to penetrate except by cutting one's way through. The notice posted by him was as follows: "Austin Creek, April 12, 1905. Notice of Mineral Location. I the undersigned claim 1,500 feet by 600 feet of this lode for mining purposes. Located in Sec. 21 Twp. 9 N. R. 11 W. adjoining the lands of Dr. Otner near Redslide, beginning at a tree and stake with monuments on south bank of East Austin creek running 1,500 feet in a northwest and southeast direction, with 300 feet on each side of lode with corner stakes and monuments on each corner. Lode crops high. Claimed for quicksilver, gold, silver or magnesite. George Madeira."

His claim is in section 20 and not section 21, as stated in the notice. Madeira was familiar with the locality and with this particular ground and had made mineral locations before and claimed to know the requisites of the law governing the method of making them. He had some knowledge of surveying and civil engineering and carried a pocket compass on April 12, 1905. He testified: That he placed the first notice at "the point of discovery about 15 feet from the (south) end of the ledge on the south bank of the creek. * * * On account of the creek raising in the winter, it would carry it away if it was on the ledge. * * * Built a monument of rock around the base of the tree where the notice was posted, and that was the center of the ledge or lode." He then followed the trail leading up and down the creek to a point where "there was a pair of bars directly upon the trail." He picked up a board which he found at the base of a so-called juniper tree, nailed it to the tree, and on it nailed a copy of his notice. He testified that any one going through these bars would see the notice. This was what he intended as his southwest corner. It was 276 feet away from where it should have been as shown in the corrected location. He found his southeast corner by following the trail. "I would step straight east and then offset and go east again to maintain as straight a line as it was possible to do." Reaching what he supposed was the southeast corner, he testified: "Posted a notice and built a monument of earth there. There was no stone there. I had what I call my geological pick, and I dug up the earth and

made a mound of earth and put a picket from the fence in it and nailed the notice on the fence." This was in fact 283 feet beyond where it should have been. There was no evidence as to the size of this monument, nor was there any evidence that he drove the picket into the ground. He then followed the trail "on the right bank of the creek 1,500," measuring the supposed distance by stepping, to what he intended as his northeast corner, where, he testified, he "built a monument of rocks and placed a stake in it immediately on the bank of the creek." The size of the monument is not given, nor does it appear that the stake was driven in the ground, nor how it was placed among the rocks. This point was 145 feet north and away from where it should have been. "I then went directly west and stepped the ground the same way as I did before. It is very difficult to get across the creeks, and I had to guess at the distance. * * * Then I came to the center. I called it the center of the claim again, and there I built a large stone monument in the gulch, in a little bit of a gulch that came down there, * * * and placed a stake in that, but no notice on that end at all. From there I went west 300 feet from that stepping it up the hill through the brush. There I found a small dry tree, I suppose three or four feet in diameter. I broke the top off and dug a mound of earth again with a pick. There was some small boulders of rocks lying around there, and I gathered them up and piled them around the base of the tree. That marked the northwest corner of the claim." This was 384 feet north of where his corner should have been on the west side of his claim, which, according to his testimony, was practically impassable, and he made no effort to get through it. Summing up the matter, the court said, in its opinion printed in defendants' brief: "Madeira intended to step off a claim 1,500 feet by 600 feet, but he really marked out an irregular parallelogram over 2,000 feet long on the west side, 1,600 feet in the center, 1,700 feet on the east side, and probably 800 feet wide on the north side." Madeira visited his claim twice prior to defendants' location, once in April and once in July, and renewed some of his notices, but placed no new ones and did nothing more towards marking his claim. He also took away some specimens of the rock, but performed no work on the claim. He did nothing further, except in March, 1906, he attempted a survey but was prevented by the adverse locators, until in June, 1906, when he made a resurvey as shown by the map attached to the transcript. He was on his claim in the latter part of 1905, some time after defendants' location was made, and met Arnold, one of the contesting locators who were at work on the mine. He then expressed to Arnold the belief that he (Arnold) was on his (Madeira's)

claim; but nothing further occurred then. He made no protest and offered no objection to the locators' possession.

Witness Bradley qualified as a surveyor and civil and mining engineer. He was employed, in September, 1905, to survey and assist defendant's grantors in locating their mines and running lines and establishing monuments. He was there for 10 days so engaged. His attention was called to the bars mentioned by Madeira and a cabin east of the outcroppings where Madeira testified he posted a notice on a picket fence. He testified that he was at these points and saw no notices. "Q. Did you cover the territory carefully around that deposit? A. Yes, sir; very carefully. Q. Did you cover the territory that could be described by a parallelogram 1,500 feet long, the center line running southeasterly and northwesterly from the outcrop 300 feet on each side? A. Yes, sir; I did. Q. Did you find at or near any of the corners of such a figure or at the center line any monument or remains of a monument of any kind? A. Well, only one monument in the creek on the lode line, which had been very recently established there, * * * on the southerly end of the lode." It was shown that this monument was not one made by Madeira. "Q. Mr. Bradley, did you discover any evidence that a line had been run north or northeasterly from the outcrops? A. None at all; no blazed line; no brush cut out." Other witnesses, who had formed part of the surveying party, gave similar testimony. Witness Arnold, one of the locators of defendants' mines in conflict with the Madeira mine, in the last part of August, 1905, went to the located ground with his partners, Davis and Woods, and with them was Mr. Cooper, state mineralogist. Their particular object was to "expert this land for oil." The party was there two days. He testified: "We were examining the veins that were shown on the ground and also looking to see whether it had been located recently." When asked if he saw "any location notice or stakes upon or in the neighborhood of that ground," he answered, "We did not." Asked what investigation they made, he answered, "We were traveling on the ground in a radius of perhaps 700 or 800 feet hunting for corners, markings, or anything that would indicate a location that had been made there recently." He saw old markings on trees, weather-beaten, old blazes, but no evidences of recent markings. His attention was called to particular points mentioned by the witnesses for plaintiffs and testified that he saw no notices. Plaintiffs introduced witnesses who testified that, in the month of May and in the early part of July, 1905, they saw the notice posted on the juniper tree at the bars testified to by Madeira and also on the picket fence. Witness Riley testified for plaintiffs. He was employed to make the resurvey and relocation of the Madeira mine, in June, 1906.

After describing his work, which was only to establish the corners, he was asked: "Q. What did you see there at or near any of those corners? A. On the north lode line there was a small tree that had been broken off, a dead tree, and there were two or three stones around the bottom of it." That was 98 feet from the lode line and 364 feet from where he established the northwest corner. There were no marks on that tree. "On the northeast corner there were a few scattered stones, looked as though they had been piled, some monument"—(interrupted). That was 45 feet from where he established the northeast corner. "Down the creek some distance * * * there was a tree standing there with some nails in it. * * * That was 276 feet from the southwest corner." On cross-examination his attention was called to the fence and cabin near where Madeira claimed to have posted a notice. He testified: "There was a fence but no corner there, no monument." He testified that this point was 283 feet from the southeast corner as he established it. He found nothing at this latter point and "nothing in that neighborhood that would indicate a mining claim." He testified that he found no markings of any kind at the southwest corner nor within 100 feet radius. At the newly located northeast corner he saw nothing, but at a point 145 feet from there, pointed out to him by Madeira, he "found some loose stones which appeared as having been a stone mound at one time. There were different mounds around there in places. There had been, I suppose, some old locations or something. I noticed some mounds down below there on the creek. I don't know what they were there for."

Section 2320 of the Revised Statutes of the United States provides that "no claim shall exceed more than three hundred feet on each side of the middle of the vein at the surface." U. S. Comp. Stats. p. 1424.

[1] It does not follow that the location is invalid where the locator includes within the boundaries of his claim more than the law permits. "He is entitled nevertheless to hold to the limit which the law authorizes within the limits laid out, and only the territory embraced within his boundaries which is in excess of these limits is to be rejected." *McElligott v. Krogh*, 151 Cal. 126, 90 Pac. 823. This rule presupposes a location which "injures no one at the time it is made, and where it has been made in good faith." *Lindley on Mines*, § 362. The mere fact, then, that, in establishing his exterior boundaries, the locator has marked out too great a quantity of land, does not necessarily invalidate his location. Where, however, the locator relies upon the corners he has established or has attempted to mark as indicia of the location of the lode or ledge, a different question may arise and a different rule may govern. If the courses are so widely separated

from where they ought to be as to bear no apparent relation to the lode, i. e., are so remote as to justify a reasonable inference by one seeing the corners that they were not intended to apply to the lode in question, they would add little, if any, force to the claim that the law had been complied with. And this would be especially true if the notice once posted at the discovery point had disappeared or the lode line was not distinctly marked. "If the preliminary notice is wanting, there would be nothing to guide the subsequent locator, and the excessive location should be held worthless for any purpose." *Ledoux v. Forester* (C. C.) 94 Fed. 600.

A subsequent locator coming on the ground and finding an uncertain marking of the discovery point and lode line, and yet sufficient to arouse inquiry and require examination for exterior boundaries, would not be required to go much, if any, beyond the lateral limits to look for corners or other markings of the boundaries; and certainly he would not be charged with notice where the markings of the corners were so far from where they properly belonged, so obscure and lacking in permanency as in the present instance, and in a country densely covered with chaparral, and where the corners were not indicated by blazing of trees or cutting out of brush or otherwise marking their location.

An instructive opinion by Judge Hanford is found in *Ledoux v. Forester* (C. C.) 94 Fed. 600, where the requirements of the statute are stated and the suggestions last above made are given significance. It was there said: "Where the country is broken and the view from one corner to the other is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush and set more stakes at such distances that they may be seen from one to another, or dig the ground up in a way to indicate the lines so that the boundaries may be readily traced. The least that can be required of locators is that the corner stakes shall not be so far apart as to include an area considerably greater than the size of the claim as described in the posted notice, or greater than the law allows to be included in a single claim. I admit the rule that a location which is made in other respects in conformity to law, but which is greater in length or width than the law permits to be taken in one claim, is not for a mere error in that respect, void, except as to the excess; but when, as in this case, the validity of the location is disputed for alleged failure to fulfill the requirements of the law with reference to marking the claim upon the ground, so that the boundaries can be readily traced, the length of the lines and the distance between stakes must be taken into account in connection with the other facts proved, for the purpose of determining this question. It is obvious that if a person, measuring from the stakes at one end of the claim, the required distance in the

direction indicated by the notice of location does not find the other end stakes, nor anything else to guide him to where the stakes may be found, he may reasonably conclude that such corner stakes have not been set and that the location is void. In such a case the excessive distance between the corner stakes is misleading, and a locator who has committed such an error has failed to comply with the law."

[2] The cases which protect the locator where he exceeds the legal lateral limits are cases where he has marked his point of discovery and lode line and has made what would otherwise be required in making a valid location under section 2324 of the U. S. Statutes (U. S. Comp. St. 1901, p. 1426), which provides that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." And this brings us to the question chiefly argued in the briefs: Was the location so distinctly marked as that its boundaries could be readily traced?

In *Gleeson v. Martin White M. Co.*, 13 Nev. 442, cited by both parties, will be found an illuminating discussion of the mining law. Beatty, J., speaking for the court, said: "One of the imperative requirements of the statute, an indispensable condition precedent of a valid location, is that it shall be 'distinctly marked on the ground so that the boundaries can be readily traced.'" Quoting from *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312, he said: "It is true that the vein is the principal thing and that the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings, or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim." Again: "How soon after the discovery of the vein 'the location must be distinctly marked on the ground so that its boundaries can be readily traced' (R. S. § 2324), we do not decide; but until it is so marked we are clear that the location is not complete, and the law has not been complied with." The opinion points out that the object of the law in requiring the location to be marked on the ground is "to fix the claim, to prevent floating and swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue." It is further shown that the statute does not in terms require the boundaries to be marked, but requires the "location to be so marked that its boundaries can be readily traced." The learned justice adds: "It would be safer, and therefore better, to comply with the recommendation of the land office and erect stakes at the corners of the claim; but, if the grand object of the law

is attained by the marking of a center line, we can see no reason why it should not be allowed to be sufficient." This rule is not everywhere accepted, nor do we think it necessary in the instant case to express a definite opinion upon it. If the rule in the Gleeson Case may be applied, we must always remember what were the facts. The Paymaster claim, the one giving rise to the rule, was marked "by means of the two stakes at the ends of the claim on the line of the croppings and by the location monument at the point of discovery." Furthermore, said the court, "it is to be observed that there is no question that the locators of the Paymaster were the original discoverers of the ledge in controversy; that their claim was notorious; that they and their successors have continued to occupy and develop the property; that the Shark locators were aware of the priority of the Paymaster claim." Such were the facts in view of which it was held that the location was sufficiently marked on the ground.

The facts in the present case differ widely and radically from the facts in the Gleeson Case in so far as the markings of the center line are concerned. Assuming all that Madeira testified to be true, what did he do? We quote from the opinion of the trial judge: "George Madeira testified that he had long been familiar with the ledge of magnesite at this point, and that on April 12, 1905, he visited it for the express purpose of locating a mine on it; that on this date the ledge was vacant and showed no signs of ever having been worked; that on this day he posted three notices and monuments on the claim as follows: The first notice was placed at the point of discovery, about 15 feet from the end of the ledge on the south bank of Austin creek, and he built a monument of rock around the base of the tree upon which the notice was posted. The second notice was tacked on a board, which board was nailed on a juniper cedar tree at a place where there was a pair of bars, near the trail running beside the creek; this was at the southwest corner of the claim. The third notice was posted by nailing it on a fence and making a mound of earth and placing a picket in it. This was the southeast corner of the claim. A copy of these notices, which were all alike, was recorded by him in Book G of Promiscuous Records at page 332, of Sonoma County Records, April 15, 1905. He then stepped off what he thought was 1,500 feet along the trail on the right bank of the creek, but what was in reality 200 feet or more than the 1,500 feet, and built a monument of rock and placed a picket in it. This was the northeast corner of the claim. He then stepped off what he thought was 300 feet to the west and built a large stone monument, in a little gulch and placed a stake in it, but did not post any notices. This was the north center line of the claim. He then stepped

what he thought was 300 feet west of this and found a small dry tree, 3 or 4 inches in diameter, the top of which he broke off, and dug a small mound of earth and piled some small rocks around the base of the tree. This was the northwest corner of the claim."

No notice was posted at the south and center. Only the point of discovery and the north and center were thus marked, and these two points were nearly the entire length of the claim apart. There were no blazings or other markings of the center line; the country was rough and brushy, and neither end of the claim was visible from the other. It is obvious that the Gleeson Case gives no support to the claim that the center line was sufficiently marked to bring it within the requirements of the statute.

[3, 4] Madeira's resurvey and relocation, made in June, 1906, are convincing evidence that he did not regard his claim as distinctly marked on the ground. At best, his location was only such as would have entitled him within a reasonable time after discovery to mark his boundaries, either by definitely marking his center line, as was done in the Gleeson Case, or both by marking that line and his exterior boundaries, before conflicting rights accrued. *Lindley on Mines*, § 373. He knew that defendant's grantors had located the ground and were at work on it in September, 1905. The evidence is that they performed a large amount of labor on the mine; that their possession was unbroken from the date of their location; their good faith is not seriously questioned; there is no evidence that they knew of Madeira's location when they made their location, or until in October, unless imparted constructively by the recorded notice, which cannot be said to give notice, for it does not identify the lode. With this knowledge on his part and this ignorance on their part, Madeira made no further attempt to mark his location on the ground until in March, 1906. This we do not think was within a reasonable time under the circumstances.

Upon the sufficiency of the steps taken by Madeira to make a location, we content ourselves with the view expressed by the learned trial judge. We quote:

[5] "And the marking upon the ground should be made so certain and so plain that any one prospecting in the same locality would have no trouble in locating the exact ground claimed. Measured by the above rule, was the marking of the claim by Madeira sufficient? This statute (section 2324, Rev. Stat.) does not require that a notice shall be recorded. Nor does it require that a notice shall be posted on the claim. It leaves these matters to the regulations of the local laws. The local laws generally require that a notice shall be posted, and, even in the absence of such a requirement, it would be a very proper aid to the description. But the statute does not require it. *Carter v. Baciga-*

lupi, 83 Cal. 188 [23 Pac. 361]. It is conceded in this action that there are no local mining laws governing the location of the claim in dispute. All of the authorities agree that any marking by which the location may be readily traced is sufficient. I think that the following citations state the law: 'All of the authorities agree that any markings on the ground by stakes, monuments, mounds, and written notices whereby the boundaries can be readily traced are sufficient.' Book v. Justice Min. Co. (C. C.) 58 Fed. 113, and cases cited. 'If a third party intending to locate can readily ascertain from what has been done by the prior locator, the extent and boundaries of the claim so located, then the object of the statute has been accomplished.' Kern Oil Co. v. Crawford, 143 Cal. 302 [76 Pac. 1112, 3 L. R. A. (N. S.) 993].

[6] "Applying the above rule to the four corners as located by Madeira, I do not think that it can be said that any of them come within the rule. His southwest corner was a copy of the notice tacked on a board and nailed on a juniper tree 276 feet beyond the point where it should have been located. This notice, after describing the lode, called for 'corner stakes and monuments on each corner.' This posting of a notice without a monument could not be said to be sufficient to notify a third party who was seeking to locate, that this was his corner. His southeast corner was made by nailing his notice on a picket fence, and with his geological pick he 'made a mound of earth and put a picket from a fence in it.' This was at a point 283 feet beyond where it should have been. There is no testimony as to whether this mound was six inches or six feet high. If it had been high enough to keep the picket from falling over of its own weight, it would have taken years of erosion to obliterate it, yet there is no evidence that anyone ever saw it again. And a notice nailed on a picket fence would in all probability not last long in the mountains. His northeast corner was made by building a monument of rock and placing a stake in it. The stake was not driven in the ground, nor was the size of the monument given. This was 145 feet north of where it should have been located, in a country that was 'extremely broken and rough and covered densely with chaparral' (Madeira's testimony). And there were other monuments near by (Riley's testimony). His northwest corner was made by breaking off the top of a small dead tree 3 or 4 inches in diameter and digging a mound of earth with his pick, and piling some small boulders about the base of the tree. This was 364 feet north of where his corner should have been on the west side of his claim, which, according to his testimony, was practically impassable, and he made no effort to get through it. While the law is as has been quoted, that where a locator has by mistake

in good faith laid off more land in his claim than he was entitled to, it is void for the excess only, I do not think that it can be held that monuments of as temporary a character as Madeira testified that he built, in an extremely broken and rough country densely covered with brush and at points so far away from where the real corners should have been placed, where there were a good many other monuments of like character, with nothing to identify them as corners of this particular claim, can be said to come within the rule as above laid down, as being sufficient to notify third parties of what has been done by prior locators. There has been but one exception made to this rule. But that was where the prior locators had done work on the claim, and the junior locators knew the extent and boundaries of the claim, and relied on the errors of the location in an attempt to oust the senior locator. The courts have properly held that, having had the knowledge of the location, they were not harmed and could not be held to come within the rule."

[7] In their brief, appellants call attention to the errors of law alleged to have been committed in the admission or rejection of evidence. The brief states that "the court erred in permitting the witness," etc., or "the court erred in permitting the witness to answer the following question," citing page of transcript. The alleged errors are not argued, counsel merely calling attention to the exceptions reserved by the plaintiffs at certain folios of the transcript. A point so presented to this court will not be considered. Pigeon v. Fuller, 156 Cal. 691, 702, 105 Pac. 976.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(20 Cal. App. 544)

NAYLOR v. ASHTON. (Civ. 1,105.)

(District Court of Appeal, First District, California. Dec. 9, 1912. On Petition for Rehearing, Jan. 8, 1913.)

1. BROKERS (§ 50*)—PERFORMANCE OF CONTRACT.

Where the writing authorizing a broker to sell realty required that the offer to sell be accepted within 10 days from date, the broker could not recover a commission unless he obtained the acceptance within that time.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68; Dec. Dig. § 50.*]

2. BROKERS (§ 49*)—RIGHT TO COMMISSION.

Unless the broker brings the minds of the buyer and seller together upon an agreement of sale and the price and terms of the sale, he is not entitled to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

3. BROKERS (§ 50*)—CONTRACT OF EMPLOYMENT—TIME OF SALE.

Time is always of the essence of a contract of employment to sell realty, when a time limit is placed upon the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68; Dec. Dig. § 50.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. **BROKERS (§ 86*)—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.**

Evidence in an action for commissions for procuring the sale of realty held to show that no exchange or sale was effected by the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

5. **APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Any error in sustaining an objection to a question on cross-examination of defendant on the ground that the counsel was reading from what purported to be defendant's deposition which was not signed by her was not reversible, especially where counsel was given permission to fully cross-examine defendant as to her testimony, and only prevented from reading a series of questions from the unsigned deposition before examining her upon the facts covered thereby, after which he was permitted to use the deposition for impeachment purposes.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Charles E. Naylor, Jr., against Ellen Lynch Ashton. From a judgment for defendant and an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Naylor & Riggins, of San Francisco, for appellant. McKee & Tashelra, of Oakland, for respondent.

HALL, J. This is an appeal from a judgment in favor of defendant, and the order denying plaintiff's motion for a new trial.

The action was brought by plaintiff as the assignee of Geo. H. Murdock & Son to recover the sum of \$500 as broker's commission under a written contract.

Murdock & Son had the property of defendant, a ranch in Tehama county, listed for sale or exchange. Learning that one Mrs. Thompson owned a piece of real property in Oakland which she was desirous of exchanging for ranch property, they informed defendant thereof and sent her to see Mrs. Thompson. All the business was transacted on behalf of the brokers by one Stanley. After defendant had examined the property, she signed and delivered to Stanley, for the brokers, a writing, dated September 27, 1909, in which she offered to sell and exchange her said ranch for the said property of Mrs. Thompson and the sum of \$5,750, to be paid in cash or approved securities bearing 8 per cent. per annum. The writing contains the following: "And I agree to pay Geo. H. Murdock & Son a commission of \$500 for their services as agents in effecting the above sale and exchange. Mrs. Thompson to be allowed ten days from the date hereof to examine the ranch and accept the above offer." This is the only written evidence of any contract between defendant and plaintiff's assignors, and is the one pleaded and relied on for a recovery.

The court found that on or about the 20th day of October, 1909, said defendant traded her said ranch to Mrs. Thompson for her said Oakland real estate and \$2,500 cash. But it also found that no sale or exchange of said properties was ever made or effected by said George H. Murdock & Son as provided in the said contract, and that Mrs. Thompson never did accept the offer made in said contract, and never did exchange or sell her said property in accordance with said contract, and that defendant did not extend the time within which Mrs. Thompson might accept said offer beyond the ten days mentioned in said contract. It is perfectly clear that upon these findings plaintiff should not recover. The finding that an exchange and sale, upon different terms and after the expiration of the time limit, was made by defendant with Mrs. Thompson, does not entitle the broker to recover, in the presence of the other findings that the broker did not effect the exchange, and that the time for the acceptance of the offer was never extended.

[1] It will be observed that the writing relied on was an offer to sell, which by its terms was to be accepted within 10 days from the date of the writing. This time expired on October 5, 1909. The broker's commissions were dependent on his obtaining the acceptance of this offer within 10 days from its date. This he did not do.

[2] "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commission does not accrue." *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 382, 38 Am. Rep. 441. "It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he fail to do that, he is not entitled to the commissions, even though he made efforts to sell property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner." *Zelmer v. Antisell*, 75 Cal. 509, 17 Pac. 642. See, also, to the same effect *Ayres v. Thomas*, 116 Cal. 140, 47 Pac. 1013; *Ropes v. Rosenfeld's Sons*, 145 Cal. 671, 79 Pac. 354; *Hicks v. Post*, 154 Cal. 22, 96 Pac. 878; *Brown v. Mason*, 155 Cal. 155, 99 Pac. 867, 12 L. R. A. (N. S.) 328.

[3] The time limit for an acceptance contained in the offer to sell made by defendant was a time limit upon the employment of the broker in this case. His only employment under the writing was to procure an acceptance of the offer contained in the writing. This he did not do, either within the time fixed for such acceptance or at all. Time is always of the essence of a contract

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of employment to sell real estate where a time limit is placed upon the employment. *Hicks v. Post*, supra. In *Ropes v. Rosenfeld's Sons*, supra, and *Brown v. Mason*, supra, the actions were for broker's commissions where the sale had eventually been made to the purchaser first found by the broker, and in each case judgment for defendant was sustained. The findings in the case at bar support the judgment. The evidence also fully supports the findings.

[4] As before stated, the offer of defendant fixed the time limit for an acceptance of her offer at 10 days, which expired on October 5th. Two days before October 5th the broker endeavored to induce defendant to exchange her ranch for certain stock, which he recommended to her, telling her that he had no hopes of doing any business with Mrs. Thompson. Indeed, he informed defendant at that time that the time allowed Mrs. Thompson for an acceptance of the offer had expired, but examination of the written offer proved this to be incorrect. So again, after the expiration of the 10 days, the broker (Mr. Stanley) told defendant that there was no hope of doing business with Mrs. Thompson, and that he would not waste any more time on her. And he did not thereafter make any further effort to effect the sale or exchange contemplated by his written employment, or at all. Subsequently defendant, without any assistance from plaintiff's assignors and without their knowledge, opened negotiations with Mrs. Thompson, and succeeded in making a trade with her, but not upon the terms of her original offer, but upon terms much less advantageous. It is thus apparent that the controlling findings are fully sustained by the evidence.

[5] Complaint is made of a ruling of the court in sustaining an objection to a question on cross-examination put to defendant by plaintiff. The objection seems to have been based upon the fact that counsel was reading from what purported to be a deposition made by defendant, but not signed by her. The matter, even if the court erred, is too unimportant to justify a new trial, especially as the court informed counsel that he might fully cross-examine the defendant about her testimony, and only prevented him from reading in the guise of a question a series of questions and answers from an unsigned deposition until he had first examined her as to the facts covered by the deposition, after which the court said the deposition might be used in impeachment.

On the whole record the case seems to have been fairly tried, and a correct judgment rendered.

The judgment and order are affirmed.

We concur: IENNON, P. J.; KERRIGAN, J.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing is denied.

In denying the petition for a rehearing we deem it proper to again call attention to the fact that the only employment of the broker evidenced by the writing relied on was to procure an acceptance of the specific offer made by defendant, which the broker never succeeded in doing, either within the 10 days allowed for such acceptance or at all. The broker was not employed generally to effect a sale or exchange of defendant's property, but only to procure an acceptance by Mrs. Thompson of the offer to exchange and sell contained in the writing signed by defendant. In this particular the case is quite like the case of *Holland v. Flash*, 130 Pac. 32, decided December 19, 1912 (which is since the opinion in this case was filed), by the court of appeal of the Second District, where it was in effect held that under such a contract the broker could only recover on showing a compliance with the particular employment evidenced by the writing.

(20 Cal. App. 797)

REYNOLDS v. YORK SYNDICATE OIL CO. et al. (Civ. 1,169.)

(District Court of Appeal, Second District, California. Dec. 31, 1912.)

1. NOVATION (§ 4*)—NEW FORM OF INDEBTEDNESS.

Plaintiff and defendant corporation, for which plaintiff did certain work entitling him to a mining lien, executed an agreement by which defendant leased the mining ground to plaintiff for a year upon a royalty of 10 cents per barrel for all oil produced, and plaintiff agreed to make certain collections because of oil previously sold by defendant to third persons, and apply the same to an indebtedness against defendant in plaintiff's favor, and further agreed to sell oil in certain holes, and apply the proceeds upon such indebtedness, and that defendant should pay plaintiff as much money, as soon as possible, on account of such indebtedness, and at least \$2,700. Held, that the contract did not constitute a novation, so as to extinguish the old indebtedness and operate as a waiver of plaintiff's lien therefor.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. MINES AND MINERALS (§ 117*)—MINING LIEN—WAIVER—PLEADING.

Waiver of a mining lien must be pleaded and proven.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 239; Dec. Dig. § 117.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by George A. Reynolds against the York Syndicate Oil Company and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. W. Wiley, of Bakersfield, for appellant.
T. F. Allen, of Bakersfield, for respondents.

ALLEN, P. J. The action was one to foreclose a lien upon certain mining property.

The answer, in addition to denials with reference to ownership and the facts upon which the right to a lien depended, set up an agreement between plaintiff and defendant corporation, bearing date of March 10, 1904, through which the defendant leased to plaintiff the mining ground described in the complaint for the period of one year, upon a royalty of 10 cents per barrel for all oil produced on said premises during the period of the lease; and, in addition, the plaintiff agreed to make certain collections on account of oil previously sold by defendant to third persons, the amount of which collections when made to be applied to an indebtedness of \$3,625 agreed to exist against defendant in plaintiff's favor; and further, to sell certain oil in sump holes at a price of 25 cents per barrel, or as near that price as possible, the proceeds to be credited upon such indebtedness. And it was further agreed that the defendant should pay plaintiff "as much money (\$2,700 at least) on account of its indebtedness to him, and as soon as possible; the total indebtedness to him being at this date \$3,625." Other covenants were contained in the agreement of no moment in considering this appeal. The court found in favor of plaintiff upon all the issues relating to the character of the property, the amount of the indebtedness, the right of plaintiff to a lien therefor, and the filing of such lien. The court, in addition, found that the agreement above referred to had been entered into after the maturity of the indebtedness, and preceding the filing of the lien, and, as a conclusion of law, determined that such agreement constituted a novation, and amounted to a waiver on plaintiff's part of his right to a lien on account of the indebtedness. Judgment was accordingly entered in defendants' favor, from which judgment plaintiff appeals upon the judgment roll.

[1] Whether the findings of novation and waiver are those of fact or law, the findings or conclusions are shown by the judgment roll to have been based solely upon the terms of the agreement; and the construction which should be placed upon the agreement is determinative of all matters presented upon this appeal. We are of opinion that such agreement cannot be construed as the substitution of a new obligation between the same parties, with intent to extinguish an old one. On the contrary, the old obligation is referred to in the agreement and specifically affirmed. The mere taking of the lease upon a royalty and authority to collect certain debts due defendant can in no sense be construed as an agreement canceling the prior obligation of indebtedness. The authority to collect, and, if collected, to apply, the proceeds to certain indebtedness due defendant was but the creation of an agency not coupled with interest, and was revocable at pleasure, and constituted no security. Conceding that the lease gave right of immediate possession of the

premises to the lessee, it does not appear that the oil in the sump holes was upon the leased premises, or that any possession, or right to possession, of this oil was conferred by the agreement. If possession was not given to the oil, no pledge arose, and no security existed by virtue of the agency to sell. Were the facts otherwise, and the oil in fact given in pledge, the security afforded thereby being but a fraction of the lien indebtedness, the same would not, in the absence of an express agreement, amount to one of extinguishment.

[2] The instrument in which was embodied the lease did not, by its terms, express a waiver of the existing lien rights; and, if any waiver was contemplated or agreed to outside the instrument, the same should have been pleaded and proven essential matters, where parties rely upon a waiver. *Pohelm v. Meyers*, 9 Cal. App. 37, 98 Pac. 65. There is nothing in the record indicating that, through the agreement set out, the time for payment of the original lien debt was extended beyond the term for filing a lien.

We are of opinion that the court erred in its judgment, and the same is reversed, and cause remanded.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 672)

PEOPLE v. TOMSKY. (Cr. 193.)

(District Court of Appeal, Third District, California. Dec. 18, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913.)

1. CRIMINAL LAW (§ 1024*)—APPEALABLE ORDERS—ORDER GRANTING NEW TRIAL.

Under the express provision of Pen. Code, § 1238, the people may appeal from an order granting a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024.*]

2. CRIMINAL LAW (§ 970*)—MOTION IN ARREST OF JUDGMENT—DEFECTS IN INDICTMENT OR INFORMATION.

Under Pen. Code, § 1185, providing that a motion in arrest of judgment may be founded on any of the defects in the indictment or information mentioned in section 1004, unless the objection is waived by failure to demur, and that it must be made before the judgment is pronounced, section 1004 enumerating the grounds upon which a defendant may demur to an indictment when the defects constituting such grounds appear on its face, and section 1187 declaring that an order arresting judgment places defendant in the same situation in which he was before the indictment was found, a motion in arrest of judgment is directed against the sufficiency of the indictment or information to state a public offense, or for any other defects appearing upon its face which would subject it to a demurrer, and is entertainable only where the defendant has demurred thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

3. CRIMINAL LAW (§ 975*)—MOTION IN ARREST OF JUDGMENT—ORDER SETTING ASIDE CONVICTION.

Defendant's motion to set aside the information was denied, and no demurrer thereto was shown, and after conviction, without a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

motion for a new trial, and over objection by defendant, the trial court of its own motion ordered the conviction set aside on the ground that defendant had never entered a plea to the information, and admitted him to bail and fixed a day for taking his plea to the information as originally filed. *Held*, on appeal by the people, that the order could not be regarded as a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2479; Dec. Dig. § 975.*]

4. CRIMINAL LAW (§ 918*)—MOTION FOR NEW TRIAL—GROUNDS—FAILURE TO PLEAD TO INDICTMENT AND INFORMATION.

The failure to secure the plea of a defendant to an information prior to putting him on his trial thereunder is a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2196, 2219-2224; Dec. Dig. § 918.*]

5. CRIMINAL LAW (§ 964*)—MOTION FOR NEW TRIAL—ORDER SETTING ASIDE CONVICTION.

On appeal by the people from an order of the trial court of its own motion setting aside a conviction on the ground that defendant had never entered a plea to the information, without a motion for new trial by the defendant and over his objection to the order, such order will be considered as an order granting a new trial on the ground that a mistrial was had by his failure to plead.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2419, 2420; Dec. Dig. § 964.*]

6. CRIMINAL LAW (§ 261*)—NECESSITY OF PLEA—EFFECT OF FAILURE TO PLEAD.

A defendant in a felony case, who has been put upon trial for the offense charged without a formal plea of not guilty having been entered by him to the indictment or information, has not been given a legal trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 612, 613; Dec. Dig. § 261.*]

7. CRIMINAL LAW (§ 961*)—MOTIONS FOR NEW TRIAL—STATUTORY PROVISIONS—AS TO A MATTER OF "PROCEDURE."

Const. art. 6, § 4½, which provides that no judgment shall be set aside or new trial granted in any criminal case for error as to any matter of pleading or procedure, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, applies to trial courts in their review of records in criminal cases on motions for new trial; and the putting of a defendant in a criminal case upon trial without his pleading to the information is error as to a matter of "procedure."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2415-2417; Dec. Dig. § 961.*]

For other definitions, see Words and Phrases, vol. 6, p. 5631.]

8. CRIMINAL LAW (§ 961*)—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL.

Under Const. art. 6, § 4½, which provides that no judgment shall be set aside or new trial granted in any criminal case for error in any matter of procedure unless the court shall be of the opinion that it has resulted in a miscarriage of justice, such opinion must be supported by a substantial legal foundation, so that, where the action of a trial court in that respect is reviewed, the question whether the opinion upon which its action is based is or is not justified is purely a question of law, to be determined from a review of the whole case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2415-2417; Dec. Dig. § 961.*]

9. CRIMINAL LAW (§ 947*)—NEW TRIAL—STATUTORY PROVISIONS—MISCARRIAGE OF JUSTICE.

Const. art. 6, § 4½, provides that no judgment shall be set aside or new trial granted in any criminal case for any error as to any matter of procedure, unless on examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Defendant, convicted of obtaining personal property by false and fraudulent pretenses, upon the clerk's announcement that he had entered his plea, remained silent, although no plea had been in fact entered, and the trial was conducted upon the understanding of parties that a plea had been formally entered, so that defendant secured all the advantage of a plea regularly entered. After a conviction, sufficiently supported by the evidence, the trial court of its own motion set aside the conviction on the ground that defendant had not entered a plea. *Held*, that defendant's failure to plead could not under any possible view have resulted in a miscarriage of justice, so that the order would be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2133; Dec. Dig. § 947.*]

Appeal from Superior Court, Yolo County; K. S. Mahon, Judge.

Sam C. Tomsky was convicted of obtaining certain personal property by false and fraudulent pretenses. From an order setting aside the verdict, the people appeal. Motion to dismiss the appeal denied, and order appealed from reversed, with directions to the court below to proceed with the rendition of judgment upon the verdict as returned.

U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People. Wm. Tomsky, of San Francisco, for respondent.

HART, J. The defendant was convicted in the superior court in and for the county of Yolo of the crime of obtaining certain personal property by false and fraudulent pretenses. At the time fixed for pronouncing the sentence or the judgment on the verdict of conviction, the court, of its own motion, made an order setting aside said verdict on the ground that the defendant had never entered a plea to the information under which he was prosecuted and adjudged guilty. The people, through the district attorney of Yolo county, present this appeal from said order.

This record certainly presents a peculiar situation for several reasons, the most important among which is the difficulty in determining with precision the legal nature of the order made by the court and from which this appeal has been taken. Most appropriately, the proceeding after verdict in this case may be said to be *sui generis*. There was no motion for a new trial by the defendant. In fact, counsel for the defendant, while interposing an objection to any judgment being pronounced on the verdict because of the failure of the defendant to plead to the information, refused to present a motion for a new trial, for the asserted reason that "there cannot be a new trial granted

where there has not been a valid trial in the first place," by which statement we understand counsel to have meant to say that, the defendant having failed to plead to the information, the proceedings involving the taking of testimony, etc., before an alleged jury and the conclusion of the latter, were an absolute nullity, or exactly the same as though the defendant had never been put upon his trial at all, from which postulate he argues, as obviously no other logical argument could therefrom reasonably be made, that there could be no new trial of a question that had never been tried. But counsel for the defendant went so far as to object to an order by the court setting aside the verdict; his contention being, in analogy to his position as to a motion for a new trial as above indicated, that there was no verdict to set aside, and that there was, therefore, nothing left for the court to do but to refuse to pronounce judgment or sentence. The court, however, as seen, made the order setting aside the verdict, and thereupon both the district attorney and the attorney for the defendant, in open court, gave "notice" that they each would appeal from said order (sections 1240 and 1259, Pen. Code), notwithstanding which action on the part of the defendant's counsel he appeared at the oral argument, and presents a brief with this record in resistance to a judgment of reversal. It may be parenthetically suggested that the Attorney General doubtless properly viewed the attitude of the defendant's counsel at the hearing of this cause before this court as tantamount to an abandonment of the defendant's appeal from the order, otherwise the state's attorney might with propriety have confessed error on the latter appeal and thus have secured a reversal without further ado.

However, the first important point presented here is as to the legal nature of the order from which this appeal is prosecuted. It must be admitted that the point is not one easily solved, if, indeed, it can be solved at all to the extent of giving an accurate legal description of the proceedings giving birth to the order appealed from or a proper designation to the order itself. The attorney for the respondent insists that the order is neither one in arrest of judgment nor one granting a new trial, and that, whatever it may be, it is not one from which the law authorizes an appeal, and upon this view of the case as it appears here, he has submitted a motion to dismiss the appeal. On the other hand, the Attorney General sees in the order many of the features or characteristics of an order in arrest of judgment, and in his argument before this court, both oral and by brief, he so treats it.

[1] There are, by virtue of the provisions of section 1238 of the Penal Code, five occasions on which the people may appeal in criminal cases, and they are (1) from an order setting aside the indictment or in-

formation; (2) from a judgment for the defendant on a demurrer to the indictment, accusation or information; (3) from an order granting a new trial; (4) from an order in arrest of judgment; (5) from an order made after judgment, affecting the substantial rights of the people.

It is clear that, if the order here complained of does not come within either the third or the fourth subdivisions of the foregoing section, it is not an appealable order. It certainly cannot be classed with the orders referred to in the other subdivisions of said section, for it is obviously neither an order setting aside the information, nor a judgment for the defendant on a demurrer to such pleading, nor an order made after judgment, etc., no judgment having been pronounced or entered. But, as stated, the Attorney General vigorously contends that the order is more in the nature of one in arrest of judgment than any other from which an appeal by the people is authorized. If that view of the order were justified, then unquestionably it would have to be reversed for the reason that the ground upon which it was granted is not included among those upon which an order in arrest of judgment may be made. And, for the same reason, we cannot see how it can be viewed as an order in arrest of judgment or as intended to have the effect of such an order.

[2, 3] Section 1185 of the Penal Code provides that a motion in arrest of judgment "may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced." Section 1004 enumerates the grounds upon which the defendant may demur to the indictment or information, when the defects constituting such grounds appear upon the face of the pleading. Section 1187 of said Code provides that the "effect of an order arresting the judgment is to place the defendant in the same situation in which he was before the indictment was found or the information filed." Thus it will be seen that a motion in arrest of judgment is directed against the sufficiency of the indictment or the information to state a public offense or for any other defects appearing upon the face of such pleading which would subject it, under the law, to the claims of a demurrer, and is entertainable only where the defendant has demurred to the pleading by which he is charged. While the record shows that the defendant made a motion to set aside the information and that the same was denied by the court, it does not thus appear that a demurrer was interposed thereto by the accused. Of course, it is plainly manifest that the effect of the order could not be to place the defendant in the same situation in which he was before the information was filed, as is true where an order in arrest of judgment

is made (section 1187, Pen. Code, supra), because said order, as shown, was not based upon defects in the information. Nor, obviously, did the court intend that it should have such effect, since it appears that it made an order admitting him to bail pending the trial of the case and fixed the following Monday as the time for taking his plea to the information as it was originally filed, preliminarily to setting the case down for trial. From all these considerations, it is very clear that the proceeding culminating in the making of the order appealed from bears no resemblance whatsoever to a motion in arrest of judgment and that it was not and it could not have been so regarded by the trial court.

[4, 5] It seems to be very plain, however, from the scope of the order as it was marked out by the court, that it bears a closer analogy to an order granting a new trial than to one in arrest of judgment. Although no formal motion for a new trial was presented, the court nevertheless, made an order the necessary effect of which was to award the defendant a new trial, and that such order was intended by the court to so operate is evidenced by the fact, as already shown, that the court ordered that the defendant be admitted to bail and fixed a time for taking his plea to the information. That the failure to secure the plea of a defendant to an information or indictment prior to putting him on his trial thereunder is a ground for a new trial is in effect held to be true in the case of the *People v. Corbett*, 28 Cal. 328, and we shall, in the consideration of this appeal, treat the order appealed from as one granting a new trial upon the sole ground that a mistrial was had by reason of the failure to take the defendant's plea to the information.

[6] It appears that, immediately after the jury were impaneled to try the defendant, the clerk of the court, in compliance with the mandate of section 1093, subd. 1, of the Penal Code, read the information to the jury, and thereupon stated, in the presence of the defendant and his counsel, that the accused had theretofore entered a plea of not guilty to said information. Neither the defendant nor his attorney interfered to say that no such plea had at any time been interposed to the information by the prisoner or made any objection whatsoever as to the matter of a plea until after a verdict of guilty had been returned.

With much force, the Attorney General has argued here: (1) That the silence of the accused and his counsel at the time of the announcement by the clerk to the jury, in the presence and hearing of the former, that the prisoner had entered a plea of not guilty to the information, should, upon principle, be construed as an indorsement by them of the clerk's statement in that regard, and therefore as in effect the interposition of a plea

of not guilty by the defendant himself, and, in this connection, it is argued that, upon every consideration of fairness and justice, he should under the circumstances be estopped from denying that a plea was entered; (2) that, since the trial was conducted upon the evident understanding by the parties on both sides that a plea had been formally entered, the defendant, therefore, securing all the benefit and every advantage of a plea regularly entered, the failure to make the formal plea should be treated as a mere irregularity which in no manner or degree affected or impinged upon his substantial rights. The last stated position of the Attorney General is supported by many of the courts of last resort of other jurisdictions by what appears to be very forceful reasoning. See *State v. Winstrand*, 37 Iowa, 112; *State v. Hayes*, 67 Iowa, 27, 24 N. W. 575; *State v. Bowman*, 78 Iowa, 520, 43 N. W. 302; *State v. Thompson*, 95 Iowa, 465, 64 N. W. 419; *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *Jones v. Territory*, 5 Okl. 536, 49 Pac. 934; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66; *Meece v. Commonwealth*, 78 Ky. 586.

On the other hand, our Supreme Court, upon reasons equally cogent, has held that a defendant in a felony case who has been put upon trial for the offense charged without a formal plea of not guilty having been entered by him to the indictment or information has not been given a legal trial. *People v. Corbett*, 28 Cal. 328; *People v. Gaines*, 52 Cal. 479; *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511. In the case last cited, it was argued, as here, by the Attorney General, and as is held by the foreign cases above cited to be the correct view of such a situation, that "by putting in evidence and arguing the case to the jury the defendant has had the benefit of a plea of not guilty, has waived its formal entry, has shown his intention to rest upon such an issue, and, having had the benefit of it, is not prejudiced by the fact it was not formally entered." Disapproving that argument, Judge Temple, in that case, said: "This position is inconsistent with the admission that a plea is necessary; for the argument would be just as persuasive had the defendant never been arraigned at all. It has been decided over and over again in numerous cases, all holding against the respondent"—citing *People v. Corbett*, supra; *People v. Gaines*, supra, and *Bishop's Criminal Procedure*, § 733, and cases there cited.

As suggested, the argument on both sides of the question is forceful, but the law of this state upon the subject is as our Supreme Court has construed and announced it, and, unless there has been pointed out here some reason which, by virtue of any change in our laws, has arisen since those cases were decided, requiring or authorizing the announcement of a different rule, it will be necessary

to hold that the position of the people upon the proposition cannot be sustained.

But the Attorney General makes the point, and contends, that the adoption of section 4½ of article 6 of the Constitution has wrought a marked and material change in the standpoint from which criminal cases must be considered and reviewed by the courts of this state, and that the opinions in the California cases above referred to, having been filed long before the adoption of said section, cannot be regarded as authority, so far as the point involved here is concerned, if it can justly and truly be said, after an examination of the whole record, that a miscarriage of justice did not follow the defendant's omission to enter a formal plea to the information. And it is further contended by the Attorney General that the constitutional provision thus invoked here applies as well to trial as to reviewing courts.

These points will now be considered. But, before doing so, it may be well first to note the fact that an examination of the record has convinced us that the verdict is sufficiently supported by the evidence. In truth, no fair-minded person can in our judgment read the evidence as it is disclosed by the record without reaching the conclusion that the jury were fully justified in finding the defendant guilty of the crime charged against him in the information. Indeed, it appears to us to have been conclusively shown that the accused, in a most deliberate and cold-blooded manner, obtained from the prosecuting witnesses, who as partners were engaged in carrying on the farming business in Yolo county, a large number of turkeys, of approximately the aggregate value of \$500, by falsely representing to them, with the intent, feloniously, to despoil them of said property, that he was the agent of a San Francisco mercantile establishment, dealing in turkeys and other fowl, and authorized as such to buy turkeys throughout the country for said house, when, as a matter of fact, there was no such house in existence, the defendant himself having received the shipment of turkeys at San Francisco, to which place they were consigned, sold them, and retained the proceeds of the sale. In short, if the testimony produced by the people was credible (and the jury seem to have so regarded it), then no other verdict than that of guilty as charged could have justly been returned.

Now, the important question here is whether, as the Attorney General contends, section 4½ of article 6 of the Constitution may properly be applied to the circumstances of this case. That section of the Constitution was adopted by the people and thus made a part of our organic law in the year 1911, but it has never up to the present time found its way to the Supreme Court in such manner as to require or receive at the hands of that court a construction of its real scope or intent. We are, therefore, without desirable

light from that source to guide us in determining the general character of the instances to which the rule thus laid down, necessarily in general terms, may justly and with propriety be applied. The question, however, whether the section may properly be invoked in support of the rights of the people in this case is squarely placed before us, and it must, therefore, be decided solely so far as this court is concerned by the unaided light of our own judgment.

[7] The section referred to reads as follows: "No judgment shall be set aside or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Although it appears to have been supposed by many members of the legal profession that the foregoing section was designed to have exclusive application to the review of criminal cases by appellate courts, we are convinced from a careful reading of its language that it was the intention that it should as well apply to trial courts in the review of records in criminal cases on motions for new trials. The section, as will readily be perceived, does not expressly limit its application to reviewing or appellate courts, nor does its language in any view that may reasonably be taken of it justify a construction that it was so intended. Trial courts, obviously, have as ample power to set aside judgments and to grant new trials as have the appellate courts, and it is as much their duty as it is that of the higher courts to do so where they are convinced that there exist legal grounds demanding such a course. But the Constitution says to those courts, as it thus enjoins the appellate courts, that they must not exercise that power by setting aside a judgment or granting a new trial "in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." And, where a trial court sets aside a judgment or grants a new trial in a criminal case in contravention of that mandate of the Constitution, its action in that regard will be nullified on appeal as readily as the appellate court would refuse to reverse the judgment or the order denying a new trial in a criminal case for any of the errors specified or contemplated by the section, where such court was of the opinion that the error complained of has not "resulted in a miscarriage of justice."

The important question, then, to be decided is: May the error for which the court below set aside the verdict in the case at bar, when tested by the circumstances disclosed by the record, be said to be among those which may be excused by authority of the constitutional provision under consideration, or, in other words, among those which cannot be held to have resulted in a miscarriage of justice?

[8] Before proceeding to answer the foregoing question, the following may be stated as indisputable propositions: (1) That, where a defendant in a criminal case is put upon his trial upon an indictment or information without having entered a plea thereto, the error thus occurring is one "as to a matter of procedure." (2) That the language of the section, "unless * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," clearly implies that such "opinion" must be supported by a substantial legal foundation, and that, in a given case, where the action of a trial court in that regard is up for review, whether the "opinion" upon which such action has been based is or is not justified, presents purely a question of law to be determined from a review of the whole record.

The central or all-important purpose of said constitutional provision is obviously to legally justify the courts in refusing to interfere with or disturb verdicts of guilty in criminal cases in the trial of which error has been committed and in which the evidence amply supports such verdicts, when such interferences may justly be withheld consistently with a just and proper regard for the substantial rights of persons tried for public offenses. The section is general in its language and terms, and, moreover, upon its face, very sweeping in its scope. It does not pretend to describe specifically the character of the errors coming within the purview of its language, or, by express language, to limit the right of the courts to determine, and say that any error, whatever its nature, has not resulted in a miscarriage of justice. But it is, of course, very clear that the power vested in the courts by the section is not to be arbitrarily exercised either in the one direction or the other, but that the propriety or impropriety of the application of the provisions of the section must be determined, perhaps, in all cases, as much on the character of the record of the particular case as upon the character of the error itself.

It is, of course, not our intention, nor, obviously, is it necessary, in this or perhaps in any other particular case, to attempt to sound the depths of the constitutional amendment, or, in other words, to undertake to suggest, even if such a task were capable of accomplishment, all the tests of its application. If, as we are convinced is true,

the record before us clearly discovers a proper occasion for its application, then the announcement of that conclusion, together with the reasons impelling us thereto, will comprehend all that the exigencies of this case require of us.

The California cases cited and relied upon by the respondent here, proceed upon the theory, which, under the former system in this state, was clearly sustainable, that, where the law prescribes and imperatively commands the observance of certain formalities in the procedure whereby citizens are put upon their trial for their lives or liberty, such formalities cannot be dispensed with, and that, where they have been disregarded, it becomes immaterial whether it may justly be said that in point of fact, the accused thereby suffered no substantial prejudice or that thus he was not deprived of a substantial right in his trial, for the law will itself conclusively presume therefrom prejudicial injury to his rights. It will always be true, and it is logically so, that there must be an issue before a trial can be had, and it is equally true that there can be no issue of fact to try unless there has been a formal affirmation of the fact in dispute on the one side and a like denial of such fact on the other, and this rule, in this state, has heretofore been strictly adhered to in criminal cases, although in civil actions relaxed under certain circumstances, or perhaps it would be better to say its breach excused by certain circumstances. Hence, as the California cases referred to say, where a criminal action is tried without issue having been formed in the manner prescribed by law, there is in law no trial. But we agree with the Attorney General that the section of the Constitution in question has overcome, so far as the point involved in this case is concerned, the effect of the decisions in those cases, and that they cannot be considered as authority in the determination of the question whether the error for which the trial court nullified the verdict in this case did or did not result in a miscarriage of justice.

In the foreign cases cited by the Attorney General and adverted to above, the conclusions were reached upon a consideration of the proposition that in point of fact the accused were not, and could not have been, damaged in any manner or sense by the failure to enter a plea to the indictment, and it is our opinion, as the Attorney General contends, that the section of our Constitution in question makes the reasoning in those cases peculiarly applicable to the case here.

[9] That it is strictly true that the defendant in this case, in point of fact, by his omission to enter a formal plea to the information, could not have been and, indeed, was not prejudiced in the remotest degree as to his substantial rights, or, in other words, could not have been, and, in truth,

was not thus deprived of a full and fair trial upon the merits of the charge, is the statement of a proposition too obvious to admit of legitimate discussion. To the contrary, it is plainly manifest that, the cause having been tried by both sides upon the theory that a plea of not guilty had been regularly entered, the defendant received the benefit of such a plea as fully and effectually as if the same had been formally interposed. The information was read, and the statement thereupon made to the jury by the clerk that the defendant had entered thereto a plea of not guilty. Evidence was received in support of the claims of both sides. Counsel on both sides argued the case to the jury, the court instructed the latter as to the law pertinent to the issues tried, and the jury returned the result of their deliberations upon the case to the court. Or, as is said in the case of *State v. Greene*, 86 Iowa, 11, 23 N. W. 154 (above referred to), where precisely the same question as the one under consideration here was before that court, "the defendant was permitted to introduce evidence to disprove the charge, and his counsel was permitted to argue the case to the jury on its merits, and the jury were required to determine it under the same rules which would have governed in its determination if the plea had been formally entered."

We cannot conceive of a case where section 4½ of article 6 of the Constitution could be applied with more propriety than it may be to the case at bar, and, if by any course of reasoning it may be shown that it does not apply here, then, indeed, may it well be said that it would be difficult to apprehend precisely what purpose it was intended to subserve. In *People v. Carroll*, 128 Pac. 4, where the trial court gave an instruction embracing the language of subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure, which it was claimed with a considerable show of reason was out of place in said case and calculated to mislead the jury to the prejudice of the defendant, this court applied the constitutional amendment in question, saying: "We think, however, the rule established by the amendment to our Constitution * * * was designed to meet just such a case as this and should be applied at this time."

Our conclusion is that the error impelling the learned trial judge to set aside the verdict in this case could not under any possible view which may be taken of it have resulted in a miscarriage of justice. On the other hand, it appears clear to our minds, after an examination of the whole record, that, to permit the order appealed from to stand undisturbed, would result in a distinct miscarriage of justice.

The motion of the respondent to dismiss the people's appeal from the order is denied.

The order appealed from is reversed, with directions to the court below to proceed with the rendition of judgment upon the verdict as returned.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 694)

CALIFORNIA TRONA CO. v. WILKINSON
et al. (Civ. 1,012.)

(District Court of Appeal, Third District, California. Dec. 24, 1912.)

1. CORPORATIONS (§ 99*)—ISSUANCE OF STOCK
—CONSIDERATION—CONSTITUTIONAL PROVISIONS.

The purpose of Const. art. 12, § 11, providing that no corporation shall issue stock except for money paid, labor done, or property actually received, is to prevent the disposal of stock by the company without a sufficient consideration in money, property, or labor; but where there is a consideration of some sort, and the transaction is intended for the benefit of the corporation in the prosecution of its purposes, the consideration is sufficient, though not equal in value to the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

2. CORPORATIONS (§ 99*)—ISSUANCE OF STOCK
—CONSIDERATION — INSUFFICIENCY — WHO MAY OBJECT.

Where there is any consideration for the issuance by a corporation of its stock, neither the corporation nor its stockholders can assail the transfer on the sole ground of inadequacy of the consideration in the sense of disparity in the market value of the stock and the consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

3. CORPORATIONS (§ 99*)—ISSUANCE OF STOCK
—INADEQUACY OF CONSIDERATION — "BONUS"—"BONUS STOCK."

A domestic corporation owning mining claims of unknown value was in need of funds for development work and applied to a foreign corporation for a loan. The application was granted in consideration of the domestic corporation mortgaging its property and delivering to the foreign corporation as a profit a per cent. of the gross sale value of mining products marketed, and an additional profit of 100 shares of stock. The domestic corporation assented to the proposition and received \$75,000 and issued the stock. *Held*, that the stock was issued for a valuable consideration in money and for the corporate purposes within Const. art. 12, § 11, providing that no corporation shall issue stock except for money paid, labor done, or property received, though the stock constituted a bonus given as an inducement to the loan, "bonus stock," technically speaking, being stock issued to the purchasers of bonds as an inducement to them to purchase bonds or loan money, though the word "bonus" may in its natural import imply a gift or gratuity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

For other definitions, see Words and Phrases, vol. 1, p. 836.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the California Trona Company against Guy Wilkinson and others. From a judgment dissolving a temporary restraining order, plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bishop, Hoeffler, Cook & Harwood, of San Francisco, Reed, Black & Reed, of Oakland, R. H. Countryman, of San Francisco, and J. W. Bingaman, of Oakland, for appellant. Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, for respondents.

HART, J. The plaintiff is a corporation organized and existing under the laws of the state of California, with its principal place of business in the city of Oakland, this state. The defendant the Foreign Mines Development Company, Limited, is a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland. The defendant Guy Wilkinson was, at all the times referred to in the complaint, the manager of the defendant corporation and as such had sole charge of its business in the state of California.

It is alleged in the complaint that on the 12th day of November, 1908, "a certificate purporting to show that said defendant the Foreign Mines Development Company, Limited, was the owner of 100 shares of the capital stock of said California Trona Company, was issued to said defendant the Foreign Mines Development Company, Limited; that said certificate was numbered 29; that said defendant * * * paid no money for said 100 shares of stock or any part thereof; that said defendant * * * did no labor for said * * * shares of stock, or any part thereof; that said defendant * * * delivered no property for said * * * shares of stock, or any part thereof; that said defendant * * * neither paid nor rendered any consideration whatsoever for said stock purporting to have been issued to it, or any part thereof, and the issuance of said certificate to said defendant * * * was wholly illegal and void, and did not constitute said defendant * * * a stockholder of said California Trona Company; that upon the so-called issuance of said certificate to said defendant * * * the name of said the Foreign Mines Development Company, Limited, was entered upon the corporate records as the owner of said 100 shares of stock." The complaint further shows that the certificate of shares so issued to the defendant corporation was surrendered to the secretary of plaintiff, who was directed by the said corporation defendant to issue, and upon such direction did issue, a new certificate in lieu thereof to one S. Walker Janes, the agent of said defendant corporation; that on the same day there was also issued to said Janes a certificate for five shares of the capital stock of plaintiff; that on the 18th day of April, 1911, said defendant corporation caused said certificates, aggregating 105 shares of the capital stock of plaintiff, issued to said Janes as stated, to be surrendered to the secretary of plaintiff, who, upon the direction of said defendant corporation, issued in lieu thereof to the defendant Wil-

kinson a certificate for 105 shares of the capital stock of the plaintiff.

It is further alleged that the plaintiff, on the 5th day of November, 1908, executed and delivered to the said defendant corporation a mortgage on all its real and personal property situated in the state of California, and that on the 27th day of November, 1909, said defendant corporation commenced an action in the Circuit Court of the United States in and for the Northern District of California to foreclose said mortgage; "that said action is now pending in said court; that judgment has not yet been rendered in said action; that a meeting of the stockholders of plaintiff for the purpose of electing a board of directors will be held at the office of the plaintiff, in the city of Oakland, on the 3d day of May, 1911, at the hour of 10:30 o'clock a. m.; that said defendant Guy Wilkinson threatens to vote at said meeting the said 100 shares of stock so illegally issued as aforesaid." It is charged that, on the 10th day of April, 1911, said the Foreign Mines Development Company, Limited, acting through said defendant Guy Wilkinson as its agent and manager, entered into an agreement with certain of the stockholders of plaintiff (naming them) whereby it was in effect agreed that said stockholders would vote with Wilkinson for the purpose of calling a meeting of the stockholders of the plaintiff for the 3d day of May, 1911, and that, at such meeting, said stockholders (parties to said agreement) would "cast," or cause to be cast, the votes to which the said number of shares shall entitle such party of the first part in filling vacancies in the board of directors of the said corporation for such persons as shall be indicated by the party of the second part, through its managing director, Guy Wilkinson," etc.

It is alleged that the 100 shares of stock so illegally issued to the defendant corporation and finally to said Wilkinson will, in conjunction with the shares held by the said persons who are parties to the agreement above referred to, constitute a majority of all the capital stock of the plaintiff, and that therefore, if said Wilkinson is permitted to vote said 100 shares of stock, he will control said election of directors to be held on the 3d day of May, 1911. It is charged that the purpose of said defendant corporation and Wilkinson "in seeking to control the election of the board of directors of plaintiff is to compromise said foreclosure suit now pending in the said Circuit Court of the United States by causing plaintiff to confess judgment therein in favor of said the Foreign Mines Development Company, Limited; that in said foreclosure suit there is a controversy as to the amount of the debt secured by said mortgage, said defendant * * * claiming that there is due from said plaintiff a sum nearly twice as great as the sum which plaintiff admits is due." The

complaint declares that, unless a temporary restraining order is issued whereby said defendant Wilkinson is prevented from voting said 100 shares of stock "at said meeting of stockholders to be held on the 3d day of May, 1911, or at any time to which said meeting is adjourned, great and irreparable injury will result to the plaintiff and its stockholders."

Plaintiff prays judgment: That said 100 shares of stock were illegally issued, and that the certificate therefor be delivered up and canceled, and that, pending the determination of this issue, and until the further order of the court, said Wilkinson, his agents, etc., be restrained "from voting said 100 shares of stock at the said meeting of stockholders to be held on the 3d day of May, 1911, or at any time to which said meeting may be adjourned."

Upon the complaint (verified) the court granted a temporary restraining order, requiring said Wilkinson and his agents, etc., to desist and refrain from voting said shares of stock at the stockholders' meeting, to be held May 3, 1911, or "at any time to which said meeting may be adjourned." Said temporary restraining order was issued on the 2d day of May, 1911. On the 4th day of May, 1911, the defendants, by a verified answer, replied to the complaint and at the same time served upon the plaintiff and its attorneys a notice of motion to dissolve the temporary restraining order issued as above indicated.

The answer denies all the equities of the complaint, at the same time admitting certain averments thereof, and then, by way of a special defense, sets forth in detail the transaction between the plaintiff and the defendant corporation whereby the latter became the owner of the 100 shares of stock of the plaintiff referred to in the complaint, and from which it appears that, on the 1st day of August, 1908, the said plaintiff and the defendant corporation entered into an agreement in writing, the terms of which, in so far as they are important to the question here, are, in substance, as follows: That the said defendant agreed to advance to the plaintiff the sum of \$50,000, more or less, with which to develop certain mining properties owned by the latter in the state of California; that, for the purpose of erecting a plant, etc., upon said properties, the sum of \$25,000 was to be advanced, upon a favorable report by an engineer, selected for the purpose of investigating said properties, that the representations of the plaintiff as to the character and extent of the minerals contained therein were true; that, after the completion of said plant, the said defendant "shall deposit in said bank (First National Bank, of Oakland, Cal.) such additional sums as shall be called for from time to time by said company (plaintiff), such additional sums, however, not to exceed in the aggregate

the sum of twenty-five thousand dollars"; * * * that, "as profit to the contractor (defendant corporation) for the advance of \$50,000 there shall be delivered to the contractor 6 1/4 per centum of the gross sale value in San Francisco of all products of said claims marketed by said company, for a period of operation, which in the aggregate shall be equivalent to the continuous operation of such plant for a period of three hundred days at full capacity." After making provision for a reduction of the per centum of the gross sale value of the products of said properties to be paid to the said defendant in case the full sum of \$50,000 is not so advanced and for an increase thereof in the event that a greater sum than \$50,000 is so advanced, the contract proceeds: "Sixth. As additional profit to said contractor (defendant corporation) for the advance of the sum of fifty thousand dollars, more or less, as above provided, said company (plaintiff) shall, upon receipt of the first payment of twenty-five thousand dollars, issue and deliver to said contractor or its nominees one hundred shares of the capital stock of said company, of the par value of one thousand dollars per share." It is then provided that the "said sum of fifty thousand dollars, or such other sum as shall be advanced as aforesaid by the contractor, shall be secured by a first mortgage to the contractor or its nominees upon the property of the company," etc.

In accordance with the provisions of the foregoing agreement, the answer alleges the defendant, on the 5th day of November, 1908, deposited to the credit of, and advanced to, the plaintiff the sum of \$25,000, and that on the 29th day of November, 1909, it advanced to the plaintiff additional sums, exceeding the sum of \$50,000, making in all so advanced by the defendant corporation to the plaintiff a sum exceeding that of \$75,000. The answer admits and alleges that the plaintiff, in pursuance of the terms of said agreement, executed to the defendant corporation "a mortgage on all its real and personal property situated in the state of California, which said mortgage was duly recorded in the offices of the county recorders of San Bernardino and Inyo counties, state of California, in which the said property is situated." It is admitted that an action for the foreclosure of said mortgage is now pending in the United States Circuit Court for the Northern District of California, and that no judgment has yet been rendered in said action; admits the agreement entered into between the defendant Wilkinson and certain other stockholders of the plaintiff, as set forth in the complaint, and that the stock held by said Wilkinson and that of said stockholders would, together, constitute a majority of the shares of the capital stock of plaintiff; denies that there was to be an election of directors of plaintiff at the meeting to be held on the 3d day of May, 1911; denies that Wilkinson would

have controlled the election of directors at said meeting; admits that there is a controversy as to the amount of the debt secured by the said mortgage, and that the defendant corporation claims a sum nearly twice as great as the sum which the said plaintiff admits in said foreclosure suit is due, but denies that the purpose of the defendant corporation and Wilkinson in securing control of the board of directors of the plaintiff "is to compromise the said foreclosure suit, now pending in the said Circuit Court of the United States, by causing the plaintiff to confess judgment therein in favor of the said defendant corporation," etc.

The plaintiff replies to the averments of the answer by an affidavit denying that there was any consideration rendered by the defendant for the 100 shares of stock "other than the so-called and alleged consideration set forth in said contract," referring to the agreement between the plaintiff and the defendant corporation.

Upon the record, of which the foregoing is a synopsis, the court, on the 15th day of May, 1911, made an order granting the motion of the defendants to dissolve the temporary restraining order. This appeal is by the plaintiff from said order dissolving the temporary restraining order.

The contention of the appellant is that the purported issue of 100 shares of stock by the plaintiff to the defendant corporation is unlawful and void under the terms of section 11 of article 12 of the Constitution of this state. The respondents not only controvert the position thus taken by the appellant, but vigorously insist that the order from which this appeal is prosecuted may and should be upheld for the asserted reason that the granting of the temporary restraining order was in direct violation of the mandates of section 527 of the Code of Civil Procedure, as amended by the Legislature of 1911 (Stats. 1911, p. 59), whereby a radical innovation on the former practice with respect to the issuance of temporary restraining orders has been brought about. The respondents also make the point that the plaintiff has not, by its complaint, shown itself to be entitled to favor from a court of equity in the matter as to which it seeks relief.

While we recognize in the last-stated contentions of respondents considerable force, it is not conceived to be necessary to consider them, since we are of the opinion that, upon the merits of the controversy, the order appealed from must be sustained.

We are unable to make out how or in what way the transaction complained of by the plaintiff may be held to be in opposition to the provisions of section 11 of article 12 of the Constitution, and, unless it can be said to be obnoxious to the objection so made, then the act of transferring the stock to the defendant corporation was in all respects bona fide and legal; there being no showing

or even pretense of extrinsic fraud in connection therewith.

The section of the Constitution, with the terms of which it is claimed the transaction involved here is in conflict, reads, in part, as follows: "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

[1] The purpose of those provisions of the Constitution is, of course, to preserve at all times the property of the corporation and thus protect and maintain the rights of the creditors and stockholders thereof as against any such manipulation or disposal of the capital stock by the owners of a majority of such stock as might result in the serious impairment if not the complete destruction of the rights of such creditors and the minority stockholders and at the same time in advantage to such majority stockholders—a situation which experience shows could easily be brought about if the law were otherwise than as laid down by the provisions of the Constitution above quoted. In other words, the design of said provisions is, among other things, to prevent the corporate stock of a corporation from being transferred or disposed of by it without a sufficient consideration, either in the form of money, or property or labor performed for it. But by this we are not to be understood as meaning a consideration equal in value with the stock, for we do not think that the constitutional inhibition invoked here requires such a consideration to render valid the issue of stock by a corporation. If there is a consideration of some sort, and the transaction is one that is intended to redound to the benefit of the corporation in the prosecution of its corporate purposes, then we should say that, so far as are concerned the requirements of the law in that regard, the consideration is sufficient, and, in a sense, adequate, although it may not be equal in value to that of the stock.

[2] In any event, in the case of the issuance of stock by a corporation for an inadequate consideration, viewed from the standpoint of value, such transaction cannot be assailed by the stockholders, or, which is the same thing, by the corporation itself, merely upon the ground of such inadequacy of consideration. "Creditors may attack the transaction—stockholders cannot." *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 67, 97 Pac. 6. So, in this case, if there be shown any consideration at all for issuance of the stock, then the plaintiff is in no position to challenge the transaction resulting in its issuance or the validity of such issue solely upon the ground of the inadequacy of the consideration in the sense that there is a marked or wide disparity, unfavorable to the stock, between the value of the latter and that of the consideration given therefor. Upon this proposition, assuming that the record

discloses some consideration for the issuance of the stock to the defendant, we could rest the decision of this case. But we are of the opinion that the facts disclosed here clearly show that the plaintiff received, under the circumstances under which the stock was issued, an adequate consideration.

[3] There is nothing in the record before us showing what the actual value of plaintiff's stock was, unless the par value thereof is to be assumed to be its actual value, which assumption is not warranted by the other facts disclosed by the record. The complaint is absolutely silent as to the actual value of said stock at the time of the transaction culminating in its transfer to the defendant. It merely alleges that the stock, having a par value of \$1,000 per share, was issued and delivered to the defendant corporation without any of the several kinds of consideration for which it may legally be issued. On the other hand, the answer declares "that the consideration for the issuance and delivery to the defendants * * * of the said 100 shares of the capital stock of the plaintiff and of the said certificate No. 29 therefor, was the advance by the defendant * * * of the sums provided by it to be advanced under the terms of said contract," etc., and that "the same was a good and valuable consideration."

Of course, it can seldom, if ever, be said that the capital stock of a mining corporation whose properties are undeveloped is actually worth its par value. It certainly cannot be said that the stock of the plaintiff, at the time of the transaction here, was worth its par value or anything near such value. The fact is that the properties of the plaintiff which were related to the transaction involved in this dispute were in a condition and of a character that it could not be told, at the time of said transaction, what actual value the stock issued to the defendant possessed, if very much of any when compared to the amount of money the plaintiff asked the defendant to loan to it. Manifestly, the value of said stock, at the time of the transaction involved here, in so far as such stock might have any actual value from the fact of plaintiff's ownership of the properties to develop which it borrowed money from the defendant (and it does not appear that it owned any other property), was purely tentative, or extremely problematical, as all undeveloped mining enterprises, from their very nature, must necessarily be, for whatever actual value it might acquire would, of course, have to depend and be determined upon the result of the experimental development of its said mining properties. It is therefore proper to say, from all the facts presented by this record, that the actual value of the stock transferred to the defendant corporation was, at the time of the issuance of said stock, very far short of its par value, if, indeed, it had any value at all as profit-producing property. We therefore

have this situation here: That the plaintiff was the owner of certain mining claims, the value of which as such was unknown, and that it was in need of the means necessary for the development of said claims; that it made an application to the defendant corporation for the loan of certain moneys to be used for that purpose, and its application was granted, the defendant corporation, upon an examination of the proposition, agreeing to advance the money required—the sum of \$50,000, more or less—in consideration of a promise upon the part of the plaintiff to do these things: (1) To execute and deliver to the said defendant a mortgage upon all its mining properties situated in the state of California and to develop which the loan was to be made; the money so loaned to bear interest at the rate of 6 per cent. per annum. (2) To pay and deliver to the said defendant, as a "profit" to it, a certain per centum of the gross sale value in San Francisco of all products of said claims marketed by the plaintiff; the amount of such per centum to be regulated according to the amount of money so advanced by the defendant. (3) As "additional profit" to the defendant, and upon receipt by it (plaintiff) of the first payment of \$25,000, to issue and deliver to the defendant, or to any person or persons it might name to receive the same, 100 shares of stock of plaintiff of the par value of \$1,000 per share.

The plaintiff assented to the foregoing propositions, and not only executed an agreement in writing to that effect, but executed the terms of the agreement, and thereupon received from the defendant the first advance of \$25,000 and thereafter, from time to time, received other sums until the total amount so received exceeded the sum of \$75,000. It seems to us that, under the circumstances as thus indicated, it must be held to be true that the stock involved in this litigation was issued to the defendant corporation for a consideration which, whatever its value was when compared to the actual value of the stock, not only satisfied the mandates of the Constitution, but which, even in a suit by creditors to cancel the stock on the ground of fraud in its issuance, could hardly be held to be such in itself to justify the inference of fraud, either as a matter of law or of fact.

It is very clear that the issuance of said stock to the defendant, under the circumstances disclosed here, was one of the chief inducements of the loan. Indeed, it is, we think, from a consideration of the whole transaction, proper to assume that, but for the agreement of the plaintiff to so transfer 100 shares of its stock to the defendant, the latter would not have agreed to advance to the former the large sum of money which was actually advanced.

However that may be, it is very clear that the stock was issued for a valuable consideration in the form of money and for the cor-

porate purposes of the corporation, and that is all that is required by the provisions of section 11 of article 12 of the Constitution to make it a perfectly valid transaction.

Provisions in the Constitutions of other states similar to those involved in this discussion have been considered by the courts of those jurisdictions as well as by the Supreme Court of the United States, and they have thus uniformly been held not to mean that the consideration should always be of equal value with the stock issued, so long as "the transaction is a real one, based upon a *present consideration*, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden." *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 299, 7 Sup. Ct. 482, 487 (30 L. Ed. 595). See, also, *Grant v. East & West R. Co.*, 54 Fed. 569, 575, 576, 4 C. C. A. 511; *Nelson v. Hubbard*, 96 Ala. 238, 250, 11 South. 428, 17 L. R. A. 375; *Speer v. Bordelean*, 20 Colo. App. 413, 79 Pac. 332; *Const. of Alabama 1875*, art. 14, § 6; *Colorado Const.* art. 15, § 9.

Even if the stock issued to the plaintiff may be said to have constituted a "bonus," as is the contention, still, it having been given as an inducement to the loan, it cannot be held to be void or even voidable for that reason. While the word "bonus" may, in its natural import, be said to imply a gift or gratuity, "bonus stock, technically, and perhaps correctly speaking, is stock issued to the purchasers of bonds as an inducement to them to purchase bonds or loan money to the corporation." *Thompson on Corporations* (2d Ed.) § 3444.

In *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, where it was contended that certain stock was issued without a consideration to the purchasers of bonds of the corporation there concerned, it is said: "It is true that these parties, in disposing of the bonds, allowed to each purchaser of a \$1,000 bond \$200 of preferred and \$400 of common stock, but they do not seem to have profited by this themselves. *And if it were necessary to the negotiation of the bonds to give a bonus in that stock, it cannot be considered in the light of a mere donation.* (Italics ours.) Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders."

We have no fault to find with the cases cited by counsel for the plaintiff, notably the case of *Central Trust Co. v. New York City, etc., Co.*, 18 Abb. N. C. (N. Y.) 831, which held that stock issued by a corporation without any consideration is illegal, and that such issue may be set aside upon that ground. Indeed, obviously, the views expressed here are in perfect harmony with those announced in those cases. In the *Central Trust Co. Case*,

just mentioned, the transaction whereby certain parties secured, without any consideration whatsoever, a large amount of the bonds and stock of the corporation, came so close to actual fraud that the learned justice who wrote the opinion found no way of relieving it from that imputation except upon the ground that such a method of manipulating bonds and stocks of corporations had been for many years a common practice in that line of the world's activities. Obviously, if, as in that case, the corporation here had parted with a large amount of its capital stock without any sort or kind of consideration—indeed, by gift pure and simple, as in that case—then most unquestionably would the transaction be held to have been in direct violation of the provisions of section 11, art. 12, of the Constitution; but, as an examination of this record clearly and distinctly discloses, there was a consideration and a most valuable one for the issuance of the stock by the plaintiff to the defendant.

As stated in the beginning, a discussion of other points made by the respondents in support of the order dissolving the restraining order is altogether unnecessary in view of the opinion as to the merits of the dispute to which we have been persuaded by an examination of this record; yet we cannot refrain from observing that the plaintiff is in an awkward position as a supplicant for relief through the extraordinary remedial power of a court of conscience. It does not complain that it has received no benefits from the act of issuing the stock to the defendant. It does not charge actual fraud whereby it suffered any injury, nor, indeed, urge any objection which would render the transaction unconscientious; but, after complacently acquiescing therein for a long time and recognizing the validity of the stock issue by various positive acts (such as issuing new certificates for the old, etc.) and after the transaction had been a thing of the past by a number of years, it merely relies, for the establishment of the invalidity of the issue, upon what may well be regarded, at least before a court of equity, as an alleged technical violation of the law of this state concerning the matter of the issuance of stock by corporations. Of course, it is not possible that a corporation may, through an ultra vires transaction of its own making, receive something beneficial or advantageous to its corporate purposes, and then escape the burden of the obligations to which such transaction bound it upon the plea of ultra vires.

But, as shown, upon the merits of this controversy, the order should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 766)

FRESNO PLANING MILL CO. v. MANNING et al. (Civ. 1,113.)

(District Court of Appeal, First District, California. Dec. 30, 1912.)

1. APPEAL AND ERROR (§ 684*)—QUESTIONS REVIEWABLE—RIGHT TO ATTACHMENT.

Whether plaintiff is entitled to a writ of attachment under Code Civ. Proc. § 1197, as amended in 1911 (St. 1911, p. 1319, § 10), will not be considered on appeal where the record does not show that the writ was ever issued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2887-2890; Dec. Dig. § 684.*]

2. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—RULINGS ON DEMURRERS.

Where the trial court struck out a pleading and did not rule on a demurrer thereto, the sufficiency of the pleading as against the demurrer was not involved on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

3. MECHANICS' LIENS (§ 305*)—ENFORCEMENT—PARTIES.

Under Code Civ. Proc. § 1197, providing that nothing in the chapter on mechanics' liens shall impair the right of any person, to whom a debt may be due for work or materials, to maintain a personal action for the debt, a materialman may foreclose a lien against the building and maintain a personal action against the contractor, or the contractor may be made a defendant with the owner in an action to foreclose the lien, and a personal judgment rendered against the contractor, though foreclosure of the lien is denied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 636; Dec. Dig. § 305.*]

4. ABATEMENT AND REVIVAL (§ 4*)—PENDENCY OF ACTION—EFFECT.

An action abates on a showing of the pendency of a prior action between the same parties on the same subject.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-28; Dec. Dig. § 4.*]

5. ABATEMENT AND REVIVAL (§ 8*)—PENDENCY OF ACTION—EFFECT.

The pendency of an action by a materialman to enforce a mechanic's lien and for a personal judgment against the contractor abates a subsequent action by the materialman against the contractor alone for a personal judgment.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-72; Dec. Dig. § 8.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Planing Mill Company against S. E. Manning and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

E. A. Williams, of Fresno, for appellants. Cartwright & Cashin, of Fresno, for respondents.

LENNON, P. J. This is an appeal from a judgment against the defendants and in favor of the plaintiff in an action brought to recover the sum of \$450 for building materials alleged to have been sold and delivered by plaintiff to the defendants, and used by

them as contractors in the construction of a building for one T. J. Hammond in the city of Fresno. Prior to the commencement of the present action the plaintiff filed its claim of lien against the lot of land upon which the building was erected for the value of the material furnished the defendants, and in due time instituted an action to foreclose said lien, in which the defendants here were joined as defendants with the owner of the building. By their answer the defendants pleaded the pendency of the previous action in abatement of the present action. The plaintiff's motion to strike out this defense was granted, and it is of this that the defendants chiefly complain.

[1, 2] Incidentally counsel for the defendants discuss the question as to whether or not the plaintiff was entitled in this action to a writ of attachment under the provisions of the amendment of 1911 (St. 1911, p. 1319, § 10) to section 1197 of the Code of Civil Procedure. The record before us does not show that such a writ was ever issued in this action; and, in the absence of such a showing, the question of the plaintiff's right to a writ of attachment is not involved and cannot be considered. In addition to the motion to strike out, the plaintiff interposed a demurrer to the answer of the defendants, which assailed the sufficiency of the facts pleaded as a special defense in abatement of the present action. The demurrer, however, was not passed upon, for the reason, presumably, that the granting of the motion to strike out in effect disposed of the points raised by the demurrer. No question, therefore, of the technical sufficiency of the plea in abatement as against the demurrer, is involved upon this appeal.

Upon the record before us the only question which can be considered is the correctness of the lower court's ruling striking out the defendants' plea in abatement.

The answer of the defendants, in addition to a denial of all of the material allegations of the plaintiff's complaint, averred in effect that prior to the commencement of the present action the defendants entered into a contract with one T. J. Hammond, whereby the defendants agreed for a stipulated sum to erect a building in the city of Fresno for said Hammond; that during the construction of said building the plaintiff in this action furnished goods, wares, and merchandise to be used, and which were actually used, in the construction of said building; that thereafter the plaintiff, not having been paid for said goods, wares, and merchandise, filed its claim of lien upon the lot of land of said Hammond upon which said building was erected; that thereafter and within the time allowed by law the plaintiff instituted an action in the superior court of Fresno county to foreclose its lien for the value of the same goods, wares, and merchandise al-

leged in the present action to have been sold and delivered to the defendants, and for the value of which the plaintiff in the present action is seeking to recover a personal judgment against the defendants; that the defendants in the present action were joined as defendants in the prior one to foreclose the lien of plaintiff; and that said last-mentioned action had never been dismissed and was pending at the time the present action was commenced.

[3] Under the provisions of section 1197 of the Code of Civil Procedure, as that section was originally enacted and as it stands today, any person to whom a debt is due for materials furnished for the erection of a building may, in addition to an action to foreclose a lien against the building and its owner, maintain a personal action to recover such debt against the person liable therefor; and under the established and approved practice in this state the person contracting for such materials may be made a party defendant with the owner of the building in an action to foreclose a mechanic's lien. In such an action a personal judgment may be rendered against the contractor, even though foreclosure of the lien be denied as against the owner of the building. *Hooper v. Flood*, 54 Cal. 218, 220; *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109; *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 226, 66 Pac. 255.

There seems to be some slight confusion of authority as to whether or not the contractor is a necessary party to an action to foreclose a mechanic's lien; but all of the authorities are agreed that, if a personal judgment is desired against the contractor, it is proper to make him a party defendant, and such practice is commended as tending to avoid a multiplicity of suits. *Giant P. Co. v. San Diego F. Co.*, 78 Cal. 198, 20 Pac. 419; *Russ L. & M. Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *S. F. Paving Co. v. Fairfield*, supra.

[4] It is not the policy of the law to permit different suits to be instituted and pending between the same parties concerning the same subject-matter; and hence the rule that an action abates upon a showing of the institution and pendency of a prior action between the same parties upon the same subject-matter. The reason for this rule is founded upon the theory that, if the first suit affords an ample remedy to the party claiming to be aggrieved, it would be not only unnecessary but vexatious to permit the prosecution of a second suit founded upon the same cause of action. An action is commenced when the complaint therein is filed. Code Civ. Proc. § 350. It is thereafter deemed to be pending until it is finally determin-

ed upon appeal (Code Civ. Proc. § 1049); and a plea in abatement, based upon the ground of another action pending, may be raised either by demurrer or by answer (Code Civ. Proc. § 430; *Tooms v. Randall*, 3 Cal. 438; *Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634).

[5] While it is not definitely stated in the answer of the defendants that Hammond, the owner of the building, was made a defendant in the prior pending action to foreclose plaintiff's claim of lien, or that the defendants here were joined as defendants in that action for the purpose of procuring a personal judgment against them, it is sufficiently clear, as against a motion to strike out, that the answer of the defendants purports to plead that the purpose of the prior action was to foreclose plaintiff's lien against Hammond and against Hammond's property, and at the same time to obtain a personal judgment against the defendants named as defendants in this action for the value of the identical goods, wares, and merchandise sued for therein. The only possible purpose in making the defendants in this action defendants in the prior action would be to secure a personal judgment against them for the satisfaction of the identical debt which is made the basis of the present action. The purpose of the present action is also to secure a personal judgment against the defendants upon practically the same cause of action upon which they were joined as defendants in the previous action. In short, the causes of action and the relief sought in the two suits, in so far as the defendants here are concerned, are alleged to be substantially the same. Consequently the pendency of the prior action was a material defense in the present one, which it was proper to present by way of answer; and it follows that the trial court erred to the prejudice of the defendants in granting the plaintiff's motion to strike out such defense upon the ground of its immateriality.

The judgment appealed from is reversed, and the cause remanded.

We concur: HALL, J.; KERRIGAN, J.

(20 Cal. App. 743)

STEVENS v. LOS ANGELES DOCK & TERMINAL CO. (Civ. 1,177.)

(District Court of Appeal, Second District, California. Dec. 30, 1912. Rehearing Denied Jan. 30, 1913.)

1. DAMAGES (§ 82*)—CONTRACTS—CONSTRUCTION—PENALTY.

A provision in a contract for the sale of land which provided that, if the vendor failed to make certain improvements within a stipulated time, the purchaser should be excused from the payment of the third installment, is not a stipulation for a penalty or the payment of liquidated damages, so that specific performance could be had despite Civ. Code, §§ 1670 and 3369, respectively, declaring contracts pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

viding a penalty invalid to that extent, and that specific performance of such agreements cannot be awarded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 178; Dec. Dig. § 82.*]

2. PARTIES (§ 80*)—NECESSARY PARTIES—WAIVER OF OBJECTIONS.

Where plaintiff's complaint was not demurred to on the ground of nonjoinder of parties, he may have specific performance of a contract for the sale of land, even though his associates, who had received the lands to which they were entitled under the purchase, were not made parties plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131, 170; Dec. Dig. § 80.*]

3. SPECIFIC PERFORMANCE (§ 17*)—JUDGMENT—ERRORS.

Though plaintiff, who had entered into a contract for the purchase of land, sold part of it to a third person and defendant conveyed to plaintiff's grantee, yet, in an action by plaintiff for specific performance, a judgment awarding specific performance as to that portion is proper; the only effect being to perfect the grantee's record title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 38-46; Dec. Dig. § 17.*]

4. ESTOPPEL (§ 110*)—PLEADING—NECESSITY.

In an action for the specific performance of a contract for the sale of land which provided for the construction of improvements by the vendor, and that, in case they were not constructed within 18 months, the purchaser would be excused from the payment of the last installment, where the vendor pleaded that this stipulation was a provision for a penalty and therefore invalid, but failed to plead the construction of the improvements after the expiration of the time limit, and that plaintiff was estopped to deny his liability therefor, plaintiff's estoppel, arising out of the construction of the improvements, cannot be shown as a defense.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by F. W. Stevens against the Los Angeles Dock & Terminal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Campbell & Moore, of Los Angeles, for appellant. J. W. McKinley and Frank Karr, both of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for respondent.

ALLEN, P. J. The action was one brought by plaintiff against defendant for the specific performance of a contract for the purchase of real estate. The contract, made a part of the complaint, was entered into by defendant as party of the first part and W. B. Redburn & Son and plaintiff of the second part, the same being an agreement to sell and convey to the parties of the second part certain described premises consisting of a large number of lots in a tract called the "Back Bay Tract No. 1," being a subdivision of certain lands in the city of Long Beach. The consideration price named for the lots was \$31,850, \$12,740 being paid at the date of the signing of the agreement, \$9,555 being pay-

able on or before the 15th day of July, 1906, and the balance of \$9,555 on or before the 15th day of January, 1907, with 6 per cent. interest upon deferred payments, payable semiannually. The agreement contained the usual clause providing that if default be made in any of the payments, or in any of the covenants and conditions of the contract, the whole should become due and payable, and the first party given the right to cancel and contract, re-enter, and take possession of the premises, and retain all moneys paid as rent for the use and occupation of such premises. It was further agreed that, when all of the payments were made, a deed should be given conveying a good and sufficient title to the property, free and clear of all incumbrances. It was further agreed that the first party should fill said land and raise it to a uniform height of at least three feet above its present elevation, or to such other height as first party might desire, not exceeding 10 feet; that the first party should grade all streets in said tract, and put in cement curbs and sidewalks. Time was made the essence of the contract. Attached to such contract and a part thereof was a further agreement between the parties to the effect that, if the improvements agreed to be put upon said premises by the first party were not completed within one year, second parties should be exonerated from the payment of interest for six months upon the third payment, and, in case the improvements were not completed at the end of 18 months, the third payment should not be required. It is alleged in the complaint that thereafter a partition was effected between the parties of the second part by which certain of the lots were apportioned to Redburn & Son in lieu of their interest in the contract, and certain other lots apportioned to plaintiff, those apportioned to plaintiff being the lots described in the complaint and with reference to which specific performance is asked; that defendant had conveyed to Redburn & Son their apportionment of the lots; that plaintiff had made all payments required of him by the contract other than the payment specified as becoming due on the 15th of January, 1907; and further alleging that none of the improvements had been placed upon said property, as specified in said contract, within the 18 months mentioned; that plaintiff has performed all of the conditions and covenants required of him to be performed by the agreement; that said agreement was just, fair, and reasonable, and the waiver of the third payment for said lands, in case said improvements should not be completed within 18 months from January 15, 1906, was fair and reasonable and was part of the consideration of such agreement, and was fair and adequate and was made for the purpose of inducing plaintiff to enter into said agreement with said defendant, and the enforcement of same is fair and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.-Key-No. Series & Rep'r Indexes

reasonable and not to the undue advantage of either party, and that said consideration was not disproportionate to the value of said lands. There were further allegations of damage resulting from the nonperformance of the conditions of the contract upon the part of defendant, with a prayer for judgment that defendant execute to plaintiff a sufficient conveyance of the property in accordance with the terms and conditions of said agreement, for damages in the sum of \$20,000, and for costs of suit.

A general demurrer to the complaint was interposed and overruled, and defendant answered, admitting the execution of the contract, but denying performance upon plaintiff's part; and alleging further that in June, 1906, plaintiff and Redburn & Son partitioned the premises between themselves, evidenced by a new and independent contract which was entered into between defendant and the respective parties to the partition. Said second contract is set out in the answer, and contains no provision with reference to the price which should be received for the premises in the event the improvements were not made, admits the conveyance to Redburn & Son of their share of the property so allotted by the mutual partition and the receipt by defendant of the full consideration price therefor. Defendant denies that all of the improvements were not made within 18 months, but alleges that they were all made before the suit was commenced, except as to the matter of sidewalks and curbs; that defendant was unable to make such sidewalks and curbs because of the absence of certain ordinances requisite therefor. Defendant further alleges that at the time of the filing of the complaint herein it had filled the said lots, but there is no issue as to default having been made in the filling of such lots within the 18 months prescribed in the original agreement. The answer, however, seeks to excuse this nonperformance of the contract because of its impracticability, in view of the fact that the Back Bay tract comprised a large body of land which, to be filled in a proper manner, required dredging and filling of the entire tract, which could not be done within the 18 months. Defendant denies generally those allegations of the complaint as to the reasonableness and fairness of the contract with reference to the purchase price. Plaintiff in due time filed his affidavit denying the due execution and delivery of the second contract attached to defendant's answer.

The action was tried by the court, which found the allegations of the complaint to be true, found that the contract set up by defendant in its answer, called the second contract, was never executed and delivered; found that the partition had been made as was substantially agreed to by both parties; found that the improvements referred to in said agreement attached to the complaint were not made and constructed within 18

months from the 15th day of January, 1906, the date of the contract, and that the same were not completed until long after 18 months from such date and are not now completed, in that neither curbs nor sidewalks are laid in the streets running through said tract; that plaintiff has performed all of the conditions and covenants required of him to be performed by the contract; that the agreement to waive the third payment for said land in case said improvements should not be completed within 18 months was fair and reasonable and was a part of the said agreement so entered into; that the first and second payments expressed in said agreement for said lands constituted the reasonable and adequate value thereof in an incomplete and unfilled condition and not disproportionate to the value of said lands; that great damage had been suffered by plaintiff, but that the same was offset and equaled by the amount of filling which had been done after the expiration of the 18 months, and that under the terms of the contract defendant is not now required to make sidewalks and curbs; that it was not impossible to make the improvements prescribed by the agreement within the time set forth; that the agreement with reference to the waiver of the third payment was not an attempt to determine and liquidate in anticipation thereof damages to be paid or other compensation to be made to plaintiff by reason of a breach of defendant's obligation mentioned. Judgment was accordingly entered in favor of plaintiff from which judgment defendant appeals upon a bill of exceptions.

It is very clear from the record that the second contract, being the one set out and attached to defendant's answer, was never executed; that, while the signatures were thereto attached, the same was not delivered by defendant or accepted by plaintiff; and that the only contract between the parties duly executed and delivered was the contract set out and attached to plaintiff's complaint. The answer admits the partition, alleging only that it was evidenced in a particular manner. The court finds that the same was not so evidenced.

[1] The principal point presented by appellant is that this waiver of the third payment in default of the making of the improvements was a contract either for a penalty or for liquidated damages; that regarding the same as one for liquidated damages, under section 1670 of the Civil Code, the same is void because from the nature of the case it was neither impracticable nor extremely difficult to fix the actual damages in the event of failure to perform the conditions, and that there is no evidence in the record tending to show the amount of actual damages, if any existed; and, further, that if treated as a penalty, under section 3369 of the Civil Code, specific relief cannot be granted to enforce a penalty or forfeiture

in any case. The learned trial judge in construing the agreement determined the case evidently upon the theory that the so-called waiver of the third payment was neither an attempt to liquidate damages, nor in the nature of a penalty, but was, in effect, an agreement to sell property in an incomplete condition for a fixed price, which was the cash price plus the first deferred payment, with an option to make certain improvements thereon within 18 months, which, if made, then the price agreed upon should be the total amount specified, which included the third payment. In other words, that the specified third payment was nothing more than a stipulation as to the enhancement in value which would attach to the property in the event that the contemplated improvements were made within the specified time, and, if so made, that the plaintiff should pay therefor a stipulated sum, a condition somewhat analogous to a contract involving a sale of vacant property at a fixed price, with an option to construct a house thereon of certain character within a stipulated time, which, if done by the seller, an additional price should be paid therefor. We are of opinion that this is a fair construction of this contract and so construed it is not open to the criticism offered, and does not come within the provisions of the sections of the Civil Code above cited, and that the allegations of the complaint were sufficient to warrant the relief granted.

[2] Appellant further contends that, the action being one for the specific performance of a contract to which Redburn & Son were parties, the same could not be decreed unless Redburn & Son had their day in court and were concluded by the judgment. There was no demurrer on account of nonjoinder of parties, and, in addition to this, it is admitted by the pleadings that Redburn & Son had received the lots mutually agreed upon to be received by them in lieu of their interest in the entire contract; that defendant had conveyed such lots to Redburn & Son; and that they had no interest in the controversy. Under this condition of the pleadings, we think the court was warranted in granting the decree in favor of plaintiff alone.

[3] Appellant further contends that it was error for the court to grant a decree requiring specific performance of the contract by a conveyance of all of the lots, for the reason that it was alleged in the answer and found by the court that one of the lots had been conveyed by defendant to one Patterson, thereby as to such lot waiving the benefit of the contract, and which lot was included in the decree. While the finding of the court that this particular lot was subject to an agreement of sale entered into between plaintiff and Patterson is inaccurate, the record disclosing the conveyance by defendant to Patterson with plaintiff's consent, never-

theless, no prejudice could result to defendant on account of such unwarranted finding. The lot was included in the original contract of sale, and the decree could only have the effect to perfect Patterson's record title. The mere sale of one or more of the lots would not have the effect to destroy plaintiff's right to have specific performance, to the end that the title by him agreed to be conveyed to the purchasers might be perfected.

[4] We quite agree with appellant that, under the construction of the contract as determined by the court, no claim for damages could be considered. The purchasers took only the uncompleted property, and the making of the improvements was optional with the seller, who failed to avail himself of such option, and the same could not be the basis for damages. The finding of the court with reference to the value of the improvements and the damages incurred by reason of the delay may be ignored. There is no evidence in the record from which damages may be estimated, even if allowable; nor were there any allegations in the answer that would permit a finding as to the value of the improvements made after the time had expired under the contract therefor. The action was upon the written contract. The defense was based upon defendant's construction thereof. There were no facts pleaded in the answer from which it could be claimed that plaintiff was estopped by any act to deny his liability on account of improvements made after the expiration of 18 months. If, as a matter of fact, the improvements were made with plaintiff's knowledge and acquiescence, the court might have taken the same into consideration, but such matters would arise by virtue of an estoppel and not through the contract. Defendant having had an opportunity to plead an estoppel, if the facts warranted the same, and failing so to do, the same could not be considered by the court. Neither could the court consider the question of practicability involved in the manner of making the improvements, the right to make which within 18 months was reserved in the contract. The contract on its face was positive in its terms, and the right to make such improvements was stipulated to terminate at the expiration of the 18 months, and when such time had elapsed and no improvements were made, in our opinion, the property in its uncompleted condition, the value of which was determined between the parties under the contract and which is found by the court to have been the reasonable value thereof, was the price and sum agreed to be paid therefor; and, it being disclosed that plaintiff had fully paid all of such contract price, he was entitled to a decree as prayed for in his complaint.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 770)

ROSSI v. BEAULIEU VINEYARD.
(Civ. 1,020.)

(District Court of Appeal, Third District, California. Dec. 31, 1912.)

1. APPEAL AND ERROR (§ 348*)—QUESTIONS REVIEWABLE—EVIDENCE.

Where an appeal from a judgment alone is taken under the new method prescribed by Code Civ. Proc. §§ 941a-941c, within the statutory six months after entry of judgment, and the record does not show that any notice of the rendition of the judgment was served, the court, if necessary, may consider the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 348.*]

2. TRIAL (§ 397*)—FINDINGS—FAILURE TO MAKE.

Where the court failed to make a finding on a material issue submitted by a pleading, the judgment must be reversed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

3. SALES (§ 442*)—CONTRACTS—CONSTRUCTION—LIABILITY OF PARTIES.

A contract for the sale of machinery for \$1,000, \$500 payable before a designated date, and \$500 when all the machinery had proved to give satisfaction, contained a guaranty that the machinery would work in good order. The machinery, when installed, did not perform its functions properly, and the parties made a new agreement, requiring the buyer to pay \$200 on the contract price on the seller exchanging parts of the machinery, so that it would operate satisfactorily for two days, after which the buyer should pay \$300 and the balance at a future time, provided the machinery complied with the guaranty. The court, adopting the theory that the new agreement was an unconditional settlement of the original contract, found that the machinery did not comply with the guaranty in the original contract, and that its actual value did not exceed \$250, and that the buyer expended, between the delivery of the machinery and the commencement by the seller of an action for the price, in repairs, a specified sum in endeavoring to use the machinery, and also found that the buyer was entitled to a deduction from the balance of \$500 of a specified sum by reason of the difference in value of the machinery and the loss sustained in operating it. *Held* that, on the theory, as maintained by the buyer, that the warranty contained in the original contract was not modified by the new agreement, the findings were irreconcilably conflicting; and, assuming that the first finding was true, the buyer would, under Civ. Code, §§ 3313, 3314, be entitled, for the detriment by breach of warranty, to the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

4. TRIAL (§ 395*)—FINDINGS—ISSUES.

Where the findings, taken as a whole or construed together, clearly show that they included the court's conclusions on all the material issues, the findings are sufficient, as against the objection that the court failed to make a finding on a material issue submitted by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.*]

5. SALES (§ 447*)—CONTRACTS—ACTION FOR PRICE—ISSUES—FINDINGS.

In an action for the balance due under a contract of sale of machinery, the buyer filed

a cross-complaint, alleging defects in the machinery and a loss in consequence thereof. A witness testified that the failure of the machinery caused a loss to the buyer of a specified sum. The court found that the buyer expended in repairs a specified sum in endeavoring to use the machinery, and also found that he was entitled to a deduction from the balance due of a specified sum, by reason of the difference in value in the original and the losses sustained in operating the same. *Held*, that the findings, made under the theory that a new agreement was in the nature of an accord and satisfaction binding the buyer to pay a sum whether the machinery complied with the original contract or not, did not contain findings on the issue submitted by the cross-complaint; and a judgment thereon must be reversed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1318; Dec. Dig. § 447.*]

6. APPEAL AND ERROR (§ 931*)—FINDINGS—CONSTRUCTION.

The findings of the trial court must receive such a construction as will uphold rather than defeat the judgment thereon; and when, from the facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by A. Rossi against the Beaulieu Vineyard. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Sterling Carr, of San Francisco, for appellant. John J. Mazza, of San Francisco, and C. E. Trower, of Napa, for respondent.

HART, J. This is an action to recover a balance of \$800, alleged to be due the plaintiff under a certain contract made and entered into between the said plaintiff, carrying on business under the name of A. Rossi & Co., in the city of San Francisco, and the defendant.

The trial was had before the court without a jury, and judgment was awarded the plaintiff in the sum of \$561.09 and costs of suit.

This appeal is by the defendant from the judgment under the alternative method of taking such appeals. Sections 941a, 941b, 941c, Code Civ. Proc.

The defendant, as indicated by the entitlement of this cause, is a corporation, engaged in the manufacture of wine in the county of Napa, this state.

The contract referred to and out of which this controversy grows was consummated through written correspondence between the plaintiff and the defendant, the former, in so far as the pleadings disclose, first addressing to George De Latour, the president and manager of the defendant, the following letter, dated at the city of San Francisco, on August 19, 1909: "As per your inquiry for a must pump, 4x4, and a grape crusher and stemmer (combined) with shaft, belting, pulleys, pipes and fitting also, installation of same at your vineyard, at Rutherford, Cal.,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

without the freight expenses, we will furnish all the above machinery and parts for the sum of \$1,000.00. We also guaranty you that the machinery shall work on good order. This price includes gasoline engine of 10 H. P. Yours very truly, A. Rossi & Co. A. Rossi."

To the foregoing letter the defendant, by De Latour, replied as follows: "Referring to your letter of even date and our conversation this morning with your Mr. Rossi, we beg to confirm the following purchase: You will supply and set up at our winery at Rutherford, as indicated by us, a must pump, grape crusher and stemmer combined of a capacity of not less than one hundred tons per day, with shaftings, beltings, pulleys, pipe and fittings complete, and a Peerless gasoline engine of ten H. P. without any expense to us except the freight and teaming from the Rutherford station to our winery, and carpenter and mason work, for the sum of one thousand dollars, payable five hundred dollars before the end of September, and five hundred dollars before the end of October, when all the machinery has proven to give satisfaction. It is understood that everything must be set up and in running order on or before September tenth, 1909. Very truly yours, Beaulieu Vineyard, per G. De Latour."

The plaintiff did not complete the delivery and installation of said machinery until the 19th day of September, 1909. This delay, the plaintiff claims and alleges in his complaint, was due entirely to the neglect of the defendant in not having prepared the masonry work or the concrete foundation for the gasoline engine.

After the machinery had been installed, the defendant complained that it did not work satisfactorily, or perform in the proper way the functions for which it was intended, and thus there arose between the parties differences, to settle which they, on the 5th day of October, 1909, made and entered into an agreement in writing, which, after rectifying the differences existing between the parties as to the machinery, and that the defendant intended at the date of said agreement to make a payment of \$200 to the plaintiff on the contract price of the same, provided Rossi & Co. should "exchange the stemmer, and fix the said machinery, so that it will operate satisfactorily for two days, after which said time said G. De Latour is to pay the said A. Rossi & Co. the further sum of three hundred dollars, said exchange and said satisfactory run of two days to take place before the 15th day of October, 1909," further provided: "Said G. De Latour further agrees to pay the balance of five hundred dollars by the end of October, 1909, providing the said machinery and equipment furnished complies with the guaranty of A. Rossi & Co. All of the other conditions of said original agreement are to remain in full force and effect, and the pres-

ent payment of two hundred dollars and the foregoing is understood to be an attempt to settle the present difficulties. * * * " At the time of the execution of the last-mentioned agreement, the defendant paid to the plaintiff the sum of \$200.

The complaint alleges that the plaintiff, after the execution of the said last-mentioned agreement, "did perform and carry out all of the conditions agreed to be performed by it under said agreement, dated October 5, 1909, and did exchange said stemmer on the 11th day of October, 1909, and did operate said machinery satisfactorily for two successive days, to wit, on October 11, 1909, and October 12, 1909, and that said machinery is now, and ever since said 11th day of October, 1909, has been, in good condition and operating in a satisfactory manner; that said A. Rossi & Co. has performed every and all of the conditions agreed by it to be performed under the agreement hereinabove referred to, as well as under the agreement last hereinabove referred to."

The making of the agreements above referred to is not controverted by the answer; but it denies that the plaintiff at any time placed said machinery, or any part thereof, in good working order, and, in this connection, alleges: "That said machinery and every part of it has wholly failed to do and perform the work required of it, or in any particular to comply with the said guaranty of the said A. Rossi & Co.; that the piping in said machinery was not properly done, and that the same clogs up and prevents the machine from operating; that the gasoline engine mentioned in the complaint * * * does not work properly or sufficiently or according to the guaranty of the said A. Rossi & Co.; that the stemmer in said machinery does not operate properly, nor is the same properly constructed; that the pulleys and belts used in said machinery are not of the requisite size, or make, or character, and that said machinery, and every part of it, has failed to do or perform the work for which it was intended, and for which the said A. Rossi & Co. guaranteed its performance; that defendant * * * has often requested said A. Rossi & Co. to repair said machinery, but they have wholly refused to so repair or perfect the said machinery, or to comply with their said guaranty." The answer denies that the delay in installing said machinery was due to any fault or the neglect of the defendant in the preparation of the concrete foundation for the gasoline engine, but alleges that the delay in the installation of said machinery was occasioned solely by the neglect of said A. Rossi & Co.; denies that, subsequent to the 5th day of October, 1909, the said A. Rossi & Co. "did perform and carry out all the conditions agreed to be performed by it under said agreement, dated October 5, 1909, and further denies that the said A. Rossi & Co. did operate said ma-

chinery satisfactorily for two successive days"; denies that said machinery has at any time worked satisfactorily, or according to the terms of the agreement, or that it is now, or at any time has been, since its installation, in good condition or operated in a satisfactory manner, and alleges that "the said machinery and every part of it fails to perform the work required of it, or for which it was intended, in a proper or satisfactory manner"; admits the payment by the defendant to A. Rossi & Co., on the 5th day of October, 1909, of the sum of \$200 on account of and in accordance with the terms of said agreement.

The defendant also filed a cross-complaint, in which it pleads the agreement entered into between A. Rossi & Co. and the defendant, and alleges that the former guaranteed, in writing, that the machinery which said Rossi agreed to furnish to and install for the defendant would run and operate and perform the work for which it was intended in a proper and satisfactory manner; alleges delay in installing said machinery, and that such delay was caused solely by the unwarranted neglect of the plaintiff; that by reason of said delay the "defendant and cross-complainant was prevented from complying with certain contracts which it had with the grape growers in the vicinity of cross-complainant's vineyard, for the crushing of their grapes within said time, and was put to great loss and expense and inconvenience;" alleges that, by reason of the defectiveness of said machinery and its consequent failure to properly perform the work it was intended and warranted to perform, and the failure of Rossi to correct the defects therein after having been notified thereof and requested by the defendant to rectify the same, the defendant suffered the loss of 300 gallons of wine on each of 35 days during which it endeavored, "in good faith," to run and operate said machine and machinery, and that the value of said wine so lost is 12 cents per gallon; that the defendant was compelled, by reason of the "defective construction of said machinery and of its character, to employ an expert machinist to endeavor to remedy the defects in said machine, for which the defendant and cross-complainant incurred a liability, the amount of which is not as yet known to it;" alleges "that the present value of said machinery as so delivered and set up by the said A. Rossi & Co. does not exceed the sum of two hundred and fifty dollars."

The cross-complaint asks for judgment: That plaintiff take nothing against the defendant by reason of plaintiff's action; and, further, that the defendant and cross-complainant "do have and recover from said plaintiff the sum of two thousand and ten dollars, and, further, for such additional sums as defendant has incurred in an endeavor to repair said machinery and for costs of suit."

The plaintiff answered the cross-complaint, specifically denying and admitting the material allegations of that pleading, according as such allegations were true or not true from the plaintiff's viewpoint.

The contentions of the appellant are: (1) That the court erred in not finding as to the damage alleged to have been sustained by the defendant in the loss of wine during the period during which it endeavored, without success, because of the defectiveness of the same, to operate the machinery mentioned in the pleadings; (2) that the evidence does not support certain findings; (3) that the findings are irreconcilably inconsistent.

[1] It is preliminarily objected by the plaintiff that, the appeal being from the judgment only, the question of the evidence to support the findings cannot be reviewed. This appeal, as stated, is taken under the new or alternative method and by the objection thus raised we understand the point is sought to be made that, because the appeal was not taken "within sixty days after notice of entry of judgment," the evidence cannot be considered or reviewed. Sections 939, 941a, 941b, 941c, Code Civ. Proc. The point is not well taken. The judgment was rendered and entered on the 21st day of April, 1910. The notice of appeal was served on the attorney for the plaintiff on the 29th day of April, 1910, and filed on the 30th day of said month. There is no evidence in the record of any notice of the rendition of the judgment having been served on the defendant. There can be no doubt that, under the circumstances as thus indicated, it is competent for this court, if it be found necessary, to consider the evidence, notwithstanding that the appeal is from the judgment only. *Brown v. Coffee*, 17 Cal. App. 381, 383, 386, 121 Pac. 309, 311.

[2] As stated, it is claimed for a reversal of the judgment that the findings are contradictory; that some of them find no support in the evidence; and that the court failed to make a finding upon a material issue submitted by the cross-complaint. While the judgment will have to be reversed for the last-stated reason—that is, because of the omission by the court to make a finding upon the question of damage from loss of wine alleged by the cross-complaint to have been sustained by the defendant by reason of the alleged defectiveness of the machinery—still, it is deemed proper to examine the findings to some extent, since it is claimed, as stated, that they are in some respects in direct conflict with each other upon matters vital to the judgment.

[3] The court found that the machinery did not prove satisfactory to the defendant from the time of its installation up to the 5th day of October, 1909, on which date the "supplemental agreement" was made. As to the manner in which Rossi & Co. complied with the terms of the agreement, dated Octo-

ber 5, 1909, the court finds: "(6) That thereafter said A. Rossi & Co. did perform and carry out all of the conditions agreed to be performed by it under said agreement, dated October 5, 1909, and did exchange said stemmer on the 11th day of October, 1909, and did fix said machinery and operate the same satisfactorily for two successive days, to wit, on October 11, 1909, and October 12, 1909," etc. The court then found (finding 7) that, by reason of the compliance with that part of the "supplemental agreement" calling for certain specified changes in the machinery and for the satisfactory operation of the same after such changes therein were made, the plaintiff was entitled to be paid by the defendant, under the terms of said "supplemental agreement," the sum of \$300. By finding 8 the court found: "That prior to said 5th day of October, 1909, and after said date, except as recited in finding 6 hereof, said machinery did not prove satisfactory, and did not comply with the guaranty contained in said first agreement; that the actual value of said machinery after said 5th day of October, 1909, and up to the date of the commencement of this action did not exceed the sum of two hundred and fifty dollars; that the defendant necessarily expended between the delivery of said machinery and the commencement of this action, in repairs thereto, the sum of forty-five and twenty one-hundredths dollars in endeavoring, in good faith, to use the same for the purposes for which it was intended."

The court then found (finding 10) "that on the 1st day of November, 1909, there became due and owing to the plaintiff from the defendant, on account of the purchase price of said machinery and for extras hereinbefore mentioned [the extras referred to were found to be of the aggregate value of \$36.23—see finding 9], the further sum of \$536.23, which said sum has not been paid, but that the defendant, by reason of the difference in value of said machinery and the loss sustained in operating the same, as aforesaid, is entitled to a deduction from said balance of the sum of \$295.20, leaving the whole amount due, owing, and unpaid from the defendant to the plaintiff of \$541.03."

Now, it appears to be the theory of the plaintiff that the "supplemental agreement" constituted an unconditional or definitive settlement of a part of the original agreement or the differences arising with respect thereto; that is to say, that said second writing, as far as it extended in the matter of settling said differences, was in the nature of an accord and satisfaction, and that the amounts thereby agreed to be paid by the defendant constituted a liquidated sum to be so paid, regardless of whether or not the machinery thereafter complied with the terms of the guaranty (warranty) contained in the agreement as originally made. The court seems to have taken that view of the "supplemental agreement," and, accordingly, having found that the actual value of the machinery

was much less than that represented by the purchase price, made the allowance in that respect to the defendant with reference to the balance of \$500 on the purchase price, after the sums of \$200 and \$300 were disposed of as above indicated.

There can be no doubt that, upon its face, the writing of October 5th, or the "supplemental agreement," as it is characterized by the court, is capable of the construction thus given it. On the other hand, it would seem to be absurd to so construe that transaction as to bring about the conclusion that the defendant was willing to pay one-half of the purchase price without any assurance that the machinery would ever operate any more satisfactorily than it had prior thereto. It would therefore seem to be the more reasonable to hold that the purpose of said "supplemental agreement" was to secure upon the part of the plaintiff the execution of the agreement as it was originally made, according to the terms of the warranty contained in said agreement; and that it was not thereby intended by the parties to take any part of the original agreement out of the operation of the warranty. It is very clear that this was the defendant's conception of the "supplemental" agreement, as we judge from the allegations of the cross-complaint. It is very probable, however, that the meaning of said "supplemental agreement," as ascribed to it by the court, was based upon the testimony of the parties, explaining, as under the circumstances they should be permitted to do, what was intended thereby in the respect referred to. We have not examined the testimony with a view of determining this proposition, because, in the first place, if there is any testimony regarding the matter, it is probably conflicting, and the trial court's conclusion thereon would, perhaps, be conclusive upon us; and, in the second place, as declared, the cause will have to be remanded for the reason above stated, and upon a retrial the question under consideration will, no doubt, be fully examined and properly decided. It is to be observed, however, that, upon the plaintiff's theory of the intent and effect of said supplementary agreement, the court made a due and proper allowance for the difference in the actual value of the machinery, as found by finding 8, from that represented by the purchase price. But upon the theory that the warranty contained in the original agreement was not modified or limited in its operation by the supplemental agreement—that is to say, that by said latter agreement it was not intended that the payments provided for therein should be treated as liquidated, or to be made regardless of whether or not the machinery came up to the test of said warranty—findings 8 and 10 are irreconcilably conflicting; for in the first-mentioned finding the court fixes the actual value of the machinery at \$250, and in the last-mentioned finding allows against the defendant a sum vastly in excess of said sum. Obviously, assuming

that finding 8 speaks the truth as to the actual value of the machinery, all that the court would be authorized to allow against the defendant on that account would be the sum as so found. Or, in other words, the defendant, in such a case as this, would be entitled for the detriment caused by the breach of the warranty to "the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time" (sections 3313, 3314, Civ. Code), which in this case means, as stated, the difference between the actual value as found by the court and the purchase price—the sum of \$750. But the consideration and solution of this whole question by the light of the suggestions we have ventured with reference thereto may be left to the trial court upon the retrial of the cause.

[4, 5] Now as to the point that the court failed to make a finding upon a material issue. As has been shown, the cross-complaint alleges that, because of the defectiveness of the machinery, and in endeavoring, in good faith, to run and operate said machinery on 35 different days, the defendant suffered the loss of 300 gallons of wine on each of said days, valued at 12 cents per gallon. In response to that issue the witness De Latour, the manager of the defendant, testified that the failure of the machinery to properly operate caused a loss to the defendant of about 10,000 gallons of wine of the value of 12 cents per gallon. Of course, it will not be disputed that a failure to find on a material issue to which evidence had been addressed is fatal to the judgment. But it is not always necessary to make a specific finding as to each of several material issues, where the findings, taken as a whole or construed together, clearly enough show that they include the court's conclusion upon all the material issues (Hayne on New Trial and Appeal [16th Ed.] p. 1356), and this is what counsel for the defendant contend is true in this case. It is argued that findings 8 and 10, read together, clearly show that the court found upon the question of the alleged damage from the loss of the wine. But we are satisfied that an analysis of those findings, by the light of the theory upon which the allowance was made on account of the difference in the value of the machinery, will not sustain counsel's view of the matter.

In finding 8, as we have seen, the court finds "that the defendant necessarily expended between the delivery of said machinery and the commencement of this action, in repairs thereto, the sum of forty-five and twenty one-hundredths dollars *in endeavoring in good faith, to use the same for the purposes for which it was intended;*" and in finding 10 it is found that the defendant is entitled to a deduction from said balance of \$500 of the sum of \$295.20, "by reason of the difference in value of said machinery, and the loss sustained in operating the same, as aforesaid."

Now, in our opinion, rather than giving the language italicized in those two instructions the effect which counsel claim for it, a comparison of said instructions clearly discloses that the court did not therein take into account the damage which the defendant alleges that it sustained from the loss of wine. The cross-complaint, in paragraph 10 thereof, specifically alleges that the defendant was compelled, on account of the defective construction of the machinery and of its character, "to employ an expert machinist to endeavor to remedy the defects in said machinery, for which defendant and cross-complainant incurred a liability, the exact amount of which is not yet known to it." We think that it must be true that the sum of \$45.20 allowed to the defendant by finding 8 was intended as reimbursement for the expenditure which the defendant alleges in the foregoing paragraph of the cross-complaint that he was required to make in an effort to remedy the defects in the machinery. In any event, it is plainly manifest, not only from finding 8 itself, but from an arithmetical calculation of the items constituting the total deduction allowed to the defendant by finding 10, that no allowance was made on account of the alleged loss of wine. Finding 8 declares that the sum of \$45.20 constituted the sum expended by the defendant *in repairs to the machinery* between the delivery of the same and the commencement of this action. Now, then, it is only necessary to subtract the sum of \$250, found to be the actual value of the machinery, from the sum of \$295.20, the total deduction allowed to the defendant from the total found coming to the plaintiff, to find that the \$45.20 which the court allows the defendant in finding 10 for "the loss sustained in operating the same [the machinery], *as aforesaid,*" is the identical sum of \$45.20 which the court declares in finding 8 was "necessarily expended by the defendant between the delivery of said machinery and the commencement of this action *in repairs thereto,*" etc.

[8] We are familiar with the rule as to the construction of findings as laid down in Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257, cited by counsel for the plaintiff, and which rule is followed by many other cases, of which one is from this court. Etna Indem. Co. v. Altadena Min. Co., 11 Cal. App. 165, 173, 104 Pac. 470. In the Breeze Case it is said that "the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court, for the purpose of rendering such judgment." But it is very clear that by no possible construction can the finding in the

case at bar, awarding the defendant reimbursement for expenditures in repairing the machinery, be held to furnish even the remotest ground for the inference that, in awarding such reimbursement, the court took into account or included therein any damage which the defendant might have sustained by reason of the alleged loss of wine.

The defendant, as stated, was undoubtedly entitled to a finding upon the issue under consideration, and, as before declared, the omission to make such finding constitutes an error fatal to the judgment.

The judgment is therefore reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 661)

MEYER v. PERKINS. (Civ. 1,017.)

(District Court of Appeal, Third District, California. Dec. 17, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913. Supplemental Opinion, April 10, 1913.)

1. BANKRUPTCY (§ 279*)—ACTIONS BY TRUSTEE—SETTING ASIDE BANKRUPT'S FRAUDULENT CONVEYANCE.

Under Federal Bankruptcy Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting a trustee in bankruptcy with the title of the bankrupt as of the date he was adjudged a bankrupt, except as to property exempt and to property transferred in fraud of creditors, and subdivision "e" providing that he may avoid any transfer by the bankrupt which a creditor might have avoided, and recover the property so transferred, except as against bona fide holders for value, a trustee, on a showing that a transfer of property by the bankrupt, while insolvent, was made to defraud his creditors, and that there was no immediate delivery or actual or continued change in the possession, and that the effect thereof was to prevent the enforcement of creditors' claims, could maintain an action to recover such property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

2. BANKRUPTCY (§ 399*) — FRAUDULENT TRANSFERS — STATUTORY EXEMPTIONS — WAIVER.

Under Civ. Code, § 3440, declaring that a transfer of personal property by a person in possession or control, not accompanied by immediate delivery, and followed by an actual and continued change of possession, shall be fraudulent, except as to any transfer of property exempt from execution, an insolvent person, transferring property without immediate delivery or change of possession, does not waive the statutory exemption by a failure to claim it at the time of sale, nor by failure to claim it in his bankruptcy schedule, since, having transferred it, he could not consistently claim it in his schedule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

3. BANKRUPTCY (§ 302*) — FRAUDULENT TRANSFERS—ACTION TO SET ASIDE—ANSWER OF TRANSFEREE—CLAIM TO EXEMPT.

Under Civ. Code, § 3440, declaring that transfers of personal property, not accompanied by an immediate delivery or actual change of possession, shall be presumed fraudulent, except as to property exempt from execution, the exception extends to the transferee as well as to the transferor; and relying upon such exception, in an action by the transferor's trustee in bankruptcy, it was incumbent upon the trans-

feree to set forth in his answer the facts which would bring him within the exception.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

4. BANKRUPTCY (§ 476*)—COSTS—ITEMS—DISBURSEMENTS NECESSARILY INCURRED.

A trustee in bankruptcy, bringing an action to recover stock alleged to have been fraudulently transferred by the bankrupt, and taking possession thereof as provided by Code Civ. Proc. § 510 et seq., was not entitled, as a part of his costs, to the expenses incurred in keeping and feeding the stock pending the action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. § 476.*]

Supplemental Opinion.

5. APPEAL AND ERROR (§ 45*)—JURISDICTION—AMOUNT IN CONTROVERSY.

The amount of money involved in an appeal from an order of the superior court taxing costs is not determinative of the jurisdiction of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 152-155, 157, 158, 172-176, 178-184, 186-197; Dec. Dig. § 45.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Henry C. Meyer, as trustee in bankruptcy of the estate of John A. De Voll, against George W. Perkins, sometimes called George W. De Voll. Judgment for plaintiff, and defendant appeals. Reversed.

For opinion of Supreme Court denying rehearing, see 130 Pac. 208.

A. H. Carpenter, of Stockton, for appellant. C. W. Miller, of Stockton, for respondent.

BURNETT, J. On the 16th day of October, 1911, one John A. De Voll was duly adjudged a bankrupt in the District Court of the United States for the Northern District of California, and, on the 9th day of November following, plaintiff herein was appointed trustee of the estate of said bankrupt, and he thereupon qualified, and ever since has been such trustee. This action was brought by him, in that capacity, to recover certain personal property which he claims was attempted to be transferred by said John A. De Voll, on the 18th day of July, 1910, to defendant herein. The said transaction of July 18, 1910, in reference to said property, evidenced by a bill of sale, was asserted to be for the purpose of defrauding the creditors of said De Voll, and "was not accompanied by an immediate delivery thereof, or followed by an actual or continued change of possession thereof, and that the said personal property then and thereafter remained in the care, custody, control, possession, use, and enjoyment of the said John A. De Voll, the same after the said pretended transfer as before."

[1] One of the questions presented for consideration is whether plaintiff, as trustee, was authorized to prosecute the action. This seems to be set at rest by the provisions of the United States bankruptcy act. Section 70 thereof provides that: "The trustee of the estate of a bankrupt, upon his appoint-

ment and qualification, * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt * * * (4) property transferred by him in fraud of his creditors." Pierce's United States Code, p. 335 (U. S. Comp. St. 1901, p. 3451). In subdivision "e" of said section it is provided that: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication." In this respect, the trustee in bankruptcy, under the United States bankrupt law, holds a position analogous to that formerly held by the assignee in insolvency under the state law. Such assignee had the right to sue for and recover everything due to the estate for the benefit of the creditors. Where a pretended transfer from the assignor was void as to creditors, the title passed to the assignee in insolvency for the benefit of the creditors, and he was authorized to maintain an action on their behalf to reduce the property to possession. As between the creditors and the debtor, who fraudulently conveyed property to defeat them, he was regarded as holding the title to, or an interest in, the property conveyed, and it therefore passed to the assignee. *Brown v. Bank of Napa*, 77 Cal. 544, 20 Pac. 71; *Ruggles v. Cannedy*, 127 Cal. 305, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371. The same principle holds now as to the trustee in bankruptcy. We think, also, that it may be said that sufficient facts are alleged in the complaint to disclose a case for the exercise of this authority of the said trustee. It appears that at all times said De Voll was insolvent; that the pretended transfer was made to defraud his creditors; that there was no immediate delivery or actual or continued change of possession; and that the effect of the said transfer was to prevent the enforcement of the claims of the creditors.

[2] Examining the evidence, we find that the only ground upon which it could be held that the said transfer was fraudulent grows out of the condition contemplated by section 3440 of the Civil Code. There was, in other words, support for the finding that there was no immediate delivery and no actual or continued change of possession of the said property. The conclusive presumption as to fraud would be indulged, therefore, as demanded by said section, if it were not for the circumstance that it is therein provided that the provisions of said section "shall not apply or extend to any sale, transfer, or assignment of any property exempt from execution." And that brings us to what we regard as the serious question in the case. It was alleged in the answer "that the said John A. De Voll was, at the time of such

sale, and for a long time prior thereto had been, a farmer, and that all of said property so sold and delivered by him to defendant, and which plaintiff seeks to recover in this action, was then and there exempt from execution under section 690, subds. 2 and 3, of the Code of Civil Procedure." The court did not find that said property, or any of it, was not exempt from execution; but, as to the aforesaid allegation of the answer, the court's conclusion was: "That the said John A. De Voll did not claim any part of said described personal property so transferred to defendant, as above set forth, to be exempt in his schedule of bankruptcy, or in said bankruptcy proceedings, or at all, and that the said John A. De Voll has waived any and all claim or right, to any exemption of said personal property, that he might otherwise have been entitled to assert or claim." The only fact, it may be said, from which the court drew the conclusion that he waived the exemption is his failure to claim it in "his schedule in bankruptcy." But, the evidence here showing that he had sold it, how could he claim, in his schedule, property as exempt from execution which did not belong to him? The law, of course, contemplates that, when he files his petition in bankruptcy, he shall furnish a schedule of the property which he owns at the time, and shall claim exemption out of that property, and not from property that belongs to some one else. The insolvent would have presented rather a curious spectacle if he had claimed this property, as exempt or otherwise, and, upon examination, had testified that more than a year before he had divested himself of all interest whatever in said property, and that the other party still remained the owner of it. Manifestly, the law would not undertake to compel a person to claim property which he knowingly has no right to claim. Nor, at the time of sale, is he required to make any claim of exemption. The law does not exact of him any declaration or agreement with the vendee as to the character of the property. It provides that the presumption of fraud does not attach to the sale of "any property exempt from execution." The question whether the property belongs to that category, if the issue arises, will be determined like any other question of fact, keeping in view and applying the provisions of section 690 of the Code of Civil Procedure, which defines and classifies the property that is "exempt from execution." Nor has any other occasion arisen when De Voll was called upon to make such claim. He was not made a party to the present action.

[3] The vendee alone was sued, and he very properly, in his answer, alleged that the property was exempt from execution. Why did he do this? For the simple reason that plaintiff, invoking the general rule, based his cause of action upon the contention that there was no "immediate delivery," etc.

But, defendant relying upon an exception to the general rule, it was incumbent upon him to set forth in his answer the facts which would bring him within the exception. Of course, this proviso in said section 3440, in reference to exempt property, applies to the vendee as well as to the vendor, and it may be asserted in behalf of the former as well as of the latter.

The trouble seems to have been born of a misapplication of *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517. There it is held that: "The right to claim the exemption of personal property from execution is waived by a failure of the debtor to exercise it; and the fact that he might have claimed it will not be sufficient, as against his creditors, to impart validity to a sale of the property, without an actual and continued change of possessions." But in that case a judgment was obtained against the vendor, and a writ of execution was issued and placed in the hands of the sheriff, who levied it upon the property in the possession of the vendor and sold it to satisfy said judgment. Afterward the action was brought by the vendee against the sheriff for conversion. It was under these circumstances that the court held as aforesaid. The property being in the hands of the vendor when the writ was executed, it was certainly due the sheriff that he be notified that the property was exempt from execution, and therefore within the exception to the general rule. Upon this point, the expression in said opinion may not be altogether accurate; but the decision was just, and also warranted by the other ground that a portion of the property was not exempt.

[4] Another question of moment is argued by counsel, which is suggested by the appeal from an order taxing costs. It seems that, after the suit was brought, plaintiff took possession of the property, as provided by section 510 et seq. of the Code of Civil Procedure. Certain expenses incurred by plaintiff in keeping and feeding the stock, during the pending of the action, were allowed as a part of the costs.

In *Williams v. Atchison, etc., Ry. Co.*, 156 Cal. 140, 103 Pac. 885, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260, it is said: "The right to recover costs is purely statutory; and, in the absence of a statute, no costs can be recovered by either party. *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 54 Pac. 731. Section 1023 of the Code of Civil Procedure is the statute which gives the right of the recovery of costs. Section 1033 prescribes the procedure for their recovery, and defines what costs and disbursements are recoverable. That section declares, in effect, that one may recover disbursements necessarily incurred in the action. The right accorded to a party, upon filing a proper bond, to take into possession the personal property in dispute is a privilege accorded him by law. It is not a necessity to his cause of action." It was therefore held, in that case, that the

charge paid to a surety company for the replevin bond was not a proper item in the cost bill. The same principle must apply to all the expenses incurred by plaintiff as a result of his exercise of this privilege and taking possession of the property pendente lite. No doubt, as suggested in the *Williams Case*, the Legislature could provide that such expenditures might be recoverable as costs; but it has not done so. The expenses incurred by the trustee for said purpose would probably be a matter of adjustment in the settlement of his account in the insolvency proceedings; but there seems to be no authority for making the defendant in this action liable for them.

The foregoing suggestions are made in view of future contingency, as, the amount of the costs allowed being less than \$300, the action of the trial court in the matter is not reviewable upon appeal. *Foley v. California Horse Shoe Co.*, 115 Cal. 196, 47 Pac. 42, 56 Am. St. Rep. 87.

The judgment is reversed. The separate appeal from the order taxing costs is dismissed.

We concur: CHIPMAN, P. J.; HART, J.

SUPPLEMENTAL OPINION.

PER CURIAM. In the consideration of the appeal from the order taxing costs in the above cause, our attention was not called to the fact that *Foley v. California Horseshoe Co.*, 115 Cal. 196, 47 Pac. 42, 56 Am. St. Rep. 87, has been overruled by the Supreme Court.

[5] It must be deemed settled now that the amount of money involved in an appeal from an order of the superior court taxing costs is not determinative of the jurisdiction of the appellate court. *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Sierra Union, etc., Co. v. Wolff*, 144 Cal. 432, 77 Pac. 1038. It was erroneous therefore to dismiss the said appeal; but, of course, the effect of the reversal of the judgment was to vacate the order allowing costs.

(20 Cal. App. 661)

MEYER v. PERKINS. (Sac. 2,064.)

(Supreme Court of California. Feb. 15, 1913.)

In Bank. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Henry C. Meyer, as trustee in bankruptcy of the estate of John A. De Voll, against George W. Perkins. Judgment for plaintiff was reversed on appeal to the Appellate District Court (130 Pac. 206). Rehearing denied.

A. H. Carpenter, of Stockton, for appellant.
C. W. Miller, of Stockton, for respondent.

PER CURIAM. In further explanation of the decision in the case of *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517, referred to in the opinion of the District Court of Appeal, we think it is proper to say that, at the time that case arose and was determined, section 3440 of the Civil Code did not contain the proviso declaring that its provisions should not apply or extend to a transfer of property exempt from execution. The proviso was first added to the section by the amendment of 1903. Stats. 1903, p. 111.

The decision is therefore inapplicable to the present case, and is not in conflict therewith.

(164 Cal. 686)

In re COWELL'S ESTATE. (S. F. 5,928.)

(Supreme Court of California. Feb. 7, 1913.
Rehearing Denied March 7, 1913.)**1. EXECUTORS AND ADMINISTRATORS (§ 194*)
—ALLOWANCE TO WIDOW—TERMINATION.**

An allowance to a widow, under Code Civ. Proc. § 1464, providing that such allowance shall be made until the inventory is returned, terminates upon the return of the inventory, at which time the court, under the express terms of section 1466, may make an order for such allowance as may be necessary during the further progress of the settlement of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713-723; Dec. Dig. § 194.*]

**2. EXECUTORS AND ADMINISTRATORS (§ 194*)
ALLOWANCE TO WIDOW.**

Since the matter of the amount of the preliminary allowance to be made to the widow rests in the sound discretion of the judge, his action will not be disturbed on appeal, in the absence of a clear abuse of such discretion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713-723; Dec. Dig. § 194.*]

**3. EXECUTORS AND ADMINISTRATORS (§ 187*)
ALLOWANCE TO WIDOW.**

That a widow had property of her own did not affect her right, under the express terms of Code Civ. Proc. § 1464, to have an allowance made for her support until the inventory was returned, though the source of such property was a special bequest, which became available to her at once upon the death of her husband.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 697; Dec. Dig. § 187.*]

4. WILLS (§ 782*)—ALLOWANCE TO WIDOW.

While a husband cannot deprive his widow of her right, under the express provisions of Code Civ. Proc. § 1464, to an allowance for her support until the inventory is returned, he may so frame his will that she cannot have the benefits thereby given her and also those of the statute, but will be required to elect between them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

5. WILLS (§ 782*)—ALLOWANCE TO WIDOW.

A bequest to testator's wife will not be construed to be in lieu of the statutory provisions for her support until the inventory is returned, unless it clearly and unequivocally appears from the will that testator so intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

6. WILLS (§ 782*)—CONSTRUCTION.

A will bequeathing an estate of about a million dollars, and providing that the testator's wife should receive cash and bank stock, to be at once delivered to her, and that for seven years, and until certain of his interests were converted into cash, she should be paid \$1,000 monthly, was not inconsistent with the widow's right to receive the preliminary allowance provided for by Code Civ. Proc. § 1464, until the inventory is returned, so as to require her to elect whether she would take under the will or under the statute, where the making of the statutory allowance in no way conflicted with other bequests made by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

**7. APPEAL AND ERROR (§ 1043*)—HARMLESS
ERROR—REFUSAL OF CONTINUANCE.**

The refusal of a continuance sought so as to permit the testimony of an absent witness to be procured, if error, was harmless, where another witness testified to the same facts without objection, though his testimony was merely hearsay and largely statements of what the absent witness had told him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4113-4121; Dec. Dig. § 1043.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Ernest V. Cowell, deceased. From an order directing monthly payments to be made to Alice M. Cowell, widow of deceased, from the date of his death until the return of the inventory, a brother and two sisters of deceased appeal. Affirmed.

Mastick & Partridge, of San Francisco, for appellants. W. I. Brobeck and P. F. Dunne, both of San Francisco, for respondent.

ANGELLOTTI, J. This is an appeal by a brother and two sisters of deceased, who are residuary legatees under his will, from an order directing the payment to Alice M. Cowell, his widow, for her support, the sum of \$1,500 per month, from the date of his death, March 18, 1911, until the return of the inventory of his estate.

The deceased left an estate valued at about \$1,000,000. The greater portion of this estate was his one-fourth interest in the property distributed in the estate of his father, Henry Cowell, his brother and two sisters owning the remaining three-fourths. The greater part of this again was held through three corporations, engaged generally in the manufacture of cement, of which he, his brother and sisters owned the stock, he holding one-fourth. These corporations were indebted to the extent of some \$600,000, which indebtedness, on account of the very large earnings reasonably anticipated, would probably be wholly discharged in two or three years if no dividend was declared. It is not suggested that the estate of deceased was at all indebted, except in so far as it might be liable on account of the indebtedness of these corporations. There was a parol understanding between the brothers and sisters that all earnings of the corporations shall be applied to the payment of the debt until the same is discharged. The property of the Henry Cowell estate outside of the corporations yielded an annual income of about \$25,000, of which deceased owned one-fourth. In addition to this deceased owned stock in the Bank of California valued at \$20,000, and about \$23,000 in cash in bank. Deceased left no heir other than his wife and his brother and sisters.

By his will deceased provided as follows: All cash and bank stock were "to be at once

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

delivered" to his wife, "whom I desire appointed executrix without bonds for all such property." He then declared: "Second: I desire that all my one-fourth interests in the various Cowell properties be converted into cash within seven years, and that until such distribution, the properties are to pay my wife Alice M. Cowell the sum of one thousand dollars in gold coin on the first of every month. At the end of seven years she is to receive the income from two hundred and fifty thousand dollars as long as she may live. At her death the said two hundred and fifty thousand dollars is to be paid to the regents of the University of California for the purpose of building a hospital on the grounds at Berkeley." He then gave, "as soon as the money becomes available," \$500,000 to the regents of the University of California for a students' gymnasium and a stadium on the grounds at Berkeley. He then gave legacies of \$1,000 to certain employes and \$500 to others, \$2,500 each to Patrick Dorsey and Cornelius Coghlan, and a legacy of \$10,000 to the Cowell Scholarship Committee of Santa Cruz. He then directed that as much of his one-fourth interest in the Cowell properties as was necessary to pay the "minor bequests" should be sold within one year. He then provided as follows: "Tenth: That the affairs of the Cowell Co. may in no wise be interfered with, I hereby direct that if all these bequests are paid within seven years from the date of my death it will not be necessary that any more of my interests be sold than will carry out these bequests. Whatever remains after paying these bequests and final settlement is to become the property of my brother and sisters." He then provided, "if none survive" the residue shall go to the regents of the University of California for certain purposes, and appointed his wife and Alexander F. Morrison executors without bonds.

[1] The allowance made was what was styled by Mr. Justice De Haven in *Estate of Lux*, 100 Cal. 593, 35 Pac. 341, the "preliminary or temporary allowance," required to be made by section 1464 of the Code of Civil Procedure, which provides that where a person dies leaving a widow or minor children, the widow or children, until the inventory is returned, are entitled to remain in the possession of the homestead, the wearing apparel of the family, and of all the household furniture, "and are also entitled to a reasonable allowance for their support, to be allowed by the superior court or a judge thereof." The allowance so made terminates upon the return of the inventory (In re *Lux*, supra; *Crew v. Pratt*, 119 Cal. 137, 51 Pac. 44; *Estate of Bell*, 142 Cal. 100, 75 Pac. 679), when the court may make an order for such allowance as may be necessary during the further progress of the settlement of the estate (section 1466, Code Civ. Proc.).

[2] It is urged that the amount allowed

was much greater than any sum reasonably necessary for the support of the widow. In the determination of a question of this character much is necessarily left to the discretion of the judge to whom the application is made. His action will not be disturbed on appeal, unless it clearly appears that the discretion has been improperly exercised. In re *Lux*, 100 Cal. 605, 35 Pac. 341; *Estate of Bump*, 152 Cal. 279, 92 Pac. 643. "The court is not restricted, in making this allowance, to a bare support for the widow. Regard should be had * * * to the mode in which she lived during the lifetime of her husband. The allowance is to be sufficient to provide all the necessities of life, and this will include all those things which are reasonable and proper for one in the home and in social intercourse, in view of the condition and value of the estate and the station and surroundings of the family." In re *Lux*, supra. In view of the condition and value of this estate the widow was entitled to continue to live, if she so desired, at the hotel where she and her husband had lived for several years immediately preceding his death, and to be maintained in such a way, as regards board, lodging, attendance, clothing, and the comforts of life generally, as would be considered reasonable and proper for the widow of one leaving an estate valued at a million dollars, for it seems clear that the estate of deceased, after payment of debts, will easily reach that amount. This leaves a wide range for the discretion of the judge in probate, and even if we were inclined, in view of the record on this appeal, to consider that the amount allowed is more than we would have given had we been in his place, invested with the discretion committed by the law to him, we are of the opinion that it is not so high, in view of the circumstances and condition of the estate, that we can say that there has been any abuse of discretion on his part.

[3] It seems to be well settled under such statutes as ours that the fact that a widow has property of her own, or other means of subsistence, in no way affects her right to such an allowance from the estate of her deceased husband as is reasonably necessary for her support. The statute gives her this right to be so supported by the estate, regardless of her own means. See *Estate of Lux*, 100 Cal. 604, 605, 35 Pac. 341; *Estate of Bump*, 152 Cal. 276, 92 Pac. 643. And it also appears to be settled in this state, even as to an allowance made under section 1466 of the Code of Civil Procedure after the return of the inventory, that the fact that the widow is given property by the will of her husband in no way affects her right to be given, by way of allowance for support, such sum as is reasonably necessary therefor, leaving the property given her by the will, in the words of the Chief Justice in his concurring opinion in *Estate of Lux*, 114 Cal. 83, 45

Pac. 1023, "whether distributed pending the administration, or at the close of it, * * * to go to the widow intact, and undiminished by any charge for expense of administration or support of family." See *Estate of Lux*, 100 Cal. 593, 35 Pac. 341; *Id.*, 114 Cal. 73, 45 Pac. 1023. Especially does it appear to us that bequests and devises to the wife are altogether immaterial in connection with the question of the preliminary or temporary allowance to be made at the outset for the period prior to the return of the inventory. We can see no good reason for concluding that it affects the question that a bequest or devise is by the terms of the will made available to the widow, in whole or in part, at once. This appears to have been the view of at least four of the justices in *Estate of Lux*, 114 Cal. 73, 45 Pac. 1023. Of course, we are not now speaking of such a provision in a will as puts the widow to her election.

[4, 5] It is not within the power of the husband, by any provision of his will, to deprive the widow of her right to a family allowance from the estate under the statutes, or to in any wise limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. See *Estate of Bump*, 152 Cal. 278, 92 Pac. 643, and cases there cited. But, of course, he may so frame his will that she cannot have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take. *Id.* It is claimed that deceased so did. His will nowhere declares in express words that the provision made for his wife is in lieu of such provision for her support during the administration of the estate as she would be entitled to under the statutes of this state, as was the case in *Estate of Bump*, *supra*, and *Estate of Lufkin*, 131 Cal. 291, 63 Pac. 469. In the will before us such provision as is made for the wife is in terms absolute and unconditional. But it is not essential to the imposition of the duty of election that a declaration to the effect above stated should be expressly made. It is sufficient that it should clearly appear from the language of the will that such was the intention of the testator. We do not understand, however, that in the absence of such an express declaration there is any presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law.

[6] We do not think that such is the situation here. The provision that "the properties are to pay" the widow \$1,000 on the first day of every month "until such distribution" does not so show such an intention. While the language of the provision of the will numbered "Second," which is the only provision in the will in her favor, with the possible exception of the preceding provision

as to cash and bank stock, is not as well chosen as it might have been, we think it clear enough that the design thereof was practically to give to the wife as a bequest the income for her life from \$250,000 of his estate, from the time of his death. As he desired that there should be no immediate segregation of his interest from the other "Cowell properties," he definitely fixed \$1,000 as the amount that she should receive monthly from his death until his interest should be so segregated, fixing the end of seven years as the time by which the division must be made. The amount so fixed was what might reasonably be considered a fair return on \$250,000 safely invested, being just a trifle less than 5 per cent. per annum on such amount. When the segregation, or "distribution" as he puts it, is had, she is thenceforth to receive the income of \$250,000 thereof. The gift thus made is absolute and unconditional, with absolutely nothing being said to indicate that it is anything else than a legacy. Whether we call it an annuity or a demonstrative legacy is unimportant here. We see nothing in the fact that it was contemplated that the amount fixed was to be paid monthly from the time of the death of the deceased to require a different conclusion.

We are of the opinion that there is nothing in the will inconsistent with the right of the widow to receive a family allowance. The deceased has not thereby disposed of all property other than that given to the widow "in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will would defeat the manifest purpose of the testator." See *Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896. It is not pretended that all the bequests made thereby cannot be fully paid in such event. The only persons who will suffer thereby are those who are given "whatever remains after paying these bequests and final settlement." These are the brother and sisters of deceased (appellants here) if they or any of them are then alive, and if none survive, then the regents of the University of California, who have already been given \$500,000 outright, and, upon the death of the wife, the \$250,000 set apart for her use during her life. We thus have as to these parties merely a general disposition of what may be left after all bequests and charges are paid. Such a disposition is not at all inconsistent with the assertion by the widow of her statutory right to a family allowance notwithstanding the provision made for her by the will. See *Shipman v. Keys*, *supra*. It is to be noted that the language is "whatever remains after paying these bequests and final settlement," clearly referring only to such property as may remain at final settlement after, not only the bequests have been paid, but also all such other amounts as may lawfully be required to be

paid in the course of the administration and settlement of the estate. This would of course include such amounts as the widow was entitled to as family allowance under the statutes of the state. As said in the case last cited, such a disposition will be construed as made in view of the absolute statutory rights of the wife and subject thereto.

We see nothing in the expressed desires of the testator, with regard to sales and refraining from interference with the affairs of the "Cowell Co." to any greater extent than is necessary, that materially assists in the determination of the question before us. The same is true as to the evidence that there was an understanding between deceased and his brother and sisters, the stockholders in the Cowell corporations, that all the earnings thereof shall be applied to the discharge of the indebtedness thereof until the same is fully paid, even if we assume that this evidence may properly be taken into consideration in determining the proper construction of the will in the matter under consideration.

Taking the will as a whole, we are unable to find therein any sufficient warrant for a conclusion that the widow was thereby put to her election in the matter of family allowance.

[7] There was certainly no prejudicial error in refusing to continue the hearing of the application for family allowance until the return of Mr. George, who was desired as a witness by appellants, from Oregon. The testimony expected to be elicited from him, as stated by the attorney for appellants to the court below, was in no substantial respect different from that given by Mr. Morrison, one of the executors, the only witness who testified in detail as to the condition and circumstances of the estate. While the testimony given by him was in many respects hearsay, his information having been largely obtained from Mr. George, it was received without objection, and, as said before, was in substantial accord with what the learned attorney for appellants stated he expected to prove by Mr. George.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(164 Cal. 629)

HORNUNG v. SEDGWICK et al.
(S. F. 6,029.)

(Supreme Court of California. Feb. 6, 1913.
Rehearing Denied March 7, 1913.)

1. TRUSTS (§ 112*) — EXPRESS TRUSTS — CONSTRUCTION.

Where an attempted trust was solely for the benefit of the minor son of the grantor, and was to terminate on his reaching majority age or his prior death, provisions in the instrument prescribing to whom the property should belong in the event of the failure or ter-

mination of the trust, and for a transfer of the property subject to the execution of the trust, as authorized by Civ. Code, § 864, could be considered in determining the proper construction of the provisions relating to the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 162; Dec. Dig. § 112.*]

2. PERPETUITIES (§ 9*) — ACCUMULATIONS — EXPRESS TRUSTS — VALIDITY.

A deed which conveyed real estate of the grantor in trust to manage the same and pay out of the net profits sums necessary for the proper education and support of a minor child of the grantor until attaining full age, and, on his attaining full age, the trust to terminate and the property described or the fund in the hands of the trustee to become the absolute property of the child, and, in case of his death during minority, the property to go to third persons not minors, created a trust for the benefit of the child during his infancy, and for the accumulation during that period of profits not necessary for his education and support, and was valid within Civ. Code, §§ 724, 852, 857, permitting provisions for accumulations for the benefit of infants, terminating at the expiration of their minority, and providing that no trust in realty is valid unless created by a written instrument, and that an express trust may be created to receive the rents and profits of real estate during the life of any person or for any shorter term.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

3. PERPETUITIES (§ 9*) — ACCUMULATIONS — EXPRESS TRUSTS — VALIDITY.

The fact that the right of the child to receive real property and accumulated income was dependent on his attaining full age, and that under the other provisions of the deed as to the passing of the property on the termination of the trust by his death during infancy, the accumulations, if any, would become the property of others, not minors, was immaterial as bearing on the validity of the trust in favor of the infant.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

4. TRUSTS (§ 51*) — EXPRESS TRUSTS — CREATION — CONSTRUCTION.

A deed whereby a grantor conveyed land in trust to manage the same, and to pay such parts of the net profits as would be necessary for the proper education and support of the infant during minority, and on his attaining full age the property described or the trust fund in the hands of the trustee to become the property of the infant, confided discretion in the trustee to determine what things were necessary or proper for the education and support of the infant, but the duty of the trustee to apply the profits for such education and support was absolute, and the trust created by the deed was not void on the ground that it was not imperative.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 71; Dec. Dig. § 51.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Rudolph C. Hornung, administrator of Laura Hornung, deceased, against Catherine Lester Sedgwick and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. Tobin & Tobin and George A. Clough, all of San Francisco, for respondents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ANGELOTTI, J. This is an appeal by plaintiff from a judgment that he take nothing and that he has no interest in the real property described in his complaint, given in an action brought by him as administrator to recover possession of said property, and to obtain a decree quieting the title of his intestate and her estate to said property as against defendants.

The appeal is on the judgment roll alone. The findings of the trial court fully present the facts upon which the respective claims of the parties are based.

On May 13, 1909, plaintiff's intestate, Mrs. Laura Hornung, who it appears in the complaint was the wife of said Rudolph C. Hornung, was the owner of the real property involved, the same being a lot of land 25 by 105 feet on Willard street in the city and county of San Francisco. On that day she signed, acknowledged, and delivered to defendants her deed of conveyance thereof. The sole question on this appeal is whether this instrument was effective to convey all the interest of Mrs. Hornung in said land. If it was so effective, the findings of the lower court fully sustain the judgment given.

The deed named Mrs. Hornung as the party of the first part, defendant Catherine Lester Sedgwick (then Catherine Lester) as party of the second part, and defendants Harold Joseph Hornung, a minor (her only child), said Catherine Lester, Lillie Mengel, Emma Matthesen, and Lewis Borle, parties of the third part. It purported first to convey the property to the parties of the second and third parts "in trust for the purposes and subject to the conditions" thereafter set forth. It then purported to grant such property to the party of the second part, now Mrs. Sedgwick, in trust, to hold, manage, and control the same, to collect the rents, issues, and profits thereof, to make all necessary repairs, improvements, etc., and "to pay out of the balance of the proceeds of said premises all sums necessary for the proper education, maintenance, and support of the above-named Harold Joseph Hornung, until he shall have arrived at the age of twenty-one years, and the said party of the first part, does hereby give and grant unto the said party of the second part, full power and discretion as to what may be necessary for the proper education, maintenance and support of the said minor, in so far as the same relates to the trust fund hereby created." A provision follows conferring upon the trustee power to sell the property and reinvest the proceeds, to mortgage the same or any property which she may purchase with the said trust fund, and to do all things necessary or proper in the full and complete management, etc., of the said trust fund. It is then provided as follows: "In the event and upon the condition that the said Harold Joseph Hornung, son of the party of the first part, should arrive at the age of twenty-one years, then and in that event the said trust shall termi-

nate and the said real property hereinabove described, or the trust fund hereby created, then in the hands of the trustee, shall be and become the absolute property of the said Harold Joseph Hornung, and subject to the said condition and trust, the said party of the first part does hereby grant, transfer and convey to the said Harold Joseph Hornung, the real property hereinabove described. In the event and upon the condition that the said Harold Joseph Hornung shall die prior to reaching the age of twenty-one years, then and in that event the said real property, hereinabove described, or the trust fund, which may at the date of the death of the said Harold Joseph Hornung, in case of his death prior to reaching the age of twenty-one years, be in existence, shall be and become the property of the above named Catherine Lester (widow), Lillie Mengel, wife of John Mengel, Emma Matthesen, wife of Joseph Matthesen, and Lewis Borle, and the party of the first part does hereby grant, transfer and convey to the said last named parties share and share alike, that is to say, an undivided one-fourth to each thereof, the said real property, hereinabove described, or in the event that the said real property had been sold, then the property constituting the trust fund, subject to the said condition hereinabove expressed." This is followed by a provision as to the duties of the trustee in the event of a sale of the property. A consideration of this instrument leaves no doubt as to the intention of Mrs. Hornung in executing it. She desired, first of all, to provide from the property, or its proceeds in the event of a sale thereof, for the proper education, maintenance, and support of her son during his minority, and, secondly, she desired such property or proceeds or what was then left of the same, to go absolutely to such son upon his arriving at the age of majority, if he should live so long; thirdly, in the event that he died before arriving at such age, she desired such property or proceeds, or what was left of the same at the time of his death, to go in equal shares to the four other persons named as parties of the third part.

The contention of learned counsel for appellant is that the trust attempted to be created by the deed to carry into effect her intention relative to her son during the period of his minority is invalid under our statutory provisions regarding express trusts, and that the attempted grants in remainder are so dependent upon the execution of the trust that they also must fall with the attempted trust.

[1] The attempted trust was solely for the benefit of the minor son of the grantor, and was to terminate upon his arriving at the age of majority or upon his death prior to such time. The other provisions were solely in the way of prescribing to whom the property to which such trusts related should belong "in the event of the failure or termina-

tion of the trust," and of a transfer of such property subject to the execution of the trust. Section 864, Civ. Code. They may, however, be looked to and considered in determining the proper construction of the provisions relating to the trust.

[2] Subdivision 3 of section 857, Civil Code, provides that an express trust may be created to receive the rents and profits of real property, and pay them to or apply them to the use of any person during the life of such person, or for any shorter term, and subdivision 4 of the same section provides that such a trust may be created to receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by title 2 of part 2, division 2, of the Civil Code. Section 724, Civil Code, contained in said title 2, permits provision for such an accumulation for the benefit of one or more minors then in being, terminating at the expiration of their minority. We are of the opinion that these provisions fully authorize the trust attempted to be declared by the deed before us. The question in this connection is simply one of construction of such provisions, for, of course, learned counsel for appellant are correct in their statement that no trust in relation to real property is valid unless created or declared in writing. Section 852, Civ. Code. But we think that, fairly construed, the deed does declare these purposes. The requirement that the trustee shall pay out of the net profits of said property or its proceeds in the event of sale all sums necessary for the proper education, maintenance, and support of the minor son during the period of his minority, in other words, shall apply to the use of said minor so much of said net profits as is necessary for such purposes during his minority, is absolute and imperative, leaving no discretion whatever in the trustee other than one to determine what things are necessary or proper to accomplish the education, maintenance, and support commanded. This matter of discretion we will discuss later. It is sufficient for the moment to point out that as to such things as are determined by the trustee to be necessary for the proper education, maintenance, and support of the minor the duty of the trustee to apply the net profits is absolute and imperative. As to any possible surplus of net profits remaining in the hands of the trustee after the application of such amounts as may be necessary for the purposes enumerated, it is true that she is not in terms directed "to accumulate" the same for the benefit of the minor. But such we think is fairly the effect of the provisions of the deed as to all amounts not so needed at any time during the minority of the beneficiary, for, of course, it was neither contemplated nor necessary to the validity of the trust to apply that it should be required that net profits to be devoted to that purpose must be so applied im-

mediately on coming into the hands of the trustee. They were to be so applied as needed for the designated purposes, and in the meantime were to be retained by the trustee. But there might be net profits in excess of the amount so needed during the continuance of the trust. All of the net profits received by the trustee, whether so needed or not, while remaining in her custody, constituted a part of the trust fund, both under well-settled principles of law and within the contemplation of the grantor, as is shown by her use of the words "trust fund hereby created" in the first provision as to the discretion to be exercised by the trustee. It was thereafter substantially provided that, upon the completion of the minority of the son, all of the trust property or trust fund "then in the hands of the trustee" shall be and become the property of such son. These provisions to our minds necessarily imply a direction to the trustee to hold for the minor all portions of the rents and profits not necessary to be applied to the designated purposes, in other words, to accumulate the same for his benefit until he arrives at the age of majority. We thus have as to any surplus of rents and profits over the amounts to be applied to the use of the minor for education, etc., a sufficient declaration of a trust for accumulation authorized by subdivision 4 of section 857, Civil Code.

[3] The fact that the right of the minor to receive the real property and the accumulated income is dependent upon the contingency of his attaining the age of majority, and that under the other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors, and who are persons in whose favor a direction to accumulate would not be valid, we regard as immaterial. As we have said, the attempted trust was one solely for the benefit of the minor. The whole object thereof was to make proper provision for the support, maintenance, and education of the minor and to insure the keeping together for him during his minority of such of the property as was not required to be used for these purposes, so that it might go to him upon attaining the age of majority. The accumulation was directed solely for his benefit, and the same was to terminate immediately upon his death, if he died prior to attaining his majority. The fact that the amounts accumulated would go to others in the event of his death before majority was a thing entirely apart from and independent of any provision of the trust, and was a mere incident to the exercise by the trustor of the right given her by the law to transfer the property subject to the execution of the trust.

[4] It is earnestly urged that the attempted trust to apply rents and profits to the use of

the minor for his education, support, and maintenance is void for the reason that it is not imperative, but merely discretionary—in other words, that the trustee is left with full discretion to determine whether any of the rents and profits shall be applied to any of such purposes, and, if any, how much. We have already referred to this point, and have shown, we think, that such is not a fair construction of the provisions of the deed. As we have said, the only discretion confided to the trustee is to determine what things are necessary or proper to accomplish the education, maintenance, and support of the minor, and, of course, it is to be assumed that the trustee will exercise that discretion fairly and honestly, with a view to provide, so far as the net profits will allow and warrant, for such education, maintenance, and support as are reasonable and proper. The duty of the trustee to apply such rents and profits for such education, maintenance and support as may be found to be necessary is, as we have said, absolute and imperative. The language involved in *Estate of Sanford*, 136 Cal. 97, 68 Pac. 494, the case very strongly relied on by appellant, differed from that in the case at bar, and, as was pointed out in *Estate of Reith*, 144 Cal. 314, 77 Pac. 942, the trustees there were to receive the rents and profits and apply the same “to such extent * * * as in their judgment may be proper to and for the use and benefit” of certain children. This language was construed as leaving to the discretion of the trustees “what amount of the income shall be applied” to the purposes designated, entirely regardless of the needs of the beneficiaries, or, as said by this court in *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315, through Mr. Justice McFarland, who wrote the opinion in the *Sanford* case, as leaving to the discretion of the trustees “what amount of the income, if any, should be applied.” As we have shown, no such construction can fairly be given to the language in the deed before us. The views expressed in *Estate of Reith*, supra, 144 Cal. 319, 320, 77 Pac. 942, in response to the claim made that the trust there involved was void for the reason that it left to the discretion of the trustee how much income shall be used for the support and education of the children, which was concurred in by three of the four justices concurring in the majority opinion in *Estate of Sanford*, supra, are applicable to the case at bar, and fully sustain the trust here involved in so far as this objection is concerned.

It follows from what we have said that the attempted trust is valid, and that the deed of Mrs. Hornung was effective to convey all of her interest in the property in suit.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(184 Cal. 645)

MEYER v. CITY ST. IMPROVEMENT CO.
(S. F. 6,058.)

(Supreme Court of California. Feb. 7, 1913.
Rehearing Denied March 7, 1913.)

1. MECHANICS' LIENS (§ 118*)—PUBLIC IMPROVEMENTS—LIENS — STATUTORY PROVISIONS.

The provision in Code Civ. Proc. § 1187, added by amendment in 1897, requiring notice of completion of any work mentioned in section 1183, giving a lien for labor and materials, does not apply to improvements under section 1191, giving a lien for street improvements, and the provision does not limit the time for the filing of a lien therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.*]

2. MECHANICS' LIENS (§ 132*)—PUBLIC IMPROVEMENTS—LIENS — STATUTORY PROVISIONS—“IMPROVEMENT.”

The provision in Code Civ. Proc. § 1187, that all claims of lien must be filed within 90 days after the completion of the “building improvement, or structure,” applies to liens under section 1191, giving a lien for the grading of streets, or any “improvement” in connection therewith; the word “improvement” in the quoted phrase being used in its broadest sense to include any improvement for which a lien is given by the chapter entitled, “Liens of Mechanics and Others upon Real Property.”

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3454.]

3. MECHANICS' LIENS (§ 280*)—PUBLIC IMPROVEMENTS—LIENS—ENFORCEMENT — ACTIONS.

Code Civ. Proc. § 1190, providing that no lien binds any property for more than 90 days after the filing thereof unless an action is begun within that time to enforce it, or where a credit is given then within 90 days after the expiration of the credit, applies to all liens, including those for street improvements, and an action to enforce a lien must be brought within the statutory time.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 456, 458–468; Dec. Dig. § 280.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Alice L. Meyer against the City Street Improvement Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Bishop, Hoefler, Cook & Harwood, of San Francisco, for appellant. Stafford & Stafford, of San Francisco, for respondent.

SHAW, J. The action herein was in the ordinary form of a suit to quiet title. An answer and cross-complaint was filed by the appellant, in which it set up that it had a lien on plaintiff's lot by virtue of a contract for the improvement of the street in front thereof, entered into with plaintiff's grantor who owned the lot at the time of the contract. The trial court held that the appellant had no lien and gave judgment quieting respondent's title, from which judgment, and

from an order refusing a new trial, the present appeals are taken.

The improvement referred to consisted of paving and curbing the street in front of the lot. It was completed on August 13, 1909, under a contract with Frederick P. Zwicker, made on June 17, 1908. At that time the lot belonged in equal shares to Frederick P. Zwicker and his wife, Helene M. F. Zwicker. On September 8, 1909, Frederick conveyed his interest to his wife, and on December 22, 1909, she conveyed the entire lot to the plaintiff. On January 5, 1910, the defendant filed in the recorder's office a claim of lien on said lot for the contract price of said improvement, which claim was in the form prescribed for claims of liens by section 1187 of the Code of Civil Procedure. The cross-complaint to foreclose the alleged lien for this work was filed on July 27, 1910. The owners of the lot did not file any notice of the completion of the improvement as provided by section 1187, and no term of credit was given for payment of the amount due for said improvement.

It will be noted that, although the work was completed on August 13, 1909, the claim of lien was not filed until January 5, 1910, and the cross-complaint to foreclose said lien was not filed until July 27, 1910. The court below held that there was no lien for two reasons: First, because the defendant did not file the claim of lien within the time prescribed by section 1187 aforesaid; second, because an action to foreclose was not begun within the time limited by section 1190 of the Code of Civil Procedure, as it read prior to the amendment of 1911 thereto. The defendant contends that, under the provisions of the Code prior to said amendment of 1911, it was not necessary to file a claim of lien for improvements of a street in front of a lot, made at the request of the owner; also that, if such lien must be filed, the owner who does not file notice of completion under section 1187 is forever estopped to show that the lien was not filed in time; also, that section 1190 does not apply to liens for work done under the provisions of section 1191.

The decision of these questions depends on the meaning and effect of the mechanic's lien law in force prior to the revision thereof by the Legislature of 1911. Stats. 1911, p. 1313. The sections involved in this case are so amended by that revision that an interpretation of the former sections would not determine the effect of the revised act. The lien law has been amended so often and with apparently such slight consideration of the relation of one section to another and with such free use of the same or similar expressions to refer to distinct things that a complete discussion of the various expressions involved and of the decisions construing similar expressions in other sections would extend this opinion to a length which we deem unnecessary, in view of the fact that, so far as the questions under consideration are con-

cerned, the original act is practically superseded by the revision. We therefore give only a brief statement of our conclusions as to the meaning and effect of the different sections as applied to the present case.

[1] Section 1191 gives a lien to any person who, at the request of the owner of a lot in any incorporated city or town, "grades, fills in, or otherwise improves the same," or the street or sidewalk in front of such lot, or who "makes any improvements in connection therewith." It was not amended in 1911. As originally enacted, section 1187 provided only for the time of filing claims of lien and the form thereof. The provision requiring the filing of notices of completion was added by amendment in 1897. Instead of placing this provision at the end of the section, it was inserted as the opening paragraph, and the original provisions concerning claims of lien were made the second paragraph. The first paragraph requires a notice of completion to be filed by the owner in every case in which a lien may be filed under section 1183, but it is silent as to liens under section 1191, and therefore in the case of improvements under the latter section a notice of completion is not required.

[2] The introductory part of the second paragraph of section 1187 allows to original contractors 60 days and to other persons 30 days, after the filing of notice of completion, as the utmost limit of the time for filing claims of lien upon any "building, improvement, or structure." This cannot apply to liens under section 1191, for, as we have seen, the owner need not file such notice of completion of work done under that section. The only provision of section 1187 that fixes the time for filing claims of lien under section 1191 is the proviso immediately succeeding the clause prescribing the form of the claim. It is as follows: "Provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof."

We cannot believe that the Legislature intended to create a lien for work upon a lot, or upon the street in front of it, which should continue without limit, or at least for the full time of the period of limitation of the cause of action against the owner, without any provision for making it a matter of record, or for giving notice to the owner, or his successor. Yet this would be the result if the provisions of section 1187, requiring the filing of claims of lien and fixing the time therefor, do not apply to liens under section 1191. The act, as a whole, shows that its policy is to require a record notice of all liens. It would not be good public policy to allow secret liens of this character. It should not be so construed unless its language permits no other reasonable interpretation. The word "improvement" has a broad meaning. In its ordinary use it includes the work of grading

an abutting street, as well as buildings, and the like, upon the lot itself. While the intent to require liens to be filed for work under section 1191 is not clearly stated, yet we think the section plainly implies that such claims must be filed for all work mentioned in the section or included in its terms. We therefore hold that the word "improvement" in the proviso was used in the broadest sense to include any and every improvement for which a lien is given by the chapter, those under section 1191, as well as those under section 1183, and that the provisions prescribing the form of the statement and requiring that such statement be filed, apply to all such liens.

In *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986, in construing section 1188, the court held that the word "improvement," as used in that section, refers only to the works and buildings mentioned in section 1183. But this narrow meaning of the word, as there used, is necessarily implied from the context, especially the last clause, which speaks of the liens therein referred to as liens for improvements "upon the land upon which the same are situated." This explains the case, and shows that it does not fix the meaning of the word in other sections with a different context. The decisions in *Kreuzberger v. Wingfield*, 96 Cal. 257, 31 Pac. 109, and *Macomber v. Bigelow*, 126 Cal. 13, 53 Pac. 312, merely hold that the liens provided for by section 1191 are not governed by the provisions of section 1183 relating to the form of the contract and mode of contracting. They are not otherwise important here.

[3] 2. Section 1190 is as follows: "No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit." Here is an express declaration making the provision applicable to all liens provided for in the chapter. And at the close of the provision in regard to the effect of giving credit there is a reference to the time when "the work is completed," a phrase which refers as aptly to work under section 1191 as to that done under section 1183. The reasons already given as to the construction of section 1187 are pertinent here. The word "improvement" was here again evidently used to include any kind of improvement for which a lien is given by any section of the chapter, and it includes work done under section 1191.

For these reasons, we hold that the claim of lien of the defendant should have been filed at least within 90 days after the completion of the work, and that the action

should have been begun to enforce it (a cross-complaint in this instance), within 90 days after the filing of such lien. This conclusion makes it unnecessary to consider the other points presented. The court below correctly refused to allow the defendant any relief.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(42 Utah, 232)

In re EVANS et al.

(Supreme Court of Utah. Jan. 30, 1913.)

1. CHAMPERTY AND MAINTENANCE (§ 5*) — CONTRACTS BETWEEN ATTORNEY AND CLIENT — "CHAMPERTY."

An agreement between an attorney and client, whereby the attorney agrees to pay all costs in a case which he shall prosecute for a contingent fee, is champertous; but an agreement to prosecute a cause for a contingent fee and advance to the client the costs and expenses, under the promise of the client to repay the same, is not champertous.¹

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 24-51; Dec. Dig. § 5.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1045-1050; vol. 8, pp. 7593, 7599.]

2. COURTS (§ 24*)—JURISDICTION — SUBJECT-MATTER—CONSENT.

Where the court has no jurisdiction of the subject-matter, the parties may not, by stipulation, confer it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

3. CONTEMPT (§ 34*)—POWER TO PUNISH—INHERENT POWER.

Courts of general and superior jurisdiction possess the inherent power to punish for contempt.

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. §§ 99, 101-104; Dec. Dig. § 34.*]

4. COURTS (§ 78*)—RULES—POWER TO MAKE AND ENFORCE.

Courts of general and superior jurisdiction have the inherent power to make, modify, and enforce rules for the regulation of the business before them.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 274, 276-281; Dec. Dig. § 78.*]

5. COURTS (§§ 1, 116*)—RECORD—AMENDMENTS — POWER OF COURT.

Courts of general and superior jurisdiction have inherent power to amend their record and proceedings, and to recall and control their process.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1-4, 6-9, 91-106, 369-373; Dec. Dig. §§ 1, 116.*]

6. ATTORNEY AND CLIENT (§ 36*)—COURTS—JURISDICTION.

Courts of general and superior jurisdiction have inherent power to control its officers, including attorneys as such, and to suspend, disbar, and reinstate attorneys.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 49; Dec. Dig. § 36.*]

7. COURTS (§ 1*)—INHERENT JURISDICTION—REGULATION.

A court of general and superior jurisdiction may exercise its inherent powers and summary

¹ *Croco v. Oregon Short Line R. Co.*, 13 Utah, 311, 54 Pac. 985, 44 L. R. A. 285; *Potter v. Ajax Min. Co.*, 19 Utah, 421, 57 Pac. 270; *Id.*, 22 Utah, 273, 61 Pac. 999; *Nelson v. Evans*, 21 Utah, 203, 60 Pac. 557.

jurisdiction as the necessities of the case may require, within constitutional limits prescribed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1-4, 6-9, 91-106; Dec. Dig. § 1.*]

8. ATTORNEY AND CLIENT (§ 61*)—DISBARMENT—REINSTATEMENT—JURISDICTION OF COURT.

A court of general and superior jurisdiction permanently disbaring an attorney has power to entertain an application for reinstatement for any reason satisfactory to it.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 84; Dec. Dig. § 61.*]

9. ATTORNEY AND CLIENT (§ 61*)—DISBARMENT—REINSTATEMENT—STATUTORY REGULATIONS.

The general procedure in the Code for new trial or rehearing does not apply to an application by a disbarred attorney for reinstatement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 84; Dec. Dig. § 61.*]

10. ATTORNEY AND CLIENT (§ 61*)—DISBARMENT—REINSTATEMENT.

An application by a disbarred attorney for reinstatement is not restricted to a procedure in the nature of a bill of review or other equity or common-law rules, since neither the original nor the appellate power of the court in respect to its statutory or common-law or equity jurisdiction is exclusively invoked.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 84; Dec. Dig. § 61.*]

11. ATTORNEY AND CLIENT (§ 36*)—REGULATION OF ATTORNEYS—JURISDICTION OF COURTS.

The summary jurisdiction of a court of general and superior jurisdiction over attorneys is inherent, continuing, and plenary, and exists independently of statute or rules of equity, and must be exercised as the necessity of the case requires to protect and maintain the integrity of the court, and to rebuke interference with the conduct of its business, and to control its officers, including attorneys.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 49; Dec. Dig. § 36.*]

12. JUDGMENT (§ 553*)—RES JUDICATA—SUMMARY JURISDICTION.

The doctrine of res judicata may apply to any adjudication, resulting from the exercise of a summary jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 553.*]

13. JUDGMENT (§ 540*)—"RES JUDICATA"—JURISDICTION.

The principle of "res judicata" relates to matters in defense which, to be availing, must be pleaded or presented in defense, and not to jurisdiction, and is largely based on the maxim that no one ought to be twice vexed for one and the same cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 540.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6126-6130; vol. 8, pp. 7786, 7787.]

14. JUDGMENT (§ 720*)—RES JUDICATA—QUESTIONS CONCLUDED.

A question actually and directly in issue in a former suit, and judicially passed on and determined by a court of competent jurisdiction, is conclusively settled between the parties or their privies, and cannot be again relitigated by them on the same or a different cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

15. ESTOPPEL (§ 116*)—PRESUMPTIONS.

Every presumption is against estoppels until the right to apply them affirmatively appears

with certainty by the right record; and among the essentials of the doctrine of estoppel are parties, the actor and reus.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 306; Dec. Dig. § 116.*]

16. ESTOPPEL (§ 110*)—WAIVER—PLEADING.

A party may waive matters giving rise to the right to apply the doctrine of estoppel; and he cannot be heard to invoke it, unless he pleads it in defense.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

17. ATTORNEY AND CLIENT (§ 49*)—PROCEEDINGS FOR DISBARMENT—PARTIES.

The parties to proceedings to disbar an attorney are the attorney and the court; for the proceeding involves matters wholly between the court and the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 48, 66; Dec. Dig. § 49.*]

18. JUDGMENT (§ 577*)—RES JUDICATA—APPLICABILITY OF DOCTRINE.

The doctrine of res judicata is inapplicable where the judgment relied on is of no force or effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1007; Dec. Dig. § 577.*]

19. JUDGMENT (§ 577*)—RES JUDICATA—VALIDITY OF JUDGMENT.

A judgment disbaring an attorney, which is founded on matters not presented by the information, or founded on insufficient findings, or on errors of law apparent on the face of the record, cannot be relied on as res judicata, but may be vacated or modified.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1007; Dec. Dig. § 577.*]

20. PLEADING (§ 1*)—ISSUES—JURISDICTION.

Pleadings are the judicial means of investing a court with jurisdiction of the subject-matter; and the court can judicially consider only what is presented thereby.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

21. JUDGMENT (§§ 18, 248*)—PLEADINGS—VALIDITY.

A judgment not supported by sufficient pleadings, or which is beyond the pleadings and the findings, is void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37, 434; Dec. Dig. §§ 18, 248.*]

22. JUDGMENT (§ 485*)—VALIDITY—ERRORS APPARENT ON THE FACE OF THE RECORD.

A judgment is void for errors of law apparent on the face of the record, such as showing the judgment or the methods by which it was obtained to be at variance with the practice of the court, or contrary to fundamental principles of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.*]

23. JUDGMENT (§ 485*)—VALIDITY—ERRORS APPARENT ON THE FACE OF THE RECORD.

A fact apparent from the mandatory record, which shows that fundamental law was disregarded in the establishment of a judgment, renders it void for all purposes, and subjects it to direct and collateral attack; and the court, on its own motion, may notice the defect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.*]

24. ATTORNEY AND CLIENT (§ 56*)—DISBARMENT—JUDGMENT—VALIDITY.

An information to disbar attorneys charged them with entering into a champertous contract. The referee did not find that the contract was champertous, and the court approved the findings as supported by the evidence, and made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

additional findings, based on the record of a civil action against the attorneys, in which the complaint alleged that the contract was champertous, and in which the attorneys interposed a demurrer; and such additional finding was at variance, not only with the findings of the referee, but also inconsistent with other additional findings of the court disclosing facts showing that the contract was not champertous. *Held*, that a judgment of disbarment was void.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76, 79; Dec. Dig. § 56.*]

25. ATTORNEY AND CLIENT (§ 54*)—DISBARMENT—INFORMATION—ISSUES.

An information to disbar attorneys charged them with entering into a champertous contract to prosecute an action for a contingent fee, and to pay the costs of the litigation. The record of a civil action against the attorneys was attached to the information. The record disclosed a contract, alleging that the attorneys agreed to pay the costs of the litigation, and a demurrer thereto, and a judgment sustaining the demurrer. The attorneys denied the allegations of the information. *Held*, that the record of the cause attached to the information was not a part thereof, within the statute requiring the information to specifically state the matters charged; and the action of the court in assuming the truth of the allegations of the complaint attached was erroneous, in view of specific evidence that the attorneys did not agree to pay the costs.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

26. ATTORNEY AND CLIENT (§ 56*)—DISBARMENT—GROUNDS—EVIDENCE.

Attorneys employed to prosecute an action for negligent death for a contingent fee were proceeded against in disbarment proceedings, on the ground that the contract was champertous as binding them to pay the costs of the litigation. They successfully prosecuted the action for the widow and children of decedent, and fully discharged their obligations to them. *Held*, that a finding that the attorneys violated their duty to the widow and children was unauthorized; and a judgment disbarring them, unless they paid to the widow and children a specified sum within a specified time, disclosed error on its face, and was subject to direct or collateral attack, and could be vacated by the court, on the application of the attorneys.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76, 79; Dec. Dig. § 56.*]

27. EVIDENCE (§ 43*)—JUDICIAL NOTICE—RECORD.

The court, in proceedings to disbar an attorney for making a champertous contract with a client to prosecute an action for a contingent fee, and to pay the costs of the litigation, may not take judicial notice of the record of a cause prosecuted by the attorney for another client, and assume that he had made a similar contract with such other client, merely because on the trial of the cause the adverse party requested the trial court to charge that there could be no recovery because of the champertous contract, and the refusal to so charge was approved by the court on appeal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

28. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—ISSUES.

Where an attorney, in proceedings to disbar him, is charged in the information with a specific offense or offenses, it is not permissible to show other similar offenses, except to prove knowledge.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

29. JUDGMENT (§ 248*)—VALIDITY—ISSUES—FINDINGS.

Findings made without the issue and by methods at variance with the practice of the court do not support a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. § 248.*]

30. CHAMPERTY AND MAINTENANCE (§ 5*)—CONTRACTS—ATTORNEY AND CLIENT.

A contract between an attorney, who had contracted to prosecute an action for a contingent fee of 50 per cent. of the recovery, and a third person, not a lawyer, to the effect that the latter should receive a third of the half of the recovery in consideration of his furnishing witnesses necessary to prosecute the cause, is not, in itself, champertous.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 24-51; Dec. Dig. § 5.*]

31. ATTORNEY AND CLIENT (§ 52*)—DISBARMENT—PROCEEDINGS—ISSUES.

The court, in disbarment proceedings under Rev. St. 1898, §§ 120-124, 130, providing for the removal of attorneys for specified misconduct, and for proceedings on information for such removal, is called on to try only the matter charged in the information.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.*]

32. ATTORNEY AND CLIENT (§ 56*)—DISBARMENT—JUDGMENT—VALIDITY—"DUE PROCESS OF LAW."

The court, adjudging, in proceedings to disbar an attorney, that the attorney was guilty of a crime not charged in the information, and without giving the attorney an opportunity to be heard, acted without jurisdiction, under the rule that judicial proceedings imply an accusation, a hearing before an impartial tribunal, and a judgment (citing 3 Words and Phrases, pp. 2244, 2245).

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76, 79; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 8, p. 7644.]

33. JUDGMENT (§ 470*)—ACTION FOR NEGLIGENT DEATH—DISTRIBUTION OF PROCEEDS—VALIDITY.

A judgment of the district court, distributing the sum recovered therein for negligent death, is presumptively regular and proper, in the absence of any showing to the contrary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

34. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION—VALIDITY.

A decree of distribution in probate proceedings, made after due notice by a court having jurisdiction of the subject-matter, is conclusive as to the fund, items, and matters covered by and properly included therein until set aside or modified by the court, or until reversed on appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 928-931; Dec. Dig. § 315.*]

35. ATTORNEY AND CLIENT (§ 44*)—ACTION FOR NEGLIGENT DEATH—DISTRIBUTION OF PROCEEDS—DUTY TO CLIENT.

A firm of attorneys was regularly employed to prosecute an action for negligent death, for the benefit of the widow and children of decedent, for a contingent fee of 50 per cent. of the recovery. An action instituted in the district court was prosecuted to judgment, and the court distributed the proceeds between the widow and children and the attorneys, giving the attorneys one-half and the widow and children one-half. There was nothing to show that the attorneys took any advantage of the widow

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and children inducing the making of the order of distribution. *Held*, that the attorneys were not guilty of appropriating to their own use money belonging to the widow and children.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

36. CHAMPERTY AND MAINTENANCE (§ 5*)—CONTRACTS—ATTORNEY AND CLIENT.

Where attorneys, solicited by the brother of a decedent to prosecute an action for negligent death in favor of the widow and children of decedent, contracted with the brother, representing the widow and children, to prosecute the action for a contingent fee, but without agreeing to pay the costs, and thereafter the brother was appointed administrator of decedent, and an action was prosecuted to judgment in his name, the contract was not champertous.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 24-51; Dec. Dig. § 5.*]

37. CHAMPERTY AND MAINTENANCE (§ 5*)—CONTRACTS—ATTORNEY AND CLIENT.

A contract between attorneys, agreeing to prosecute an action for negligent death for a contingent fee, and a brother of decedent, an attorney, for a division of the contingent fee, in consideration of the brother rendering services in the prosecution of the action, is not champertous.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 24-51; Dec. Dig. § 5.*]

38. CHAMPERTY AND MAINTENANCE (§ 1*) — CONTRACTS.

Champerty is a species of maintenance or a bargain with plaintiff to divide property sued for, if they prevail at law; whereupon the champertor is to carry on the suit at his own expense (quoting 2 Words and Phrases, 1047).

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 1, 3, 10; Dec. Dig. § 1.*]

39. ATTORNEY AND CLIENT (§ 151*)—CONTRACT OF EMPLOYMENT—VALIDITY.

Where a contract by attorneys to prosecute an action for negligent death for the benefit of the widow and children of decedent was valid under the circumstances, a contract between the attorneys and a brother of decedent, who was also an attorney, for a division between them of the contingent fee, in consideration of the brother rendering services in the prosecution of the action, was not prejudicial to the interests of the widow and children, and was not invalid.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 312, 313; Dec. Dig. § 151.*]

40. ATTORNEY AND CLIENT (§ 44*)—DISBARMENT—GROUNDS.

A firm of attorneys, on solicitation, contracted to prosecute an action for negligent death for the benefit of decedent's widow and children. Pending action for the death, the attorney for defendant made a settlement with the widow without the knowledge of her attorneys, who procured the setting aside of the settlement, and who thereafter prosecuted the action to judgment in a sum greatly in excess of the sum received under the settlement. *Held*, that the attorneys of the widow, though guilty of a technical infraction of the law, were not guilty of a wrong justifying disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

Petition by David Evans and Lindsay R. Rogers for a rehearing and a review and re-

examination of the record and judgment in proceedings for their disbarment. Judgment of disbarment vacated.

For former judgment, see 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794.

Ogden Hiles and C. C. Dey, both of Salt Lake City, for petitioners. Waldemar Van Cott and E. B. Critchlow, both of Salt Lake City, amici curiæ.

STRAUP, J. In May, 1900, an information or accusation was filed in this court to disbar David Evans and L. R. Rogers, members of the bar of this court, who theretofore were copartners in the practice of the law at Ogden, Utah. The matter was referred to a master or referee, who took the testimony and reported findings which exonerated Evans and Rogers of the charge. After a submission of the cause on the findings and the record, the court made additional findings, upon which, and the conclusions stated upon them, Evans and Rogers were adjudged guilty and deprived of the right to practice in any of the courts of this state until they paid into court the sum of \$1,793 for the use and benefit of one Mrs. Nellie Nelson and her minor children, the costs of the proceedings, \$175 referee's fee, and a stenographer's fee of \$54. It was further adjudged that, upon their failure to pay such sums within 60 days, they be permanently disbarred and their names stricken from the roll of attorneys. The case, *In re Evans & Rogers*, is reported in 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794, where the findings of the referee, the additional findings of the court, and its opinion and the judgment are set forth. Upon the filing of the decision Evans and Rogers complied with the order by paying the moneys as directed, and there the matter was at rest until in April, 1912, when they filed a verified petition in this court for a rehearing and a review and re-examination of the record and the judgment. The Attorney General, and counsel theretofore appointed in the former proceedings as friends of the court and to conduct the prosecution, by written stipulation, consented that the petition, if the court were so advised, be entertained. Such counsel were thereupon reappointed by us as friends of the court. Upon their request that they be relieved from further participation in the matter, we appointed other counsel for such purpose, who consented to act, and who have rendered us much assistance.

The petition sets forth the former proceedings, the findings of the referee, the additional findings of the court, portions of its opinion, and the judgment. It is further averred that there are manifest errors apparent on the face of the record and judgment, in the particulars that the additional

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

findings made by the court are inconsistent with each other; that material portions of such findings, as appears on the face of them, are based, not on the evidence, but upon misapplied legal fictions, and were made by a resort to methods at variance with the forms and practice of the court and contrary to law, and that they do not support the judgment; that upon the face of the findings the petitioners were not guilty of the charge; that the court adjudged them guilty of matters not within the issues, and upon which they had not had their day in court; and that the petitioners, since the rendition of the judgment, removed to the state of California, where Evans resumed the practice of the law, and where Rogers intends to do so, and that the judgment and the opinion, as they now stand, impeach and prejudice, and will continue to impeach and prejudice, their good name and their social and professional standing, and hinder and embarrass, and will continue to hinder and embarrass, them in obtaining business and employment, especially in California and elsewhere, where the circumstances of the controversy are not known as they are in Utah. For these reasons the petitioners pray for a rehearing and re-examination of the record, and for an annulment or a modification of the judgment.

At the threshold counsel *amici curiæ* advise us that, in their opinion, we are without jurisdiction or power to now review the record, or to set aside or modify the judgment; for, while the proceedings resulting in the judgment complained of were special and summary, nevertheless, the judgment is res adjudicata of the whole issue, and cannot be inquired into, except on a motion for new trial or rehearing as by law provided for rehearing of causes, or for legal reasons for maintaining a bill in the nature of a review, which, as they advise us, are not sufficiently made to appear. Our attention, therefore, is called to the statute permitting the filing of petitions for a rehearing of causes determined by us on appeal, our rules requiring such a petition to be filed within 20 days after the filing of the opinion, and to the failure of the petitioners thereunder to invoke the action of the court, as they, within such time, might have done, and upon these considerations are we advised that they should not now be heard to complain and be permitted to invoke such action more than 11 years after the rendition of the judgment. We are further advised that if the petition be regarded as in the nature of a bill of review, and as designed to invoke in the broadest and most comprehensive manner all the powers possessed by us to correct error, nevertheless, since it is not grounded on newly discovered matter arising since the judgment, nor upon fraud, but on error, not of law appearing on the face of the record, but of fact and alleged errors resulting from

a misconception or misapplication of the evidence, or conclusions deduced therefrom, the petition cannot be entertained on that theory.

On the other hand, it is contended by counsel for petitioners that the petition invokes the summary jurisdiction of the court, and not its original or appellate jurisdiction in respect of either its common-law or equity jurisdiction, and therefore the general rules of criminal and civil procedure prescribed by the Code do not apply, and that such summary jurisdiction over its officers is inherent in the court and exists of necessity; that the exercise of such a jurisdiction is wholly different from that of the ordinary common-law and equity jurisdiction, and, in the absence of direct legislative enactments or constitutional provisions, such summary jurisdiction may be exercised and such procedure adopted and such remedies applied as, of necessity, may be required to protect the integrity and dignity of the court and its officers in respect of matters wholly between the court and them; and that within such limitations the power of the court is complete, continuing, and plenary. Counsel for petitioners further contend that, though the petition be regarded as in the nature of a bill of review, yet, as alleged in the petition, there are manifest errors of law appearing on the face of the record for which not only such a bill will lie, but which also render the judgment a nullity, and subject to both direct and collateral attack.

Before passing to a consideration of these divergent views, it may be well first to notice, as have counsel, the nature and substance of the accusation and the admitted transactions as disclosed by the record out of which it arose, the findings of the referee, and the additional findings of the court upon which the judgment was based. In 1892 Charles A. Nelson, then a resident of Nevada, while transporting and accompanying live stock on a train of the Southern Pacific Railway Company, was, near Truckee, Cal., knocked off the train in a snowshed and killed. He left surviving him a widow and two minor children, also then residing in Nevada. Shortly thereafter they moved to Oakland, Cal. One of the deceased's brothers, Alfred H. Nelson, was a lawyer practicing his profession at Ogden, Utah. Another brother, Thomas Nelson, resided in Nevada. The widow communicated with Alfred, and employed him to inquire into the circumstances attendant upon the accident, and authorized him to employ such other counsel, and on such terms, as he thought proper to protect her interests, and to prosecute an action against the railway company for damages. Alfred consulted the petitioners, Evans & Rogers, a firm of lawyers of long experience and in active practice at Ogden, especially in the trial of causes. Upon such consultation, and upon the conclusion reached that a meritorious cause of action existed against

the company and in favor of the widow and minor children, Alfred, in virtue of his authority from the widow, employed Evans & Rogers to assist him in the prosecution of such an action. The terms of the employment, as to attorney's fees, were a contingent fee of 50 per cent. of whatever amount might be recovered in the action, of which Evans & Rogers were to receive two-thirds and Alfred one-third; but, as Alfred was not an experienced lawyer in the trial of causes, it was agreed that his share of the labor in the litigation should mainly be to procure the attendance of witnesses, some of whom were beyond the jurisdiction of the court, or to obtain their depositions. It was also decided to commence the suit in the Utah courts at Ogden. As Mrs. Nelson resided in Oakland, and for convenience in the conduct of the business, Alfred was appointed administrator of the estate of the deceased by the probate court at Ogden. Thereafter the suit, in the name of the administrator against the railway company, was commenced in the district court at Ogden. The litigation which ensued was long and laborious. The case was tried five times in the district court, and was heard three times on appeal in the Supreme Court. Finally a judgment was recovered against the company in the sum of \$10,000, which, when paid, with interest, amounted to \$10,700. In December, 1893, and before the first trial of the cause, Alfred Nelson left Utah, and did not thereafter assist in the litigation. Before leaving, he desired to assign his interest in the contingent fee to his brother, Thomas Nelson, partly to secure Thomas for advances or loans of money which he had made to Alfred, and partly for the benefit of Alfred, who was financially involved, and over whose interest Thomas was fearful Alfred's creditors might make trouble. Such an assignment was made and submitted to Evans & Rogers in the presence of both Alfred and Thomas. Evans & Rogers at first declined to recognize Thomas in the transaction, mainly for the stated reason that he was not a lawyer, and because of the understanding that Alfred, who was a lawyer, was expected, as such, to render some assistance in the case. Upon the solicitation of both Alfred and Thomas that Thomas be in some manner recognized, the conclusion was finally reached to do so; but, instead of the proposed assignment, it was thought advisable to make a direct contract between Evans & Rogers and Thomas Nelson. Thereupon a written contract, which is referred to as "Exhibit A," was entered into between Evans & Rogers and Thomas Nelson, as follows: "Ogden, Utah, Dec. 2, 1893. We, the undersigned, agree to give Thomas Nelson one-third of one-half of any amounts which may be collected, whether on compromise or otherwise, in the case of Alfred H. Nelson, as administrator of the estate of

Charles A. Nelson, deceased, v. Southern Pacific Ry. Co., in consideration of said Thomas Nelson furnishing witnesses necessary to prosecute said case. Evans & Rogers."

The dispute between Evans & Rogers and Thomas Nelson, which subsequently, and after the judgment against the railway company had been paid, arose over and grew out of this contract, is what gave rise to the proceedings of disbarment resulting in the judgment of which the petitioners now complain. When the judgment against the railway company was paid, one half thereof, or \$5,350, was distributed by the probate court, and was paid to the widow and her minor children. The other half was retained by Evans & Rogers. Thomas Nelson, who was a witness in the case, was paid his witness' fees and all his expenses and disbursements. In addition to that, he thereafter, and in accordance with the terms of Exhibit A, also demanded of Evans & Rogers one-third of one-half of the amount recovered. They declined to pay him any part thereof, for the stated reason that he had not performed his part of the contract, and had not procured the attendance of witnesses, or obtained their depositions, as by his contract he had agreed; and that upon his failure and refusal so to do, on their demand, they themselves, in order to procure the attendance of necessary witnesses and to take necessary depositions, advanced such costs and expenses at the request of the widow, and upon an agreement with her that she should repay them, regardless of the outcome of the litigation, all of which were subsequently repaid to them by her. Thomas Nelson, of course, claimed that he had performed, and therefore demanded one-third of one-half of the recovery. Upon the refusal of Evans & Rogers to pay it, Thomas Nelson sought an attorney who had represented other railway companies in numerous suits prosecuted by Evans & Rogers and defended by him, and between whom and Evans & Rogers a strained and unfriendly relation then existed growing out of such litigations. Thomas Nelson submitted to him a copy of the contract, Exhibit A, and requested him to bring suit against Evans & Rogers for a recovery. The attorney advised him that, in his opinion, the contract was champertous, and for that reason no recovery could be had. Thomas nevertheless insisted that the suit be commenced, and upon such direction one was commenced by him against Evans & Rogers. The action was bottomed on the contract, Exhibit A, Nelson's compliance with and Evans & Rogers' breach of it. But in the complaint it was also alleged, by way of inducement, as testified to in the disbarment proceedings by Nelson's attorney, that Evans & Rogers had entered into an agreement with Alfred H. Nelson, the administrator, by the terms of which the administrator had agreed to pay

and they to accept one-half of whatever sum might be recovered against the railway company, in consideration of services to be rendered by them in the litigation and their paying and discharging "all taxable costs incurred and the costs incident to procuring the attendance of witnesses and all other costs that might be incurred in the prosecution of the cause"; and then it was alleged that thereafter Evans & Rogers entered into a contract with him (Thomas Nelson), as evidenced by Exhibit A; that he had performed all the conditions thereof on his part to be performed; and that Evans & Rogers wrongfully refused, on his demand, to pay him one-third of one-half of the amount recovered.

When Thomas Nelson's suit was commenced, Evans and Rogers had dissolved partnership. Upon the service of summons on Evans he handed the copy to a Mr. Horn, an attorney at Ogden, and who had theretofore been in the employ of Evans & Rogers covering a portion of the time of the litigation against the railway company, and requested him to "look after it." Later Evans informed Rogers what he had done in that regard. Horn, without consulting either Evans or Rogers, interposed in their behalf a general demurrer to the complaint for want of facts. In no other way was the question of champerty or illegality of the contract, as alleged in the complaint, pleaded or raised, except, on the hearing of the demurrer in the absence of Evans and Rogers, Horn, in support of it, urged that the complaint alleged a champertous contract, and for that reason no recovery could be had. Nelson's attorney did not seriously dispute the legal conclusion. The demurrer was sustained, and the action dismissed. Rogers, believing that the demurrer was a "time server," as also did Evans, and learning the reason for which the demurrer had been sustained, sought Nelson's attorney, stated to him that he did not desire to make any defense of champerty, offered to consent that the demurrer be withdrawn, the case reinstated, and asked that he be permitted to answer on the merits, and later proposed a written stipulation to that effect. As testified to by Nelson himself, the offer was communicated to him, but was declined on his attorney's advice that "it would not amount to anything," as the lower court would likely take the same view of the matter as before, and would not permit a recovery because of the character of the contract; and therefore he (Nelson) "proceeded with it to the Supreme Court to show up" Evans and Rogers and "to place them on record." Evans, learning of the offer, also expressed a desire to join in the stipulation, but was told by Rogers that it would not be accepted. A speedy appeal by Nelson was prosecuted to the Supreme Court. His counsel, in his brief, after referring to the allegations of the complaint and to the de-

murrer, submitted the case with the observation: "The demurrer is general. It is submitted that the complaint states a cause of action, unless there is an illegality in the contract itself. There is no presumption that such is the case, and there is no presumption, certainly, that the defendants rely upon such defense." Horn, at Rogers' request, withdrew his appearance for him in the Supreme Court, but after he had filed a brief on behalf of both Evans and Rogers, in which all that he said was that the complaint "does not state facts sufficient to constitute a cause of action," and cited cases, including the case of *Croco v. O. S. L. R. Co.*, 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285, relating to champertous and illegal contracts. The judgment of the court below was affirmed. The case is reported in *Nelson v. Evans & Rogers*, 21 Utah, 202, 60 Pac. 557.

[1] A reading of the case shows that the court did not hold that the contract, Exhibit A, between Thomas Nelson and Evans & Rogers was champertous or illegal, but held that the contract, as alleged in the complaint, was champertous and illegal. Such holding, however, was based, as appears by the opinion in that case, solely upon the ground of the allegations that Evans & Rogers had agreed to pay and discharge the costs and expenses of the litigation in the suit against the railway company. But the terms of such an agreement to pay and discharge such costs and expenses were alleged to be terms of an agreement between the administrator, Alfred H. Nelson, and Evans & Rogers. They were not alleged to be terms of, nor are they contained in, the agreement, Exhibit A, between Thomas Nelson and Evans & Rogers.

The agreement between Alfred H. Nelson and Evans & Rogers, as alleged in that complaint, is champertous and illegal. *Croco v. O. S. L. R. Co.*, 18 Utah, 321, 54 Pac. 985, 44 L. R. A. 285. The agreement between Thomas Nelson and Evans & Rogers, Exhibit A, is not champertous. *Potter v. Ajax Min. Co.*, 19 Utah, 421, 57 Pac. 270; s. c., 22 Utah, 273, 61 Pac. 909, where it was held by this court that contracts for contingent fees, based on a moiety of the amount of recovery, are lawful; and that an attorney may lend or advance to his client moneys for necessary costs and expenses to carry on the litigation, when there is an express or implied understanding or agreement for the repayment of such moneys, and no agreement of indemnity against the client's liability to pay costs. And it was the contract, Exhibit A, which defined, and under it Thomas Nelson in fact claimed, his primary right and the corresponding primary duties of Evans & Rogers, and the delict or omission which violated them, and under which he in fact claimed he had performed, and with respect to which he in fact claimed the breach arose. Thus Thomas Nelson could have stated a good cause of action, founded upon his contract

and a breach thereof, which would have been free of the charge of champerty or illegality; for let it be noticed that his complaint was held bad on the sole ground that it contained allegations showing terms of a contract whereby the defendants, Evans & Rogers, had agreed to pay and discharge all costs and expenses of the litigation referred to, terms of the alleged Alfred H. Nelson contract, but not of the Thomas Nelson contract. Nevertheless, Thomas Nelson, by way of inducement, first alleged that Evans & Rogers had entered into an alleged contract with the administrator, Alfred H. Nelson, which, as alleged, was impregnated with champerty, and then alleged that they thereafter entered into a contract with him, which within itself was not so tainted, and thereby unnecessarily, and either inadvertently or purposely, imported something odious into his complaint, which the court held defeated a recovery, and drove him out of court.

After the remittitur was sent down, Thomas Nelson's attorney, upon an affidavit of Nelson, presented to and filed in this court a written accusation or information to disbar Evans and Rogers. Thomas Nelson himself testified that he made the affidavit and caused the disbarment proceedings to be instituted "out of revenge," and, as found by the referee, to force Evans & Rogers to pay him the money which he claimed was due him, believing, as he testified, that they would do so rather than "face the charge." The original information filed in the cause is lost. Upon an application on behalf of the petitioners for a substitution, supported by a verified petition and affidavits of those who averred and showed personal knowledge of the contents of the original information, and who, upon such knowledge, made direct and positive averments as to the substance and contents thereof, and especially as to all of the specifications of the charge therein contained, and upon service of notice and copies of such petition, affidavits, and proposed substituted information upon counsel who prepared, presented, and filed the original information, and upon counsel *amici curiae*, and the averments of such petition and affidavits and contents of such proposed substitution with respect to the specifications of the charge not having been in any particular disputed or controverted, and no objection having been made, and no other or different action requested, a substitution of the lost information was ordered. As shown by the substituted information, the specifications of the charge are that Evans & Rogers had (1) entered into a champertous agreement with the administrator, Alfred H. Nelson, in the suit against the railway company, by the terms of which they "undertook and agreed to prosecute said cause against the railway company to final judgment, and also to pay and discharge all the taxable costs incurred, and also the costs incident to procuring the

attendance of witnesses, and all other costs that might be incurred in the prosecution of the cause," which terms of such contract, in such particular and as so alleged in the information, are the same as were alleged in the Thomas Nelson complaint, and (2) had afterwards, and on the 2d day of December, 1893, in connection with the foregoing contract, entered into another champertous contract, Exhibit A, with Thomas Nelson, heretofore fully set forth, to which information were attached and made a part thereof, and as exhibits, a copy of the abstract of the record on the appeal in the Thomas Nelson Case, a copy of the brief, signed by Horn as attorney for Evans and Rogers, and a copy of the decision of the court on such appeal, true copies of which abstract and brief, as is averred in the substituted information and affidavits, are now on file in this court and contained in volume 62 of Abstracts and Briefs, file No. 1,191 of the records and files of this court, and the official decision itself contained in 21 Utah, 202, 60 Pac. 557. And upon the whole record, including the briefs as filed in the original proceedings, a full and complete stenographic report of all the proceedings had and evidence taken before the referee, and as reported by him, which briefs and transcript of such proceedings and evidence are preserved and now on file, the findings of the referee, and the additional findings of the court, as set forth in 22 Utah, 368, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794, it also clearly appears that the original information contained no specification of charges other than or different from those set forth and contained in the substituted information.

[2-7] Now, recurring to the question of our jurisdiction to at this time entertain the petition for the prayed relief: If we have no such power, the stipulation filed by counsel cannot confer it. There is no direct legislation or constitutional provision which, in express terms, prescribes our power in such particular; nor is there anything which limits, restricts, or prohibits it. It is undoubtedly true that courts of general and superior jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt, to make, modify, and enforce rules for the regulation of the business before the court, to amend its record and proceedings, to recall and control its process, to direct and control its officers, including attorneys as such, and to suspend, disbar, and reinstate attorneys. Such inherent powers of courts are necessary to the proper discharge of their duties. Such powers and summary jurisdiction may, within certain limits, be abridged, and the procedure with respect to the exercise of them be regulated, by legislation. But, unless so prescribed and limited, a constitutional court of general and superior jurisdiction may exercise such inher-

ent powers and summary jurisdiction as the necessity of the case may require, and in manner comporting with a proper discharge of its duties in the premises.

[8-10] Confessedly, had the petitioners been permanently disbarred and their names stricken from the roll, the power exists to entertain a petition or an application for complete reinstatement for any reason satisfactory to the court. 4 Cyc. 917. That cannot be doubted. Such applications have frequently been made and granted, but generally based on matters arising subsequent to the disbarment. But, manifestly, the general procedure provided by the Code for a new trial or rehearing of causes does not apply; nor is the application otherwise to be restricted to a procedure in the nature of a bill of review, or other equity or common-law rules; for neither the original nor the appellate power of the court in respect of its statutory or common-law or equity jurisdiction is exclusively invoked.

[11] The summary jurisdiction which the court has over its attorneys as officers of the court is also invoked. That jurisdiction is inherent, continuing, and plenary, and exists independently of statute or rules of equity, and ought to be assumed and exercised as the exigencies and necessity of the case require, not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process, and to rebuke interference with the conduct of its business, but also to control and protect its officers, including attorneys.

[12-14] True the doctrine of *res adjudicata* may apply to an adjudication resulting from the exercise of a summary as well as a formal jurisdiction. But the principle involved does not go to jurisdiction, but relates to matters in defense which, to be availing, must be pleaded or presented in defense, not to jurisdiction, but in bar. The doctrine is a principle of repose, and is largely based upon and in accordance with the maxim that no one ought to be twice vexed for one and the same cause; and, as stated by Wells in his work on *Res Adjudicata* (section 2), chiefly bears upon the parties and others privy to the immediate parties, and restrains them from litigating anew such matters as have previously been drawn into controversy between them or those representing them, and have been authoritatively decided by a competent tribunal. Hence the oft-repeated declaration that a fact or question actually and directly in issue in a former suit, and there judicially passed on and determined by a court of competent jurisdiction, is conclusively settled, so far as concerns the parties, and cannot be further litigated in a future action between them or their privies, in the same or in another tribunal, upon the same or a different cause of action. The doctrine is in the nature of an estoppel.

[15, 16] Estoppels are odious, and every presumption is against them until the right to apply them affirmatively appears with certainty by the right record. Among the essentials of the doctrine are parties, the actor and the reus. They may waive the matters giving rise to the right to apply it, and cannot be heard to invoke it, unless pleaded in defense.

[17] Who are the parties to the disbarment proceeding? The petitioners on the one side; but who on the other? Certainly not the informant, nor Thomas Nelson. If there were another party, within the meaning of parties essential to the doctrine, it was the court; for the proceeding involved matters wholly between the court and the petitioners. Let it be conceded that the petitioners, if twice vexed by the same cause, could successfully interpose the plea. So, too, must it be conceded that they could waive it, and could not be heard to apply and invoke it, unless pleaded in defense and in bar. Let it be conceded that the court, too, might invoke it, as is now suggested should be done. But it also can waive it. Why should the court here invoke an estoppel, an odium of the law, in dealing with a matter which wholly concerns the court and its officers?

[18, 19] But aside from these considerations, and upon the further views entertained by us as to the nullity of the judgment, the doctrine is inapplicable; for a judgment of no binding force or effect is not *res adjudicata* of anything. There is no more reason for a holding that an order or judgment growing out of disbarment proceedings, and founded on matters not presented by the accusation or information, and not within the issues, or founded on conflicting or insufficient findings, or upon other errors of law apparent on the face of the record, may not in such particular be inquired into and modified or vacated upon an application invoking such action, than for a holding that a judgment in an ordinary action may not, by a bill of review or other remedy other than by a direct proceeding prescribed by the Code for a new trial or a rehearing, be vacated or modified for errors of law apparent on the face of the record.

[20-23] It is fundamental that pleadings are the juridical means of investing a court with jurisdiction of the subject-matter to adjudicate it; and that a court can judicially consider only what is presented by the pleadings. A cause of action depends upon allegations, and what is not juridically presented cannot be judicially considered or decided. A judgment not supported by sufficient pleadings must fall. So must, also, a judgment which is beyond the pleadings and the findings. So, too, must a judgment fall for other errors of law apparent on the face of the record, such as showing the judgment or the methods by which it was obtained to

be at variance with the forms and practice of the court, or contrary to well-recognized principles and fundamentals of the law. A fact apparent from the mandatory record showing that fundamental law was disregarded in the establishment of the judgment will render it null and void for all purposes. And a judgment founded upon such a record is subject both to direct and collateral attack, and will, *sua sponte*, be noticed by courts and acted upon by them without regard to the wishes or the relation of the parties named upon the record.

[24] We have already referred to the substance of the information. With respect to the alleged contract between Alfred H. Nelson and Evans & Rogers, the referee, in finding No. 5 (22 Utah, 369, 62 Pac. 914, 53 L. R. A. 952, 83 Am. St. Rep. 794), found: "That the said Alfred H. Nelson employed Evans & Rogers to prosecute said claim against said railway company, and the said Evans & Rogers and Alfred H. Nelson agreed to prosecute 'such action' for a contingent fee of one-half of the amount recovered;" and in finding No. 6: "That Evans & Rogers and Alfred H. Nelson entered into a contract, by the terms of which Evans & Rogers were to receive and retain two-thirds of the one-half of the amount recovered against the Southern Pacific Railway Company, and the said Alfred H. Nelson was to receive one-third of the one-half of the amount recovered of said company, which amount Evans & Rogers agreed to pay him for his services in said case, including the production of witnesses for the prosecution." It is thus seen that the referee, in finding the terms of the Alfred H. Nelson contract, did not find that the petitioners had agreed to pay or discharge any of the costs in the suit against the railway company, and as the terms of that contract were alleged in the information or in the Thomas Nelson complaint. These findings the court did not disapprove, but asserted were supported by the evidence. 22 Utah, 372, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794. At the trial before the referee it was shown that that contract with other property was unavoidably destroyed by fire; but Alfred H. Nelson, for the prosecution, gave testimony with respect to its terms, as also did Evans and Rogers. All testified in that respect as found by the referee, and not otherwise; nor was there any evidence to show that Evans and Rogers, or either of them, agreed with Alfred H. Nelson, or with any one, to pay or discharge the costs or expenses of any kind, as alleged in the Thomas Nelson complaint or in the information. That is admitted. Nevertheless, the court, after the submission of the cause, by its additional finding No. 8 (22 Utah, 374, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794), found that an agreement was made between Alfred H. Nelson and Evans & Rogers, by the terms of which they had agreed to pay and discharge

all costs, as alleged in the Thomas Nelson complaint; but, as manifestly appears on the face of such additional finding, such finding of fact was not based on the evidence, but on a legal fiction, and upon an assumption of an admission by failure of denial.

The court, after finding that the abstract of the record on appeal in the Thomas Nelson Case, containing, among other things, the complaint in that action, was attached to and made a part of the information, then, by additional finding No. 8, found that "the complaint [in the Thomas Nelson Case] also alleged that in the contract with Alfred H. Nelson Evans & Rogers undertook and agreed to prosecute said cause against the railway company to final judgment, and also to pay and discharge all the taxable costs incurred, and also the costs incident to procuring the attendance of witnesses and all other costs that might be incurred in the prosecution of the cause." These allegations were admitted by the demurrer to said complaint, and are not denied by respondents in their answer to the information or contradicted by the evidence." It is thus seen that the court, by such additional finding, made a finding with respect to the terms of the alleged Alfred H. Nelson contract which contradicted the findings of the referee on that subject, which referee's findings the court declared were "supported by the evidence"; and, as manifestly appears on the face of it, the court made such additional finding, not on the evidence, but, at least partly, on the legal fiction that a demurrer, for the purposes of the demurrer, admits all material and properly pleaded allegations of the pleading demurred to, and extended and applied the fiction, not only to material and properly pleaded allegations, but also to immaterial and unnecessary allegations, and further applied and extended it, not only for the purposes of the demurrer in testing the legal sufficiency of the complaint demurred to, but also as a rule of evidence and as conclusive admissions of fact in a subsequent and wholly independent cause or proceeding involving different issues and between different parties, and so extended and applied it as to contradict the evidence and to displace the truth as indisputably and confessedly shown by the evidence. That the making of such an application of the fiction was a misconception and misapplication of it, and making it the basis of a finding was at variance with the forms and practice of the court and contrary to fundamental principles, cannot be doubted. A finding which, on its face, was made in that manner no more supports a judgment founded upon it than would a verdict of a jury which manifestly, on its face, shows it was made up and rendered by some process or method at variance with the forms and practice of the court and contrary to law. Furthermore, such additional finding No. 8, as ap-

appears on the face of the findings themselves, is not only at variance with the findings of the referee, but is also inconsistent with the third and fifth additional findings of the court (22 Utah, 373, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794), which are to the effect that a portion of the costs were advanced by Evans & Rogers not under an agreement with Alfred H. Nelson, by the terms of which the petitioners had agreed to pay and discharge the costs, but under an agreement with the widow, by the terms of which she had agreed to repay the same to them, an agreement under the authority of *Potter v. Ajax Min. Co.*, not champertous, and that she repaid them all the moneys so advanced, and "paid all of the expenses of the litigation, as far as Evans & Rogers are concerned."

[25] It, however, is suggested that, since the abstract of the record on appeal in the Thomas Nelson Case, containing, among other things, the complaint in that case, was attached to the information and made a part thereof, and since, as found by the court, the allegations of that complaint were admitted by the demurrer, and were "not denied by respondents in their answer to the information, or contradicted by the evidence," such allegations in the Thomas Nelson complaint with respect to the petitioners' alleged agreement in the Alfred Nelson contract to pay and discharge the costs and expenses, and as in that complaint alleged, the very essence of the charged offense of champerty, were not put in issue. The portion of the answer referred to is set forth in 22 Utah, 374, 375, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794. Certainly from that no conclusion of such an admission is permissible; nor is it otherwise deducible upon the record. The statute requires the accusation or information itself to be in writing, and to specifically state the matters charged, and to be verified. Such an information was filed. The denial may be oral and without oath. It is manifest that such copies of the abstract of the record and the opinion of the court in the Thomas Nelson Case were attached to the information, not as substantive charging portions of the information, nor as having the effect of an attached copy of an instrument or exhibit to a complaint constituting the foundation of the action or the thing sued on, and where, as in some such instances and in some jurisdictions, the allegations of the instrument so attached and sued on may be considered as a part of the pleading itself, but merely as illustrating the proceedings had in the Thomas Nelson Case, and as showing the disposition of it. That the attached exhibits here could have no other purpose and have no other effect, and cannot be regarded as the foundation of the action, nor as instruments sued on, needs no argument. To say that such an attached abstract of the record, briefs of counsel, and opinion of the court may be regarded as substantive charg-

ing portions of the information, and thus the matters charged left to be gathered by reference to and upon research of the attached exhibits, is to do violence to the requirement of the statute and the well-settled rule that the information be specific and definite with respect to the matters charged constituting the offense. The petitioners did not deny the proceedings or disposition of the case as exhibited by the attached copy of the record and the opinion of the court; nor did they deny that the copies so attached were true or correct copies of such abstract, brief, and opinion. But to say that they thereby specifically admitted every matter or thing declared or asserted in such record, brief, and opinion—for it cannot be said that they were required to specifically deny one any more than another—is to carry the doctrine of judicial admissions quite beyond the adjudicated cases. The petitioners, of course, were required to plead to the information or accusation. This they did. No claim is made that their plea or answer did not put in issue every material allegation alleged in the accusation or information, except as to the making of the contract, Exhibit A. The making of that contract was expressly admitted. But, as clearly appears by the record, the making of the Alfred H. Nelson contract as alleged in the information or in the Thomas Nelson complaint was not admitted. And no claim or pretense of any such an admission is suggested, except as resulted from the petitioners' demurrer to the Thomas Nelson complaint and by their failure in their answer to the information to specifically deny, not the allegations of the information, but the allegations of the Thomas Nelson complaint as contained in the abstract of the record attached to the information as an exhibit.

Since the terms of the Thomas Nelson contract, as alleged, were expressly admitted, if, therefore, it was thought that the terms, as alleged, of the Alfred H. Nelson contract were also admitted, the only other issue of fact presented by the information, it is difficult to perceive on what theory a reference was made of the case to take testimony and report findings. But on the record there is a most conclusive answer to the suggestion or contention of any such an admission. The whole case, as indisputably shown by the record, was tried and submitted on the theory that all of the allegations of the information or accusation were put in issue. At the threshold of the trial before the referee, and upon observations of counsel for the prosecution as to the issues, counsel for the accused stated: "The issue arises from your charges, and it devolves upon you to produce your proof, if you have any, to sustain them." This view was accepted by the referee and by counsel for the prosecution, and the latter thereupon put in evidence a copy of the abstract of record, brief of counsel, and the opinion of the court as attached to

the information, made proof of and put in evidence the contract, Exhibit A, and called witnesses, as heretofore shown, to give testimony, as did also Evans and Rogers, with respect to the terms of the alleged Alfred H. Nelson contract. Not only did counsel and the petitioners so treat and regard the alleged terms of the Alfred H. Nelson contract as in issue, but so also did the referee and the court, for both made findings with respect to them; the referee on the evidence; the court on legal fictions. The referee found as to the terms of that contract, and found them to be, not as alleged in the Thomas Nelson complaint, nor in the information, but as set forth in his findings Nos. 5 and 6, heretofore referred to. Those findings were approved by the court, and they in no uncertain language were most solemnly declared by the court to be "within the issues" and "supported by the evidence." 22 Utah, 372, 62 Pac. 915, 53 L. R. A. 952, 83 Am. St. Rep. 794. And so they were. Of that there can be no doubt. Hence such additional finding No. 8 by the court, which manifestly, on the face of it, was not based on the evidence, but upon a misapplied legal fiction, and upon an erroneous assumption of no denial, manifestly, on the record, contrary to the pleadings and the theory upon which the case was tried and submitted, cannot support a judgment founded upon it. And on that finding, and no other, rests the conclusion that Evans & Rogers had agreed with Alfred H. Nelson, or with any one, to pay and discharge the costs and expenses of the suit against the railway company, and as alleged in the information or in the Thomas Nelson complaint.

[26] There is, however, another and controlling reason why the judgment, on the face of the record, is a nullity. The opinion of the court, as will be seen by a reading of it, is based, not upon considerations that Evans & Rogers had in any particular wrongfully withheld moneys from either Alfred H. or Thomas Nelson, or had in any particular failed to discharge, or had violated any obligation or duty to them, the alleged misconduct involved in the charge, but much of it is based on observations and considerations that Evans & Rogers had not been faithful in the discharge of their duties and obligations to their clients, the widow and minor children, and had wrongfully withheld moneys from them which belonged, and ought to have been paid, to them. And for that reason the judgment directed that Evans and Rogers pay into court the sum of \$1,793 for the use and benefit of the widow and children, and deprived Evans and Rogers of the right to practice until so paid, and upon their failure to do so within 60 days ordered that they be permanently disbarred and their names stricken from the roll. Such matters constituted the formal portions and directions of the judgment. 22 Utah, 388, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794.

The record discloses that no one had claimed that Evans & Rogers had wrongfully or otherwise withheld moneys from the widow or children, or otherwise had not fully discharged all of their duties and obligations to them, or had in any particular been unfaithful to or unmindful of them. Neither the widow nor children, nor any one in their behalf, had claimed or demanded anything; nor had she or any one complained that she or the children had not been paid all that was due them. No such matters were alleged in the information; nor was there any such issue otherwise raised or presented with respect to them. As has been seen, the controversy, both in the Thomas Nelson suit and in the disbarment proceedings, arose over a dispute between Thomas Nelson and the petitioners as to a division of the contingent attorneys' fee, or the amount thereof the petitioners had agreed to pay him. The referee found, and the court approved the finding, that the attorney's fee agreed upon in the cause against the railway company was 50 per cent. of the amount recovered. Of that amount Evans & Rogers were to have two-thirds, and Alfred H. Nelson one-third, conditioned upon his procuring the attendance of the witnesses upon the trial. As he was about to leave and cease to further participate in the cause, the petitioners entered into an agreement with Thomas Nelson, whereby they agreed to pay him the one-third of such contingent fee, but also conditioned upon his procuring the attendance of the witnesses. Now, the petitioners contended that they were entitled to the whole of such contingent fee (50 per cent. of the amount recovered); and that Thomas Nelson was entitled to no part thereof because of his nonperformance of his contract with them. Nelson contended that he was entitled to the one-third thereof upon his claim of performance, and further urged that the petitioners wrongfully deprived him of it, and when sued therefor defeated a recovery, not by taking advantage of the contract as it, in fact, existed between him and them, but as he alleged it in his complaint to have been induced by, or made in connection with erroneously or falsely alleged terms of a champertous contract with Alfred H. Nelson with respect to the petitioners' undertaking to themselves pay the costs of the litigation in the suit against the railway company; and because they demurred him out of court upon such erroneous or false allegations he preferred the charges of disbarment. And in respect of such controversy and matters, and no other, was it claimed the alleged champerty existed and pertained and was the conduct of the petitioners in such particular charged.

It therefore is apparent that as to such a controversy the widow and children were not concerned. No one claimed that the amount of the contingent attorney's fee was unrea-

sonable or excessive, or that the services rendered in the protracted litigation by the petitioners were not reasonably worth such sum; nor were their relations to or dealings with the widow and children in any other particular complained of or questioned. The court, nevertheless, adjudged the petitioners guilty of misconduct in not faithfully safeguarding the interests of the widow and children, in violating duties and obligations, and in wrongfully withholding moneys belonging to them—"put into their own pockets" \$1.793 belonging to them—and ordered and adjudged that they be deprived of the right to practice until they paid such moneys into court. An attorney should not so solemnly and summarily be pronounced guilty of such gross disloyalty and infidelity to his client, conduct constituting a criminal offense (Rev. Stat. 1898, § 136), without a charge or an issue and an opportunity to be heard upon it. The court made such observations and reached such conclusion on the theory that, since, as found by the court, neither Alfred H. nor Thomas Nelson were entitled to any part of the contingent fee, and to no part of the amount recovered against the railway company, and since, as also declared by the court, two-thirds of 50 per cent. of the amount recovered was all that the petitioners were entitled to, either under their contract or on a quantum meruit, not only as between them and Thomas Nelson, had he performed, but also as between them and the widow and children, therefore were the petitioners ordered to pay the other one-third of such contingent fee to them. Surely the petitioners, as between them and the widow and children, were entitled to their day in court upon the question as to their right to compensation, and the amount thereof, either, under their contract of employment as found by the referee, of a contingent attorney's fee of 50 per cent., or on a quantum meruit for the reasonable value of the services rendered by them. But the court summarily deprived them of such a hearing, and without pleadings or an issue, or evidence, or an opportunity to be heard, judicially considered and determined the rights of the petitioners in such particular, when clearly no such question was juridically presented and could not judicially be considered or decided. That such adjudication, on the face of the record, is wholly unsupported by the information or accusation and clearly without the issues, and hence the judgment founded upon it a nullity and subject to attack whenever and wherever brought in question, cannot be gainsaid.

In this connection it may be here noticed, and as found by the referee (finding No. 9, 22 Utah, 370, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794), which finding, also, the court approved, that Thomas Nelson procured the attendance of but two witnesses other than himself "at one of the trials of said

cause," the cause against the railway company. And it is shown that when the first trial resulted in plaintiff's defeat Thomas Nelson lost hope and failed and refused to procure the attendance of witnesses at the subsequent trials, and especially failed and refused to aid the widow to come from California to Utah to be a witness and in attendance upon the trial. Hence Evans & Rogers, at her request, and upon representations of her inability to defray her expenses, and upon an agreement that she should repay them, advanced her moneys at different times for that purpose, and also to procure the attendance of other necessary witnesses, of whom some were beyond the jurisdiction of the court, and to take depositions. Whatever different opinions may be entertained as to the propriety of an attorney so assisting his client, it certainly ought not to be said that the former was unfaithful to or derelict in not protecting the latter. And upon the record it is very evident that, had not the petitioners so assisted the widow, and had they not so perseveringly maintained and upheld the cause in her behalf, notwithstanding defeat upon defeat, neither she nor the children would have recovered anything.

[27] And, lastly, the observations of the court, in the opinion (22 Utah, 380, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794), concerning a contract in the case of Croco v. O. S. L. R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285, between Croco and Evans & Rogers, his attorneys in that case, are also wholly without the issues. In the Croco Case the railroad company, represented by the same counsel who presented the original accusation in this cause, sought to avail itself against the charged negligence, and to defeat a recovery for injuries alleged to have been sustained by Croco by reason of such negligence, on the ground that Croco, the plaintiff, had entered into an alleged champertous contract with his attorneys, Evans & Rogers. The court held that the railroad company, being a stranger to the contract, could not avail itself of such a defense, and could not on that ground "avoid a legal liability because the plaintiff and his attorneys may have entered into a champertous contract to enforce the obligation," and that the making of such a contract was wholly immaterial to the determination of the rights of the plaintiff, Croco, and the liability of the defendant railroad company. In the opinion in *Re Evans & Rogers*, 22 Utah, 380, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794, it will be seen that the court took judicial notice of the record of the Croco Case, and by a resort to such method found and stated the terms of the Croco contract, and observed that "the present instance is not the only one in which the respondents have made champertous contracts in the pursuit of their profession as attorneys." Thus the court, by such method, took the record of the Croco Case, to which the petitioners were

neither real nor nominal parties, and where the question as to the terms and character of the contract was wholly immaterial, as binding admissions of fact against the petitioners in a wholly different proceeding involving entirely different issues and between wholly different parties. And this, too, as against the sworn testimony as to the terms of that contract and the intention of the parties that the petitioners were only to advance such costs, and not themselves to pay and discharge them. In the Croco Case, as can be seen from a reading of the opinion, it was not found nor determined that the petitioners had entered into such a contract as stated by the court in the opinion in *Re Evans & Rogers*. In the former case the railroad company requested the trial court to charge that the plaintiff, Croco, had "entered into a contract with his attorneys, whereby" they had agreed "to pay the costs required to be advanced to the clerk" and other costs, and for that reason the plaintiff was "not entitled to recover" anything in that action. The trial court refused to so charge; and this court, for the reasons heretofore given, affirmed the ruling. Why should it thereafter be said that such a proceeding constitutes an admission, even as to a party to the record, and as evidence against him as to the terms or character of such a contract? If a litigant in a case requests the court to charge upon assumed or asserted facts stated in a request, and the court refuses to so charge, shall it then be said that his adversary in the cause may thereafter be held to a binding admission of such facts, and as evidence against him? And shall it further be said that his attorney or attorneys are also held to such a binding admission of such facts, and as evidence against them, in a wholly different proceeding and between different parties? The mere statement of the proposition would seem to be self-condemning.

[28] But whatever may have been the terms or character of the Croco contract, it is indisputably true that it was not the transaction, nor any part thereof, mentioned or referred to in the information. It is well settled that, when one is charged in an information with a specific offense or offenses, it is not permissible to show other similar claimed offenses, except in cases where it is proper to prove a scienter; and for weightier reasons is it improper to import such matters into a case under the doctrine of judicial notice. Here the court not only found and stated the terms of the Croco contract by resorting to and invoking such doctrine (22 Utah, 380, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794), but also, by such method, inadvertently made such fact and transaction one of the issues, and upon it condemned the petitioners, unheard. On that question they neither had their day in court in the Croco Case nor in this.

[29] Facts so found and findings so made

without the issues, and found and made by methods at variance with the forms and practice of the court, and unauthorized by law, cannot support a judgment. And for the reasons heretofore given upon such a foundation rests the judgment under consideration. That it works an irreparable and continuing injury to the petitioners in the practice of their profession, who, as the court stated in its opinion (22 Utah, 388, 62 Pac. 919, 53 L. R. A. 952, 83 Am. St. Rep. 794), "have for a long time maintained a good standing before the courts of this state, and are men of good morals," must be conceded. No good reason exists why such a judgment should be permitted to stand, which, though a nullity, yet so apparently and solemnly impeaches the "good standing" and "the morals" of the petitioners, and so injuriously affects them in their calling. If the petitioners were entitled to the demanded relief, had they, upon the grounds and considerations now urged, applied therefor within the time prescribed by the statute and rules of court for the making of applications for a rehearing, we see no good reason why they were not at any time thereafter, or are not now, entitled thereto; for length of years will not make that good which, on the face of the record, is a nullity.

From these views it necessarily follows that the judgment ought to be held for naught and vacated. The further question arises as to what further order or judgment in the premises should now be made. As has been seen, the Alfred H. Nelson contract, as alleged in the Thomas Nelson complaint and in the information, with respect to the petitioners' undertaking to themselves pay and discharge the costs in the suit against the railway company, is champertous and illegal; but confessedly there is no evidence to show the making of such a contract. The finding of the court on the legal fiction and the erroneous assumption of an admission by failure of denial—the only things pointed to in support of the making of such a contract—do not, as heretofore shown, support the conclusion that such a contract was made. The charge, then, with respect to the making of that contract, as to the petitioners' agreement to pay and discharge such costs, the gravamen of the charged offense of champerty, and as alleged in the Thomas Nelson complaint and in the information, is wholly unsupported.

[30] The Thomas Nelson contract, Exhibit A, is not itself champertous. Neither was it, as heretofore shown, held champertous or illegal in the case of *Thomas Nelson v. Evans & Rogers*, supra. The contract, as alleged in the complaint in that action, was held champertous and illegal, but by reason of the allegations that the petitioners had agreed to pay and discharge the costs referred to—terms, as heretofore shown, of the Alfred H. Nelson contract, but not of the

Thomas Nelson contract. And from a reading of the opinion it would seem that, had the complaint not contained such allegations, the contract would not have been held champertous or illegal. And the only claim made that the Thomas Nelson contract, Exhibit A, is champertous is by reading into it the alleged terms of the Alfred H. Nelson contract with respect to the petitioners' alleged agreement to pay and discharge such costs, or by assuming that the Thomas Nelson contract was induced by, or substituted for, the Alfred H. Nelson contract in such particular. But since the charge and the allegations that the Alfred H. Nelson contract contained terms by which the petitioners had agreed to pay or discharge such costs, or that they otherwise had agreed to do so, are wholly unsupported, it follows that no such terms can be read into the Thomas Nelson contract; nor, for that reason, can it be said that it was substituted for, or induced or influenced by, or tainted with, any such terms or agreement to pay and discharge such costs. And since the Thomas Nelson contract is not itself champertous, and is not claimed to be so, it follows that the charge that the petitioners had entered into a champertous contract with Thomas Nelson is also wholly unsupported; and so the whole of the charge preferred against them by the information stands wholly unsupported.

Thus, to recapitulate, the case as to the charged offense of champerty is this: Thomas Nelson, in his suit against the petitioners, erroneously or falsely alleged terms of the Alfred H. Nelson contract with respect to their undertaking to themselves pay and discharge the costs in the suit against the railway company, a champertous contract, and then alleged that, in connection therewith, they made a contract with him, which is not itself champertous. By reason of such erroneous or false allegations they demurred him out of court. Then, instead of declaring on his contract as it in fact existed, or on a quantum meruit, he preferred charges of disbarment against the petitioners, alleging that they had made a champertous contract with Alfred H. Nelson, as in his (Thomas Nelson's) complaint alleged, and that, in connection therewith, they also had made a champertous contract with him. The evidence wholly failed to show the making of such a contract with Alfred H. Nelson; and the findings of the referee, based on the evidence, showed that no such contract was in fact made. And hence both the evidence and the findings showed the allegations of the information and of the Thomas Nelson complaint, in such particular, to be untrue. The court nevertheless accepted them as true upon a misapplied legal fiction and an erroneous assumption of an admission, and thereupon found the petitioners guilty, and then pronounced a judgment against them on matters wholly without the issues.

These questions have all been fully presented and argued and submitted on this application. We do not see anything that can be presented in addition to what has already been presented on a further review of or rehearing on the record. It therefore is ordered and adjudged that the judgment heretofore made and entered in the case of *In re Evans & Rogers*, 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794, be, and the same hereby is, annulled and vacated; that the charge or accusation preferred against them is not supported by any evidence; and that they, on the record, ought to be, and hereby are, exonerated and discharged. Such is the order.

McCARTY, C. J. I concur. Rev. Stat. 1898, § 120, so far as material, provides: "An attorney and counselor may be removed or suspended by the Supreme Court * * * for any of the following causes: * * * (1) His conviction of felony or misdemeanor, involving moral turpitude, in which case the record of conviction is conclusive evidence. (2) * * * Any violation of the oath taken by him or of his duties as such attorney and counselor. * * * (5) For any other act to which such a consequence is by law attached." Section 122 reads: "Proceedings to remove or suspend an attorney and counselor under the first subdivision of section 120 must be taken by the court on the receipt of a certified copy of the conviction. Proceedings in other cases may be taken by the court for matters within its knowledge, or may be taken upon the information of another." Section 123: "If the proceedings are upon the information of another, the accusation must be in writing." Section 124: "The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true." Section 130: "If the accused * * * deny the matters charged, the court must, at such time as it may appoint, *proceed to try the accusation*." (Italics mine.)

[31] The proceedings in question were instituted under sections 123 and 124; hence the only matter the court was called upon to try was the matter charged in the information. The entire record of the proceedings, with the exception of the original information upon which the proceedings were based, is before us, and clearly shows, independent of the substituted information filed in the cause, that the only charge made against Evans and Rogers was that of champerty. A demurrer was interposed by Evans and Rogers to the information. Typewritten briefs were filed, in which the question raised by the demurrer was stated and discussed by counsel for Evans and Rogers and by the Attorney General, who appeared in the cause as counsel for the state. The Attorney General, in his brief, illustrated the question presented by the demurrer in the following language: "The question for con-

sideration in this case arises upon the demurrer to the information filed in this court, * * * charging respondents, Evans and Rogers, with having entered into a champertous contract, and to have been guilty of acts inconsistent with their office, etc. * * * This court has held, in the case of Nelson v. Eyans & Rogers, 21 Utah, 203, 60 Pac. 557, that the contract made between the respondents and Nelson was champertous, and say in that opinion that 'counsel for the defendants (defendants being respondents in this case), in support of the demurrer, claimed that the facts as stated in the complaint show that it does not state a cause of action, for the reason that it appears therefrom that the contract made as there alleged was champertous as between the parties thereto. * * *' The contract entered into by respondents having been declared to be champertous by this court, and it further appearing that the respondents avoided such contract on the ground of its champertous nature, *the question for determination is as to whether or not such conduct on the part of attorneys and counselors at law is sufficient cause for disbarment.*" (Italics mine.)

In the respondents' brief it was said: "The sole question for determination by the court is as to whether the information filed * * * states such a case as to lead the court to the conclusion that the respondents are unfit to practice at this bar. * * * The charge is that respondents *entered into an unlawful, champertous contract with Alfred H. Nelson, deceased.* And that *they also entered into an unlawful and champertous contract with one Thomas Nelson.* * * * In other words, upon this hearing *the sole question for consideration is as to whether, if an attorney enters into a champertous contract, that is a sufficient ground for disbarment.*" (Italics mine.)

In neither of the briefs mentioned is there any statement, suggestion, or word to the effect that Evans and Rogers, or either of them, had in their possession a dollar that belonged to the estate of Charles A. Nelson, deceased, or to any of the beneficiaries thereof. Nor is there a suggestion that they, or either of them, was in any respect unfaithful to, or unmindful of, their client's interest in the case of Nelson v. Southern Pacific Railway Company, to which the contract in question referred, or that they were derelict in their duty to their clients in any other case or cases. The only question discussed in the briefs was the question of whether the contracts mentioned were champertous. Furthermore, the findings of fact proposed and submitted by the relator in the disbarment proceedings to the referee as the findings in the case are among the papers on file herein, and they contain no statement, nor even a suggestion, from which it can be inferred that there was any claim made at the hearing, or at any other time, that Evans and Rogers, or either of them, was withholding,

or that they or either of them had in their possession, any fund or money belonging to the Charles A. Nelson estate. Those proposed findings refer only to facts having some bearing upon the question of champerty. Moreover, I have read the record containing a transcript of the evidence submitted on the hearing before the referee, and it shows that no claim was made, nor was it even suggested by the relator, the Attorney General, or by counsel who were appointed as friends of the court at the hearing on the merits, that there was any money due from Evans and Rogers or either of them, or that they had any money or fund in their possession or under their control belonging to the Charles A. Nelson estate; nor was any evidence offered for the purpose of establishing any such fact. On the contrary, the record, as made before the referee, shows that the Attorney General, who examined the witnesses called by the state and cross-examined the witnesses who testified for respondents (petitioners herein), endeavored to show that Thomas Nelson complied in every particular with the terms of the contract in question; and that he (not the widow and children of Charles A. Nelson) was in effect defrauded out of what was due him, because Evans & Rogers availed themselves of the alleged champertous character of the contract as a defense in his suit against them.

Thomas Nelson, who made and subscribed to the affidavit upon which the disbarment proceedings were instituted, was called as a witness by the state, and testified in part as follows: "Q. Where did you get the affidavit from; who drew it up for you? A. Well, I think Mr. Williams drew the main part of it. * * * I sent him the facts first, and then he put it in form for me and sent it back to me. * * * Q. You sent him the facts to draw the affidavits from and paid him \$75; that is, to prepare the papers necessary to institute these proceedings? A. Yes, sir. * * * I wanted to place Mr. Evans and Rogers on record in the Supreme Court in this matter, and I told him that. Q. I understand you to say that you wanted to put Evans & Rogers on record in the Supreme Court? A. If they didn't settle with me. * * * Q. What you were anxious for was to collect under your contract? A. I wanted my money. * * * I brought proceedings against them with the hope of getting my money. * * * Q. Mr. Nelson, what satisfaction did you expect from placing Evans & Rogers on record in this case? A. Well, I don't know what you would call it, perhaps revenge. * * * They made a contract with me that they knew was illegal, and that they could make void and I could not collect, and then to take advantage of that contract and deny it and repudiate it after I had performed my part of it."

And I here remark, parenthetically, that the evidence of Thomas Nelson, above set forth, which is not disputed nor the effect of

it in any sense neutralized by the testimony of any of the other witnesses who testified in the case, shows that the disbarment proceedings, so far as he was concerned, was a case of blackmail to extort money from Evans & Rogers, which this court, in the opinion under consideration, held he was not entitled to receive. On this phase of the controversy this court, so far as material here, said that the services for which "Alfred H. Nelson was, under the agreement, to receive through Thomas Nelson, amounting to \$1,793.33, * * * were never rendered." And, again, the court said: "Neither Alfred H. Nelson nor Thomas Nelson was entitled to receive any part of the amount recovered under said contract."

On the filing of the report of the referee and the findings of fact made by him, together with a transcript of the evidence taken at the hearing, the Attorney General and counsel appointed by, and who appeared in the cause as friends of, the court, jointly filed a brief in the cause on behalf of the state. The questions of fact discussed in the brief relate solely to the conduct of Evans & Rogers in entering into the alleged champertous contract, and the only legal questions therein discussed relate to the law of champerty. The only reference made in the brief to the matter which seems to have impelled this court to make additional findings and to render the judgment complained of is the following: "We think the respondents will not thank their counsel for the suggestion, in their brief, that the \$1,666.66 retained by them is the money of their clients, and not their own. This would be shunning Scylla and falling into Charybdis." Moreover, counsel who represented Thomas Nelson in his suit against Evans & Rogers, and who, after familiarizing himself with all of the facts, prepared the information upon which the disbarment proceedings were instituted, in integrity, legal learning, and ability stands high in his profession. In fact, in these respects he is regarded as the peer of any member of the bar of this court. It is apparent that it did not occur to him, neither in the Thomas Nelson suit against Evans & Rogers, in which he sought to recover for his client the \$1,793.33, nor in the disbarment proceedings, that this money belonged to the widow and children, and that Evans & Rogers were wrongfully withholding it from them. As I have stated, it was not claimed, nor even suggested, either by the Attorney General or the eminent counsel who appeared in the case as friends of the court, that the widow and children, in the order and decree of distribution of the money recovered, did not receive every cent that they were entitled to receive. On the contrary, the only reasonable inference that can be drawn from the record is that all of the attorneys mentioned believed that if it were not for the alleged champertous character of

the contracts mentioned Thomas Nelson would have been entitled to receive this money from Evans & Rogers. I invite attention to the attitude of counsel for Thomas Nelson and the attorneys who appeared for the state merely for the purpose of showing that, even if it were conceded that the widow and children were entitled to the \$1,793.33 mentioned, it nevertheless was a question upon which legal minds might well differ, and would have a material bearing on the question of good faith on the part of Evans & Rogers, who have persistently claimed that they were entitled to this money, and not Thomas Nelson. And I think the only reasonable inference that can be drawn from the record is that it never occurred to them that the widow and children were entitled to any more than the one-half of the judgment, which was paid them, until their attention was called to the brief filed in the case by their counsel, in which it was said: "If Thomas Nelson did not perform the consideration he promised, viz., secure the attendance of the nonresident witnesses, then Evans & Rogers, who, by that contract, were made trustees of one-third of one-half of the recovery, would have been grossly derelict in duty, violating the rights of their clients, the real beneficiaries, had they paid said Thomas." Regarding this statement of counsel this court, in the opinion, at page 338 of 22 Utah, page 918 of 62 Pac. (53 L. R. A. 952, 83 Am. St. Rep. 794), says: "The declaration in the respondents' brief that they were made trustees of that amount (\$1,793.33) for their clients, the real beneficiaries, *was evidently an afterthought*. At the argument before us, when the attention of respondents' counsel was called to that declaration, one of them, in the presence of one of the respondents, * * * notwithstanding his name was attached, as an attorney, to said brief, disputed that declaration, and declared that the respondents were entitled to retain the whole sum distributed to them." This declaration on the part of counsel was clearly a repudiation of the statement made in the brief. How, then, can it be said that Evans & Rogers admitted that they were derelict in their duty to their clients, and especially in face of their sworn testimony, wherein they claimed that they were entitled to the money distributed to them?

Neither the widow, nor any other person who was interested, either directly or indirectly, in the suit against the railroad company or in the disbarment proceedings, has ever suggested or even intimated, so far as shown by the record, that the services contracted for by the widow were not fully performed in every particular. In fact, the loyalty of the attorneys, especially that shown by Evans & Rogers, to their clients, and the perseverance with which they prosecuted their claim against the railroad company under circumstances which the record shows

were of the most discouraging character, was highly commendable. They advanced (loaned) the widow money to enable her to come from her home to Ogden and be present and testify in the cause at the several trials (five in number), and to pay other necessary costs and expenses. She was therefore advised that after the first trial was had Evans & Rogers, in effect, carried on the litigation for her and finally brought it to successful termination. For aught that appears in the record, the widow was perfectly satisfied with the manner in which the case was handled by Evans & Rogers and the outcome of it, and with the amount (one-half) of the judgment that was distributed to her and the children. It thus appears that this question—the assumed dereliction of duty on the part of Evans & Rogers to their clients, and upon which the final order in the opinion is based—was by this court, acting under a misconception of the facts, and by a misapplication of legal principles to the facts, imported into the case on its own motion, after the case was argued and submitted. In the opinion and judgment complained of it is said that Evans & Rogers "put into their own pockets" \$1,793.83 that belonged to their clients. The court therefore, without its power being invoked, went entirely outside of the issues and in effect adjudged Evans & Rogers guilty of a crime with which they had not been charged, and concerning which no evidence was adduced. For aught that appears in the record, the first intimation that Evans & Rogers received that they were accused of having appropriated to their own use their clients' money was when the opinion and judgment under consideration was announced by the court.

[32] It requires no argument to show that the court, in effect, adjudging these parties guilty of a crime not charged in the information, and without giving them an opportunity to be heard, acted without jurisdiction. "Courts have no power to adjudicate matters not involved in issues in the case before them; and such adjudications, if made, are not binding." 12 Ency. Pl. & Pr. 130, and cases cited in note.

This court, in the case of *Maynard v. Insurance Ass'n*, 14 Utah, 458, 47 Pac. 1030, referring to certain facts found that were not within the issues, said: "This, however, is a fact found outside of any issues raised in the pleadings; for nowhere in the complaint or answer does there appear any reference to such a by-law, nor is its existence shown anywhere in the transcript or abstract, except in the findings of fact. A fact found outside of any issue cannot be considered as supporting the judgment, because facts not in issue need not be found; and, if found, the finding is nugatory and without effect."

In *Cooley's Constitutional Law*, at page 232, the author, in defining the term "due

process of law," quotes and adopts the language of an eminent advocate and statesman, as follows: "By the 'law of the land' is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

In Story, Const. (5th Ed.) § 1946, the author says: "When life and liberty are in question, there must, in every instance, be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted." See 3 Words and Phrases, pp. 2244, 2245.

In *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, the Supreme Court of the United States, speaking through Mr. Justice Field, says: "Wherever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

[33, 34] There is another reason why that part of the opinion in which it is found that Evans & Rogers "put into their own pockets" and appropriated to their own use money that belonged to their clients cannot be upheld. An order or decree of distribution of the money recovered from the railroad company was made by the district court of Weber county. Under this decree one-half of the fund was distributed to the widow and minor children of Charles A. Nelson and one-half to Evans & Rogers in payment of their contingent fee due them by the terms of their contract with the widow of Charles A. Nelson, through Alfred H. Nelson. The law is well settled that a decree of distribution in probate proceedings, after due and legal notice, by a court having jurisdiction of the subject-matter, is conclusive as to the fund, items, and matters covered by and properly included within the decree until set aside or modified by the court entering the decree in the manner prescribed by law, or until reversed on appeal.

In 2 Black on Judgments, § 643, the author says: "Thus, where a judge of probate has, by a decree, allowed a widow her distributive share in her husband's estate, the accuracy of the decree, as to the amount by law allowable to her, cannot be called in question collaterally." And, again, in section 644, it is said: "A decree of the probate court settling an executor's or administrator's final account and discharging him from his trust, after due legal notice, and in the absence of fraud, is conclusive upon all matters or items which come directly before the court, until

reversed; and it will be presumed that it was founded upon proper evidence, and that every prerequisite to a valid discharge was complied with; nor can the decree be impeached in any collateral proceeding."

In 23 Cyc. 1055 the text, which is written by this same author, contains the following terse statement of the rule as applied to judgments generally: "A judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment in respect to its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding." And on page 1061 the same author says: "Orders and decrees of a surrogate, or of a probate or orphans' court, in any case in which jurisdiction has attached, are not open to contradiction or re-examination in any collateral proceeding." And, again, on page 1063, after illustrating what constitutes a direct attack on a judgment, the same author says: "On the other hand, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral. This is the case where the proceeding is founded directly upon the judgment in question, or upon any of its incidents or consequences as a judgment, or where the judgment forms a part of the plaintiff's title, or of the evidence by which his claim is supported."

The order and judgment of this court requiring Evans & Rogers to deposit with the clerk of this court \$1,793.33, with interest thereon, "for the use and benefit of the widow and minor children of Charles A. Nelson," was, at least, a partial annulment of the order and decree of distribution theretofore made by the district court of Weber county of the money recovered from the railroad company in the suit mentioned. This court, by thus collaterally impeaching and in effect annulling the order and decree of the district court, clearly acted without jurisdiction. I do not wish to be understood as holding that this court may not, in a proper proceeding, order an attorney and counselor at law licensed to practice before the courts of record of this state, who wrongfully withholds money or funds from his clients, to account to them for such money or funds, and, if he fails to comply with the order, to suspend or permanently disbar him. If this court, when its attention was called to the order and decree of distribution, had refused to be bound by any feature of it, on the ground that it was absolutely void because of the alleged champertous features of the contract under which it was obtained, and had required Evans & Rogers to pay the entire sum retained by them, under the decree, into court, and left them to recover for their

services on a quantum meruit, it might be argued with much force that, since they were officers of the court, such an order, under the circumstances, would have some legal basis upon which to stand. This court, however, did not make the order requiring Evans & Rogers to pay to the clerk of this court, for the use and benefit of the widow and children, the \$1,793.33 mentioned, on the ground that the order and decree under which they retained the money was void. The court, by making its order, recognized the validity of the decree of distribution, and, in effect, held that the basis upon which the distribution of the fund was made was inequitable; and the order made was, in effect, a modification of the decree.

No claim was made, nor was there any intimation by any one at the hearing of the disbarment proceedings, so far as shown by the record, that Evans and Rogers, or either of them, induced the court to make and enter the order and decree of distribution of the money recovered in the suit against the railroad company to the parties entitled thereto through misrepresentation or other unprofessional conduct. In fact, this question, as hereinbefore stated, was not an issue in the proceedings. It was incidentally referred to by David Evans in his testimony regarding the settlement which he claimed he had with Mrs. Nelson and Thomas A. Nelson. In the opinion it is said: "It appears from the record that Alfred H. Nelson, the administrator, was absent from the state when the order of distribution was made; and, while it does not in express terms appear that Evans & Rogers obtained the order of distribution, it is inferable that they did. Whether they did or did not procure the order, they knew of its provisions, and received one-half of the recovery with full knowledge of all the facts in the case. Neither does it appear that the widow, nor any one legally qualified to act for the minor children, appeared or was represented in the proceeding in which said order was granted, or that Evans & Rogers advised the widow, or any representative of the minor children, that the widow and minor children were entitled to \$1,793.33 more than allowed them by the order of distribution."

[35] In the absence of any showing to the contrary, the presumption is that the order and decree of distribution made and entered by the district court were regular and proper. Black on Judgments, § 270; 23 Cyc. 1047. There is absolutely nothing in the record from which it can be inferred that there was any irregularity whatever in the proceedings leading up to and which culminated in the making of the order and decree of distribution. The language of the opinion above set forth, however, seems to imply that some undue advantage was taken of the widow and children by Evans & Rog-

was, or with their connivance, when the order and decree of distribution was procured. The only evidence in the record on that question was given by Mr. Evans, and is as follows: "Q. The judgment was affirmed by the Supreme Court of the state? A. Yes; and the money was distributed to the proper parties—Mrs. Nelson getting one-half under the contract which we made. Q. It was not paid to A. H. Nelson, as administrator? A. A. H. Nelson had left in the meantime, and these payments were all made under the order of the court—the matter was in the court, and the matter of the estate of Charles A. Nelson, deceased, was pending, and, Nelson being absent, the whole matter was referred to the Second judicial district court, * * * and the money distributed in this way under the order of the court. Q. How was the money distributed under the order of the court? A. It was distributed one-half to the widow and her two children and one-half to Evans & Rogers as fees in the case, aside from the witness' fees, clerk's fees, etc., which were recovered that was paid to the several parties entitled to it. Mr. Nelson then, after the money had been recovered, and having refused at that time to do anything, demanded fulfillment of that contract which is marked here 'Exhibit A.'"

And further along in his testimony he said: "I would like to state right in that connection, too, that at the time I came to settle with Mr. Nelson, to settle with all the parties, they were all present, the widow, Nelson, and all interested; that Nelson insisted that we had made a contract with him by which we agreed to pay him one-half of our fees in the Saunders Case and one-half in the Nelson Case, and I told him that no such contract was made at all, and he seemed to be somewhat dissatisfied about it, and he figured up all the money which he had expended in procuring witnesses, * * * and he was paid by the parties in the manner which I have suggested, somewhere in excess of that which he advanced; and I supposed the thing was all satisfactory until he came in the next day and said he had a contract which we made with him in the Nelson Case, and exacted a settlement for that and * * * stated that if that contract was not fulfilled he would sue us."

The foregoing is the only evidence in the record bearing upon the distribution of the fund in question under the order of the court.

[30] I now come to the question, and the only question, that was in issue in the disbarment proceedings, namely, were the two contracts in question, or either of them, champertous? I refer to the contract entered into by Evans & Rogers and Alfred H. Nelson, on the one hand, and the widow of Charles A. Nelson, on the other, and the contract entered into between Evans & Rogers and Thomas Nelson. I am clearly of the

opinion that neither of the contracts was champertous, as the term is now defined and understood. Nor do I think that either of them was against sound public policy. The contract under which Evans & Rogers represented the widow and children of Charles A. Nelson in the prosecution of their claim against the railroad company was made with the widow, through Alfred H. Nelson. The evidence, without conflict, shows that she authorized Alfred H. Nelson to make the contract; and the evidence is undisputed that the contract was made before Alfred H. Nelson was appointed administrator of the estate of Charles A. Nelson deceased. Mr. Rogers testified, and the evidence is corroborated by the testimony of other witnesses and not disputed by any, as follows: "A. H. Nelson, * * * in February, 1892, came into the office of Evans & Rogers, * * * and apprised me of the fact that his brother, Charles Nelson, had been killed in the previous January, while transporting a car load of sheep from Nevada to California, and showed me some letters which he had from the widow of Charles Nelson, asking him to look into the matter or cause of her husband's death, and furnished him in the letter the names of persons who were eyewitnesses to the cause of his death. He also had a newspaper clipping from some Nevada paper, purporting to contain an account of his brother's death and cause of it, and consulted me about it. And the result of the conversation was that he was advised by me to write for further particulars in regard to the matter. He received another letter from his sister-in-law, the widow of Charles Nelson, in which she stated that she placed the matter entirely in his hands as her attorney, and desired him to do everything which was necessary to secure compensation from the Southern Pacific Company for the negligent killing of her husband, and directed him, if he saw fit, to employ other attorneys to assist him in the case. * * * We agreed to make a contract to prosecute the case on behalf of the widow and her minor children against the company for 50 per cent. of whatever sum was recovered, the 50 per cent. compensation to be divided between A. H. Nelson and Evans & Rogers, he to receive one-third, and Evans & Rogers to receive two-thirds. Q. The time that you made this contract, was A. H. Nelson administrator for the estate? A. No, sir. He was appointed administrator afterwards, simply for the purpose of promptly prosecuting the suit on behalf of the widow and children. * * * He was selected on account of the relationship and the fact that he was a brother of the deceased—more for convenience, perhaps, than anything else. * * * Q. After the contract was made with A. H. Nelson and suit was commenced, and he was appointed administrator, state whether or not Nelson left Ogden. A. Yes, sir. * * *

He left Ogden in 1893 and before the trial of *Nelson v. Southern Pac. Co.* * * * The case was first tried in November or December, 1893; tried at Ogden, and a nonsuit was granted. Q. At that time had you a contract with Thomas Nelson? A. No, sir. Q. That was afterwards? A. Yes, sir. Q. You may state whether, after the nonsuit was granted, you commenced another suit in the name of the administrator for another cause of action. A. Yes, sir; under the same, with A. H. Nelson representing the widow and children, having authority from her to employ attorneys to assist her."

Mr. Evans testified concerning these transactions as follows: "Q. State, as nearly as you can, Mr. Evans, the terms of that contract. A. I can only state in a general way. The terms of the contract were that we agreed, the three of us, A. H. Nelson and Evans & Rogers, to prosecute that cause for one-half, a contingent fee of one-half. Q. Whom did you agree with? A. We made an agreement with the widow and children, as I understand it. I am not clear about that contract, because I didn't draw it. * * * I did not draw up the contract; but my recollection is that he [Nelson] communicated with his people in Nevada and California, and they agreed there to give one-half to the three of us if we would take the case."

Regarding the understanding that Evans & Rogers had with the widow, Mrs. Nelson, relative to the payment of costs, etc., Mr. Evans testified as follows: "Mrs. Nelson, being an important witness on the question of damages, appealed to us—that is, Evans & Rogers—for assistance to bring her from California to Utah, in order to give her testimony in the case, and likewise to exhibit whatever interest a widow woman, under the circumstances, would have. She stated to us that she would be glad if we would lend her the money or advance it to her; that she would return it to us whether we won the case or lost it, if she had to earn her money with her needle. Under this appeal Evans & Rogers advanced her the money to bring her here every time she testified in the case, which, I believe, was four times. * * * Mrs. Nellie Nelson was a seamstress by trade, had two minor children, and had no income or support whatever, except that which she earned with her needle. * * * The case either had to go by default, or we had to lend money to the widow for the purpose of assisting her in carrying it on. * * * That arrangement, however, was not made with her until after the case was instituted. * * * She returned, after she received her money, every dollar which we had advanced to her, to us—paid us."

The foregoing evidence, which is not disputed in any particular, clearly illustrates the terms of the contract between the widow, on one side, and Evans & Rogers and Alfred

H. Nelson, on the other. Under the contract these three attorneys were to receive for their services one-half of any amount recovered from the railroad company for the death of Charles A. Nelson, and the widow and the minor children one-half. The widow did not, as the opinion of this court seems to imply, make a separate and independent contract with Alfred H. Nelson for his services, in which she agreed to pay him one-third of one-half of any amount that might be recovered, and another separate and independent contract with Evans & Rogers for their services, in which she agreed to allow them two-thirds of one-half of any amount that might be recovered. The only inference permissible from the evidence is that the widow made but one contract, and by the terms of that contract she agreed to give the three attorneys mentioned a lump sum of one-half of the amount recovered. No claim was, or is made, that the attorney's fee agreed upon between the parties and later allowed by the district court in its order and decree of distribution of the money recovered from the railroad company was, under the circumstances, unconscionable, or in any sense disproportionate to the services rendered. Therefore, so long as the attorneys safeguarded their clients' interests in the suit against the railroad company and discharged every duty required of them by the terms of the contract, it was no concern of their clients on what basis they divided between themselves the fee received for their services, or, for that matter, what arrangements they made between themselves regarding the disposition of it.

[37] After the contract referred to was made with the widow, the attorneys reduced to writing the oral agreement they had between themselves regarding the basis upon which the fee should be divided in case of a recovery. Alfred H. Nelson, who was a witness for the state, testified that the contract between himself and Evans & Rogers was "similar" to the Thomas Nelson contract set forth in the foregoing opinion written by Mr. Justice STRAUP. Mr. Nelson was asked the following question by the Attorney General: "At the time of making the contract between yourself and Messrs. Evans & Rogers, had you been appointed administrator of the estate of your brother?" And he answered: "I don't remember; I think not, but my recollection is not perfectly clear as to that. I know we talked the matter over about the bringing of a suit for some days, possibly some weeks, before we did anything. We looked the matter up quite carefully. Mr. Horn and myself spent a great deal of time in Evans & Rogers' office looking up authorities and studying the case before we finally decided to do anything." He also testified that he was appointed administrator "simply to facilitate the prosecution of the action with the railroad company." Mr. Evans

testified positively that the contract with Alfred H. Nelson was, in substance, the same as the Thomas Nelson contract, and that it was executed before Nelson was appointed administrator, and that "he [Nelson] was appointed administrator afterwards, simply for the purpose of promptly prosecuting the suit on behalf of the widow and children. * * * He was selected on account of the relationship and the fact that he was a brother of the deceased—more for convenience than anything else." Rogers testified in relation to these questions, and his evidence is, in substance, the same as that given by Mr. Evans. The only evidence in the record regarding the nature of the contract between Evans & Rogers and Alfred H. Nelson, the time when it was executed with reference to the time Nelson was appointed administrator, and the reason why he, instead of some other, was appointed, is the evidence of these parties. As stated in the opinion written by Mr. Justice STRAUP, the case was tried five times in the district court, and was brought to this court three times on appeal. The case was first tried in the district court in November or December, 1893, and the plaintiff was consulted. Soon after the trial was had, Alfred H. Nelson left Utah and located permanently in California. Before leaving Utah he and his brother, Thomas Nelson, called upon Evans & Rogers at their offices in Ogden, and after some discussion between the parties the Thomas Nelson contract was entered into under the circumstances and conditions as stated by Mr. Justice STRAUP in the foregoing opinion.

But few rules of the common law have undergone more sweeping changes in their application than those relating to maintenance and champerty. Under the old common-law doctrine the transfer of choses in action was prohibited. The reason for this rule was, as stated by Mr. Chitty in his work on Bills, (section 6), that "such alienations tended to increase maintenance and litigation and afforded means to powerful men to purchase rights of action, and thereby enabled them to oppress indigent debtors whose original creditors would not, perhaps, have sued them." In Ray on Contractual Limitations (page 119) the author, after giving a brief history of the law of maintenance and champerty, says: "The peculiar state of society out of which such a law grew carried it to the most absurd extremes. Men were held indictable for aiding a litigant to find a lawyer; for giving friendly advice to a neighbor as to his legal rights; for lending money to a friend to vindicate his known legal rights; for offering voluntarily to testify in a pending suit; and other like offices of charity and friendship. It is not surprising, therefore, that the law on this subject has gradually undergone a great change, which is recognized universally by jurists, judges, and law writers everywhere."

And, again, on page 120 the author says: "This change has been called for by the new conditions of modern society, considered in its varied relations, commercial, political, and sociological. In many of its phases it has been, both in America and England, emphatically discarded as 'inapplicable to the present condition of society, and obsolete.' It is accordingly asserted on high English authority that no one has been punished criminally for the offense of maintenance or champerty within the memory of living man." Stephen, Crim. L. 234.

Warvelle, in his work on Legal Ethics (section 146), says: "The ancient doctrine of maintenance grew out of conditions which do not exist and never have existed in the United States. Having little or no foundation in reason, it has fallen into disuse; and the general rule now is that any person claiming a right may contract to pay, for legal services rendered in vindicating it, a stipulated portion of the thing, or of the value of the thing, when recovered, the payment to be dependent solely upon such recovery, instead of paying, or contracting to pay, a certain sum and in any event. Such an agreement does not conflict with the law as now administered; nor does it, in any proper sense, contravene any principle of public policy."

And, again, the author, after referring to the arguments generally made against such contracts on ethical grounds (section 150), says: "It not infrequently happens that persons are injured through the negligence or willful misconduct of others, but who yet, by reason of poverty, are unable to employ counsel to assert their rights. In such event their only means of redress lies in gratuitous service, which is rarely given, or in their ability to find some one who will conduct the case for a contingent fee. That relations of this kind are often abused by speculative attorneys, or that suits of this character are turned into a sort of commercial traffic by the 'personal injury' lawyer, does not destroy the beneficent idea last discussed. So it will be seen that much can be said in favor of contingent fees, viewed solely from an ethical standpoint."

See, also, Archer on Ethical Obligations of the Lawyer, p. 191.

[38] According to the weight of modern authority "champerty is a species of maintenance, 'being a bargain with the plaintiff or defendant to divide land or other matter sued for between them if they prevail at law; whereupon the champertor is to carry the party suit at his own expense.'" 2 Words and Phrases, 1047. While there are some decisions to the contrary, the great weight of authority is to the effect that, where an "attorney does not undertake to support the litigation at his own expense, or to indemnify the client against costs and charges, but merely agrees to render the

ordinary services of an attorney, in consideration of receiving a percentage of the money or thing recovered, * * * that this does not constitute champerty." 6 Cyc. 859, 860, and cases cited in note 41. And on page 862 of the last-cited volume it is said: "It is neither against public policy nor champertous for an attorney to loan his client money with which to pay costs of suit, nor to advance money necessary to carry on the suit as needed, when such advances are made as a loan, with the express or implied understanding or agreement for its repayment, and there is no contract of indemnity against the client's liability to pay costs." This doctrine has been recognized and followed in this jurisdiction. *Potter v. Ajax Min. Co.*, 22 Utah, 273, 61 Pac. 999.

In 5 Am. & Eng. L. 820 it is said: "The doctrine of champerty and maintenance does not prohibit an attorney retained in a case from advancing the necessary incidental costs of litigation; and, even though he advances the money to pay such costs without special agreement, he may recover from his client the amount so advanced."

In 1 Page on Contracts, § 339, the author quotes and adopts the language of 4 Blackstone, Com. 135, as follows: "A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor out of charity and compassion, with impunity," and adds: "A parent may supply his daughter with funds to sue, as for breach of promise and seduction. So it is not maintenance for a wife to aid her husband." See, also, section 341, same volume.

In *Brown v. Bigne*, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752, the syllabus, which correctly reflects the doctrine as announced in the opinion, is as follows: "A fair, bona fide agreement by a lawyer to supply funds to carry on a pending suit, in consideration of having a share of the property in controversy, if recovered, is not per se void, either on the grounds of champerty, as now understood, or of public policy."

So in the case of *Wood v. Casserleigh*, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138, it was held that the furnishing of documentary evidence and agreeing to pay expenses of litigation for a contingent fee, the claim being a valid one, is not against public policy. See, also, *O'Driscoll v. Doyle*, 31 Colo. 193, 73 Pac. 27.

There is not a scintilla of evidence in the record that shows, or tends to show, that Evans & Rogers agreed to prosecute the suit against the railroad company at their own expense for the widow and minor children of Charles A. Nelson; but, on the contrary, the evidence, without conflict, shows that after the contract was entered into and the suit commenced Evans & Rogers advanced certain sums of money to the widow to carry on the litigation, with the understanding that she would repay to them the sums so ad-

vanced, which she accordingly did. Therefore, under the great weight of authority and the decisions of this court, the contract was not champertous; nor did it in any respect contravene any rule of public policy. *Potter v. Ajax Min. Co.*, supra. It seems that this court, in determining the character of the contract made with the widow, through Alfred H. Nelson, looked solely to the allegations of the complaint in the suit of *Thomas Nelson v. Evans & Rogers*, instead of considering the terms of the agreement itself, as shown by the evidence in the matter under investigation.

[30] The contract made by Alfred H. Nelson with Evans & Rogers, fixing the basis on which the contingent fee should be divided between them in case of a recovery against the railroad company, under the circumstances, was not in any sense adverse or prejudicial to the interests of the widow and children. Alfred H. Nelson was a brother of the deceased, Charles A. Nelson; and under practically all of the authorities he had the ethical, as well as the legal, right to assist the widow and minor children of his deceased brother in their suit against the railroad company. The fact that, by the terms of his contract with Evans & Rogers, he was to be paid out of the contingent fee agreed upon, instead of being paid out of the portion of the fund that went to the widow and children, rather inured to the benefit of than prejudiced the rights of the widow and children. There can be no question that Evans & Rogers had the right—in fact, it was their duty—to take the necessary steps to procure the presence of witnesses who were familiar with the transaction and circumstances under which Charles A. Nelson lost his life, and, if the witnesses who resided in Nevada, and were outside of the jurisdiction of the court could not be induced to attend the trial in person, to take their depositions. Alfred H. Nelson, being associated with Evans & Rogers as counsel in the case, also had the legal and ethical right to perform those services for which he was to receive no compensation other than the portion (one-third) of the contingent fee agreed upon. Under these circumstances I fail to understand upon what ground it can be successfully claimed that his interests were in any sense antagonistic to those of the widow and children, or upon what theory his contract with Evans & Rogers regarding the portion of the contingent fee he should receive for his services can be held to be champertous or against public policy. As I have stated, the record shows that after the first trial was had the Thomas Nelson contract was entered into. The evidence, without conflict, shows that this contract was "similar" to the contract that Evans & Rogers made with Alfred H. Nelson. Therefore what I have said regarding the validity of the Alfred H. Nelson contract ap-

plies with equal force to the Thomas Nelson contract.

[46] I fully concur in the observations made and conclusions reached by Mr. Justice STRAUP regarding the references made in the opinion under consideration to the Croco Case, 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285. There were, however, some matters involved in the case of Kennedy v. Oregon Short Line R. Co., 18 Utah, 325, 54 Pac. 988, that were pleaded by Evans & Rogers in their answer in the disbarment proceedings. In that case the plaintiffs, Mrs. Kennedy and her children, three of whom were minors, sought to recover damages from the railroad company for the death of Patrick Kennedy, who was the husband of Mrs. Kennedy and father of the children mentioned, which they claimed was caused by the negligence of the railroad company. Evans & Rogers represented the plaintiffs, and the railroad company was represented by its general counsel, Mr. Williams, who prepared the information in the disbarment proceedings and presented it to this court, and who was also the state's principal witness in the proceedings. It appears that Evans & Rogers had a contract with the widow and children of Mr. Kennedy, the deceased, similar to the contract here involved, by the terms of which they were to be paid a contingent fee, in case a recovery should be had against the railroad company. In their answer filed in the disbarment proceedings Evans & Rogers alleged that, while the Kennedy Case was pending and awaiting trial in the district court at Ogden, Utah, Mr. Williams, counsel for the railroad company, "by himself in person, * * * went to Boise city, in the state of Idaho, * * * to secure from her [Mrs. Kennedy] a settlement without the knowledge or consent of her attorneys, and the said Williams, * * * through duress, deceit [and other improper influences therein mentioned], caused her, the said Margaret Kennedy, to enter into and execute a contract, by which she agreed to settle the same for the sum of \$3,500; and the said Williams asserted that he did not regard the feelings or legal interest of respondents, or any lawful right whatever which they might have in the premises." The foregoing, as well as other matters of the same import pleaded in the answer, were read into the record by the attorneys representing the state in the disbarment proceedings as part of the examination in chief of the witness Williams, the attorney who represented the railroad company in the Kennedy Case.

Mr. Williams, in giving his testimony in the disbarment proceedings, admitted that he made a settlement with Mrs. Kennedy without conferring with her attorneys, but denied using improper influences to obtain the settlement, as alleged in the answer. He attempted to justify his actions and course

of conduct in that regard on the ground that they (Evans & Rogers) were making a practice of conducting personal injury cases in the courts of this state under contracts made with their clients similar to the contracts in the A. H. Nelson and Kennedy Cases, which he claimed were illegal and champertous. Regarding this matter, Mr. Williams testified in part as follows: "I stated then, and I state now, that I went and attempted to settle the case with Mrs. Kennedy for the reason that previous to that we had a case tried in which the champertous contract that has been introduced in evidence here was disclosed in that case. * * * The view I took of their position was that they were not entitled to that consideration which I thought members of the profession were ordinarily entitled to receive, and which I was disposed to extend." The settlement referred to was afterwards repudiated by Mrs. Kennedy, and the money received in payment of her claim was returned to the railroad company. A trial was had, and a judgment was rendered in favor of the plaintiffs in the sum of \$7,085. The case was appealed to this court and the judgment affirmed. 18 Utah, 325, 54 Pac. 988.

It will thus be observed that the settlement was obtained for less than half of the amount ultimately recovered by the plaintiffs in the action. Conceding, for the sake of the argument, that Evans & Rogers, in making their contract with the widow and children of Patrick Kennedy, violated the strict letter of the law, it nevertheless, under the circumstances, was a mere technical rather than a substantial infraction. They did not, in either the Nelson Case or in the Kennedy Case, solicit the business. On the contrary, the printed records of those cases, which are on file in this court, show that the plaintiffs in each case sought and obtained the services of Evans & Rogers. In neither of the cases was there any officious intermeddling by Evans & Rogers, or either of them, such as the law and the ethics of the legal profession denounce. While settlements of pending cases, made with the clients of opposing counsel in the manner and under the circumstances that counsel for the railroad company procured a settlement with Mrs. Kennedy in the case mentioned, may not be in violation of law, nor in contravention of any principle or rule of public policy, they nevertheless are not to be commended. *Potter v. Ajax Min. Co.*, supra.

In *Archer on Ethical Obligations of the Lawyer* (page 136), the author says: "A person who has engaged a lawyer to look after his interests in a given case places the entire matter in his charge. He engages him because he is learned in the law and can protect his clients' rights. It is the right of the client to have all persons representing adverse interests go to the attorney and nego-

tiate with him, rather than try to take advantage of his own lack of technical knowledge of his rights."

The author also quotes with approval canon 9 of the American Bar Association's Code of Ethics, which is as follows: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him, as to the law."

In the trial of the cases mentioned, and others of like character, brought by Evans & Rogers, in their capacity of attorneys, in which Mr. Williams represented the defendants, much ill feeling was engendered between them. Evans & Rogers were severely criticised by Mr. Williams because of the alleged champertous character of the contracts under which they prosecuted this class of cases; and, on the other hand, Evans & Rogers characterized the conduct of Mr. Williams, in importuning their clients to settle pending cases against the railroad company without first consulting them, as unprofessional.

I think it may be fairly inferred from the many heated discussions that took place between them in the trial of this class of cases, as shown by the printed records thereof on file in this court, in which bitter personalities were indulged in between them, that the disbarment proceedings were the outgrowth of this ill, and I might add bitter, feeling existing between them. And I think it may be fairly said that, were it not for the feelings of resentment entertained towards Evans & Rogers by Mr. Williams, and Thomas Nelson's desire for "revenge," the proceedings would never have been instituted. While these matters brought out on the hearing before the referee concerning the conduct and method of counsel in conducting or defending, as the case might be, this class of cases can have no possible bearing on the question of the jurisdiction of this court to make the order and render the judgment complained of, they nevertheless tend to explain and to account for, at least to some extent, the action of Mr. Williams and Thomas Nelson in instituting the disbarment. And since these proceedings involved ethical as well as legal questions, I have felt constrained to refer to these matters.

FRIOK, J. I fully concur in the conclusions reached by my Associates for the reasons so ably and exhaustively stated in the foregoing opinions. The only question upon which I had any doubt, namely, the jurisdiction of this court to entertain the applica-

tion, is so fully answered by Mr. Justice STRAUP that nothing more need be, nor, indeed, could be, said upon that subject.

The question involved in the application most strongly appeals to my sense of justice. No court should hesitate to correct any wrong arising out of its judgments, when it is within its power to do so. This is especially true with respect to any judgment which affects the honor, integrity, standing, or morals of its officers. While the court should be strict in enforcing the rules of ethics, as they affect the conduct of its officers, yet it should also be ever ready and quick to correct any wrong that any of its officers may suffer by reason of its judgment, where such correction is possible and legal. In this case it is made apparent that a wrong exists; and it is equally apparent that we have the power to correct it. That the wrong was brought about through inadvertence and with the purest motives of our predecessors, in an effort to reflect justice and to vindicate the law, cannot relieve us from the duty of correcting it. I therefore heartily join my Associates in the foregoing judgment correcting such wrong.

(42 Utah, 270)

PETERSON v. PETERSON et al.

(Supreme Court of Utah. Jan. 29, 1913.)

1. DAMAGES (§ 217*)—INSTRUCTIONS—INJURIES TO CROP.

An instruction that the measure of damages for injuries to growing lucerne seed would be the market value at the time and place of injury was not objectionable as leaving out of view the expense of threshing the seed, as its market value as it stood at the time of the injury was the measure of damages contemplated by plaintiff by the instructions.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 556-559; Dec. Dig. § 217.*]

2. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTION.

Any error in such instruction must be regarded as harmless, where the jury allowed but \$400, when, under the evidence, they might have allowed from \$1,200 to \$1,400.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

3. CONSTITUTIONAL LAW (§ 65*)—LEGISLATIVE POWERS — DELEGATION — SUBMISSION TO VOTE IN LOCALITIES.

Comp. Laws 1907, § 18, providing that any county, or precinct thereof, by a majority vote at a called election, might declare in favor of fencing farms and allowing domestic animals to run at large, was complete as a law as framed by the Legislature; and a submission thereof to voters of particular localities was not unconstitutional as a delegation of legislative power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 116; Dec. Dig. § 65.*]

4. STATUTES (§ 73*)—SPECIAL OR LOCAL LAWS — UNIFORMITY OF OPERATION.

Comp. Laws 1907, § 18, enabling any county, or precinct thereof, by majority vote at any general or special election called for that purpose by county commissioners, to declare in favor of fencing farms and allowing domestic animals to run at large, since it applied to all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—16

localities and to all counties, and might become operative throughout the state, was not objectionable as lacking uniformity in operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 73; Dec. Dig. § 73.*]

5. STATUTES (§ 77*)—SPECIAL OR LOCAL LAWS—ADOPTION BY COUNTIES.

Comp. Laws 1907, § 18, allowing any county, or precinct thereof, in the state, by a majority vote at any called election, to declare in favor of fencing farms and allowing domestic animals to run at large, was not local or special legislation simply because it might be in force in only a part of the counties or their precincts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82, 95; Dec. Dig. § 77.*]

Appeal from District Court, Box Elder County; W. W. Maughan, Judge.

Action by Nels R. Peterson against P. C. Petterson and N. W. Taylor, copartners doing business as Petterson & Taylor. Judgment for plaintiff, and defendants appeal. Affirmed.

Halverson & Pratt, of Ogden, for appellants. J. D. Call, of Brigham City, for respondent.

FRICK, J. This case was before this court on a former occasion. Peterson v. Petterson, 117 Pac. 70. We there held the complaint sufficient, and further held that the plaintiff, appellant on that appeal and respondent here, was an "occupant," within the provisions of Comp. Laws 1907, § 20, and as such was authorized to maintain an action for the acts alleged in the complaint, if established by competent evidence. The salient facts, together with a transcript of section 20, upon which the action was based, are given in the former opinion, and hence need not be repeated here.

[1] It is now contended that the court erred in its charge to the jury with respect to the measure of damages. The court, upon that question, charged as follows: "If you find a verdict for plaintiff, then you are instructed that the measure of damages would be the market value at the time and place of the alleged injury to the lucerne seed, if any, which you may find, by a preponderance of the evidence, was eaten, injured, or destroyed by cattle owned by or in possession of said defendants, or with which the defendants were charged with the care at the time of the alleged trespass."

It is insisted that, while there was evidence respecting the market value of the seed alleged to have been destroyed by appellants' cattle, and of the number of pounds of seed that the land in question was capable of producing, and probably did produce, yet there was no evidence respecting the expense of threshing the seed and preparing it for market, and that no allowance was made for the latter items. We cannot agree with appellants' counsel in this claim. We think there was evidence showing the expense of threshing the seed; and, in view of

that and the theory upon which the case was tried and submitted to the jury, we have no doubt the jury fully understood that the market value of the seed in the condition it was when destroyed was the market value referred to and stated by the court. This, we think, is made clear from the expression in the court's charge, where the jury are told that the amount that should be allowed "would be the market value at the time and place of the alleged injury to the lucerne seed, if any." This referred to the condition of the seed at the time it was injured by appellants' cattle.

[2] But, in addition to this, it is clear that the jury made full allowance for the expenses incident to threshing and marketing the seed. Under the evidence the jury could have found the value of the seed destroyed from \$1,200 to \$1,400. They found in favor of respondent only for \$400. If, therefore, respondent was entitled to recover at all, the verdict of the jury is manifestly for less than could have been allowed under the evidence. It is clear, therefore, that the jury were not misled by anything that was said in or omitted from the charge.

The contention that the charge was erroneous, for the further reason that it permitted the respondent to recover for the injury caused by cattle other than those for which appellants were responsible under the statute, in view of the evidence, is not tenable. A careful examination of the record discloses no evidence from which it could reasonably be inferred that there were any other cattle, except those for which appellants were responsible under the statute, that in any way ate, molested, or damaged any part of the lucerne seed in question. We are clearly of the opinion, therefore, that in view of the whole evidence the charge in this particular was not prejudicial to any of appellants' rights.

[3] The next contention is that the respondent cannot recover, because section 20, supra, is unconstitutional and void. It seems this question is raised for the first time in this court. Section 20, aforesaid, is based upon section 18, which reads as follows: "Any county, or precinct thereof, in the state may, at any general or special election called for that purpose by the board of county commissioners, by a vote of the majority of all the legal voters of such county or precinct, declare in favor of fencing farms and allowing domestic animals to run at large; and in such cases the provisions of this chapter authorizing the detention and sale of animals for damages shall be inoperative."

Counsel insist that section 18 is void, because, under our Constitution, power to legislate is vested exclusively in the Legislature, and cannot by it be delegated to the people, as is attempted to be done in said section. It is further insisted that the law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is special, and not of uniform operation. There is no merit in either one of the contentions. The law was complete as a law when it left the hands of the Legislature. It is not unusual for matters relating to local police regulations to be submitted to the voters of particular localities under general laws. To do so is not delegating any legislative functions to the voters. This is clearly explained by the author in Cooley's Const. Lim. (7th Ed.) pp. 173, 174, and is further illustrated and applied, under statutes like our section 18, in Dalby v. Wolf, 14 Iowa, 228; Davis v. State, 141 Ala. 84, 37 South. 454, 109 Am. St. Rep. 19; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175. Other cases could be cited, but the foregoing are quite sufficient to show the trend of the decisions.

[4, 5] Nor can the objections that the statute is special legislation, and that it lacks uniformity in operation, prevail. The law applies to all localities and to all counties, and may therefore become operative everywhere in the state. These objections are also answered in some of the foregoing cases. It has too often been held that laws that may become operative in all counties or localities of a state are not local or special, simply because they are only in force in one or possibly two counties at the time the objection is raised, to require citation of authorities. If authorities are required, however, then some of the cases cited above dispose of the proposition against appellants' contention. The two cases cited by appellants' counsel in support of their contention are clearly distinguishable from the case at bar, and for that reason require no comment.

The judgment is affirmed, with costs to respondent.

MCCARTY, C. J., and STRAUP, J., concur.

(42 Utah, 274)

EDDINGTON v. UNION PORTLAND CEMENT CO.

(Supreme Court of Utah. Jan. 30, 1913.)

1. STATUTES (§ 141*)—AMENDMENT—CONSTITUTIONAL REQUIREMENTS.

Comp. Laws 1907, § 1017, provides that any person may appeal on taking an oath in forma pauperis. Section 3305, declaring that an appeal is taken by filing with the clerk of the district court a notice of appeal, and within five days thereafter an undertaking or a deposit of money, was amended by Laws 1899, c. 62, to provide that, where appellant files an affidavit in the form set forth in section 1017, no bond on appeal shall be required, and that the clerk shall certify to the filing of such affidavit. *Held*, that the amendatory act did not intend or attempt to amend section 1017, but was a constitutional amendment of section 3305, obviating the apparent incongruity between that section and section 1017.†

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.*]

2. APPEAL AND ERROR (§ 389*)—BONDS—FORMA PAUPERIS.

Under Const. art. 8, § 9, permitting appeals from final judgments under such regulations as may be provided by law, the Legislature may provide that those who, by reason of their poverty, are unable to give the appeal undertaking required by Comp. Laws 1907, § 3305, may appeal by filing an affidavit in forma pauperis, as provided by section 1017.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072-2076; Dec. Dig. § 389.*]

3. STATUTES (§ 145*)—REVISION—LEGISLATIVE AUTHORITY AND APPROVAL.

Whatever change of phraseology or omission of words there may be between Rev. St. 1898, §§ 1016-1019, inclusive, and the original acts from which they were taken was expressly approved, legalized, and adopted by Laws 1899, c. 7.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 214; Dec. Dig. § 145.*]

4. COSTS (§ 129*)—IN FORMA PAUPERIS—REPEAL—CONFLICTING PROVISIONS.

Laws 1897, c. 34, repealing conflicting provisions, did not repeal the proviso of Rev. St. 1898, § 1016, excepting impecunious suitors from the payment of certain fees, since that special matter was not touched upon in chapter 34.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 496; Dec. Dig. § 129.*]

5. CONSTITUTIONAL LAW (§ 249*)—DISCRIMINATION AGAINST CLASS—APPEAL IN FORMA PAUPERIS.

Comp. Laws 1907, § 1017, which allows appeals upon affidavit in forma pauperis, and section 3305, which dispenses with a bond on appeal, where such affidavit has been filed and certified, are not unconstitutional as discriminating against litigants who are able to pay such appeal costs.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. § 249.*]

6. PLEADING (§ 205*)—GENERAL DEMURRER—COMPLAINT GOOD AGAINST MOTION FOR NONSUIT.

A complaint, under which complainant may prove such a state of facts and inferences as would withstand a motion for nonsuit, is not vulnerable to a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

7. PLEADING (§ 205*)—GENERAL DEMURRER—GROUNDS.

Under Comp. Laws 1907, § 2986, providing that pleadings are to be liberally construed, doubts upon the allegations in the pleadings are not necessarily to be resolved against the pleader, and, construing the pleading liberally, a general demurrer should always be overruled, unless the complaint clearly fails to state some essential element necessary to a cause of action, or states some acts by reason of which plaintiff cannot recover.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Henry W. Eddington against the Union Portland Cement Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Halverson & Pratt, of Ogden, for appellant. C. S. Varian, of Salt Lake City, and H. H. Henderson, of Ogden, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Hoagland v. Hoagland, 12 Utah, 304, 54 Pac. 978.

FRICK, J. This is an appeal from a judgment dismissing the action after sustaining a general demurrer to the complaint. Before proceeding to a consideration of the merits, we are required to dispose of the motion interposed by respondent to dismiss the appeal. The motion is based upon two principal grounds: (1) That no undertaking on appeal, as provided by Comp. Laws 1907, § 3305, has been filed; and (2) that the alleged affidavit, filed in lieu of an undertaking on appeal, is insufficient and unauthorized, for the reasons hereinafter stated.

[1] Compiled Laws 1907, § 1017, on which the affidavit aforesaid is made, reads as follows: "Any person may institute, prosecute, defend, and appeal any case in any court in this state on taking and subscribing, before any officer authorized to administer an oath, the following: I, A. B., do solemnly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence or the appeal which I am about to take, and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal." This court, in *Hoagland v. Hoagland*, 18 Utah, 304, 54 Pac. 978, held that, because an undertaking was expressly required by Compiled Laws 1907, § 3305, section 1017, *supra*, did not authorize the appellate court to dispense with the undertaking provided for in said section 3305. Section 3305 reads as follows: "An appeal is taken by filing with the clerk of the district court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but within five days after service of the notice of appeal an undertaking shall be filed or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived in writing by the adverse party: *Provided, that where the appellant makes and files with the clerk of the court from which the appeal is taken an affidavit in the form set out in section 1017, no bond on appeal shall be required; and where such affidavit is filed, the clerk of the court from which the appeal is taken shall certify that the appellant has made and filed an affidavit as provided for in section 1017.*" (Italics ours.) In order to meet the objections of this court as they appeared in *Hoagland v. Hoagland*, *supra*, the Legislature, after that decision, in 1899, amended section 3305, *supra*, by adding thereto that portion printed in italics. Laws 1899, p. 83.

The appeal in this case is therefore based upon section 3305 as amended, and not as it stood when *Hoagland v. Hoagland* was decided. Respondent, however, contends that what was added to section 3305 was, in effect, an amendment of section 1017, and that under our Constitution laws cannot thus be amended. In our judgment, the amendment

to section 3305 was properly and constitutionally made; and in making it the Legislature did not intend to amend, nor make the attempt to amend, section 1017. All that was done was to make the affidavit set forth in section 1017 sufficient on appeal. This was done for the sole reason that this court had theretofore held the affidavit provided for in said section insufficient to perform such a function because of what was contained in section 3305 before it was amended. The Legislature therefore obviated the apparent incongruity between sections 1017 and 3305 by changing section 3305 as before indicated.

[2] The Constitution of this state (article 8, § 9) permits appeals from all final judgments "under such regulations as may be provided by law." The Legislature therefore had the power to regulate appeals, and to provide that those who, by reason of their poverty, were unable to give the undertaking on appeal provided for by section 3305 might dispense therewith, and might nevertheless appeal by filing the affidavit provided for in section 1017. The Legislature having legislated upon a subject which is clearly within its constitutional powers, the courts have no alternative, but must enforce the law.

[3] The contention that some portions of sections 1016 to 1019, inclusive, relating to the matter of costs, are void, because placed in the Revised Statutes of 1898 without authority, even if conceded, could have no bearing upon the question now under consideration. But the contention is not tenable. All that is contained in the sections, aforesaid, is there by the authority of the Legislature. Whatever change of phraseology or omission of words there may be between said sections as they now stand and the original acts from which they were taken was clearly authorized by section 4 of chapter 85, Laws of 1896. Laws 1896, p. 296. Moreover, if what is said in said chapter could be held insufficient authority, the matter was nevertheless settled by chapter 7, Laws 1899, in which the Revised Statutes, as printed, were approved and adopted by a special legislative act.

[4] Nor is there any merit in the contention that the proviso of section 1016 was repealed by chapter 34, Laws 1897. Nothing was repealed by that chapter, except such matters as were in conflict with the provisions contained in said chapter. The repeal is in general terms, and therefore repealed only conflicting provisions. There is nothing in the proviso of section 1016 that is in conflict with anything contained in chapter 34 of the Laws of 1897, *supra*. The supposed conflict, therefore, did not exist, since the matter contained in the proviso in section 1016 relates to a special matter not touched upon in said chapter 34, as will appear from a careful examination of the alleged conflicting portions of said chapter with the proviso in section 1016.

[5] The claim that section 1017 or section

3305 are, or that either of them is, unconstitutional, upon the ground that respondent and the class to which it belongs are discriminated against, is clearly untenable. Statutes providing for the allowance of appeals without an undertaking, upon the filing of an affidavit in which it is set forth, under oath, that the appellant, by reason of his poverty, is unable to bear the expense of the proposed appeal, are in force in so many states, and have so often been upheld and enforced by the courts, that, in the absence of direct authority to the contrary, we must assume them to be valid. See 2 Cyc. 24, where the cases upon the subject are in part collated. See, also, 1 Enc. Pl. & Pr. 999.

We are of the opinion, therefore, that the motion to dismiss the appeal should be, and it accordingly is, denied.

Proceeding, now, to a consideration of the merits:

In the complaint the pleader states, or at least attempts to state, a cause of action by a servant against his master to recover damages for personal injuries sustained by the servant through the alleged negligence of the master. The complaint is very long, covering eight pages of the printed abstract, and for that reason we shall not set it forth. A general and special demurrer to the complaint were interposed by the respondent. With respect to the disposition of the demurrers, the record reads as follows: "The demurrer to plaintiff's complaint was argued and submitted and taken under advisement, and on October 10, 1911, the same was sustained, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, but overruled as to the other ground." Appellant elected to stand on his complaint, and the court entered judgment dismissing the action, as before stated.

[6] The rulings of the court in sustaining the demurrer and in entering judgment are assailed. As already stated, no particular reason is disclosed why the complaint is deficient in substance. The respondent insists that the demurrer was sustained for the reason that it appears upon the face of the complaint that appellant assumed the risk of injury, and hence contends that the demurrer was properly sustained. We have carefully considered the allegations of the complaint, and in doing so cannot agree with respondent's contentions. Without pausing now for the purpose of analyzing the allegations of the complaint, it must suffice to say that we are unanimously of the opinion that, under the allegations, appellant may prove such a state of facts and inferences as would withstand a motion for nonsuit; and this being so the complaint is not vulnerable to a general demurrer.

[7] Nor is the contention sound that, under the allegations of the complaint, a court ought to say, as matter of law, appellant as-

sumed the risk of the injury in question. Unless it is clear that the complaint fails to state some essential element necessary to a cause of action, or that some facts are stated by reason of which the plaintiff cannot recover because of some act of his own, which prevents a recovery, a general demurrer should always be overruled. Under our statute (Comp. Laws 1907, § 2986) doubts, if any arise, upon the allegations in the pleadings are not necessarily resolved against the pleader; but the pleading, as provided in that section, "must be liberally construed." No reason is perceived why appellant cannot prove a prima facie case under the allegations of his complaint. If, upon the trial, however, appellant fails to make a prima facie case, or if, when all the evidence is before the court, it shall be made to appear that, as matter of law, he has assumed the risk, the court should then dispose of the case accordingly. That is different, however, from adjudging the litigant's case in advance of a trial, where, as here, no element in stating a good cause of action is lacking in the complaint. The only claim is that the pleader has pleaded the facts so specifically as to plead himself out of court.

The judgment is reversed, and the cause remanded to the district court, with directions to reinstate the case, and to proceed therewith in accordance with the views herein expressed. Appellant to recover costs upon appeal.

MCCARTY, C. J., and STRAUP, J., concur.

(17 N. M. 409)

TERRITORY v. GALLEGOS et al.

(Supreme Court of New Mexico. Jan. 9, 1913.)

(Syllabus by the Court.)

1. TRESPASS (§ 82*)—CRIMINAL TRESPASS—WHAT CONSTITUTES.

Any violent opening of a door or window for the purpose of entering and molesting the persons in possession of the house or building is sufficient to complete the offense made punishable by section 1161, R. S. 1897. *Held*, that an opening of four inches was sufficient.

[Ed. Note.—For other cases, see TRESPASS, Cent. Dig. § 172; Dec. Dig. § 82.*]

2. TRESPASS (§ 88*)—CRIMINAL TRESPASS—EVIDENCE—STATEMENT OF ACCUSED.

Evidence of what was said and done by defendant a few hours before the attempted entrance, in the presence of prosecuting witness, was admissible, as tending to characterize the attempted entrance.

[Ed. Note.—For other cases, see TRESPASS, Cent. Dig. § 182; Dec. Dig. § 88.*]

3. TRESPASS (§ 88*)—CRIMINAL TRESPASS—EVIDENCE.

There was no error in permitting a witness to describe the condition of the door three or four days after the assault, where it had been shown by other evidence that the door was then in the same condition that it was immediately after the assault upon it.

[Ed. Note.—For other cases, see TRESPASS, Cent. Dig. § 182; Dec. Dig. § 88.*]

4. CRIMINAL LAW (§ 1121*)—APPEAL—REVIEW OF THE EVIDENCE.

The Supreme Court will not attempt to pass upon the sufficiency of the evidence to sustain the verdict, where it appears that the transcript does not contain all the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 938, 2939; Dec. Dig. § 1121.*]

5. CRIMINAL LAW (§ 1172*)—APPEAL—FAVORABLE INSTRUCTIONS.

Defendants cannot complain of an erroneous instruction which was favorable to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

6. CRIMINAL LAW (§ 599*)—SURPRISE—DEMAND FOR CONTINUANCE.

In order to take advantage of surprise, the surprised party must ordinarily ask for the needed postponement or continuance to procure the required evidence, and have been refused by the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1333, 1334; Dec. Dig. § 599.*]

7. CRIMINAL LAW (§ 1056*)—FAILURE TO INSTRUCT—NECESSITY OF REQUEST.

If counsel fail to ask for an instruction which they think should be given, and on refusal of the court to give it do not except, they cannot take advantage of it on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

Appeal from District Court, Rio Arriba County; before Justice McFie.

Telesforo Gallegos and Felix Borrego were convicted of crime, and appeal. Affirmed.

J. H. Crist, of Santa Fé, for appellants. Frank W. Clancy, Atty. Gen., for the Territory.

ROBERTS, C. J. [1] This appeal is prosecuted from a judgment of the district court of Rio Arriba county, imposing a fine and jail sentence upon the appellants, for the violation of that portion of section 1161, R. S. 1897, which makes it an offense for any person with violence to open any door, window, or sash, for the purpose of entering and molesting the person or persons in possession of the house or building. The evidence on the part of the territory disclosed that the lower hinge of the door had been broken, and the lower part of the door opened about four inches. There is evidence to show a violent assault upon the door by the appellants, but it is argued that, because the statute says that the opening must be for the purpose of entering the house, it must be established that the opening made was sufficient to permit the entrance of the person making the attempt. To place this construction upon the meaning of the statute, it appears to us would lead to absurd results, and would in all cases, where an actual entrance was not effected, require such mathematical accuracy in establishing the width of the opening and the size of the party making the attempt that but few convictions

would be secured. For instance, a very small opening would be sufficient to permit the entrance of a slim man, while a much larger one would be required for a stout man, and a case might be imagined where a very large person might not be able to enter, even though the door was wide open, and in that case, if appellants' contended construction is sound, no offense under this statute would be committed by a large man in opening the door in the prohibited manner, and for the prohibited purpose. We are of the opinion that any violent opening of the door, for the purpose of entering and molesting the persons in possession of the house or building, is sufficient to complete the offense.

[2] The court permitted the prosecuting witness to testify, over objection, as to what was said and done by the appellant Telesforo Gallegos during the afternoon before the offense was committed at night, admitting such testimony, however, only as against said Gallegos, and cautioning the jury that it was not evidence against the codefendant, Borrego. Appellants urge that this was prejudicial error. We think the evidence was properly admitted, and that it was relevant for the purpose of showing the intent with which the defendant Gallegos acted in violently opening the door. This evidence showed the temper and disposition of Gallegos toward Mrs. Sisneros, with whom he was talking, and who drove him out of the house, and tended to characterize the act committed later by him.

[3] Error is also predicated upon the action of the lower court in permitting Silviano Roybal, a witness called by the territory, to testify as to the condition of the doors of the house some three or four days after the commission of the alleged offense. Mrs. Sisneros testified that the doors were in the same condition when examined by Roybal as they were immediately after the occurrence. The condition of the doors, after the assault, was a fact which was admissible in evidence. The weight of Roybal's testimony, in view of the time which had elapsed, was for the jury to determine. There was no error, however, in permitting the evidence to go to the jury.

[4] It is next contended by appellants that the evidence was not sufficient to sustain the verdict. As a general rule, an appellate court will not undertake to pass upon the weight of the evidence. It is sufficient, if there was competent evidence, which, if believed, would support the verdict, but, in order to obtain any review of the sufficiency of the evidence, it is clear that all the evidence should be brought up. It appears that three witnesses gave testimony, which is not set out in the record. This being true, this court will not undertake to review the evidence.

Error is assigned upon instructions num-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bered 7 and 8 given by the court. The instructions are as follows:

"(7) That said defendants, each of them participating in kicking and throwing stones at the doors of the house of Mauricio Sisneros, did thereby violently break the lower hinge of one of said doors, and cause the lower portion of said door to be driven in and opened to the width of three or four fingers from its proper place.

"(8) That such assault, if made, was made for the purpose of entering said house and molesting the wife of Mauricio Sisneros, Manuela Trijillo de Sisneros."

These instructions were given by the court, in conjunction with other instructions, preceding and following, setting out the material allegations of the charge against the defendants, and what the state must prove beyond a reasonable doubt in order to justify a conviction. It is true, as urged by appellants, that the court by instruction No. 7 told the jury that if the door was opened three or four fingers, and all the other elements were present and established, the defendants would be guilty, but there was no error in this, as we have heretofore stated that any opening of the door, accomplished in the prohibited manner, is sufficient. It is further contended that this paragraph states facts which were shown only by the evidence as a material allegation of the indictment. It sets out in effect that it must be established beyond a reasonable doubt that the breaking of the door was caused by kicking and throwing stones.

[6] This portion of the instruction was, of course, technically incorrect, because any violent opening of the door, however brought about, was sufficient, but the defendant cannot complain of this defect because it was favorable to them by limiting the opening to the specific ways indicated. The objection urged against instruction No. 8 is that it imposed upon the prosecution the burden of establishing beyond a reasonable doubt no more than "that such assault was made for the purpose of entering said house and molesting," etc. It is urged that this was misleading because the assault is not the offense denounced by the statute, but the violent opening of the door for the purpose of entering. If this instruction stood alone, unconnected with anything else, there would be some plausibility in this argument, but the preceding paragraph describes the assault and the violent breaking, and this instruction refers to what immediately precedes and includes the whole of it. The offense had been therefore clearly defined by the court, and the jury could not have been misled by this paragraph, when considered with the other instructions given in connection with it.

[8] Appellants also allege error upon the action of the court in overruling their motion for a new trial, and especially urge the

ground therein set forth to the effect that they were surprised by the evidence adduced on the part of the territory, and that they did not have an opportunity to procure witnesses to combat such testimony. Our attention is called to section 1280, Bishop's New Criminal Proc., wherein the author says, "Surprise is a familiar ground for a new trial, both in criminal cases and in civil," but the same author further on in the same section says: "Ordinarily the surprised party must have asked for the needful postponement or continuance to procure the required evidence, and have been refused." It does not appear that the appellants asked for any delay or continuance to enable them to procure witnesses to combat the testimony which surprised them, or that any such suggestion was made to the court. And, as said by the territorial Supreme Court in the case of *Duncan v. Holder et al.*, 15 N. M. 323, 107 Pac. 685: "There is hardly a better established rule of practice, or one more uniformly adhered to by this court, than that the granting or refusal of a motion for a new trial, being addressed to the sound discretion of the trial court, will not, unless it plainly appears that such discretion has been abused, be reviewed on appeal."

[7] Appellants also urge that the court erred in failing to instruct the jury as to the competency of defendants as witnesses in their own behalf, and also in failing to instruct as to what constituted an assault upon a house, but the record fails to disclose that defendants asked or requested the court to instruct the jury upon either of the questions, or took any exceptions to the failure to so instruct, and consequently, even if such instructions should have been given, they have lost all right to object now to the failure. See *Ter. v. Caldwell*, 14 N. M. 543, 98 Pac. 167, and authorities there cited.

Finding no error in the record, the judgment of the lower court is affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

(17 N. M. 159)

DAILY et al. v. FITZGERALD et al.

(Supreme Court of New Mexico. Jan. 9, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 530*)—COSTS IN TRIAL COURT—TRANSCRIPT OF RECORD.

All costs accruing in the district court must be taxed prior to the filing of the transcript in this court on appeal or writ of error, and a certificate of the clerk of the district court as to such costs must be included in the transcript of record, and no recovery can be had in this court for costs not so taxed and certified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2304-2306; Dec. Dig. § 530.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Bernalillo County; before Justice Abbott.

Motion to strike out certificate of the district clerk as to costs sustained.

For former opinion, see 125 Pac. 625.

Wade & Wade, of Las Cruces, for appellants. Marron & Wood, of Albuquerque, for appellees.

ROBERTS, C. J. At the present term of this court this cause was submitted on the merits, and the appellees prevailed. After the cause was decided on the merits by this court, appellees caused the clerk of the district court of Bernalillo county to transmit to the clerk of this court, a certificate of costs, taxed by the clerk of the district court of said county, after the rendition of the judgment in this court, which certificate showed additional costs in the district court, amounting to \$139.60, which it appears appellees had not caused to be taxed and certified theretofore. Appellants have filed a motion to strike out such additional certificate, on the ground, among others, that such costs must be taxed prior to the filing of the transcript of the record in this court, and a certificate of the clerk of the district court as to all costs in the case must be included in the transcript. The motion appears to be well taken.

It is true that section 3157, C. L. 1897, does not seem to require the taxation of costs until the execution on the judgment is issued, yet as section 22 of chapter 57, S. L. 1907, requires the clerk of the district court, in case of appeal or writ of error, to include in the transcript of record a copy of the final judgment, etc., and "a certificate of the clerk of the district court as to all costs in the case in the district court including the clerk's and stenographer's fees for the transcript of record and bill of exceptions," it would appear that the costs should be taxed before the transcript is prepared and filed in this court. If a successful party in the lower court could await his own pleasure to have the costs taxed where an appeal is taken, it would lead to endless confusion, and would deny to the other party the opportunity to object to the items of cost in the lower court, and secure a proper taxation thereof. No good reason can be advanced for the delay, and we believe the better practice is to require the costs to be taxed prior to the filing of the transcript in this court, so that the amount can be included therein, as required by the statute.

Appellants' motion to strike the certificate of the district clerk as to costs filed in this court after the decision of the case here on its merits will be sustained, and it is so ordered.

HANNA and PARKER, JJ., concur.

(17 N. M. 100)

Ex parte CANAVAN.

(Supreme Court of New Mexico. March 28, 1912. Rehearing Denied March 8, 1913.)

1. DIVORCE (§ 269*)—DIVISION OF PROPERTY—CONTEMPT—PLEADING AND PROOF.

A divorce decree awarding the wife a certain sum of money as her share in the community property created a presumption that the husband was possessed of sufficient money and property to pay the amount, and the husband, upon being charged with contempt of court, had the burden of pleading and proving his inability to pay the amount, if he desired to defend on such ground.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

2. DIVORCE (§ 269*)—CONTEMPT OF ORDER—VIOLATION OF RESTRAINING ORDER.

Where an order was issued in divorce proceedings restraining the husband from removing the community estate from the jurisdiction, and the wife was awarded a certain sum of money as her share of the estate, and the husband failed to pay such sum, his act in removing the community estate from the jurisdiction in violation of the restraining order was clearly a contempt of court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

3. CONSTITUTIONAL LAW (§ 83*)—IMPRISONMENT FOR DEBT.

A contempt judgment committing the husband to prison for a definite term for violating a restraining order issued in divorce proceedings was not an attempt to enforce collection of a debt by means of imprisonment under contempt process, though it provided for the husband's benefit that he could be released upon payment of the sum awarded to his wife by the divorce decree.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.*]

4. CONTEMPT (§ 63*)—JUDGMENT—VALIDITY.

A contempt judgment committing one for a definite term "or until further order of the court" was not void for uncertainty; the quoted words being employed merely to retain in the court the power to terminate the imprisonment before its expiration upon satisfactory cause shown.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197-201; Dec. Dig. § 63.*]

5. CONTEMPT (§ 57*)—ORDER TO SHOW CAUSE—SERVICE—WAIVER.

An appearance and answer in contempt proceedings without objection was a waiver of service of the order to show cause.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 162, 163; Dec. Dig. § 57.*]

6. DIVORCE (§ 269*)—CONTEMPT—DEFENSE—WANT OF DEMAND.

Where the husband in his answer in contempt proceedings for violation of a restraining order issued in a divorce action claimed that he was unable to pay the amount awarded his wife by the divorce decree, he could not relieve himself from the charge of contempt by a claim that no demand had been made upon him for payment of the amount of the decree; no demand being necessary, since his plea showed that it would have been unavailing and the omission of a demand, even if demand were required, being merely an error or irregularity, and not jurisdictional.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 750-763; Dec. Dig. § 269.*]

7. HABEAS CORPUS (§§ 4, 30*)—NATURE OF REMEDY.

A writ of habeas corpus is available only when the lower court has exceeded its jurisdiction, and cannot take the place of a writ of error or an appeal, however irregular or erroneous the judgment may be.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 4, 25; Dec. Dig. §§ 4, 30.*]

Original habeas corpus proceeding by Stephen Canavan. Petitioner remanded, and writ discharged.

Argued before ROBERTS, C. J., and PARKER, J.

E. W. Dobson, of Albuquerque, for petitioner. A. T. Hannett, of Gallup, and Vigil & Jamison, of Albuquerque, opposed.

PARKER, J. This is a habeas corpus proceeding brought by the petitioner to obtain his discharge from custody under a commitment for contempt, in pursuance of the judgment of the district court of McKinley county, the pertinent provisions whereof are as follows:

"Your petitioner further represents that his confinement or restraint is by virtue of a warrant issued upon the filing of a petition in that certain suit lately pending in the county of McKinley, state of New Mexico, entitled Kate Canavan, Plaintiff, v. Stephen Canavan, Defendant, as will more fully appear by copy of said petition so filed upon which said warrant was issued is attached hereto and made a part of this petition and marked 'Exhibit A'; that thereafter another petition was filed in said cause alleging further grounds than alleged in the original affidavit or petition, a copy of which said second petition is also attached hereto and made a part of this petition, and marked 'Exhibit B.'

"Your petitioner further represents that he is further advised by counsel, and believes, that his imprisonment is illegal in the following respects: Your petitioner states that on the 21st day of June, 1911, a decree was rendered in the case of Kate Canavan v. Stephen Canavan, which was a suit for divorce and alimony, and on final hearing the court granted the plaintiff a divorce and a money judgment for alimony against your petitioner in the sum of \$20,000 as her share in the acquet community property; that said decree further provided that your petitioner and defendant in said divorce case pay plaintiff's counsel the sum of \$1,500 as counsel fee and the costs of the suit, a copy of which said decree is attached hereto and made a part of this petition and marked 'Exhibit H.'

"Your petitioner further represents that he is advised by counsel, and believes that the filing of said petition and the issuance of said warrant and the committing of your petitioner to jail is an attempt to imprison

a person for debt contrary to the Constitution of the United States and the laws of the state of New Mexico, and that, therefore, his confinement is illegal, and an attempt to imprison your petitioner for failure to pay a money judgment."

As appears the petitioner was defendant in a divorce proceeding in which final decree was rendered against him, which final decree provided, inter alia, "that the plaintiff do have and recover of the said Stephen Canavan the sum of \$20,000 as her share of the acquet property of said marriage community, * * * and that execution issue. * * *"

This decree was signed June 14, 1911. It further appears that on August 5, 1910, a restraining order was served on petitioner, and on March 9, 1911, an order to show cause why he should not be punished for contempt for having disposed of parts of his personal property in violation of said restraining order issued against him. On February 29, 1912, Kate Canavan, plaintiff in the divorce case, filed her affidavit, charging that petitioner had failed to obey the judgment in the divorce case; on information and belief that prior to the signing of the divorce decree, petitioner departed from the jurisdiction, taking with him all of his property to the extent of \$50,000, and that he was avoiding service of process upon him, and was fleeing from the jurisdiction, when apprehended under an attachment issued upon a previous affidavit of her attorney, and that petitioner now had no property in New Mexico out of which to satisfy said decree in the divorce case. The affidavit of Mrs. Canavan's attorney contained a further allegation on information and belief that execution on the divorce decree had been issued and returned unsatisfied. A demurrer to the petition for attachment for contempt was interposed by petitioner, and overruled by the court. Thereupon petitioner filed answer to the petition, in which he admitted his default in payment of the amount decreed in the divorce case, accounted for his whereabouts since giving his testimony in the divorce case, and denied his intention to abscond to avoid the process of the court, denied service or knowledge of the existence of the order to show cause, alleged that, if he had violated the restraining order, it was in mortgaging some real estate at Gallup to save the same from sale under execution, denied that he had \$50,000 of property or money, and alleged that he was indebted to divers persons whom he was unable to pay in addition to the amount decreed against him in the divorce proceedings, and denied that he ever had, or has at present, money or property out of which he could pay the amount of the decree. The answer is strangely devoid of any specific denial of the charge that petitioner had removed his property from the jurisdiction in violation of the

original restraining order. Counsel for Mrs. Canavan then moved for judgment on the petition for attachment for contempt, the judgment and evidence in the divorce case, and the answer to the petition for attachment. Thereupon the district court rendered the judgment hereinbefore mentioned. Petitioner then brings habeas corpus in this court, and asks to be discharged from custody.

Upon the coming in of the return, a demurrer was interposed to the same, and a motion for discharge of petitioner based upon several grounds, which will be considered. The evidence in the divorce case is not before us.

[1] 1. The evidence in the divorce case not being before us, it is to be presumed that the same fully justified the decree. That decree, as we have seen, found that Mrs. Canavan was entitled to \$20,000 as her share of the acquet property of the marriage community. This finding presupposes that the evidence shows that petitioner was possessed of sufficient money and property to pay the amount. It is inconceivable that any court would award such a decree in the absence of proof of petitioner's ability to perform. The community estate was not what it might have been in the past, but it was what the evidence showed it to be when the action was instituted and the restraining order issued and served, and the court, in the final decree, determined the wife's just share of the same and awarded execution. It may therefore be assumed that the evidence amply showed the husband's ability to perform the decree. The complaint in the divorce case is not before us, and we must assume that it contained the usual and necessary allegations as to the nature and extent of the community estate. The court found all of the material allegations of the complaint to be sustained by the proofs. This finding is a finding of the husband's ability to perform. If the pleadings and facts were otherwise, it devolved upon petitioner to show it to this court.

In this connection, counsel for petitioner cite *In re Jaramillo*, 8 N. M. 598, 45 Pac. 1110. That case is clearly distinguishable from this. In that case it clearly appeared that petitioners did not have the money to comply with the decree when it was rendered, and had never had the larger portion of the amount adjudged against them. The territorial Supreme Court construed the decree "only as a finding by the court that the petitioner and his coadministratrix owed the amount of money found due to their other coadministratrix. * * * But in the case at bar, as we have seen, it appears that petitioner had the ability to perform the decree.

[2] 2. As before seen, the court issued an order upon the filing of the complaint, restraining the petitioner from removing the community estate from the jurisdiction. It ap-

pears from a recital in one of the orders of the court that the question of the violation of this restraining order was gone into in the evidence in the divorce case, but the court made no final conclusion so far as appears. The petition for attachment for contempt was based upon this alleged violation of the injunction, and the petitioner in his answer strangely, it seems to us, avoids any reference to it. All the evidence in the divorce case was before the court in the contempt proceedings, without objection on the part of the petitioner, and the court found petitioner guilty of violating the injunction. If the case were before us on appeal, there is nothing in the record from which we could say the court reached an incorrect conclusion. We have then a case of the husband enjoined from removing the acquet property from the jurisdiction, a decree for the wife of a sum of money as her fair share of said estate, a finding by the court that the husband has not paid said sum, and has removed the community estate from the jurisdiction in violation of the restraining order. This certainly makes out a clear case of contempt. At this point petitioner presents two objections to the judgment rendered by the court.

[3] 3. It is first urged that the judgment is an attempt to enforce collection of a debt by means of imprisonment under process for contempt. In this counsel for petitioner is in error. The contempt of petitioner consists in the removal of the estate from the jurisdiction, so that the decree became unenforceable by execution. If the judgment had simply provided for the imprisonment, and had made no reference to payment of the amount of the decree to the wife, no one, we assume, would be found to say that the same was not a most righteous one. The reference in the judgment to the discharge of petitioner upon payment of the amount due under the divorce decree is inserted for the benefit of the petitioner, and provides a means whereby he may be discharged before the expiration of the term of the sentence, if he shall so elect. The court was not concerned as to whether petitioner paid the amount of the decree or not, it having sentenced him to a definite term of imprisonment for violation of the injunction order. There was no attempt to enforce the collection of the debt. If the judgment had provided for imprisonment until petitioner paid the amount of the decree, the proposition urged by petitioner would perhaps be presented. This was the form of the judgment in *Re Jaramillo*, 8 N. M. 598, 45 Pac. 1110, referred to above. But here the commitment is for a definite period, with the proviso that the petitioner may sooner be discharged by paying the amount due.

[4] 4. Counsel for petitioner contends that the contempt judgment is void by reason of the last clause thereof, as follows: "Or until further order of the court." This pro-

vision of the judgment is easily distinguishable from decrees or judgments which merely order commitment "until the further order of the court." In such cases the judgment is indefinite and uncertain, but in cases like the one at bar, where there is a definite term of sentence fixed, the language used should be considered merely as employed to retain in the court the power to terminate the imprisonment before its expiration, according to its terms, upon satisfactory cause shown. It has been so held. *Tinsley v. Anderson*, 171 U. S. 101, 108, 18 Sup. Ct. 805, 43 L. Ed. 91; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

[5] 5. Counsel for petitioner urges that no order to show cause was served upon him prior to the attachment, and that the judgment is therefore illegal. A sufficient answer to the proposition, if the fact be true, would seem to be that the plaintiff appeared, and, without objection on that ground, answered the petitions filed to obtain the attachment as represented by counsel who argued and submitted the question of petitioner's guilt or innocence of the contempt of the court. This was a waiver of the order to show cause. *State v. Hansford*, 43 W. Va. 773, 28 S. B. 791. Appearance and answer without objection cures irregularity in the commencement of the proceeding. 9 Cyc. 43.

[6] 6. Counsel for petitioner urges that no demand was made for the payment of the amount of the decree, and that, therefore, the judgment was unwarranted. It appears from the answer of petitioner that he claimed he was unable to pay the amount, and hence a demand would have been entirely unavailing. In such case no demand is necessary. *State v. Dittmar*, 19 Wash. 324, 53 Pac. 350; *Potts v. Potts*, 68 Mich. 492, 36 N. W. 240. The petitioner was deprived of no right by the failure to make demand, and, if demand was required, the omission was no more than an error or irregularity, and was not jurisdictional.

[7] 7. Much that has been said might more properly be said if the judgment of the district court were before us for review on appeal or error, if, indeed, it is so reviewable. We do not decide the question. But we have found the discussion necessary in order to state fully the facts. It is to be remembered, however, that the writ of habeas corpus is not designed to take the place of a writ of error or an appeal. It is only when the lower court has exceeded its jurisdiction that the writ is available. No matter how irregular, or even erroneous, the judgment may be, it cannot be reviewed on habeas corpus. *In re Peraltareavis*, 8 N. M. 30, 41 Pac. 538; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. *State v. Pratt*, 20 S. D. 440, 107 N. W. 538, 11 Ann. Cas. 1049, and note, where numerous cases are collected. The question of the power or

jurisdiction of the district court is sought to be raised by alleging that it attempted to collect a debt by contempt proceedings. But, as we have pointed out, the question is not involved.

For the reasons stated, the petitioners will be remanded to the custody of Thos. McMullen, deputy sheriff of Bernalillo county, to be dealt with according to law, the writ of habeas corpus will be discharged; and it is so ordered.

ROBERTS, C. J., concurs. HANNA, J., being disqualified, did not participate in this proceeding.

(17 N. M. 466)

BULL et al. v. BAL et al.

(Supreme Court of New Mexico. Jan. 27, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 26*)—ADMINISTRATOR WITH WILL ANNEXED—BOND.

Where the authority of an executor is revoked, and an administrator with the will annexed is appointed, it is not essential to the validity of the bond to be given by him, as such, that his special character should be recited therein; a bond in the ordinary form required of general administrators by the statute is valid and proper.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144-170; Dec. Dig. § 26.*]

2. EXECUTORS AND ADMINISTRATORS (§ 20*)—CHARACTER OF ADMINISTRATOR—ORDER OF APPOINTMENT.

Reference should be made to the order of appointment, for the purpose of determining the character and status of one assuming to administer upon an estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

3. EXECUTORS AND ADMINISTRATORS (§ 26*)—ADMINISTRATOR WITH WILL ANNEXED—BOND.

The defect in the bond executed by the administrator with the will annexed did not vitiate his appointment nor invalidate his acts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144-170; Dec. Dig. § 26.*]

4. EXECUTORS AND ADMINISTRATORS (§ 27*)—LETTERS OF ADMINISTRATION.

Letters of administration are to be considered merely as credentials and not necessary, where the order or record of the court show his authority to act.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 171-176; Dec. Dig. § 27.*]

5. EXECUTORS AND ADMINISTRATORS (§ 327*)—POWER OF SALE—ADJUDICATION BY COURT.

An adjudication by the probate court as to insufficiency of personal assets to meet debts and legacies is not necessary preliminary to exercise of power of sale, conferred by last will and testament, by an executor or administrator with the will annexed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1344; Dec. Dig. § 327.*]

**6. EXECUTORS AND ADMINISTRATORS (§ 363*)—
SALE UNDER POWER IN WILL—PRIVATE
SALE.**

An executor or administrator with the will annexed, where power of sale of real estate has been conferred by the last will and testament of the decedent, has, as a general rule, considerable discretion as to the manner and conduct of such sale, and may sell at private sale at his discretion, when prudently and honestly exercised.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1488-1494; Dec. Dig. § 363.*]

Appeal from District Court, Dona Ana County; before Justice Parker.

Action by the First National Bank of Santa Fé, suing for itself and other creditors of Thomas J. Bull, deceased, against Francisco Bal, Thomas R. Bull, and others. From the decree Thomas R. Bull and certain other defendants appeal. Dismissed, and judgment affirmed.

This suit was instituted by the First National Bank of Santa Fé, suing for itself and all other creditors of the estate of Thomas J. Bull, deceased, against Barbaro Lucero et al., including the administrator *de bonis non* of the estate of Thomas J. Bull, and sureties on the bonds of preceding administrators, to review and set aside orders of the probate court allowing administrators' accounts, to discover assets, to compel the payment of creditors, so far as the personal property and assets would pay the same, and to compel a sale of real estate to pay any balance that the assets and personal property would not pay. All appellants and appellees were named as parties defendant, as claimants of the land which was sought to be subjected to sale.

The case, as thus initiated, was determined by a decree which is not appealed from. The questions presented for our determination in this appeal are raised by the answers and counterclaims of the several defendants who are appellees here, setting up title in several of the tracts sought to be sold to pay debts of decedent.

Each appellee filed a separate answer and counterclaim against appellants, who are vendees of devisees of said tracts of land under the last will and testament of Thomas J. Bull, deceased, seeking reformation of the deed executed to him for the land described in his counterclaim, so as to give it effect as the deed of Willis J. McGinnis, as administrator of the estate of Thomas J. Bull, deceased, instead of a deed by him as executor, in which form it was executed. The appellants, defendants to said several counterclaims, filed separate answers to each of said counterclaims, assailing the validity of said several administrators' sales under which said counterclaimants, respectively, claimed, upon the grounds that (1) W. J. McGinnis, who made the sales, was not administrator with the will annexed, the will containing power of

sale for purpose of paying debts; (2) that the sales were made at private sale; and (3) that the inventory and appraisement and list of claims showed sufficient personal assets to pay all debts at the time the sales were made.

The facts found by the court, so far as essential to this appeal, are briefly as follows: That Thomas J. Bull, a resident of Dona Ana county, died January 1, 1899, leaving an estate therein, and consisting of both real and personal property, also leaving a will, in which Willis J. McGinnis and Benancia Padilla were named jointly as executor and executrix, who failed to accept the trust and did not qualify. That the will was duly probated, and letters of administration duly issued to Willis J. McGinnis, who qualified as administrator with the will annexed by entering into the usual administrator's bond, conditioned, among other things, that he should administer according to law all the moneys, goods, etc., of the deceased, and should pay any and all balances upon the settlement of the accounts to such persons as the probate court, or the law, should direct, which bond was duly approved by said court, and said administrator thereupon entered upon his duties as such. That Thomas J. Bull was the owner of tracts of land, described in the complaint as tracts A to P, inclusive, at the time of his decease. That the personal estate of said decedent, coming into the hands of said McGinnis, administrator, was insufficient to meet the debts of the estate, and necessitated a resort to a part of the real estate to realize funds to pay the debts of the estate.

The conclusions of law pertinent to the present inquiry were as follows:

"(3) That the personal estate of the said Thomas J. Bull, deceased, being insufficient to pay the debts of the estate, the said administrator, Willis J. McGinnis, properly resorted to the real estate of the said estate, for the purpose of realizing funds wherewith to satisfy the claims against the estate of the said Thomas J. Bull, deceased, and that the sums realized therefrom became and were a part of the estate to be and by the said administrator disbursed, as provided by law, in the satisfaction of existing claims against the said estate."

"(7) That Willis J. McGinnis, being in fact and law the administrator of the estate of Thomas J. Bull, deceased, with the will annexed, and having been such administrator with the will annexed at the time he executed and delivered the deeds and transfers as executor of the estate of Thomas J. Bull, deceased, as alleged in the answers and cross-complaints filed herein, the said defendants and cross-complainants, Francisco Bal, Pablo Gamboa, Miguel Estrada, S. W. Sherfey and Nancy Sherfey, his wife, Oscar Snow, W. N. Hager, and Ramon Bermudes, administrator

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the estate of Ramon Gonzales, deceased, are, and each of them is, entitled to the relief prayed for in their said cross-complaints; that said instruments and deeds of conveyance be reformed, as prayed in said cross-complaints."

Judgment was rendered for each of the appellees, reforming his deed, and from that judgment this appeal is taken.

Sam B. Gillett and F. G. Morris, both of El Paso, Tex., for appellants. R. L. Young, of Las Cruces, for appellees.

HANNA, J. (after stating the facts as above). The first assignment of error is that the district court erred in its third finding of fact "that letters of administration were duly issued to Willis J. McGinnis, who qualified as such administrator with the will annexed."

The second error assigned is that the court erred in its seventeenth finding of fact "that Willis J. McGinnis, administrator with the will annexed of the estate of Thomas J. Bull, deceased, executed to the defendants and cross-complainants certain deeds and instruments in writing."

The third error assigned is that "the trial court erred in its eighteenth finding of fact, in so far as it finds that Willis J. McGinnis, administrator with the will annexed of the estate of Thomas J. Bull, deceased, executed certain instruments."

These three assignments of error raise the same questions for our consideration, and are each based upon the contention of the appellants that neither the letters of administration, the oath of office, nor bond of administrator, or all together, show that said administrator was appointed and qualified as administrator with the will annexed, but expressly limit the powers of the administrator to those of an ordinary administrator.

[1] The record discloses that the probate court of Dona Ana county, February 7, 1899, admitted the last will and testament of Thomas J. Bull, deceased, to probate, and as a part of said order directed that "letters of administration with the will annexed to issue to the said Willis J. McGinnis and Benancia Padilla, after first entering into bonds with two or more good and sufficient sureties in the sum of \$31,000, conditioned for the faithful performance of said trust." Three days later McGinnis filed a bond in the sum of \$31,000, in which he was described as administrator, but which differed from the bond required of ordinary administrators, in that it was conditioned that he "administer according to law all the moneys, goods, rights and credits of the said deceased, and the proceeds of all his real estate which may be sold for the payment of his debts." The oath of McGinnis was not in the form required of ordinary administrators, or in full compliance with the form of oath re-

quired of other classes of administrators, but follows more closely the requirements of our statutes as to oath of administrator with the will annexed.

We do not agree with appellants that the bond executed by McGinnis was in the form required of ordinary administrators; on the contrary, its form would indicate that an attempt was made to comply with the requirements of the statute (section 1944); and, while the bond describes McGinnis as administrator, instead of administrator with the will annexed, this was doubtless due to a mistake or omission, which appellants, in good conscience, cannot be permitted to avail themselves of. The approval of the bond by the probate court, within three days after the order of appointment, precludes any presumption of a renunciation of the appointment or intention on the part of McGinnis not to qualify under the terms of the order of his appointment.

It has been held in the case of *Casoni et al. v. Jerome*, 58 N. Y. 315, that: "Where the authority of an executor is revoked, and an administrator with the will annexed is appointed, it is not essential to the validity of the bond to be given by him, as such, that his special character should be recited therein; a bond in the ordinary form required of general administrators by the statute is valid and proper."

Our statutes containing similar provisions to those of New York, upon which the foregoing opinion was based, we agree with the rule there laid down. The opinion further elucidates the rule in the following language: "It is true that her special character as administratrix with the will annexed is not recited in the bond, but this was not essential to its validity. Whether she was a general or special administratrix would have been disclosed by an examination of the order appointing her; and the bond must be held to refer to her acts and conduct in the actual character and relation to the estate which she held by virtue of her appointment."

[2] We are of the opinion that reference should be made to the order of appointment, for the purpose of determining the character and status of one assuming to administer upon an estate. The fact that in our jurisdiction no legal training or skill is requisite as a qualification for the office of probate judge or clerk results in many clerical and other mistakes, and makes the adoption of the rule referred to imperatively necessary.

[3] We do not concede that the bond given by McGinnis was fatally defective, but are inclined to the opinion that the defect in the bond executed by the administrator with the will annexed did not vitiate his appointment nor invalidate his acts. *Peebles v. Watt's Adm'r*, 9 Dana (Ky.) 102, 33 Am. Dec. 531; *Mobberly v. Johnson's Ex'r*, 78 Ky. 273.

[4] We do not consider that the contention

of appellants that the letters of administration do not show that the administrator qualified as administrator with the will annexed is meritorious. We are of the opinion that letters of administration are to be considered merely as credentials and not necessary, where the order or record of the court show his authority to act. *Hosey v. Brasher*, 8 Port. (Ala.) 559, 33 Am. Dec. 299; *Burkhalter v. Ector*, 25 Ga. 55; *State v. Price*, 21 Mo. 434.

It is also urged that the oath did not describe McGinnis as an administrator with the will annexed. While this is true, it is purely technical objection, which cannot be given serious consideration.

For the reasons given, we are of the opinion that the first three assignments of error are not well taken, and they are therefore overruled.

[5] The fourth assignment of error is that: "The court erred in its third conclusion of law, in so far as it found that the administrator properly resorted to and sold real estate belonging to said estate, for the purpose of realizing funds wherewith to satisfy the claims against the estate of Thomas J. Bull, deceased, to which said conclusion of law appellants duly excepted and now assign error as to the sales in question between appellants and appellees, upon the ground that it appears from the trial court's said findings of fact that the administrator, at time of making said sales, had not sold the personal property of said estate, which appears from the inventory and approved claims and reports of the administrator, all as found by the court, in the findings of fact, to be sufficient to pay the debts of the estate; that the said sales were not lawfully made by said administrator; that they were made without an order of the district court, and the said administrator could not sell said real estate, under such circumstances, without an order of the district court."

The argument in support of this assignment of error is that the sale by the administrator, if he was authorized to exercise the power given to executors to sell real estate to pay debts, was nevertheless without authority and void, because the statute of New Mexico (section 2065) limits the power of the executor acting under a will containing power to sell real estate to pay debts, as well as the power of the district court to order a sale, to cases wherein "it shall appear from the inventory and appraisement that the personal estate of the decedent is insufficient to discharge the just debts allowed against his or her estate and the legacies charged thereon." We cannot agree with this contention of appellants, but interpret this section of the Compiled Laws of 1897 to mean that whenever, after inventory and appraisement, it shall appear that the personal estate is insufficient to discharge the debts allowed against the estate, etc., resort may be had to

real estate in the manner provided, and that the fact of such insufficiency of assets quite properly may be made to appear by facts outside of the inventory and appraisement, and that the inventory and appraisement may be shown to be erroneous, should it show a condition as contended for by appellants here, viz., an apparent sufficiency of personal assets, whereas an actual insufficiency existed.

We construe this section (2065) to provide for the action by the executor or administrator under a power of sale contained in the will, and section 2066 to provide for sale of real estate arising where personal assets are insufficient to meet debts and legacies in those cases where no power is contained in the will, thereby supplementing the provisions of section 2065. In the latter contingency proceedings in the district court are necessary, and the authority of the executor or administrator is clearly limited and circumscribed. Under our interpretation of these statutes, we do not consider that an adjudication by the probate court as to the insufficiency of personal assets was necessary. We think that the Legislature has clearly shown an intention to vest in the district courts the necessary jurisdiction in the matter of the sale of real estate of decedents, where power of sale was not given to some designated person by a last will and testament of decedent. It does not appear from these sections that the Legislature had any intention to confer any such power upon the probate courts; and, in our opinion, it would be inconsistent with the apparent intention of the Legislature in this regard to so construe the acts referred to as to vest in the probate court a vestige of such jurisdiction. Furthermore, it is unreasonable to presume that the Legislature intended conferring upon the probate court the power of adjudication as to insufficiency of assets, where no intention appears from reading either of the acts referred to to confer such power upon the district court, so far as the exercise by an executor or administrator of the power of sale conveyed by a last will and testament. It seems quite clear that the Legislature recognized the right of a decedent to designate some person (by last will), with authority to sell real estate, without hampering such individual by court proceedings in either the probate or district courts.

This leaves for our consideration the remaining point urged by appellants in connection with this fourth assignment of error, viz., that the sales made by this administrator with the will annexed were not lawfully made, because not made under an order of the district court, which contention is based upon the alleged fact that McGinnis was a general administrator, instead of an administrator with the will annexed. We have disposed of this question by our holding that his authority may be discovered or ascertained by examining the order of appointment.

For the reasons stated, we overrule the fourth assignment of error.

The fifth assignment of error is as follows:

"The court erred in its seventh conclusion of law, wherein it held that said McGinnis was in fact and in law administrator of the estate of Thomas J. Bull, deceased, with the will annexed, at the time he executed said deeds, and that the defendants therein named were entitled to the relief prayed for, because it was error to hold that said McGinnis was such administrator with the will annexed, because the letters of administration, oath of office, and bond show, as a matter of law, that he was not appointed, or that he qualified, as administrator with the will annexed, and in holding that appellees were entitled to the relief prayed for, in that said sales were made without an order of sale of the district court, without an order of confirmation of said court of said sales, and because it did not appear from the inventory and appraisal and claims allowed and approved at the time each sale was made that the personal property was insufficient to pay the debts of said estate, and because each of said sales were at private sale, and not at public sale, as required by statute, and without an order of the district court authorizing a private sale of any of said lands."

The only new element in this assignment of error, not heretofore disposed of by this opinion, is the point that the sales of real estate were private and not public sales, which contention is based upon section 1960 of the Compiled Laws of 1897, which section is as follows: "The executor shall exercise all the authority conferred upon him by his appointment, and if it should be necessary, in order to carry out the desires of the testator, to sell a portion of the whole estate, he may dispose of the same at public sale, without being allowed to purchase, under penalty of the sale being declared null and void."

[6] Appellants contend that the word "may," as used in the foregoing statute, should be construed as "shall," and thereby limit the power of sale given by the last will and testament of decedent, and thus compel a public sale. Section 1960 was approved February 12, 1852, and, in our opinion, must be construed in connection with the later statutes enacted as a portion of chapter 29 of the S. L. 1884, appearing as sections 2064 and 2065, C. L. 1897. Section 2064 is as follows: "Whenever any testator shall, by his last will, direct that his real estate, or any of it, be sold, or otherwise disposed of, for the payment of his debts, or for any other purpose, and no executor be named therein, or if the executor named therein refuse such office, or be removed or die, the administrator, with the will annexed, or de bonis non, may sell, convey and dispose of such real estate,

in accordance with the provisions of such will."

We construe this last section to show a clear intention on the part of the Legislature to leave the disposal of real estate by last will and testament of decedent unhampered by court proceedings, and subject only to provisions expressed in the power of sale. Section 2065, supra, further enlarges the powers of an executor or administrator in those cases where power of sale is contained in the will, and gives to such officer the additional power to mortgage or lease, should such power be conferred by will. It is not for us to limit these acts of the Legislature, and the intention therein shown, in the manner contended for by the appellants. The general rule governing these matters has been laid down in Cyc. vol. 18, p. 325, as follows: "An executor, and given a power of sale by the will, has, as a rule, considerable discretion as to the manner and conduct thereof. While public auction sales are insisted on in a few states, the more general rule permits a private sale at the discretion of the executor, prudently and honestly exercised."

There is no contention in this case that McGinnis failed to exercise a sound discretion in the sale of the several tracts of real estate, or that his conduct was not both prudent and honest; and we therefore hold that the fifth assignment of error should be overruled.

Finding no error in the record, and for the reasons given in this opinion, the appeal is dismissed and the judgment of the district court affirmed; and it is so ordered.

ROBERTS, C. J., and ABBOTT, District Judge, concur.

(7 N. M. 455)

AMBERSON et al. v. CANDLER et al.

(Supreme Court of New Mexico. Jan. 27, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 26*)—QUALIFICATION—BOND.

An executor is without power to act, as such, until he has given bond as required by statute, unless bond shall have been waived by the testator or testatrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 144-170; Dec. Dig. § 26.*]

2. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—EFFECT OF IRREGULARITIES.

As a general rule, all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appointment is voidable, and the letters issued by the court are afterward revoked, or the incumbent discharged from his trust.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177-182; Dec. Dig. § 20.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. EXECUTORS AND ADMINISTRATORS (§ 29*)—
APPOINTMENT—EFFECT OF IRREGULARITIES.**

A grant of administration which is not void, although it may be voidable, is not open to collateral attack, either on the ground of irregularity in the proceedings, a mistake in the character of letters granted, when a proper case for administration existed, that the grant was premature, or that the person to whom letters of administration have been granted was not entitled by priority to administer, or lacked the necessary qualifications.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182; Dec. Dig. § 29.*]

**4. EXECUTORS AND ADMINISTRATORS (§ 29*)—
APPOINTMENT—EFFECT OF IRREGULARITIES.**

Although the probate court may fail to observe the requirements of the law in granting letters of administration, or make any mistake as to their character, where a proper case for administration exists, yet, having jurisdiction of the subject and the person, and being fully empowered to act by refusing or granting such letters, a person appointed becomes the administrator de facto; and the regularity of his appointment cannot be questioned in a collateral proceeding.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182; Dec. Dig. § 29.*]

**5. EXECUTORS AND ADMINISTRATORS (§ 29*)—
APPOINTMENT—EFFECT OF IRREGULARITIES.**

A mistake as to the character of letters issued does not render them and all acts performed by the executor or administrator void; the principle being that, where a court has jurisdiction, the judgment must be held conclusive, except in a direct proceeding for its reversal.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182; Dec. Dig. § 29.*]

Appeal from District Court, Dona Ana County; before Justice Parker.

Action by W. J. Amberson and another against John K. Candler and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an action of ejectment for the possession of a tract of land situated in Dona Ana county, N. M., described as follows, to wit: "A tract of land bounded on the east by land formerly belonging to Ramon Ramos and Otto Bomback, on the west by the west half of the old river bed of the Rio Grande, on the south by lands formerly belonging to Juan Farjado and Martin Amador, and on the north by the lands formerly belonging to Agapito Sedillos. Said tract of land contains one hundred and forty-one and thirteen one-hundredths acres (141.13), more or less."

The facts covered by stipulation of counsel are as follows: "That on, to wit, the 1st day of January, A. D. 1899, in the county of Dona Ana, territory of New Mexico, one Thomas J. Bull departed this life testate; that on, to wit, the 7th day of February, A. D. 1899, the last will and testament of the said Thomas J. Bull, deceased, was duly admitted to probate and probated in the probate court within and for said county of Dona Ana, which county was the domicile of the said Thomas J. Bull at the time of his death. That Ben-

ancia Padilla, who was named as executrix in said will with one Willis J. McGinnis, failed and refused to qualify, act, or accept the trust. That at the time of the death of the said Thomas J. Bull there was vested in him the legal title to the land in controversy in this suit. That the appraised value of the personal estate of said Thomas J. Bull, deceased, was sixteen thousand two hundred and ninety-three and 25/100 dollars (\$16,293.25). That on February 27, 1900, approved and unpaid claims against the estate of said Thomas J. Bull, deceased, aggregated, to wit, ten thousand two hundred and seventy-eight dollars (\$10,278). That on the 27th day of February, 1900, and from thence hitherto, the personal estate of said Thomas J. Bull, deceased, was insufficient to pay and discharge all the just debts against his said estate. That on the 27th day of February, 1900, Hiram Hadley purchased the property in controversy in this suit for the sum of two thousand dollars in money, which amount was applied to the payment of claims against the estate of the said Thomas J. Bull, deceased. That on the 27th day of February, 1900, Willis J. McGinnis was in possession of the premises in controversy in this suit, and that the sale of the said premises by the said McGinnis was a private sale. That from and after the 27th day of February, 1900, to date, the said Hiram Hadley and his grantees and successors in interest, including John K. Candler, one of the defendants in this cause, have continuously been in exclusive, notorious, open, hostile, and adverse possession of the premises in controversy in this cause. That on, to wit, the 15th day of January, A. D. 1904, by deed of that date reciting a consideration of one dollar, lawful money of the United States, to them in hand paid, Francisca Bull, widow of the said Thomas J. Bull, deceased, and Thomas R. Bull, grandson of the said Thomas J. Bull, deceased, remised, released, sold, conveyed, and quitclaimed to the said Hiram Hadley, and to his assigns forever, all their right, title, interest, claim, and demand whatsoever in and to the premises in controversy in this cause, which deed was duly acknowledged and filed for record on the 16th day of January, 1904, and recorded in Book of Deeds No. 23, at pages 533 and 534, in the office of the probate clerk and ex officio recorder of Dona Ana county, New Mexico. That Francisca Bull, surviving wife of the said Thomas J. Bull, deceased, departed this life on, to wit, January 18, 1911."

The facts found by the court, in addition to those stipulated, are as follows: "That the land and premises in controversy in this suit was acquest and community property at the time of the execution of said will, and at the time of the death of said Thomas J. Bull. That the said Thomas J. Bull, deceased, by his last will and testament, devised his one-half of said acquest and community

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property, for life, to his wife, Francisca Bull, remainder over to Thomas R. Bull and Chas. H. Bull. That on February 27, A. D. 1900, the premises in controversy in this suit were sold and conveyed to the said Hiram Hadley by Willis J. McGinnis, executor of the last will and testament of the said Thomas J. Bull, deceased, by deed of that date, acknowledged and executed on that date. That the defendant and his predecessors and grantors have continuously paid all taxes which were and have been levied upon the land or interest in controversy in this cause for the years from 1900 to and including the first half of the taxes for the year 1911, both dates inclusive. That the said defendant John K. Candler deraigned title by good and sufficient deed of conveyance from the said Hiram Hadley of the land and premises in controversy in this suit, all of which said deeds are duly recorded in the office of the probate clerk and ex officio recorder of the county of Dona Ana. That at the said time of the execution of said deed by said Willis J. McGinnis, executor of the last will and testament of Thomas J. Bull, deceased, the said Willis J. McGinnis was executor of the last will and testament of said Thomas J. Bull, deceased, under bond. That the said defendant John K. Candler is the owner of the land and premises in controversy in this suit. That the plaintiffs have failed to maintain the issues on their part to be maintained."

The court found for the defendants, and the plaintiffs have appealed.

Morris & Gillett, of El Paso, Tex., for appellants. Holt & Sutherland and Bonham & Reber, all of Las Cruces, for appellees.

HANNA, J. (after stating the facts as above). The several assignments of error in this case are very largely covered by the proposition of appellants set forth in their brief in the following language: "The court having issued to McGinnis ordinary letters of administration, without reference to the will, and he having made the affidavit required of ordinary administrators, and not the affidavit required of administrators with the will annexed, and having given bond conditioned as for an ordinary administrator, and not one conditioned for the performance of the duties of an executor, which would have devolved on him if he had been appointed administrator with the will annexed, he was not authorized to sell real property to pay debts of the estate without an order of the district court."

Appellants concede that the probate court of Dona Ana county entered an order on February 7, 1899, directing the issuance of letters of administration with the will annexed to Willis J. McGinnis and Benancia Padilla, upon giving a bond in the sum of \$31,000, conditioned for the faithful performance of their trust, but contend that these persons

never executed such a bond, and that no such letters ever issued to them; that therefore the order of said probate court was ineffectual as an appointment, and was superseded and nullified by the ordinary letters of administration issued to Willis J. McGinnis on February 10, 1899.

We will therefore first direct our attention to the question of the status of Willis J. McGinnis at the time he executed the conveyance for the land in question. The conveyance was dated February 27, 1900, and the grantee was described as executor of the estate of Thomas J. Bull, deceased. This deed was executed in an attempted exercise of the power of sale conferred upon the executors by the last will and testament of Thomas J. Bull, as set forth in item 5 thereof in the following language: "Fifth. In the event that my personal estate shall not be sufficient to pay and discharge all my just debts, I *heroby direct and empower* my said executor to sell and dispose of sufficient of my real estate to pay and discharge the same."

The facts stipulated by counsel disclose that Benancia Padilla failed and refused to qualify as executrix, and the record discloses that Willis J. McGinnis, who was appointed an executor by the terms of the will, on February 10, 1899, filed an oath and bond, wherein he is styled "administrator," and that ordinary letters of administration were issued to him. No order of the probate court, directing the issuance of letters, other than the one of February 7, 1899, referred to *supra*, appears to have been issued.

[1] It is argued by appellees that under the common law the power of an executor to sell real estate was not derived from the order of appointment or the letters issued by the court, but from the will itself. We are not disposed to question that the rule was as stated at the common law, but we find that this rule has been changed in many of the states, where the rule is largely repudiated. In those numerous states which have departed from the common-law rule, the statutes provide that after probate of any will letters testamentary shall be granted to the persons therein appointed executors. But such letters cannot be granted, unless they qualify by giving bond, taking oath of office, etc. In several states the executor is absolutely prohibited from acting without giving bond, etc.; in others it has been held that the executor is prohibited from acting by necessary implication as plainly as though the prohibition were direct. *Stagg v. Green*, 47 Mo. 500.

An examination of our statute upon this subject seems to be conclusive upon the question of the authority of an executor to act prior to giving a bond. The statute referred to is section 1940 of the Compiled Laws of 1897, which is as follows: "After probate of any will, letters testamentary shall be granted to the person or persons therein appointed executor or executors; if a part of the persons thus appointed refuse to act, or be dis-

qualified, the letters shall be granted to the other persons therein appointed. If all such persons refuse to act, or be disqualified, letters of administration shall be granted to the person to whom administration would have been granted if there had been no will; when there are two or more persons named executors in a will, none shall have power to act as such except those who give bond." See, also, section 1944, C. L. 1897.

We are of the opinion, therefore, that an executor is without power to act, as such, until he has given bond as required by statute, unless bond shall have been waived by the testator or testatrix.

This brings us to the question of the sufficiency of the bond given by McGinnis in his attempt to comply with the order of the probate court, directing the issuance of letters of administration with the will annexed to him and his coexecutor, upon entering into bond with two or more good and sufficient sureties. In this connection it is urged by appellee that the questions raised by the several assignments of error amount to a collateral attack upon the acts of the executor.

[2, 3] It has been established as a general rule that all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appointment is voidable, and the letters issued by the court are afterward revoked or the incumbent discharged from his trust. 18 Cyc. 141. It is also laid down as a general rule that a grant of administration which is not void, although it may be voidable, is not open to collateral attack, either on the ground of irregularity in the proceedings, a mistake in the character of letters granted, where a proper case for administration existed, that the grant was premature, or that the person to whom letters of administration have been granted was not entitled by priority to administer, or lacked the necessary qualifications. 18 Cyc. 141-143.

We have noted the point made by the appellants that they do not attack the appointment; that they merely contend that the appointment is that of an ordinary administrator; and that therefore the power of sale given in the will could not be exercised by this ordinary administrator. We are of opinion, however, that this case falls within the subdivision of the last general rule stated above, of "a mistake in the character of letters granted, where a proper case for administration existed."

[4, 5] It is quite clear from the record in this case that a mistake was made in the character of letters issued to McGinnis. We are therefore of the opinion that, although the probate court may fail to observe the requirements of the law in granting letters of administration, or make any mistake as to their character, where a proper case for administration exists, yet, having jurisdic-

tion of the subject and the person, and being fully empowered to act by refusing or granting such letters, a person appointed becomes the administrator de facto; and the regularity of his appointment cannot be questioned in a collateral proceeding. We are fully convinced, and therefore hold, that a mistake as to the character of letters issued does not render them and all acts performed by the executor or administrator void; the principle being that, where a court has jurisdiction, the judgment must be held conclusive, except in a direct proceeding for its reversal. The reason and the necessity of this rule is well stated in the case of *Wight v. Wallbaum et al.*, 39 Ill. 554 et seq., from which we quote, at page 565, as follows: "From the whole tenor of the legislation of our state we are unable to perceive that, whether the grant of such letters be a judicial or a ministerial act, it was ever designed that, in a proper case for the grant of letters, any mistake as to their character should be held to render them, and all acts performed by the executor or administrator, void. Such a policy would be attended with great inconvenience, injury, and loss to estates. Persons would be deterred from becoming purchasers at sales of real and personal estate, and debtors would not know whether they could make payment with safety. It can hardly be supposed that it was designed that, when a case had arisen authorizing the grant of letters, whether the act be judicial or ministerial, a mistake of the officer, as to whether they should be of the ordinary character, or with the will annexed, whether to one person or to another, or as to the sufficiency of the security, should render all acts performed under them void. But it must have been intended, in such cases, that the letters should be good, and the acts valid, until they should be revoked. Then whether the will was properly proved or not could not affect the letters until repealed, or the sale of the property by the administrator."

A case more nearly in point with the case now under consideration is *Jackson v. Reeve*, 44 Ark. 496. In both cases last referred to the action was in ejectment, as is the case at bar, and the questions raised were similar to those now under consideration. In the last opinion the court say: "The probate of a will authorizes the grant of letters testamentary, but until letters be ordered it gives no jurisdiction over the estate; that is, to make orders concerning its management or disposition. Courts of probate have general jurisdiction to grant letters of administration; and if there was any error in granting letters generally, instead of cum testamento, etc., it did not render the proceedings void. It was matter to be corrected by appeal."

Further, with respect to the contention of appellants that they do not attack the appointment, but merely contend that, the appointment being one of ordinary administra-

tion, the power of sale, under the terms of the will, could not be exercised, we would say that we have disposed of this question by our opinion in the case of *Bull v. Bal*, 130 Pac. 259, handed down at the present term, in which case we hold that reference should be made to the order of appointment, for the purpose of determining the character and status of one assuming to administer upon an estate. That case and this, growing out of the same state of facts and involving the same contentions must be determined by the same reasoning as well as authority; and therefore this case, so far as its merits are concerned, is determined by our opinion in the case referred to, i. e., *Bull v. Bal*.

The other errors assigned, with the exception of that referring to the bar of the action by limitation, are equally a collateral attack upon the proceedings had in the probate court.

Finding it unnecessary to decide the question of the bar of the action by our statute of limitation, and for the reasons given, we overrule the assignments of error, dismiss the appeal, and affirm the judgment of the court below.

ROBERTS, C. J., and ABBOTT, District Judge, concur.

(37 Okl. 41)

HAMILTON v. HAVERCAMP et al.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 69*)—"MISTAKE OF LAW."

When the parties to a deed are uncertain as to what estate the vendor has taken under the statutes of descent and distribution, and the land is conveyed to the vendee under the agreement that, when the courts have settled the law on the subject, the vendor shall be paid such a proportion of the entire purchase price of the land as his interest bears to the entire title, this does not constitute a mistake of law such as would justify a rescission of the contract and a cancellation of the deed. Comp. Laws 1909, § 1058.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156-164; Dec. Dig. § 69.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4543, 4544.]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF TRIAL JUDGE.

The decision of the trial judge, the jury being waived, upon a question of fact, where the evidence is conflicting and where there is evidence reasonably tending to support the judgment, will not be disturbed in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8983-8989; Dec. Dig. § 1011.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by Ellen Hamilton against Bennie B. Havercamp and the Okmulgee Loan & Trust Company. Judgment for defendants, and plaintiff brings error. Modified and affirmed.

Frank F. Lamb, of Okmulgee, for plaintiff in error. Owen & Stone of Muskogee, and Lex V. Deckard, of Okmulgee, for defendants in error.

AMES, C. The plaintiff alleged that she was the mother of Millie Hawkins, a citizen of the Creek Nation; that certain lands had been selected for Millie's allotment; that before deeds were delivered, and in September, 1899, Millie died unmarried, leaving the plaintiff and her father and some brothers and sisters surviving; that at the time of her death the land passed to her nearest relation by virtue of the Creek law of descent and distribution, and that plaintiff was the nearest relation; that in 1906 the defendant, the Okmulgee Loan & Trust Company, secured a deed from the plaintiff to the land, for which she was paid \$2.50, and that certain false representations were made to induce her to execute the deed. The defendants admitted procuring the deed, but denied the false representations, alleging that prior thereto the trust company had procured a deed to the land from Thomas Hawkins, the father of Millie, and the former husband of the plaintiff, for the consideration of \$800 paid to him; that the laws of the Creek Nation governed the descent of this land, and these laws were pleaded in full; that subsequently the deed was procured from the plaintiff; and that at the time she was paid \$2.50, and it was agreed that whenever the court settled the descent of the land, so that the amount of her interest should be ascertained. She should be paid such a part of \$800 as her interest in the land might bear to the entire estate therein. The case was tried to the court without a jury, and the court, upon the evidence, found that the averments of the answer were sustained, and entered a decree denying the plaintiff's prayer of cancellation, and requiring the defendants to pay to the plaintiff one-half of \$800. In this court the defendants admitted that they should pay to the plaintiff the entire sum of \$800, less the \$2.50 previously paid, and under this admission it is unnecessary for us to pass upon any of the questions of law involved in this case; the only question remaining being one of fact, whether the plaintiff was induced to make the conveyance by false representations, or whether it was made under a mutual mistake of law.

Under the findings of the court, both these questions must be resolved against the plaintiff, as the court found that the conveyance was made upon the agreement that the plaintiff should be paid \$800 for the land, or that proportion of such amount, as the interest she inherited bore to the whole title. This being true, there was no mutual mistake of law, because neither party pretended to know what the law was, but both contracted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the uncertainty as to the law in mind, and upon the condition that, when the court should settle the law, payment should be made according to the decree of the courts.

Under the decree of the trial court, the defendants were ordered to pay into the hands of the clerk of that court, \$397.50, with interest at the rate of 6 per cent. per annum since the 9th day of October, 1906; in addition to that, and under the offer of the defendants in error made in this court, they are hereby directed to pay the additional sum of \$400 into the hands of the clerk of this court for the benefit of the plaintiff in error, and, as thus modified, the decree of the district court should be affirmed.

PER CURIAM. Adopted in whole.

(36 Okl. 773)

DEMING INV. CO. v. LANHAM.

(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 11, 1913.)

(Syllabus by the Court.)

MINES AND MINERALS (§ 79*)—OIL AND GAS LEASE—CONSTRUCTION.

A clause in an oil and gas lease reading as follows: "Provided however, that if a well is not drilled on said premises, within one year from the date hereof, then this lease and agreement shall be null and void, unless the party of the second part, within sixty days from the beginning of each and every year after the expiration of the term above mentioned for the drilling of a well, shall pay a rental of \$.25 per acre, until a well is drilled thereon, or until this lease is canceled, as herein provided,"—does not obligate the lessee to pay rent for delay in commencing to drill for oil and gas, said grant in the lease amounting only to an option to the lessee, to explore for oil and gas, and preventing the lessor, after receiving the consideration for the first year, from leasing to another, during such time, and after receiving a second or subsequent payment from leasing to another, until such delay period had expired, the lessee having the option by continuing to pay such yearly payments to prevent the forfeiture of the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. § 79.*]

Commissioners' Opinion, Division No. 1. Error from Marshall County Court; J. W. Falkner, Judge.

Action by Manley Lanham, a minor, by his guardian, Perry G. Lanham, against the Deming Investment Company for rent on an oil lease. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

William M. Franklin and George S. March, both of Madill, for plaintiff in error. George E. Rider, of Madill, for defendant in error.

ROBERTSON, C. On October 2, 1906, Manley G. Lanham, a minor, by his guardian, made and entered into a certain oil lease contract with the Deming Investment

Company. Lanham claims that by the terms of said lease he is entitled to a rental of \$40 per year, which the Deming Investment Company denies and refuses to pay. This contention is the only question in the record, and requires at our hands the construction of the following paragraphs of said lease, to wit:

"To have and to hold the same unto the said party of the second part, its successors and assigns, for the term of five years from date hereof, in consideration whereof, the said party of the second part agrees to deliver to the party of the first part in tanks or pipe lines the one-tenth part of all oil produced and saved from the leased premises. And should gas be found on said premises in paying quantities second party agrees to pay \$100.00 yearly in advance for the product of each gas well while the same is being sold off the premises, and first party shall have free use of gas for domestic purposes, by making connection for such gas at the well at his own risk and expense. Second party agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the premises, and to pay for all damage to the growing crops caused by said operation.

"Provided, however, that if a well is not drilled on said premises within one year from the date hereof, then this lease and agreement shall be null and void, unless the party of the second part within sixty days from the beginning of each and every year after the expiration of the term above mentioned, for the drilling of a well, shall pay a rental of \$0.25 per acre until a well is drilled thereon or until this lease is canceled, as hereinafter provided. And it is agreed that the completion of a well shall be and operate as a full liquidation of all rentals under this provision during the remainder of this lease. All rentals and other payments may be made direct to the party of the first part, or may be deposited to his credit at the Madill National Bank, at Madill, Indian Territory. This lease shall be null and void at the end of three years from this date without further liability to the second party if a well has not been drilled by it, its successors or assigns, during the said three years period, provided that the party of the first part shall have given the party of the second part ninety days written notice so to drill within said three years period or forfeit the lease.

"And further, upon the payment of one dollar at any time by the party of the second part, or his successors in office, said lessee shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease shall become null and void."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is alleged in plaintiff's petition: " * * * That said lease was for a period and term of five years, and it was provided in said lease that if a well was not drilled on said premises within one year from said October 2d, 1906, the date of the execution of said lease, said defendant, the Deming Investment Company, should pay a rental of 25 cents per acre until such well was drilled thereon, or until said lease was canceled as provided in said lease. * * * That said defendant, the Deming Investment Company, failed and refused to dig a well on said premises within one year from the date of the execution of said lease, as aforesaid, and after said time, and has failed and refused, and still fails and refuses, to comply with each and every term and provision of said lease contract, has failed and refused, and still fails and refuses, to pay plaintiff the said sum of \$40 due him under the terms of said lease contract. That the said lease contract was attempted to be canceled by said defendant, the Deming Investment Company, without notice to said plaintiff, and not in accordance with the terms of said lease contract on the 2d day of September, A. D. 1908, at which said last-named date there was due plaintiff as rental as aforesaid the sum of \$40, the same being 25 cents per acre for said 160 acres for one year."

It will be observed by a careful reading of the lease that there is a substantial variance between its terms and those alleged in the petition. Thus, in the petition, it is charged "that said lease was for a period of five years, and it was provided in said lease that if a well was not drilled on said premises within one year from said October 2, 1906, the date of the execution of said lease, said defendant, the Deming Investment Company, should pay a rental of 25 cents per acre until such well was drilled thereon, or until said lease was canceled as provided in said lease." A careful examination of the lease contract fails to show any such language, but, on the contrary, we find the following: "Provided, however, that, if a well is not drilled on said premises within one year from the date hereof, then this lease and agreement shall be null and void, unless the party of the second part within sixty days from the beginning of each and every year after the expiration of the term above mentioned, for the drilling of a well, shall pay a rental of \$.25 per acre until a well is drilled thereon or until this lease is canceled, as hereinafter provided." Now it will be observed that the grantor agrees to lease the land for a term of five years, and is to receive therefor one-tenth net of all oil saved, and \$100 per year for each gas well, but it is specifically provided that, if a well is not drilled within one year, then the lease shall be null and void, unless the party of the second part within sixty days from the beginning of each year after the expiration

of the term above mentioned for the drilling of a well shall pay a rental of 25 cents per acre until a well is drilled, or until the lease is canceled. It is admitted that the company did not drill a well within one year, and it is also admitted that it did not pay the rent, but it must be remembered that the company had an option as to what it should do. If it desired to keep the lease alive, it must do one of two things; i. e., drill a well within one year, or pay a rental of 25 cents per acre until a well is drilled, or until the lease is canceled. By failing to drill a well or to pay the rent the lease became forfeited, and no rent was due thereunder. Ordinarily forfeitures are not favored, but gas or oil leases furnish exceptions to this general rule. Thus, in paragraph 148, Thornton's (2d Ed.) The Law Relating to Oil and Gas, provides: "Forfeitures, however, on the part of the lessee in a gas or oil lease, which arise by reason of his neglect to develop or operate the leased premises, are rather favored by the law, because of the peculiar character of the product to be provided." And in section 155 it is said: "Where a lease provided that the lessee was to pay a bonus of one hundred dollars, and a royalty of one-eighth part of the oil produced, that it was to continue five years, and as much longer as gas or oil was found in paying quantities, if gas were found, then three hundred dollars rental per year for each well, and there was a proviso that 'this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars monthly in advance for each additional month'—it was held that the lease contained no covenant binding upon the lessee to pay rent, the only penalty imposed upon him being a forfeiture of his rights under the agreement. 'But the payment,' said the court, 'was means provided by the contract by which the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making the payment.' Where an oil lease was given for a certain period, providing that it should become void, and the rights of the lessee under it should cease unless a well should be completed on the premises within a certain period of time, or unless the lessee should pay a certain sum for each year the completion of the well should be delayed, it was held that the terms of the lease did not require the lessee to develop the land or pay the rent; the only penalty for such a failure being a forfeiture of his rights under it."

To the same effect is the rule announced in *Glasgow v. Chartiers Oil Co.*, 152 Pa. 48, 25 Atl. 232, in the syllabus of which it is

said: "An oil lease demised the oil and gas under the grantor's land with the right to go upon and operate the land for oil and gas purposes. The lease was to continue for five years, and as much longer as oil or gas should be found in paying quantities. The consideration was a bonus of \$100, and a royalty of one-eighth part of the oil produced. If gas was found, the rental was fixed at \$300 per year for each well. The lease then proceeded as follows: 'Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of \$100 monthly in advance for each additional month.' Held, that the lease contained no covenant on the part of the lessee to pay rent or develop the land. The only penalty imposed upon him for failure to operate the land or pay \$100 per month for delay was a forfeiture of his rights under the agreement. The legal effect of the agreement is to confer on the grantee the right to explore for oil on the tract described. If he does not exercise this right within one month, it is lost to him, unless he chooses to pay \$100 in advance as the price of another month's opportunity to explore. If he does exercise it, and finds nothing, he is under no obligation to continue his explorations. If he explores and finds oil or gas, the relation of landlord and tenant or vendor and vendee is established, and the tenant would be under an implied obligation to operate for the common good of both parties and pay the rent or royalty reserved." In *Snodgrass v. South Penn. Oil Co.*, 47 W. Va. 509, 35 S. E. 820, the court, in discussing the following provision in a gas and oil lease, to wit: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of \$350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed"—says: "Although the agreement contains the provision above quoted, yet that clause merely provides a means by which a forfeiture of the lease may be avoided. The agreement contains no contract or promise to pay anything whatever for the delay in the completion of a well, and yet the declaration claims that, by the terms of the contract, there is due from the defendant to the plaintiff on account of the sums to be paid quarterly in advance the sum of \$1,400. The question in this case is not whether the defendant has forfeited the lease, but whether it is pecuniarily liable to the plaintiff for failing to make certain payments to the plaintiff whereby such forfeiture could have been avoided. Counsel for

the plaintiff relies on the case of *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 96, but that case was materially different from this. There the leases sued on contained the following clause: 'It is agreed that the party of the second part shall pay to the party of the first part \$100 per month, in advance, until a well is completed, from the date of this lease, and a failure to complete such well or to pay said rental when due or within ten days thereafter shall render this lease null and void,' etc. There was an express promise to pay \$100 per month in advance until a well was completed, but in the agreement sued on in the case under consideration there was no such promise or contract. Counsel for plaintiff in error claims that the lease continued, unless it had been surrendered by the defendant, but, even if that be true, it would work no benefit to the plaintiff in error, for the reason that there was no contract on the defendant's part to pay anything as rent or compensation for delay in commencing operations." In *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, the court having under consideration the following provision of an oil and gas lease, to wit: "In case no well is completed within two years from this date, then this grant shall immediately become null and void, as to both parties; Provided, that second party may prevent such forfeiture from year to year by paying to the first party annually in advance \$18.75 at her residence, until such well is completed"—said: "This latter clause converts what would be otherwise a perpetual grant into a lease from year to year, at the option of the lessee, until oil and gas are produced, and then to continue so long as they are produced in paying quantities." The Supreme Court of Ohio in the case of *Van Etten v. Kelly*, 66 Ohio St. 605, 64 N. E. 560, decided June 24, 1902, among other things said: "The plaintiff below claims that the words, 'unless second party shall pay to the first party \$30 each and every month in advance which such completion is delayed,' there lies a promise to pay \$30 per month for such delay. This is not tenable. The full force and effect of this 'unless' clause, taken by itself, is to give the lessee the option, by making such payment, to continue the lease in force to the end of the term without completion of the first well, or, upon failure to make such payment, allow the lease to become null and void at the end of thirty days after the date of the lease."

Plaintiff below, in his petition, claimed that there had been no legal surrender of the lease, but this does not seem to be necessary. Thus in *Brooks v. Kunkle*, 24 Ind. App. 624, 57 N. E. 260, it was said: "It does not appear that any part of the property of the second part was ever placed on the land, or removed therefrom, or whether or not there was any affirmative surrender or proposal therefor. But more than a

(25 Okl. 447)

CATRON v. DEEP FORK DRAINAGE
DIST. NO. 1.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. JURY (§ 17*)—APPEAL FROM DRAIN COMMISSIONERS—TRIAL BY JURY.

A landowner, who appeals from the decision of the board of commissioners upon his exceptions to the action of the viewers, on the ground that they had assessed his land too much, pursuant to Comp. Laws 1909, § 3057, is not entitled to a trial by jury upon that issue in the district court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 95-98; Dec. Dig. § 17.*]

2. DRAINS (§ 82*)—APPEAL—BURDEN OF PROOF.

A landowner, who excepts to the action of the viewers upon the third ground set forth in section 3057, Comp. Laws 1909, or upon the ground that his land was assessed too much, on trial of his appeal in the district court, has the burden of that issue.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83-87; Dec. Dig. § 82.*]

Error from District Court, Oklahoma County; W. Clark, Judge.

Action by H. S. Catron against the Deep Fork Drainage District No. 1. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. L. Brown, of Oklahoma City, for plaintiff in error. Grant Stanley, of Oklahoma City, for defendant in error.

TURNER, J. On December 7, 1908, there was filed in the office of the county clerk of Oklahoma county a petition praying for the establishment of a drainage district, to be known as Deep Fork drainage district No. 1, and located in Oklahoma county, pursuant to Comp. Laws 1909, §§ 3043 to 3077, inclusive. Thereafter bond was filed and notice given, and the district duly established. Upon the coming in of the report of the viewers, appointed to assess the benefits and damages, exceptions were filed thereto by plaintiff as to the amount assessed against certain lands belonging to him and the damages allowed for right of way, alleging that the latter were inadequate and the former excessive for certain reasons therein set forth. Thereafter the same came on to be heard; whereupon the board, without objection, struck out the amount allowed for damages, confirmed the assessment of benefits, assessed the same against the land, and plaintiff appealed to the district court. There, on August 28, 1910, the cause coming on to be heard, the court, without objection, the question having been eliminated before the board, dismissed the matter of damages and proceeded to try the question of the assessment of benefits; whereupon plaintiff demanded a jury trial, which was by the court refused. He then moved to require the defendant to first produce its evidence, contending that the burden of proof was there, which was overruled, and excep-

year had elapsed, and the party of the second part had failed to avail himself of the right to drill a well, and no rent had been paid. There was no absolute requirement that the party of the second part should pay any rent, but the grant was to be void unless rent were paid. The instrument is susceptible of being construed as an expression of a rational and lawful agreement. We must construe it as expressed, attributing to the language its ordinary meaning, and we cannot construct a different contract by injecting additional words not implied in the terms employed by the parties, or by substituting meanings merely conjectured by us to be more reasonable than those expressed." In *Frank Oil Co. v. Belleview Gas & Oil Co. et al.*, 29 Okl. 719, 119 Pac. 280, Mr. Justice Williams, in an elaborate opinion dealing with a similar question, said, concerning a clause in a lease which reads as follows: "If no well is commenced on said premises within one year from this date, then this grant shall become null and void, unless second party shall pay to the first party eighty (\$80) dollars for each year thereafter such completion is delayed, said rental to be paid quarterly in advance. Party of the second part further agrees to protect the lines of the land above described by immediately offsetting all wells drilled within 150 feet of said land, unavoidable delays excepted. It is further provided that this grant shall become null and void unless a well is commenced within thirty days from the date hereof, on the following land belonging to Benjamin L. Gibson * * *"—"Held, that this provision did not bind the lessee to pay any rent for the land or for delay in commencing to operate for oil and gas, said grant or lease amounting to an option preventing the lessor, after receiving the consideration for the first year, from leasing to another during such time, and, after receiving a quarterly payment, from leasing to another until such delay period of a quarter had expired, the lessee having the option by continuing to pay such quarterly payments, the word 'year' being used merely as a basis to fix the amount of quarterly payments." The above is an instructive case, and in effect settles the question involved herein. (See that opinion for many cases in point.) The lease sued on herein does not bind the lessee to do anything. It is nothing but an option, preventing the lessor, after receiving the bonus or rent for the first year, from leasing the land to some one else during such time.

This being true, it follows that the action of the lower court in overruling the demurrer to the petition was error, for which the judgment should be reversed, and the cause remanded, with instructions to proceed in conformity with the views herein expressed.

PER CURIAM. Adopted in whole.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions saved on both points. Then, after hearing the evidence and being duly advised, the court found the issue in favor of defendant, and ordered that the assessment of benefits theretofore made by the board of viewers and confirmed by the board of county commissioners be confirmed, and that the clerk of the court certify to the county clerk of the county judgment to that effect, and that there be entered upon the assessment roll of Deep Fork drainage district No. 1 the assessment of benefits theretofore confirmed by the county commissioners against the lands of plaintiff. After motion for a new trial filed and overruled, plaintiff brings the case here, and assigns that the court erred in refusing to allow him a jury trial upon the question of benefits.

The point is not well taken. While "all questions" made by plaintiff's exceptions are, by statute, directed to be heard and determined by the board, "either or any" of certain questions only are thus authorized to be heard and determined on appeal therefrom to the district court, and among them the very question for the determination of which a jury trial was invoked by plaintiff. By Comp. Laws 1909, § 3050, the return of the reviewers must state: " * * * the names and residences of the owners that will be benefited, damaged, or condemned by or for the improvements, and the damage or benefit to each tract of forty acres, or less, and make separate estimate of the cost of location and construction, and apportion the same to each tract in proportion to the benefits or damages that may result to each."

Section 3057: "Any person whose lands are affected by the proposed improvement may, on or before the day set for the hearing before the commissioners, file exceptions to the apportionments made by and the action of the viewers, upon any claims for compensation or damages. The commissioners may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record. * * * Any person aggrieved may appeal from the order of the commissioners, and upon such appeal there may be determined either or any of the following questions: 1st. Whether just compensation has been allowed for property appropriated. 2d. Whether proper damages have been allowed for property prejudicially affected by the improvements. 3d. And whether the property for which an appeal is prayed has been assessed more than it will be benefited, or more than its proportionate share of the costs of the improvements."

Concerning procedure, section 3058 provides: "The district clerk shall docket said appeal, in the district court, styling the appellant as plaintiff, and the drainage district, giving its name and number, as defendant, and the cause shall stand for trial and be heard and determined as other appealed cas-

es are tried in the district court. After the appeal is heard and determined in the district court, the district clerk shall return the original papers filed in his office by the county clerk, together with a transcript of the proceedings held in said cause in the district court, including a certified copy of the finding, verdict, judgment or decree of said court; the district clerk shall also return an itemized statement of the costs accruing on the appeal, and such costs shall be paid as hereinbefore provided. The commissioners shall thereupon cause such entries to be made on their record which may be necessary to give effect to the judgment of the district court."

Compiled Laws 1909, § 1690, further provides: "From all decisions of the board of commissioners upon matters properly before them, there shall be allowed an appeal to the district court by any persons aggrieved." And section 1693: "All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*"—showing that this appeal is to be tried *de novo* and "as other appealed cases are tried in the district court." Section 5784a reads: "A trial is a judicial examination of the issues, whether of law or fact, in an action." Section 5785: "Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for recovery of money or of specific real or personal property shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided." Section 5786: "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code."

[1] We are therefore of opinion that, as the issues involved in the assessment of benefits to the land in question were not "issues of fact arising in actions for recovery of money, or to recover real or personal property," but were "other issues of fact," the court did not err in overruling plaintiff's request to try them to a jury, as the court was required, by section 5786, to try them himself, subject to his power to order the same tried to a jury, as therein set forth.

Nor does article 2, section 19, of the Constitution, which provides, "The right of trial by jury shall be and remain inviolate, * * * protect plaintiff in his right to a trial by jury in this case. This for the reason that the right so declared, except as modified by the Constitution, means the right as it existed in the territory at the time of the adoption of the Constitution (State v. Cobb, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. [N. S.] 639; Baker v. Newton, 27 Okl. 436, 112 Pac. 1034), and was not intended to extend the right to a trial by jury to the issue of the question of benefits in cases of this kind. See 1 Page & Jones on Taxation, § 202. Nor are we so sure that, being here

involved the determination of the first two of the three questions set forth in section 3057, *supra*, plaintiff would be entitled to a jury trial upon either or both such questions, as he contends and argues so conveniently. This for the reason that in *Riley Co. Clerk v. Carico et al.*, 27 Okl. at page 37, 110 Pac. 740, we said: "Section 24, art. 2, Const., having no application to drainage or improvement districts, where the expense of constructing same is borne by the land affected or benefited, is not a limitation upon any of the provisions of article 16 of the Constitution." But upon this we express no opinion.

[2] There is no merit in the contention that the court erred in holding the burden of proof to be upon plaintiff. This is the manifest intent of the statute (section 3058), when it directs, as it does, that the appellant shall be styled as plaintiff and the drainage district as defendant. This is, in effect, saying that the remonstrant before the board should be the remonstrant in the district court, and shall introduce his evidence in support of the issues raised thereby. Or, in effect, that if the assessment of the benefits to his land is too high the burden of proof is upon him to show what it should be. This was, in effect, the holding of the court in *Hardy et al. v. McKinney*, 107 Ind. 364, 8 N. E. 232. In that case, pursuant to a certain act of the Legislature, McKinney filed his petition before the board of commissioners of Carroll county for the same purpose as here. Pursuant thereto, viewers were appointed, and reported in favor of the construction of the ditch, as prayed. Later certain parties of the name Hardy, upon whose land and the land of the petitioner was located the pond sought to be drained by the proposed ditch, filed a remonstrance against its construction, and also a claim for compensation. Viewers were thereupon appointed, who reported in general terms against the Hardys; whereupon the board of commissioners ordered the establishment and construction of the ditch. The Hardys appealed to the circuit court, which proceeded to try the issues presented by the petition and the remonstrance. There was judgment for the petitioner and against the remonstrators, the Hardys, as to damages, and the Hardys took the case to the Supreme Court. There, after reciting that the act of 1875 contained a provision providing that, "Any party aggrieved may appeal to the circuit court as provided by law for appeals from commissioners" (Laws 1875, p. 99, § 10), and that the statute governing appeals from boards of commissioners provided that "all appeals thus taken to the circuit * * * court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original case" (1 Rev. St. 1876, p. 357, § 36), the court said: "Under this provision of the statute, it has always been held that appeals

from commissioners stand for trial *de novo* in the circuit court; that is, that all matters in issue before the commissioners stand for trial anew in the circuit court, and not for review or correction as in a court of errors. As a necessary consequence, it has been further held that such appeals suspend all the proceedings had upon questions in issue before the commissioners; and that such proceedings cannot either be used or taken into consideration upon the trial *de novo* in the circuit court. These holdings are, as they long have been, the established law of this state. [Citing.] In appeals to the circuit court in causes like the one in hearing, and in all analogous cases, the court or jury trying the same succeeds to all the substantial duties which devolved upon the viewers and reviewers before the board of commissioners as to the matters which stand for trial *de novo*; and a finding or verdict in detail upon all the matters in issue between the parties is contemplated. This includes the assessment of benefits and the allowance of damages, in cases in which damages ought to be allowed. The finding or verdict ought to be sufficiently specific upon every question involved to authorize a judgment finally determining all the matters in controversy, and leaving nothing for the adjudication of the commissioners in the event that the cause shall be certified back to them." And, after commenting upon the fact that the cause should have been styled *John McKinney v. Alexander Hardy et al.*, instead of the reverse, as it was, so far recognized the statute as placing the burden in the trial court upon the remonstrators that the same was not questioned.

In *Conwell et al. v. Tate et al.*, 107 Ind. at page 171, 8 N. E. 36, it is expressly held that a landowner, who remonstrates on the single ground that his land is assessed for too much, has the burden of the issue. See, also, 2 Page & Jones on Taxation and Assessment, § 923.

We are therefore of opinion that the trial court did not err in placing the burden where it did; and for that reason, and finding no error in the record, the judgment is affirmed. All the Justices concur, except WILLIAMS, J., who concurs in the conclusion.

(35 Okl. 494)

IN RE BONDS OF CITY OF GUTHRIE.

(Supreme Court of Oklahoma. Nov. 26, 1912.
Rehearing Denied Feb. 25, 1913.)

(Syllabus by the Court.)

MANDAMUS (§ 103*)—ISSUE OF BONDS—PUBLIC UTILITY.

Where, with the proceeds of bonds issued pursuant to section 27, art. 10, of the Constitution, a bridge is intended to be constructed upon a street closed to traffic to enable the city to acquire land upon which to erect abutments, and opened again to traffic after the same is completed, the approaches over its tracks to be supplied and owned by a railroad, held that, as the proposed structure, when completed, would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be a street improvement, and not a public utility owned exclusively by the city, within the meaning of said section and article, the bond commissioner will not be required by mandamus to approve said bonds.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 220-222; Dec. Dig. § 103.*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

In the matter of the submission of the agreed case on the issuance of bonds by the City of Guthrie. From a judgment directing the approval of the issuance, the bond commissioner brings error. Refusal to approve bonds affirmed.

Chas. West, Atty. Gen., for appellant. D. M. Tibbetts, City Atty., of Guthrie, for appellee.

TURNER, C. J. On July 18, 1912, pursuant to ordinance No. 1302, passed by the mayor and board of commissioners of the city of Guthrie, a city of the first class, and a proper election proclamation, there was, at an election held for the purpose of issuing public utility bonds pursuant to the provisions of section 27, art. 10, of the Constitution, submitted to the qualified property taxing voters of said city the proposition: "Shall the city of Guthrie, Logan county, state of Oklahoma, incur an indebtedness by issuing its negotiable coupon bonds of the aggregate principal sum of \$25,000 for the purpose of providing funds to purchase a site and construct a bridge across the Cottonwood river in said city of Guthrie, such site and bridge to be owned exclusively by said city, and levy and collect an annual tax, in addition to all other taxes upon all of the taxable property in said city sufficient to pay the interest on said bonds as it falls due and also constitute a sinking fund for the payment of the principal thereof when due; said bonds to bear interest at a rate not to exceed 5 per cent. per annum, payable semiannually, and to become due 25 years from their date?" After said bonds had been issued by the city, the same were presented to the bond commissioner of the state for his approval, pursuant to act of March 24, 1910 (Laws 1910, c. 94), which he refused to do, "for the reason that the purpose for which the money is to be borrowed is not a public utility, within the meaning of said section," or, in other words, that the same were not public utility bonds. From a judgment of the district court of Oklahoma county, rendered and entered August 16, 1912, requiring him to approve said bonds, the bond commissioner brings the case here, and assigns for error that said judgment is contrary to law.

Although the proposition thus submitted fails to disclose the location of the bridge referred to therein, it is disclosed by the record that, within the limits of the city,

Noble avenue runs east and west, and, after crossing the Santa Fé tracks and right of way at a right angle, is carried over the Cottonwood river by a bridge. To replace this bridge with the proceeds arising from a sale of the bonds, it is the intent of the city: " * * * To secure lots on each side of Noble avenue, and on both sides of the Cottonwood river, in such way that, upon the street being vacated, the fee to the street, from a short distance within the river bank across the river to a short distance east of the river bank, would vest absolutely in the city, thus giving it exclusive ownership of a tract of ground which could be improved by the construction of a public utility, to wit, a bridge; both site and bridge to be owned exclusively by the city. The bridge would not cross a railroad track or any part of the railroad right of way, but would stand for its entire length upon property owned exclusively by the city. The tracks and right of way on each side of the bridge could then be crossed by viaduct approaches, to be constructed by the Santa Fé Railway Company, in such way as to be used in conjunction with the bridge constructed by the city." After this is accomplished, it is the further intent to open Noble avenue for traffic across this bridge.

On behalf of the city, it was first contended that, the proceeding being fair on its face, it is the duty of the bond commissioner to approve the bonds, and that he has no right to inquire into the use to which the money arising from their sale is to be put. It would seem that, inasmuch as we have held in *State ex rel. Edwards v. Millar*, Mayor, et al., 21 Okl. 448, 96 Pac. 747, the question of whether the provision made for the payment of interest and the creation of a sinking fund, in compliance with the requirements of law, was a proper question to be raised by the mayor and city clerk of Norman, when they were sought to be compelled by mandamus to execute a certain issue of waterworks and sewer bonds under this provision of the Constitution; and a like question was raised and answered in *State ex rel. v. Allen*, 183 Mo. 288, 82 S. W. 103, that the bond commissioner had a right to withhold his approval of these bonds for the reason he has assigned. But let that be as it may; it being addressed to our sound legal discretion whether we will issue or withhold the writ, we will withhold it if, from the record, we are of opinion that the money arising from the sale of these bonds, if approved, will be expended by the city in erecting other than a public utility within the contemplation of said section and article of the Constitution. This was, in effect, the attitude of the court in *Dingman v. City of Sapulpa*, 27 Okl. 116, 111 Pac. 319. There, as here, so far as the record discloses, the proceeding was fair on its face; but the mayor and clerk were en-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

joined from issuing the bonds. The only question involved was conceded to be not whether a bridge sought to be constructed upon the street of a city with the proceeds of a bond issue, as here, was a public utility, but whether approaches to viaducts sought to be constructed upon such streets, with the proceeds of a similar bond issue, were public utilities. In that case the court, being of the opinion that such they were not, enjoined the mayor and clerk as prayed. And so, we repeat, we will refuse to mandamus the bond commissioner to approve these bonds, if the proposed structure in our opinion is not a public utility. The question then before us is whether the structure sought to be erected from the proceeds of the bonds will be a public utility, when erected.

As stated, for the purpose of constructing this utility, it is the intention of the city to vacate Noble avenue in order to acquire title to sufficient land, in the vacated street, on both sides of the stream, upon which to erect abutments. This, we take it, so that it may be said that the utility, when constructed, is a public utility, owned exclusively by the city. But, as the same would be useless erected upon a closed street, it is the further intent of the city, upon completion of the utility, to again open Noble avenue to traffic, after the Atchison, Topeka & Santa Fé Railway Company has erected approaches thereto over its tracks.

The proposed structure is nothing more or less than a street improvement; and that such are not public utilities, within the contemplation of the section and article, supra, is no longer an open question in this jurisdiction. We held this in *Coleman v. Frame*, 26 Okl. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556. In that case the city attempted, among other things, to issue public utility bonds to pave its street crossings. But the court held that such could not be done, as the same, being a street improvement, was not a public utility owned exclusively by the city. If in that case the city had proposed to first close the street, and then purchase the intersections from the abutting property owners and pave them with the proceeds of the bond issue in question, and then reopen the street, the precise question here presented would have been there decided. It goes without saying that the city here will not be permitted to do indirectly what the city there was not permitted to do directly. The reason for the holding there was that the pavement, when completed at the intersections, would not and could not be owned exclusively by the city. The same is true as to the bridge here in question. This for the reason that, after the spans tower aloft on their abutments, it is the purpose of the city, not to supply the approaches, but leave them to be supplied by the railroad company and carried over its

tracks at both ends of the structure. As a bridge is not a bridge, but is useless without approaches, so this bridge would not be completed and ready for use until these approaches were supplied. This being true, to say that this bridge would be, when completed, a public utility, owned exclusively by the city, would no more be true than it would be to say that a chair is owned exclusively by one person when another owned its legs; that a passenger coach is owned exclusively by one company when another owned the steps and platform; or that a sword is owned exclusively by one person when another owned the hilt.

We are therefore of opinion that the bond commissioner was right in refusing to approve these bonds. This for two reasons: First, because the money arising from their sale is intended to be used for street improvements; and, second, that the proposed utility, when completed, would not be owned exclusively by the city.

The writ is denied. All the Justices concur.

(36 Okl. 789)

HARGADINE-MCKITTRICK DRY GOODS CO. et al. v. BREEDLOVE.

(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 11, 1913.)

(Syllabus by the Court.)

CORPORATIONS (§ 269*)—STOCKHOLDERS' LIABILITY—ACTION—EVIDENCE.

In a suit by the creditor of a corporation to recover a stockholder's liability, the same having been assigned to the creditor, when the alleged stockholder denies the subscription and denies all interest in the corporation, it is sufficient for the plaintiff to prove the subscription and the assignment to him, and the burden does not rest upon him to prove that the stockholder has not paid the subscription.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 887, 888, 980, 1149-1159, 2277; Dec. Dig. § 269.*]

Commissioners' Opinion, Division No. 1. Error from Carter County Court; W. D. Potter, Judge.

Action by the Hargadine-McKittrick Dry Goods Company and others against O. V. Breedlove. Judgment for defendant, and plaintiffs bring error. Reversed and rendered.

J. F. Bledsoe and R. N. McConnell, both of Oklahoma City, for plaintiffs in error. W. F. Bowman and Potterf & Walker, all of Ardmore, for defendant in error.

AMES, C. This action was brought by the plaintiffs to recover from the defendant the sum of \$500, which he owed the Model Dry Goods Company on a subscription for that amount of the capital stock of the

corporation. The dry goods company was indebted to the plaintiffs, and, as security for the indebtedness, assigned to a trustee for their benefit the defendant's subscription, together with a number of others. The defendant's answer contained a general denial, and, in addition, a specific denial that he had any interest in the Model Dry Goods Company, directly or indirectly, or that he ever subscribed to the capital stock of that company. The answer did not plead payment of the subscription, but, as stated, a denial of the existence of the subscription. The evidence sustained the allegations of the petition, showed a subscription by the defendant to the capital stock of the Model Dry Goods Company, and the assignment thereof to the plaintiffs. The plaintiffs' evidence did not show nonpayment of the subscription. The defendant demurred to the evidence, and, upon an inquiry from the court whether he had any evidence to offer, stated that he would stand upon the demurrer. The court thereupon rendered judgment for the defendant, upon the ground that it devolved upon the plaintiffs to prove nonpayment of the subscription. This was error. The plaintiffs proved that the subscription had been made, and its assignment to them. The defendant had denied making the subscription. He had not pleaded payment thereof. Under these circumstances, it was not necessary for the plaintiffs to prove nonpayment; and it is even doubtful whether, under the issues raised by the pleadings, the defendant could have proven payment, as he had not admitted the subscription or pleaded payment.

In *Jones v. El Reno Mill & Elevator Co.*, 26 Okl. 796, at page 798, 110 Pac. 1071, at page 1072 (Ann. Cas. 1912B, 486), the court held that where the action is merely to recover a balance due, without reference to the extent of the original liability, evidence of payment is admissible under a general denial, and in holding that, under the facts of that case, it was not necessary to affirmatively plead payment, say: "If plaintiff had sued on the account, ignoring the partial payments, it would have been necessary for the defendant to plead payment in order to introduce evidence of any payments made; and the cases cited by his counsel, to the effect that payment is an affirmative defense, which must be pleaded, would be in point."

In *Dickson v. Wainwright* (Ga.) 73 S. E. 515, it is held that, when in a suit on an account the only defense is a denial of the account, it is not error to exclude the testimony of the defendant that the account sued on had been fully paid. The following authorities also support the holding that it was unnecessary for the plaintiff to prove nonpayment: *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Ferguson v. Dalton*, 158 Mo. 323, 59 S. W. 88; *West*

Pub. Co. v. Corbett, 165 Mo. App. 7, 145 S. W. 868; *Wessel v. Bishop*, 76 Neb. 74, 107 N. W. 220; *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 111 Pac. 760; *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; *Lapham v. Kansas & Texas Oil, Gas & Pipe Line Co.*, 87 Kan. 65, 123 Pac. 863; *Rice v. Kabak*, 72 Misc. Rep. 18, 128 N. Y. Supp. 1092; *Ives v. Male*, 75 Misc. Rep. 387, 135 N. Y. Supp. 526; *Fein v. Meier* (N. J. Sup.) 58 Atl. 114. Counsel for defendant in error do not call our attention to any authorities on the subject.

The judgment of the trial court should be reversed, and the cause remanded, with instructions to render judgment for the plaintiffs.

PER CURIAM. Adopted in whole.

(36 Okl. 784)

LEE et al. v. SUMMERS et al.
(Supreme Court of Oklahoma. Nov. 19, 1912.
On Rehearing, Feb. 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 343*)—TIME OF TAKING—MOTIONS.

The filing of a useless and unauthorized motion in a case will not operate to prevent the running of the time in which an appeal must be perfected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889-1904; Dec. Dig. § 343.*]

2. APPEAL AND ERROR (§ 362*)—REVIEW—ASSIGNMENT OF ERROR.

Where appellant fails to assign in his petition in error the overruling of a motion for a new trial, no question that seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below is properly presented to this court, and such cannot be reviewed. *Meyer v. James*, 29 Okl. 7, 115 Pac. 1016.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961, 3282-3284; Dec. Dig. § 362.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; John H. King, Judge.

Action by R. C. Summers against A. J. Lee and Ralph Dresback. Abe Morrison intervened. Judgment for plaintiff, and defendants bring error. On death of plaintiff pending appeal E. H. Summers and others were substituted for defendants in error. Dismissed.

Samuel E. Gidney and Merritt Eslick, both of Muskogee, for plaintiffs in error. N. A. Gibson, H. C. Thurman, and T. L. Gibson, all of Muskogee, for defendants in error.

ROBERTSON, C. Since the filing of this appeal in this court the defendant in error has died, and the proper parties, by consent of court, have stipulated that the cause shall be revived in the name of E. Helen Summers, administratrix, and E. Helen Summers, Lloyd

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Ray's Indexes

Summers, and Curtis Summers, sole heirs of R. C. Summers, deceased, as defendants in error.

[1,2] This action in equity was begun in the United States Court for the Western District of the Indian Territory, sitting at Muskogee, on February 24, 1906, by R. C. Summers, against A. J. Lee and Ralph Dresback to recover title and possession of certain real estate then within the jurisdiction of said court. Later one Abe Morrison intervened and set up some claim of title to the land in controversy, and was made a party defendant. On the advent of statehood the case was, by operation of law, transferred to the district court of Muskogee county, where, on November 26, 1909, a judgment was entered in favor of plaintiff and against defendants. On November 27, 1909, defendants filed a motion demanding a new trial as a matter of right; also the usual motion for a new trial, setting up various statutory grounds; and also a motion to vacate the judgment for the reason that the trial court, under the provisions of the Enabling Act, was wholly without jurisdiction of the subject-matter of the controversy. These various motions were passed by the court until January 29, 1910, when they were each overruled and denied. The motion to vacate the judgment was heard on an agreed statement of facts. Counsel for defendant in error object to the consideration of this appeal, for the reason that this court has no jurisdiction, and in support of this objection show that the suit being one in equity, under the law of Arkansas, in force at the time the action was commenced, no motion for a new trial was necessary, and hence the appeal in this case, not being completed in the time and manner required by the Oklahoma law governing appeals, must be dismissed. It will be remembered that the judgment having been entered on November 26, 1909, the case-made should have been served within three days from that date, or within the time allowed by proper order of the court for that purpose, in case a motion for a new trial was necessary. The case-made was not served within three days from November 26, 1909, and no extension of time was asked for that purpose until January 29, 1910. It is difficult to understand the position of counsel for plaintiff in error in this behalf. Evidently they thought a motion for a new trial was necessary, else they would have filed none, and yet, after filing it, they do not predicate error in the overruling of the same by the trial court, for the petition in error does not contain an assignment of error, direct or otherwise, based on the overruling of the motion for a new trial. No objection to the action and ruling of the trial court in overruling the motion for a new trial is to be found anywhere in the petition in error.

If, under the practice in force in the United States court in which this action was

pending at the time of statehood, no motion for a new trial was necessary, then the filing of such motion in the case would not prevent the running of the time in which an appeal must be perfected. *Doorley v. Buford & George Mfg. Co.*, 5 Okl. 594, 49 Pac. 936; *Boulanger v. Midland Valley Merc. Co.*, 128 Pac. 113, not yet officially reported. And, if a motion for a new trial was necessary, then the alleged errors assigned for review have all been waived by the failure to assign as error the action of the court in overruling the motion for a new trial. "Where appellant fails to assign in his petition in error as error the overruling of a motion for a new trial, no question that seeks to have reviewed errors alleged to have occurred during the progress of the trial in the court below is properly presented to this court, and such cannot be reviewed." *Meyer v. James*, 29 Okl. 7, 115 Pac. 1016. The record presents no questions for review, except those required to be presented by the motion for a new trial. Hence it necessarily follows that the purported case-made does not as such present any question for the consideration of this court. Neither can the case-made be considered as a transcript, inasmuch as it is not certified to by the clerk as required by law, no certificate of any such character appearing at any place in the record.

Therefore the appeal should be dismissed for the reason that this court has no jurisdiction in the premises.

On Rehearing.

In this case it will be remembered that plaintiffs in error on November 27, 1909, filed, after judgment had been entered against them, first, a motion for a new trial, as a matter of right; second, the usual statutory motion for new trial; and third, a motion to vacate the judgment, for that the court had no jurisdiction over the subject-matter of the controversy. These various motions were not passed upon until January 29, 1910, when each was overruled by the court.

In the order of dismissal entered in this case on November 18, 1912, it was held that under the Arkansas practice in force in the Indian Territory at the time this action was commenced no motion for a new trial was necessary in equity cases, and that, therefore, the case-made should have been made and served within three days from the date of entry of the judgment or within the extension of time allowed by the court, and that the filing of an unnecessary motion would not stay the running of the time in which to prepare and file the appeal. Counsel for plaintiffs in error now insist that they did not appeal from the judgment entered on November 26, 1909, but from the order of the court entered January 29, 1910, denying the motion to vacate said judgment, and that no motion for a new trial was necessary to preserve the alleged errors of the

court denying the motion to vacate, inasmuch as the evidence adduced at the hearing thereon was embodied in an agreed statement of fact.

Without withdrawing our former opinion, but in addition thereto, we hold that the district court of Muskogee county by virtue of the provisions of the Enabling Act, the Constitution, and the statutes had full and complete jurisdiction of the subject-matter of the controversy and the persons of the parties, and, inasmuch as the same result would be reached by the consideration of this phase of the case as was reached in our former opinion, we hold that no error was committed in overruling the motion to vacate, and therefore the petition for rehearing should be denied.

PER CURIAM. Adopted in whole.

(36 Okl. 792)

PACIFIC MUT. LIFE INS. CO. OF CAL. v.
O'NEIL.

(Supreme Court of Oklahoma. Feb. 11, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—ASSIGNMENTS OF ERROR—WAIVER.

Assignments of error presented by counsel in their brief, if unsupported by authority or argument, will not be noticed by the court, unless it is apparent without further research that they are well taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. PLEADING (§ 418*)—DEMURRER — WAIVER OF ERROR.

When a demurrer is sustained to certain paragraphs of an answer, and defendant by leave of court files an amended answer setting up the same defenses contained in the original answer, and to which the demurrer was directed, and issues are joined thereon, and a trial had, the defendant waives any error committed by the trial court in sustaining such demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

3. EVIDENCE (§ 354*) — DOCUMENTARY EVIDENCE—BOOKS.

Entries in books made in the ordinary course of business at or near the time of the transaction to which they relate, upon proof of the handwriting of the person who made such entries, in case of his death or absence from the county, may be admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. § 354.*]

4. APPEAL AND ERROR (§ 1046*)—REVIEW—OBJECTIONS TO EVIDENCE.

Remarks made by the trial court pertaining to the relevancy and competency of evidence offered, or in stating illustrative examples or hypothetical cases, held not to constitute reversible error, where the only objection made or exception saved was to the competency of the question propounded to the witness on the stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.*]

5. INSURANCE (§ 114*)—INSURABLE INTEREST—VALIDITY OF CONTRACT.

One may insure his own life for the benefit of another having no insurable interest therein, where he makes the contract, and pays the premiums himself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 186-188; Dec. Dig. § 114.*]

6. INSURANCE (§ 298*)—APPLICATION—EFFECT OF FALSE ANSWERS.

Under the law in force in the Indian Territory prior to statehood, a false answer to an inquiry giving the relationship between applicant for accident insurance and the beneficiary, where by the terms of the policy said answer is made a warranty, vitiates the policy, even though made in good faith and without knowledge of its falsity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 677; Dec. Dig. § 298.*]

7. INSURANCE (§ 392*)—FORFEITURE—WAIVER—ESTOPPEL IN PAIS.

Where, after a policy has become a death claim, the company continues to treat it as a subsisting claim by receipting for the original policy and accepting and retaining proofs of death without condition or objection except to call for the names of additional persons cognizant of the facts of the insured's death, and where, after full knowledge of the facts rendering the policy voidable at its election, the premium paid was retained, and no offer made at any time before or during the trial to repay it, or tender it into court, or to exercise its right to rescind, such acts amount to both waiver and estoppel in pais.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1053, 1058-1070; Dec. Dig. § 392.*]

8. INSURANCE (§ 560*) — PROOFS OF LOSS — WAIVER OF DEFECTS.

Where proofs of death were received and retained without condition or objection, except to call for the names of additional witnesses, passengers on the train at the time of insured's death, it will be held that the insurance company waived any objections thereto that might otherwise have been urged.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1393-1404; Dec. Dig. § 560.*]

Commissioners' Opinion, Division No. 1. Error from District Court; Pittsburg County; Preslie B. Cole, Judge.

Action by Mary O'Neil against the Pacific Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant brings error. Affirmed.

Masterson Peyton, of Muskogee, for plaintiff in error. James S. Arnote, of McAlester, for defendant in error.

SHARP, C. [1] The original petition in error contains 69 assignments of error, the amended petition in error 4 additional assignments. Authorities are cited in support of but 11 of the points urged as grounds for reversal, and some of these involve a consideration of the same question, being presented in a somewhat changed form; the brief of counsel as to the remaining questions consisting of little more than a restatement of the several assignments of error, followed by the general statement that by reason thereof the court committed error. This court has recently passed upon this

identical question in *Title Guaranty & Surety Co. v. Slinker*, 128 Pac. 696, where it was held that assignments of error presented by counsel in their brief, where unsupported by authority, would not be noticed by the court, unless it was apparent without further research that they were well taken.

[2] Among other assignments urged is that the court erred in sustaining plaintiff's demurrer to paragraphs 5, 6, and 7 of the defendant's original answer. In view, however, of the fact that the defendant filed an amended answer, setting up specifically the several defenses pleaded in the original answer, to which the demurrer was directed, the error, if such it was, was thereby waived, and cannot here be assigned as ground for reversal. *Tecumseh State Bank v. Maddox*, 4 Okl. 588, 46 Pac. 568; *Kingman & Co. v. Pixley*, 7 Okl. 351, 54 Pac. 404; *Berry et al. v. Barton et al.*, 12 Okl. 221, 71 Pac. 1074, 66 L. R. A. 513; *Morill et al. v. Casper et al.*, 13 Okl. 335, 73 Pac. 1102; *Carle et al. v. Oklahoma Woolen Mills*, 16 Okl. 515, 86 Pac. 66; *Board of County Com'rs v. Beauchamp*, 18 Okl. 1, 88 Pac. 1124; *Hale v. Broe*, 18 Okl. 147, 90 Pac. 5; *Pattie Plow Co. v. Beard*, 27 Okl. 239, 110 Pac. 752, Ann. Cas. 1912B, 704; *Childsey et al. v. Ellis et al.*, 31 Okl. 107, 125 Pac. 464.

[3] Assignments of error 4 to 13, inclusive, concern the admission of the testimony of E. L. Dubois, a clerk in the office of the treasurer of the Midland Valley Railway Company, and the admission in evidence of the deduction order book and other records of said office. The records referred to were kept by Thomas V. Cleever, timekeeper, who was at the time out of the jurisdiction of the court, having gone, according to the information of the witness, to the republic of Mexico. The proper predicate having been laid, we think the testimony competent under the rule laid down in *First Nat. Bank of Enid v. Yeoman*, 14 Okl. 626, 78 Pac. 388; *Missouri, K. & T. Ry. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866; *Missouri, K. & T. Ry. Co. v. Walker*, 27 Okl. 849, 113 Pac. 907; *Muskogee Electric Traction Co. v. McIntire*, 129 Pac. 830, lately decided, and not yet officially reported.

The policy of insurance was issued in consideration of an order given by Thomas O'Neil on his employer, the Midland Valley Railroad Company, which authorized said employer to deduct from the wages of said employé certain specified sums of money, the same to be paid at stated intervals to the insurer. This order was given contemporaneously with the issuance of the policy, and directed that the first premium paid should be for a period of two months. The records introduced showed that, pursuant to said order, the deduction had been made from the insured's wages from the May pay roll, and a check drawn in favor of the Pacific Mutual Insurance Company June 1,

1907, for \$11.90, which check was indorsed by the insurer, and deposited with the Corn Exchange National Bank of Chicago, and paid by the First National Bank of Muskogee, on which bank it was drawn, on June 27, 1907. It was shown that the amount of the check included a deduction in favor of the insured for \$7.50, and of another employé for \$5, the railway company deducting 60 cents commission. This testimony was clearly competent, and was introduced for the purpose of showing the payment of the premium according to the terms of the policy. The fact that payment was made after the insured's death is of no consequence, as the policy was issued in consideration of the order given, and not its payment previous to his death. In fact, the order contains an express stipulation providing that in making settlement for any claim any amount payable on account thereof should first be applied to the payment of any premium for each and all of the insurance periods for which payment had not previously been made.

[4] The fifteenth, twenty-third, twenty-fifth, twenty-seventh, and twenty-eighth assignments of error concern remarks made by the trial court, which it is claimed were calculated to prejudice the minds of the jury, but, upon referring to the record, we find that the only exceptions saved were made to the ruling of the court on the admission of evidence and not the remarks complained of.

As to the twenty-ninth assignment of error, a sufficient objection to the court's remarks was made, but, in view of our conclusions, the defendant was in no wise prejudiced by such statements.

[5] It is urged that the plaintiff at the time of the issuance of the policy had no insurable interest in the life of the insured, and hence plaintiff cannot recover. Plaintiff and insured had been husband and wife for 18 years, and up until March 25, 1907, when a decree of divorce was rendered in plaintiff's favor in an action theretofore begun by her in the United States court at McAlester, in October, 1906. On the date that the insured took out the policy of insurance it does not appear that he knew that his wife had obtained a divorce. He had previously written her, asking that she abandon the divorce proceedings, to which she promptly replied that she would do so. Some time prior to this, and in the month of February, plaintiff had given her deposition in said divorce proceedings. At that time the very general practice that prevailed in the United States courts in the Indian Territory was to hear all divorce cases either upon depositions or testimony given before the master in chancery. At the time plaintiff heard from her husband, she was visiting a relative at Ft. Cobb, in Western Oklahoma. After advising her husband that she would abandon the divorce proceedings, she neglected to advise her attorney of her con-

clusion, expecting as she testified, to be at McAlester, and see him in person, but was prevented from doing so by being detained at Ft. Cobb on account of the illness of a relative. The divorce was obtained shortly afterwards, when it appears from the testimony her husband wrote her again, and a reconciliation between them was effected, and their remarriage agreed upon. This was the relation of the parties at the time. The policy of insurance was taken out by the insured on his own life, and paid for on his own order out of his wages, and, so far as we have examined the authorities, the courts of last resort, with possibly one or two exceptions, and the text-writers on insurance generally, are agreed that a person may take out insurance upon his own life and designate whom he pleases as the beneficiary. *Rupp v. Western Life Insurance Co.*, 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675; *Hess v. Segenfelder*, 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343; *Heinlein v. Imperial Life Insurance Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *Hill v. United Life Insurance Co.*, 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807; *Elkhart Mutual, etc., Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Albert v. Mutual Life Insurance Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *Bloomington Mutual, etc., Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558. In *Connecticut Mutual Life Insurance Co. v. Schaefer*, 95 U. S. 457, 24 L. Ed. 251, it was said by Mr. Justice Bradley, speaking for the court: "It is well settled that a man has an insurable interest in his own life and in that of his wife and children, a woman in the life of her husband, and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. * * * The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." The same rule was announced in *Aetna Life Insurance Co. v. France*, 94 U. S. 561, 24 L. Ed. 287. This being a case arising in the Indian Territory prior to statehood, and the rights of the parties having attached under the laws then in force, these decisions are of controlling force. The relations of the parties were not immoral; and, while the insured perhaps owed to

his divorced wife no legal obligation, yet from their past relations and from the new relations assumed there was a strong moral obligation of support resting upon the insured.

[6] The statement contained in the application of the insured that the beneficiary named therein bore to him the relationship of wife was untrue, though not known to be so when made, and the good faith of the insured is not seriously questioned. The authorities differ as to the legal consequences of a false statement as to the relations existing between the insured and his beneficiary, the one class holding the designation of the party to whom the policy is to be paid, even where the statement in the application is expressly made a warranty, does not amount to such, and, if untrue, does not render the policy void, but is simply a direction by the insured as to whom the insurance should be paid. *Cunat v. Supreme Tribe of Ben Hur*, 249 Ill. 448, 94 N. E. 925, 84 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213; *Lampkin v. Travelers' Insurance Co.*, 11 Colo. App. 249, 52 Pac. 1040; *Standard Life & Accident Insurance Co. v. Martin*, 133 Ind. 381, 33 N. E. 105; *Story v. Williamsburgh Masonic Mut. Ben. Ass'n*, 95 N. Y. 474. In other cases the falsity of a statement of relationship is held to be sufficient ground for forfeiture. *May on Insurance*, § 263. Such was the view entertained by the Supreme Court of the United States in *Jeffries, Adm'r, v. Economical Life Insurance Co.*, 22 Wall. 47, 22 L. Ed. 833, where it was held that a false answer to an inquiry, whether the applicant had made any other application to have his life insured, and whether he was married or single, was sufficient to avoid the policy. This latter being a decision of the highest court in the land, and, as already seen, the case at bar being one that arose in the Indian Territory, we are precluded of an opportunity to choose between the two lines of decisions. *Moore v. Atchison, T. & S. F. Ry. Co.*, 28 Okl. 682, 110 Pac. 1059; *Chicago, R. I. & P. Ry. Co. v. Newburn*, 27 Okl. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432; *Summers v. Alexander*, 30 Okl. 198, 120 Pac. 601, 38 L. R. A. (N. S.) 787; *Kansas City Bridge Co. v. Lindsay Bridge Co.*, 32 Okl. 81, 121 Pac. 639. If no other controlling question intervened, upon that ground alone our decision must be that the statement of the relationship between the insured and the beneficiary, even though made in good faith, being in fact untrue, the terms of the warranty were violated and no recovery would lie.

[7] It is urged, however, by counsel for defendant in error that in any event the plaintiff in error is not in a position to urge a forfeiture for the reason that the defendant company by its conduct has waived its right to insist upon such forfeiture. The all-important question for our consideration therefore is: Was there a waiver on the part of the insurance company, or is it estopped from

insisting upon one or both of the grounds of forfeiture? Upon the first ground of forfeiture—i. e., that the insured's habits of life were correct and temperate—there was we think a failure of proof upon the part of the defendant to establish this fact. Not only is this true, but we find the truthfulness of the statement is amply supported by the evidence.

Upon the second ground of forfeiture, that plaintiff was not at the date the policy was written the wife of the insured, there is no dispute in the testimony. The policy bears date April 30, 1907. Its consideration was an order, executed by the insured, on his employer, the Midland Valley Railway Company, to deduct and pay from the insured's monthly wages a fixed sum at stated periods. The insured was accidentally killed while a passenger on one of the Midland Valley Railway Company's passenger trains between Stigler and Forum, Ind. T., on the 22d day of May, 1907. On June 15, 1907, in the course of submitting proof of death, the original policy was delivered to Masterson Peyton, who was at the time counsel for the insurance company, and who executed his receipt therefor, and which policy remained in the possession of the company until during the trial of the case. On or about the 13th day of July there was delivered to said Masterson Peyton proof of death of said Thomas O'Neil, consisting of the affidavits of C. N. Campbell, Lee Hoffman, J. C. Downey, and C. H. Foster. The affidavit of C. N. Campbell was prepared in the office of said Peyton, but not by him, though in his presence. Following the delivery of these proofs of death the law firm of Peyton & Mason, of which Masterson Peyton was a member, addressed a letter to the plaintiff at South McAlester, as follows: "I am just in receipt of your esteemed favor of yesterday giving me the names of J. D. Downey, Lee Hoffman and his wife Bertha. Please accept my thanks for same. You have already furnished the affidavits of two of the parties above mentioned and Mrs. Hoffman is the wife of one of said parties. The Company would, therefore like to have the names of three other disinterested parties who were upon the train upon which your husband was riding just previous to his death. Find herewith inclosed stamped envelope in which please give us three additional names with post office address if possible." October 15th following said Peyton delivered to the plaintiff a copy of the policy, the original of which had previously been delivered to him, the receipt therefor reciting that, upon return of the original policy to plaintiff, she would, in turn, deliver the copy to said Peyton. Suit was brought on November 15, 1907, and on March 3, 1908, defendant filed its answer, denying liability under its policy of insurance; and on April 22d filed its amended answer, in which it charged (1) that defendant's death was due

to his own gross negligence; (2) false and fraudulent statements contained in the application, in that the habits of life of the insured were not correct and temperate, and that the beneficiary in said policy of insurance was not the insured's wife; that these false and fraudulent representations contained in the application vitiated and rendered invalid the policy, and thereby the defendant company was not liable to plaintiff in any sum. It does not appear that at any time did defendant company notify plaintiff that by reason of the alleged false and fraudulent statements and warranties it was not bound by reason of the provisions of the policy, nor did it at any time tender or offer to tender to any one the premium paid it on account of said policy; the only notice of the company's purpose and intent being that disclosed in its answer. It does not appear at what particular time the defendant company first learned of the alleged grounds of forfeiture. Is the company, therefore, under the facts stated in a position to urge a forfeiture? So far as the record discloses, the policy was treated as a subsisting obligation until the date of the filing of the original answer, in which among other defenses urged was (1) a failure to submit proper proof of death; (2) a denial that the insured's death was accidental, but, on the other hand, was the result of gross negligence on his part by reason of his being at the time completely under the influence of liquor, hence, for that reason, no liability under the policy of insurance ever attached.

In *New Life Insurance Co. v. Baker*, 83 Fed. 647, 27 C. C. A. 658, affirming the judgment of the Circuit Court in 77 Fed. 550, it was held that the conduct of the defendant company, after it had discovered the respects in which the statements made by the insured were untrue, amounted to a waiver of its right to refuse payment on that ground. It was said that the falsity of the statements complained of did not render the policy void in the sense that an illegal contract, or one that cannot be performed, is void; that the falsity of the statements complained of merely rendered the contract voidable at the election of the insurer. There, after knowledge of all the facts which would have rendered the policy voidable at its election, the company continued to treat the same as a subsisting obligation for more than seven months, and in the meantime dealt with the plaintiff below upon that basis. At its instance plaintiff was induced to take out letters of guardianship to complete proofs of loss, which the court observed doubtless put her to considerable expense. The premium was not returned, and no offer made to repay it for a year after the company had acquired full knowledge of its alleged right to rescind. It was observed by the court that the acts in question amounted both to a waiver and estoppel in pais; that good faith and

fair dealing required the company to be more prompt in asserting its right to treat the policy as void, and in taking the necessary steps to rescind the contract; that, after acquiring knowledge that the policy was invalid, it was not entitled to exact from the plaintiff a technical compliance with the provisions of the policy relative to the proofs of loss, which would involve considerable trouble and expense, unless, on its part, it would resolve to pay the loss when such proofs were submitted. The court cites in support of its conclusion *Titus v. Insurance Co.*, 81 N. Y. 410, 419; *Insurance Co. v. Norton*, 96 U. S. 234, 241, 24 L. Ed. 689; *Gray v. Association*, 111 Ind. 531, 11 N. E. 477; *Hollis v. Insurance Co.*, 65 Iowa, 454, 459, 21 N. W. 774; *Society v. Winning*, 19 U. S. App. 178, 185, 7 O. C. A. 359, 58 Fed. 541; *Webster v. Insurance Co.*, 86 Wis. 67, 17 Am. Rep. 479; *Marthinson v. Insurance Co.*, 64 Mich. 372, 31 N. W. 291. That an insurance company may waive any provision in a policy intended for its benefit is a principle that requires no citation of authorities in its support. Where there has been a breach in the conditions of a policy, the company may, at its election, take advantage of such breach and cancel the policy, or it may waive the forfeiture, by acts as well as words. It is always required that the company, as well as the insured, should proceed in the utmost good faith. The consideration for the insurance is the premium paid, and if, when paid and appropriated by the company, it may, while retaining the premium, be allowed to plead that the contract of insurance is void ab initio, then in such cases the insurer would be bound only at its pleasure. In *Schoneman v. Western, etc., Ins. Co.*, 16 Neb. 404, 20 N. W. 284, it is said: "The company received the premium for that policy, and have appropriated the same to their own use. If the policy was obtained by fraud, they should have tendered back the premium and asked for the cancellation of the policy. But this they have not done. The instruction asked therefore should have been given"—citing *Viele v. Ins. Co.*, 26 Iowa, 10, 96 Am. Dec. 83; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671; *Jolliffe v. Ins. Co.*, 39 Wis. 111, 20 Am. Rep. 85; *Ins. Co. v. Schollenberger*, 44 Pa. 259; *Ins. Co. v. Bowen*, 40 Mich. 147; *Bowman v. Ins. Co.*, 59 N. Y. 521; *Hodsdon v. Ins. Co.*, 97 Mass. 144, 93 Am. Dec. 73; *Boehen v. Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Sheldon v. Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213; *Young v. Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *Smith v. Ins. Co.*, 3 Dak. 80, 18 N. W. 355; *Ins. Co. v. McLanathan*, 11 Kan. 533; *Mershon v. Ins. Co.*, 34 Iowa, 87; *Keim v. Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291. In *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708, the court at length reviews the decisions of many of the courts. The opinion in part

reads: "A court cannot, by its fiat alone, render a voidable contract void, but it can only adjudge that the party entitled to avoid it has done so, and that it thereby and for that reason became invalid. If appellant desired to avoid this policy for the reason pleaded, it was required to act with reasonable promptness after acquiring knowledge of the facts, and thereupon it was its duty to notify appellees of its decision to avoid the policy, and of the reasons therefor, and to return or tender, or in some appropriate way manifest its willingness and readiness to restore the unearned premium received. The answers filed do not disclose the time when appellant learned the true state of appellees' title, nor deny knowledge of the same at the time of issuing the policy, but proceed upon the theory that the policy was void ab initio and without any action on the part of the insurer. This theory was wrong, and the averment of facts insufficient. The answers should have pleaded the covenants or conditions relied upon, a breach, and the acts done by the appellant in pursuance of its election to avoid the contract. Appellant's contention is that, under the terms of the policy, no risk attached, and no liability was assumed by it at any time. It must therefore follow that there was no consideration for the premium received, and good faith and common fairness required its prompt return; and the insurer, by retaining such premium with full knowledge of the facts, waives the right to insist upon a forfeiture of the policy. *Hanover F. Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *German Ins. Co. v. Shader*, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510, 524, 90 N. W. 476; *Sharp v. Scottish Union & Nat. Ins. Co.*, 136 Cal. 542, 69 Pac. 253, 254, 615; *Pearlstone v. Westchester F. Ins. Co.*, 70 S. C. 75, 49 S. E. 4; *Harris v. Equitable Life Assur. Soc.*, 64 N. Y. 197; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270; *McQuillan v. Mutual Reserve Fund Life Ass'n*, 112 Wis. 685, 87 N. W. 1069, 88 N. W. 925, 56 L. R. A. 233, 88 Am. St. Rep. 986; *Schreiber v. German-American Hall Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *Union Cent. L. Ins. Co. v. Jones*, 17 Ind. App. 592, 47 N. E. 342."

Section 12 of the policy provides that a failure on the part of the insured or any one claiming under the policy to comply with any of the foregoing agreements should render the policy void. Even though this provision under the facts should be held to include statements contained on the back of the policy, the legal effect would be simply to render it voidable at the election of the insurer; but the insurer could waive the forfeiture and continue the policy in force, as in all contracts where stipulations avoiding the same are inserted for the sole bene-

fit of one of the parties. The word "void" in such cases is to be construed as though the contract read "voidable." *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio (N. Y.) 154, 49 Am. Dec. 234. It would therefore follow, as was said in *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 208, 40 Am. Rep. 295: "That a distinct act of affirmance of the contract by the party entitled to avoid it, made with knowledge of the facts and especially such acts as the demand and receipt of premiums or assessments, would constitute a waiver of the forfeiture or of the right to annul the contract. * * *". In *Kidder v. Knights Templars & Masons Life Indemnity Co.*, 94 Wis. 538, 69 N. W. 364, the court in quoting with approval from *Cannon v. Home Insurance Co.*, 53 Wis. 593, 11 N. W. 13, used the following language: "That a party cannot occupy inconsistent grounds or positions; that one who relies upon the forfeiture of a contract cannot, at the same time, treat the contract as an existing, valid one, nor call upon the other party to the contract to do anything required by it; or, to apply the proposition to the precise facts in the case, that, as the defendant, in its correspondence with the attorneys of the plaintiff, after full knowledge of the forfeiture, saw fit to call for additional proofs of loss, recognizing by this act the continued validity of the policy, it could not, after the plaintiff had gone to the expense and trouble of furnishing these proofs, change its ground and claim that the policy was no longer in force." It seems that the defendant company's attorney at Muskogee actively had charge of procuring the proofs of loss, and the necessary preliminary steps having to do with settlement of the company's liability. At an early date this attorney had procured from the plaintiff the original policy, receipting therefor, and some four months thereafter delivered to plaintiff a copy of the policy obtained from the home office in Los Angeles. The proofs were filed with this attorney, and he, in turn, called upon the plaintiff for not additional proof of death, but the names of disinterested witnesses riding upon the train at the time of the insured's death. This same attorney was afterwards employed to defend plaintiff's action, and in the answer filed promptly asserts as one of the defenses the forfeiture of the policy, but without any previous offer to rescind the contract on the ground of the alleged fraud on the part of the insured, and, further, without any form of offer or tender of the return of the premium. If, as may have been the case, defendant company did not know of the alleged grounds of forfeiture at or about the time that the proofs of death were being secured, notwithstanding that plaintiff's decree of divorce was a matter of public record at Mc-

Alester, yet it is certain that it had this knowledge at the time that its answer was prepared, and, if knowledge of the facts had been by it only lately acquired, these facts could have been pleaded, and an offer made to rescind the contract by a tender into court of the premiums received. But it did not see fit to do either, and from the authorities cited and those which follow it should not be permitted to occupy the inconsistent position of retaining the premiums, the only right to which it can claim being through the policy itself, and then say that notwithstanding these facts it is relieved from the performance of its part of the original undertaking. By its conduct it has waived the grounds of forfeiture, and treated the policy of insurance as of binding effect upon itself. *New York Life Ins. Co. v. Baker*, 27 C. C. A. 658, 83 Fed. 647; *Id.* (C. C.) 77 Fed. 550; *Society v. Winning*, 7 C. C. A. 359, 58 Fed. 541; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 692; *Schoneman v. Western, etc., Ins. Co.*, 16 Neb. 404, 20 N. W. 284; *Cotten v. Fidelity & Casualty Co.* (C. C.) 41 Fed. 506; *Gray v. Ass'n*, 111 Ind. 531, 11 N. E. 477; *Oshkosh Gaslight Co. v. Germania Fire Ins. Co.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; *Hollis v. Ins. Co.*, 65 Iowa, 454, 21 N. W. 774; *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 208, 40 Am. Rep. 295; *Marthinson v. Insurance Co.*, 64 Mich. 372, 31 N. W. 291; *Bevin v. Connecticut M. L. Ins. Co.*, 23 Conn. 244; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144, 93 Am. Dec. 73; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 100, 28 Am. Rep. 535; *Carpenter v. Continental Ins. Co.*, 61 Mich. 635, 28 N. W. 749; *Allen v. Vermont Ins. Co.*, 12 Vt. 366; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67, 17 Am. Rep. 479; *Mechanics' & Traders' Ins. Co. v. Smith*, 79 Miss. 142, 30 South. 362; *Northwestern Mut. Life Ins. Co. v. Freeman*, 19 Tex. Civ. App. 632, 47 S. W. 1025; *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644. These views find strong support in the decisions of this court in the following cases: *Gish et al. v. Ins. Co. of North America*, 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826; *Taylor v. Ins. Co. of North America*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; *St. Paul F. & M. Ins. Co. v. Cooper*, 25 Okl. 38, 105 Pac. 198. In the former case it was held that the return of the unearned premium, in a fire insurance policy was essential to a cancellation of the policy by the insurance company. In the latter case it was said that the acceptance of the premium by the local agent of the insurance company, after the death and notice of loss, operated as a waiver of the forfeiture and rendered the company liable on the policy from its inception, as

though the premium note had been paid when due.

[8] As to the sufficiency of the proofs of death, the defendant company by accepting and retaining those furnished, even though they were not in the form required by the terms of the policy, waived any objection thereto. *St. Paul F. & M. Ins. Co. v. Mitten-dorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651; *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 91 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; 4 *Cooley's Briefs on the Law of Insurance*, 3544; *Bliss on Life Insurance*, § 268. Not only this, but by subsequently denying any liability thereunder the agreement to furnish proofs of a particular character was waived. *Farmers' & Merchants' Ins. Co. v. Cuff*, 29 Okl. 106, 116 Pac. 435, 35 L. R. A. (N. S.) 892.

Having concluded that the insurer has waived its right to insist upon the original forfeiture, a consideration of a large number of the remaining assignments of error is rendered unnecessary. While there may have been trivial errors committed in the admission of testimony, it has not been shown that they were of such a nature as could have influenced the jury's verdict. There is little material conflict in the testimony, except upon the question that the habits of life of the insured were not correct and temperate, as stated in his application, and upon the further question that the insured's death was caused by his own acts of gross negligence. These questions of fact were resolved against the company by the jury, and, there being evidence tending to support the verdict, it will not be disturbed.

For the reasons given, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 468)

PECK v. STEPHENS et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 572*)—CASE-MADE—FAILURE TO FILE.

The case-made, or a copy thereof, not having been filed with the papers in the case in the court below, is a nullity, and cannot be considered in this court for the purpose of reviewing matters complained of in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2554; Dec. Dig. § 572.*]

Error from District Court, Stephens County; Frank M. Bailey, Judge.

Action between P. H. Peck and Dan Stephens and others. From the judgment, Peck brings error. Dismissed.

H. B. Lockett, of Comanche, for plaintiff in error. Wilkinson, Morris & Speer, of Duncan, for defendants in error.

DUNN, J. The sufficiency of the purported case-made in the above-entitled proceeding in error, to support the petition in error, is challenged in a motion to dismiss on the ground, among others, that neither the case-made nor a certified copy thereof was filed in the office of the clerk of the district court. The order from which the appeal was sought to be taken was rendered on the 1st day of April, 1912.

The motion must be sustained; the rule being that the case-made, or a copy thereof, must be filed with the papers in the case in the court below, or it is a nullity, and cannot be considered in this court for the purpose of reviewing matters complained of in the trial court. See *Abbott v. Rodgers*, 128 Pac. 908, an opinion of this court decided December 3, 1912, but not yet officially reported, and cases cited therein.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(35 Okl. 476)

ROBINSON v. CITY OF PERRY.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 220*)—PAYMENT OF LABORERS—"EMERGENCY."

The proviso contained in section 4057, Comp. Laws 1909 (Act March 22, 1909 [Laws 1909, c. 39, art. 4]), is an "emergency" measure; and it is not contemplated thereby that a man employed by a city as an engineer at its waterworks plant should recover for extra time over eight hours provided for therein, where the same is devoted by him to performance of his ordinary and usual duties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 599-608; Dec. Dig. § 220.*]

For other definitions, see Words and Phrases, vol. 3, p. 2361.]

Error from Noble County Court; L. B. Robinson, Judge.

Action by Harry M. Robinson against the City of Perry. Judgment for defendant, and plaintiff brings error. Affirmed.

George G. Graham, of Norman, for plaintiff in error. Chas. R. Bostick, of Perry, for defendant in error.

DUNN, J. This case presents error from the county court of Noble county. From the petition and evidence it appears plaintiff in error was employed as an engineer at the waterworks plant of the city of Perry, his service beginning on the 1st day of June, 1910; that during the period of his said employment, by reason of the fact that no one was provided to relieve him, he was compelled to remain and render service for twelve hours each day, instead of eight hours, as provided for by section 4057, Comp.

*For other cases see same topic and section-NUMBER in Dec. Dig. & Am. Dig., Key-No. Series & Rep'r Indexes

Laws 1909 (Act March 22, 1909 [Laws 1909, c. 39, art. 4]); that on leaving the employ of the city he presented his verified claim to the city council for the amount due him for the time served in excess of eight hours per day, which was by the council rejected, and recovery was denied in an action therefor in the county court. The case has been prosecuted to this court to secure a review of the judgment rendered.

The statutes involved (sections 4057, 4058, Comp. Laws 1909) read as follows:

"4057. Eight hours shall constitute a day's work for all laborers, workmen, mechanics, prison guards, janitors of public institutions, or other persons now employed or who may hereafter be employed by or on behalf of the state of Oklahoma, or by or on behalf of any county, city, township or other municipality of this state, except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: Provided, that in all such cases the laborers, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: Provided, further, that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the state of Oklahoma, or any county, city, township, or other municipality of said state; and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts within the state of Oklahoma, or within any county, city, township, or other municipality thereof, shall be deemed to be employed by or on behalf of the state of Oklahoma, or of such county, city, township, or other municipality thereof.

"4058. All contracts hereafter made by or on behalf of the state of Oklahoma, or by or on behalf of any county, city, township, or other municipality of said state, with any corporation, person or persons, for the performance of any public work, by or on behalf of the state of Oklahoma, or any county, city, township, or other municipality, shall be deemed and considered as made upon the basis of eight hours constituting a day's work; and it shall be unlawful for such corporation, person or persons, to require, aid, abet, assist, connive at, or permit any laborer, workman, mechanic, prison guards, janitors in public institutions, or other person to work more than eight hours per calendar day in doing such work, except in

cases and upon the conditions provided in section one of this act (4057)."

From the foregoing statement it will be seen that the construction of these statutes and their application to the defendant and the employment in which he was engaged is all that is presented to this court. The rights and remedies involved are purely statutory. Whatever relief plaintiff may be entitled to must be found within the written letter of the law, or be so clearly implied thereby that by construction the court could say that it was contained therein. For a violation of the act in other cases than where it was due to an extraordinary emergency, or for the protection of property or human life, the same is made a misdemeanor; and wherever employes are engaged for an excess of time in the excepted instances they are entitled to increased pay. That the employment in this case was not induced because of any extraordinary emergency occasioned by war is certain, nor is any claim made thereon; but it is contended that the work in which plaintiff was engaged for more than eight hours was for the protection of human life and property, and that it was lawful for him to be employed for that period of time, and he was entitled to remuneration therefor. Such a holding would involve a construction that engineers and other employes in and around waterworks plants, which are required to be ready for service at all hours of the day and night, were without the operation of this act. There is nothing in the act to support such a construction. The Legislature intended to punish employing public officers of the municipalities mentioned for compelling employes to work more than eight hours in the performance of their ordinary duties, and considered this penal provision to be sufficient; and that a right to pay for extra time arose when, for some reason beyond the control of the municipality, it was necessary, to protect life or property, to retain an employe for longer than the statutory period. Such cases would arise where an engineer, whose duty it was to relieve plaintiff after his regular eight hours of work had expired, should get hurt or sick, or quit without adequate notice, so that another might be procured, or that the plaintiff, in the event of a breakdown of its plant, might operate the same while it was being repaired. The proviso is to cover an emergency, and not contemplated to be called into exercise in the pursuit of a municipal employe's ordinary and usual duties.

From the view which we take of the act, therefore, the judgment of the trial court is affirmed.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(35 Okl. 404)

LANKFORD, State Bank Com'r, v. OKLAHOMA ENGRAVING & PRINTING CO.

(Supreme Court of Oklahoma. Feb. 4, 1913.)

*(Syllabus by the Court.)***BANKS AND BANKING (§ 15*)—STATE BANKS—GUARANTY FUND—INSOLVENCY.**Reversed and remanded upon the authority of *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 128 Pac. 556.[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 12-17; Dec. Dig. § 15.*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by the Oklahoma Engraving & Printing Company against J. D. Lankford, State Bank Commissioner. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiff in error. Wilson & Tomerlin and E. E. Buckholts, all of Oklahoma City, for defendant in error.

KANE, J. This is an appeal from an order of the court below, whereby it enjoined the state bank commissioner, who was administering the affairs of the insolvent Columbia Bank & Trust Company, from preferring the depositors' guaranty fund over what is called a "merchandise creditor" in the distribution of the assets of the defunct bank. Counsel for the defendant, who was a creditor of the bank by virtue of sales of supplies made prior to its insolvency, state their position in their brief as follows: "We concede that the depositors' guaranty fund is a fund for the sole payment of depositors in failed banks, and we concede here that the intervener, as a merchandise creditor of such failed bank, has no right to participate in said fund, or along with the depositors. We do, however, claim that a merchandise creditor, as intervener is in this case, is a creditor of the bank, and entitled to prorate with the deposit creditors of the bank and all other creditors in the assets of said failed bank; that, upon the failure of the bank, the assets of such bank come into the hands and possession of the bank commissioner, not for the purpose of paying any favored creditor, but for the purpose of being pro rata distributed and conserved as a trust fund for the purpose of such pro rata distribution to creditors."

The question raised by counsel is somewhat similar to the one decided by this court in the case of *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 128 Pac. 556. In that case the surety company sought to compel the bank commissioner to discharge the liability of its principal, for which otherwise it would be bound, out of the depositors' guaranty fund. The court held that that could not be done, and in de-

fining the status of a surety, under conditions created by the bank guaranty law, says: "That, with the exception of the first lien of the state upon the assets, etc., of insolvent state banks created by section 323, supra, for the benefit of the depositors' guaranty fund, the rights and liabilities of the surety company are the same as they would have been if the bond was executed to secure the deposit of a part of the permanent school fund in any bank or trust company within or without the state, not governed by the bank guaranty law." This reasoning applies to the defendant in error herein, who was not a creditor of the bank in the sense that a depositor was, and hence admittedly not entitled to be paid out of the depositors' guaranty fund. The depositors' guaranty fund was created for the payment of depositors, only as defined in *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, supra. Section 323, Comp. Laws 1909, provides that the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of any defunct bank or trust company, and all liabilities against the stockholders, officers, or directors thereof, and against all other persons, corporations, or firms; and that such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund. The effect of this statute is to make the state a preferred creditor until any deficiency in the guaranty fund, created by the payment therefrom of the depositors of an insolvent bank, is made up. After that, any remaining assets of the bank become available for the purpose of being prorated and distributed among the general creditors of the bank, in the manner contended for by counsel for defendant in error.

The judgment of the court below is accordingly reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed. All the Justices concur.

(37 Okl. 40)

BURNS v. MALONE.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

*(Syllabus by the Court.)***INDIANS (§ 16*) — AGRICULTURAL LEASE — RIGHT TO CROPS.**

The fact that an agricultural sublease of Indian lands may be void, because not approved by the Secretary of the Interior, does not justify the landlord in unlawfully taking possession of the crops and appropriating them to his own use.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; John J. Shea, Judge.

Action by John A. Malone against Henry Burns. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

T. J. Leahy, of Pawhuska, for plaintiff in error.

AMES, C. The plaintiff was a tenant of the defendant. In his absence, and without his permission, the defendant wrongfully took possession of his crop. He brought this action of replevin to recover the corn. The answer was a general denial.

It appears from the evidence that the land on which the corn was grown was Osage land; that the defendant held under a lease which was not approved by the Secretary of the Interior; and that the plaintiff held under a lease from the defendant, which likewise was not approved by the Secretary of the Interior; and the defendant claims that by virtue of this fact the leases were void, and that this justified him in wrongfully taking possession of the plaintiff's crop. This contention must be denied on the authority of *Holden v. Lynn*, 30 Okl. 663, 120 Pac. 240, 38 L. R. A. (N. S.) 239.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(36 Okl. 781)

BAILEY v. LINDSEY, County Treasurer.
(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 696*)—CASE-MADE—REVIEW OF EVIDENCE.

Where the case-made does not contain a recital to the effect that the record contains all the evidence introduced on the trial of the cause, this court will not review any question which requires an examination of all the evidence in order for its correct determination. *Gaffney v. Stanard et al.*, 31 Okl. 541, 122 Pac. 510.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2916, 2917; Dec. Dig. § 696.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Murray County; R. McMillan, Judge.

Action by J. E. Bailey against J. C. Lindsey, County Treasurer, to enjoin collection of taxes. Judgment for defendant, and plaintiff brings error. Affirmed.

Emanuel & Broadbent, of Sulphur, and Cottingham & Bledsoe, of Oklahoma City, for plaintiff in error. Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for defendant in error.

ROBERTSON, C. The Attorney General, in his brief, objects to the consideration of this appeal, for the reason that the case-made does not contain an averment, by way of recital or otherwise, that it contains all the evidence submitted or introduced in the trial of the cause, and that a consideration of each of the errors assigned in the petition

in error would require the review of the evidence introduced upon the trial, and that, under the rules and decisions of this court, the petition in error must be dismissed and the judgment of the trial court affirmed. We find that this identical question was up for consideration in *Gaffney v. Stanard et al.*, 31 Okl. 541, 122 Pac. 510, where, in an opinion by Williams, J., the court says: "In order to consider the questions sought to be reviewed by the plaintiff in error, it is essential to examine the evidence heard by the trial judge. The defendants in error, in their brief, however, contend that the evidence cannot be considered by this court, as the case-made does not contain a positive averment, by way of recital, that it contains all of the evidence introduced or submitted on the trial of the cause. Where such a recital in the case-made is lacking, it has been time and again held by this court that it will not review any question depending upon the facts for its determination. *Tootle, Wheeler & Motter Mercantile Co. v. Floyd*, 28 Okl. 308, 114 Pac. 259; *Wagner v. Sattley Mfg. Co.*, 23 Okl. 52, 99 Pac. 643; *Board of Commissioners of D. County v. Wright*, 8 Okl. 180, 57 Pac. 203. The attorney for plaintiff in error in the record certifies that the case-made 'contains a full, true, correct, and complete copy and transcript of all the proceedings had, and all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct, and complete case-made.'"

In *Sawyer & Austin Lumber Co. v. Champion Lumber Co.*, 16 Okl. 90, 84 Pac. 1093, it is said: "This question requires an examination of the evidence. The case purports to contain the evidence, but the record contains no recital or other statement that it contains all the evidence introduced in the trial of the cause. There is a certificate of counsel that the case contains all the evidence, also a certificate of the stenographer that his transcript contains all the evidence; but neither of these certificates are authorized or recognized. The case itself must contain the positive averment, by way of recital, that it does contain all the evidence submitted or introduced on the trial of the case; and, in the absence of such recital, this court will not review any question depending upon the facts for its determination. This question has been repeatedly decided. *Frame v. Ryel*, 14 Okl. 536, 79 Pac. 97; *Board of Washita County v. Hubble*, 8 Okl. 169, 56 Pac. 1085; *B. K. & S. W. Ry. Co. v. Grimes*, 38 Kan. 241, 16 Pac. 472; *Ryan v. Madden*, 46 Kan. 245, 26 Pac. 680; *Pelton v. Bauer*, 4 Colo. App. 339, 35 Pac. 918; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492; *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The Attorney General, in his brief, filed February 9, 1912, calls specific attention to this defect of the record. No attempt has been made to correct the same; and it is presumed that no correction can be made. In view of the objection raised by the Attorney General, and by authority of the foregoing, the appeal should be dismissed, and the judgment of the district court of Murray county should be affirmed.

PER CURIAM. Adopted in whole.

(36 Okl. 783)

WALL v. LINDSEY, County Treasurer.
(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 11, 1913.)

Commissioners' Opinion, Division No. 1. Error from District Court, Murray County; R. McMillan, Judge.

Action by V. C. Wall against J. C. Lindsey, County Treasurer. Judgment for defendant, and plaintiff brings error. Affirmed.

Emanuel & Broadbent, of Sulphur, and Cottingham & Bledsoe, of Oklahoma City, for plaintiff in error. Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for defendant in error.

ROBERTSON, C. The questions raised by the record in this case are identical with those raised in *J. E. Bailey v. J. C. Lindsey*, County Treasurer, 130 Pac. 279, decided this term, not yet officially reported. On the authority of that case, the appeal should be dismissed, and the judgment of the district court of Murray county should be affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 434)

ST. LOUIS CARBONATING & MFG. CO. v. LOOKEBA STATE BANK.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 171*)—COLLECTION—DUTIES OF BANK.

It is the duty of a bank, which receives commercial paper for collection or other service in connection therewith, to do all reasonable acts necessary to secure its payment and secure the liability thereon of the parties thereto, and if it fails in this duty, and thereby causes loss to its principal, it becomes liable for such loss.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-618; Dec. Dig. § 171.*]

2. SALES (§ 202*)—TRANSFER OF TITLE—BILL OF LADING.

Where a merchant draws a draft for a part of the purchase price of goods consigned to a customer with notes and mortgage to be executed by him for the balance, and transmits the same with bill of lading attached to a bank with instructions to collect the draft and have notes and mortgage executed before delivering the bill of lading, this will be held sufficient evidence of consignor's intention to reserve the title and right of possession until the draft is paid and the papers executed.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

3. BANKS AND BANKING (§ 175*)—COLLECTIONS—NEGLIGENCE—MEASURE OF DAMAGES.

The measure of damages which a principal is entitled to recover of a collecting bank which has been negligent is the actual loss which he has suffered, which prima facie is the amount of the claim which has been placed with said bank for collection if there is a reasonable probability that the entire debt would have been collected except for the bank's negligence, and the burden is on the defendant to reduce it.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 634-652; Dec. Dig. § 175.*]

Error from Caddo County Court; B. F. Holding, Judge.

Action by the St. Louis Carbonating & Manufacturing Company against the Lookaba State Bank. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Pruett & Livesay, of Anadarko, and Gardner & Pickett, for plaintiff in error. McKnight & Heskett, of Anadarko, for defendant in error.

DUNN, J. This case presents error from the county court of Caddo county. On February 18, 1910, plaintiff in error as plaintiff filed its petition in the said court against the defendant, in which it was alleged that it was a corporation organized under the laws of the state of Missouri and located in the city of St. Louis in said state; that on the 17th day of March, 1909, plaintiff forwarded by mail to the defendant a certain bill of lading from the plaintiff as consignor to Wade & Hadley, of Lookaba, Okl., as consignee, said bill of lading calling for a soda fountain and supplies, a sight draft on said Wade & Hadley and in favor of plaintiff, in the sum of \$50, and 20 notes for \$10 each made payable to plaintiff to be signed by said Wade & Hadley as makers, and also one chattel mortgage upon the merchandise so consigned. Accompanying the notes, chattel mortgage, and bill of lading, was a letter to the said Lookaba State Bank, as follows: "We are sending you herewith sight draft for \$50.00, twenty notes for \$10.00 each, and chattel mortgage securing the payment of notes. We will ask you to have these notes and mortgage signed by Wade & Hadley of your town. We will also ask you to collect the inclosed draft for \$50.00 from them, and after same has been done we will ask you to surrender bill of lading, which is also inclosed herewith. We will then ask you to kindly have the mortgage properly recorded and return same to us with all notes and proceeds of sight draft, less your fee for your services in the matter."

Plaintiff alleges that the instructions given the said bank in the foregoing letter were not followed, but that, contrary thereto, defendant did not collect said sight draft from the said Wade & Hadley and did not have the said Wade & Hadley execute and deliver

the notes and mortgage, and delivered said bill of lading to Wade & Hadley without first collecting the said \$50 and without securing the proper execution of the notes and mortgage; that, upon the delivery of the said bill of lading to Wade & Hadley by the defendant, the said Wade & Hadley secured the soda fountain and supplies and appropriated the same to their own use and benefit. Plaintiff alleges that, by reason of said negligent and wrongful delivery of the said bill of lading, it had been damaged in the sum of \$250, for which sum it prays judgment with interest from April 1, 1909, and for costs. Defendant answered by general denial, and the cause came on for trial before the court without a jury. Plaintiff established the averments of its petition by the deposition of its president, to which defendant filed a demurrer, which was by the court sustained, and the cause has been lodged in this court for review.

[1] The question presented is whether the bank, acting in the capacity of agent for the plaintiff, having violated the instructions set out in the above letter, is liable, and, if so, in what amount. We think the rule as to the liability of the bank is well stated in *Clark & Skyles on the Law of Agency*, § 402d, as follows: "It is the duty of an agent who receives negotiable paper for collection to do all acts necessary to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss." See, also, 2 *Bolles on Modern Law of Banking*, p. 572 et seq.; *Bank of Big Cabin v. English*, 27 Okl. 334, 111 Pac. 386; *Chapman v. McCrea et al.*, 63 Ind. 360; *Palmer v. Holland*, 51 N. Y. 416, 10 Am. Rep. 616; *Hoard v. Garner*, 5 N. Y. Super. Ct. 179; *Bank of Washington v. Triplett et al.*, 1 Pet. 25, 7 L. Ed. 37; *Tyson v. State Bank of Indiana*, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139; *Mound City Paint & Color Co. v. Commercial Nat. Bank*, 4 Utah, 353, 9 Pac. 709; *National Revere Bank v. Nat. Bank of Republic*, 172 N. Y. 102, 64 N. E. 799.

[2] Defendant argues that it is not made liable for the amount of the \$50 draft by delivery of the bill of lading, for the reason that defendant had no right to retain the bill of lading from Wade & Hadley in accordance with plaintiff's instructions because the goods shipped were in effect delivered to Wade & Hadley on being consigned to them. On this identical proposition the Supreme Court of South Carolina, in the case of *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261, said: "The sole question, therefore, is whether by drawing on the plaintiff with the bill of lading attached to the draft, and refusing to deliver the bill of lading without payment of the

draft, the defendant retained title and right of possession of the property. The effect of a bill of lading issued by the carrier, who is a third party on the title to the property as between the consignor and consignee, is a question of fact depending not only on the terms of the paper itself, but on the intention of the parties as expressed by their dealings with each other. 1 Benj. on Sales, §§ 568, 579, 580; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; 24 Am. & Eng. Ency. of Law (2d Ed.) 1066; *Hobart v. Littlefield*, 13 R. I. 341; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Kentucky Refining Co. v. Globe Refining Co.*, 104 Ky. 559, 47 S. W. 602 [42 L. R. A. 353, 84 Am. St. Rep. 468]; *Chandler v. Sprague*, 38 Am. Dec. 418, note; 23 Eng. Rul. Cas. 383, note.

* * * As between the vendor and purchaser the authorities leave no room for doubt, however, that even if the bill of lading provides for delivery to the consignee, yet, if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment. *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Chandler v. Sprague*, 38 Am. Dec. 419, note; *Rocheater Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Marine Bank v. Wright*, 48 N. Y. 1; *Halsey v. Warden*, 25 Kan. 128; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92." See, also, *St. Louis & S. F. R. Co. v. Allen*, 31 Okl. 248, 120 Pac. 1090, 39 L. R. A. (N. S.) 309.

[3] The defendant therefore being liable, the next consideration is the measure of damages in which it is responsible to plaintiff. From an investigation of the authorities we find that the circumstances of each particular case as a rule govern the measure of damages in cases of negligence in the collection of drafts or the matter of taking proper steps to preserve liability thereon. The damages which a principal is entitled to recover of a collecting agent who has been negligent are generally stated to be the actual loss which he has suffered which is prima facie the amount of the claim which has been placed in his hands for collection, if there is a reasonable probability that the entire debt would have been collected but for the agent's negligence. 1 *Clark & Skyles, Law of Agency*, § 402g; 2 *Bolles on the Modern Law of Banking*, pp. 572, 573; 3 *Sedgwick on Damages*, § 819; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555. And as was said by the Supreme Court of Nebraska, in the case of *Dern et al. v. Kellogg et al.*, 54 Neb. 560, 585, 74 N. W. 844, 846: "It is only necessary to show a reasonable probability that with due care the collection would have resulted. The burden

then rests on the defendant to show that there was no damage." Under the circumstances of this case, the burden is upon the defendant to show that there was no damage, or that the damage was less than the full amount of the note or that the damage was only nominal. *Clark & Skyles on the Law of Agency*, § 402g; *Bolles on Banking*, pp. 572, 573; *Dern et al. v. Kellogg et al.*, supra; *Allen v. Suydam*, supra.

The judgment of the trial court in sustaining the demurrer to the evidence is, accordingly, reversed, and the cause remanded, with instructions to grant a new trial.

(35 Okl. 503)

SEXSMITH v. CHAPPELL

(Supreme Court of Oklahoma. Feb. 4, 1913.)

(Syllabus by the Court.)

1. CLERKS OF COURTS (§ 1*)—COUNTY OFFICERS.

The office of clerk of the superior court is a county office.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. CLERKS OF COURTS (§ 7*)—TERMS—REPEAL OF STATUTE.

Section 8 of the Act of March 6, 1909 (Sess. Laws 1909, c. 14, art. 7; chapter 24, art. 4, § 1972, Compiled Laws of 1909), in so far as it affects the term of the clerk of the superior court, is repealed by section 19 of the act of March 19, 1910 (chapter 69, Session Laws 1910, pp. 129, 137).

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 21-25; Dec. Dig. § 7.*]

3. CLERKS OF COURTS (§ 3*)—ELECTION.

The laws in force in this state at the time of the holding of the election for county officers in November, 1912, provide for the election of the clerk of the superior court.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

Error from District Court, Garfield County; James B. Cullison, Judge.

Action by M. T. Sexsmith against H. E. Chappell. From the judgment, Sexsmith brings error. Reversed and remanded.

Parker & Simons, of Enid, for plaintiff in error. McKeever & Walker and Robberts, Curran & Otjen, all of Enid, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to have reviewed the judgment of the trial court adjudicating the title to the office of clerk of the superior court of Garfield county.

The same question involved in this case has this day been determined by this court, in *Beaty v. State of Oklahoma ex rel. Harold Lee* (No. 4,718) 130 Pac. —, in favor of the contention of defendant in error.

The case is reversed and remanded, with instructions to grant a new trial, and to award the possession of the office of clerk of the superior court of Garfield county to the plaintiff in error. All the Justices concur.

(as Okl. 375)

KNIGHT et al. v. STATE ex rel. HENRY, County Atty.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

BAIL (§ 75*)—RECOGNIZANCES—CRIMINAL PROSECUTION.

A recognizance, conditioned that the party charged shall appear and answer to a certain charge that may be preferred against him at a named term of the court, and to do and receive what shall be enjoined by said court upon him, and not depart from the said court without leave, may be extended to any subsequent term of said court by a continuance of said cause to such term.

(a) The party charged failing to appear at such subsequent term, such recognizance may be duly forfeited and enforced against the sureties thereon.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 50, 55, 90-108; Dec. Dig. § 75.*]

Error from Greer County Court; Jarrett Todd, Judge.

Action by the State, on the relation of H. D. Henry, county attorney, against T. H. Knight and others. Judgment for relator, and defendants bring error. Affirmed.

B. F. Van Dyke, of Granite, for plaintiffs in error. H. D. Henry, County Atty., of Mangum, for defendant in error.

WILLIAMS, J. On September 6, 1910, the defendant in error sued the plaintiffs in error, T. H. Knight, T. W. Baker, and M. D. Sultor, on a certain bail recognizance in favor of the state of Oklahoma.

Section 7112, Comp. Laws of Oklahoma, 1909 (section 5941, Stats. of Oklahoma 1890), is as follows: "If, without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond or undertaking, either for hearing, arraignment, trial or judgment, or upon any other occasion when his presence in court or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the recognizance, bond or undertaking of bail, or the money deposited instead of bail, as the case may be, is and shall be thereupon declared forfeited. * * *

The language of the recognizance is that the principal "shall personally be and appear before the * * * county court * * * at present term, held at Mangum, * * * to answer a charge of transporting intoxicating liquors * * * and to do and receive what shall be enjoined by said court upon him, and shall not depart the said court without leave." This recognizance, executed pursuant to said provision of the statute, was a "continuing bond."

In *Glasgow et al. v. State*, 41 Kan. 333, 21 Pac. 253, paragraph 2 of the syllabus is as follows: "Section 53, c. 82, Comp. Laws 1885,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

authorizes an examining magistrate to require a defendant in a criminal action to enter into a recognizance for his appearance at the court where such defendant is to be tried; and, when the defendant gives one, conditioned to appear at such court to answer the charge against him, and not depart therefrom without leave, it is valid, and within the provisions of said section." In the opinion it is said: "The contention of the defendants is that the statute only authorized the examining magistrate to take bail for the appearance of the defendant, and because the bond provides, not only for the appearance, but that he is to answer the charge made against him, and not to depart from the court without leave, it is more onerous than the provisions of the statute, and for that reason is a nullity, and cannot support the judgment based upon it. They also claim that the conditions of such a bond as would have been authorized by statute were fully complied with by the defendant McGuire; that he did appear at the term of the court, and therefore his sureties on the bond were released from all liability. We think when a party is required to appear at the district court, after a preliminary examination has been had or waived, that the use of the word 'appear' implies that he is to appear for the purposes of a trial of the charges made against him. * * *

In *Ellison v. State*, 8 Ala. 273, it is said: "When the recognizance is inspected, we find that the recognizers bound themselves that David A. Armstrong should make his personal appearance at the fall term of the circuit court of Dallas, for the year 1843, to answer to a charge of the state, for an assault and battery, upon one David Armstrong, and, further, to do what should be required by that court. * * * At that term of the court, an indictment for that offense was returned by the grand jury, but no proceedings on the recognizance, or against the recognizers, was had until the spring term, 1844, when the principal being called and not appearing, a judgment nisi was rendered against each of the parties to the recognizance for the sum of \$500. It is now insisted that the recognizers, not having been called to produce their principal at the fall term, 1843, were virtually discharged from all liability to do so at a subsequent term. It is said by Hawkins that: 'If persons be bound by recognizance for the appearance of one in the King's Bench, on the first day of the term, and that he shall not depart till he shall be discharged by the court, and afterwards a nolle prosequi, as to the particular charge upon motion is entered, and another is exhibited on which the defendant is convicted and refuses to appear in court after personal notice, the recognizance is forfeited; for, being express that the party shall not depart till he be discharged by the court, it

cannot be satisfied unless he is forthcoming and ready to answer to any other information exhibited, while he continues not discharged, as much so as to that which he was particularly bound to answer to.' 2 Hawk. 173. Our practice, in misdemeanor cases, is supposed to differ from that pursued in England, inasmuch as the trial is always had when the defendant is present, and he is considered in strict custody as soon as placed on trial; but, even with this difference in practice, the quotation from Hawkins is conclusive to show that the recognizers are bound to produce their principal to answer the charge, and that they are not released by the omission to call out the recognizance at the term at which the indictment is found. No injury can ever arise to the recognizers, as they are entitled at any time to surrender their principal in discharge of the recognizance. Clay's Dig. 450, par. 34. Whether the recognizance would continue in force, without some special order, when no indictment was returned at the proper term is a question not involved in this case. * * *

Our statute also provides that a party admitted to bail may be arrested by his bailors at any time before they are finally discharged, at any place within the state, or, by a written authority indorsed on a certified copy of the recognizance, bond, or undertaking, may empower any officer or person of suitable age and discretion to do so, and he may be surrendered and delivered to the proper sheriff or other officer, before any court, judge, or magistrate having the proper jurisdiction in the case, and at the request of such bail the court, judge, or magistrate shall recommit the party so arrested to the custody of the sheriff or other officer, and indorse on the recognizance, bond, or undertaking, or certified copy thereof, after notice to the district (county) attorney, and, if no cause to the contrary appear, the discharge and exoneration of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law. Section 7111 of Compiled Laws of Oklahoma, 1909.

The following authorities support the rule announced in the Alabama case: *Gentry v. State*, 22 Ark. 544; *Moore v. State*, 28 Ark. 480; *Price et al. v. State*, 42 Ark. 178; *Hortsell v. State*, 45 Ark. 59; *Norfolk et al. v. People*, 43 Ill. 9; *Stokes et al. v. People*, 63 Ill. 489; *Gallagher et al. v. People*, 88 Ill. 335; *Rubush v. State*, 112 Ind. 107, 13 N. E. 877; *State v. Brown et al.*, 16 Iowa, 314; *State v. Ryan et al.*, 23 Iowa, 406; *Commonwealth v. Branch*, 64 Ky. (1 Bush) 50; *Ramsey, etc., v. Commonwealth*, 83 Ky. 534; *Id.*, 7 Ky. Law Rep. 704; *State v. Plazencia*, 6 Rob. (La.) 417; *People v. Hanaw*, 106 Mich. 421, 64 N. W. 328.

The judgment of the lower court is affirmed. All the Justices concur.

(36 Okl. 771)

KEPLEY et al. v. DINGMAN et al.(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 11, 1913.)*(Syllabus by the Court.)***1. CONTINUANCE (§ 16*)—GROUNDS.**

On objection being made to the introduction of depositions because they had not been on file one clear day before the trial, it is not error for the court, upon its own motion, to continue the cause until the following day.

[Ed. Note.—For other cases, see Continuation, Cent. Dig. §§ 38, 39; Dec. Dig. § 16.*]

2. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—REMARKS OF COURT.

On such ruling being made, the court remarked, "You are not going to get that advantage; I can tell you that." While this remark was improper, the cause will not be reversed on that account, unless we can see that it resulted in material prejudice to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; W. L. Barnum, Judge.

Action by James K. Kempley and Nora Kempley against R. B. Dingman and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

McDougal, Lattimore & Lytle, of Sapulpa, for plaintiffs in error. Mann & Jackson, of Sapulpa, for defendants in error.

AMES, C. The plaintiffs and the defendants both claimed the land in controversy, through Dora Grayson, a Creek Indian. The defendants' title originated in a deed executed in February, 1906, while the plaintiffs' title originated in a deed executed in December, 1907, and the issue involved and tried was whether or not the common grantor was an infant or adult at the time of the execution of the first deed. The issue of fact was submitted to the jury under instructions to which no complaint is made.

[1, 2] The principal argument of the plaintiff arose out of the ruling of the court upon the admission of certain depositions taken by the defendant. These depositions were filed in the cause on May 2d. The trial commenced on May 3d. When the depositions were offered by the defendant, the plaintiff objected, on the ground that they had not been on file one clear day, as required by the statute. Comp. Laws 1909, § 5881. Upon this objection being made the court, of its own motion, continued the cause until the following day, remarking, "You are not going to get that advantage, I can tell you that." On the next day the trial was resumed and the depositions were admitted; the plaintiff again objecting to their admission. We do not think there was reversible error in these proceedings. To so hold would substitute form for substance. The remark of the court should not have

been made, but we cannot say that it resulted in material prejudice to the plaintiff. The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 212)

SANDERS et al. v. HART.

(Supreme Court of Oklahoma. Dec. 3, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§§ 336, 338*)—PARTIES—DISMISSAL.**

All necessary parties to a proceeding in error must be brought into the appellate proceeding by summons in error or general appearance within the time allowed by statute for commencing such proceeding.

(a) When not so done, this court has not jurisdiction of said action.

(b) After the expiration of the time for commencing such proceeding, a necessary party having been omitted, jurisdiction cannot be conferred by the voluntary entering of the appearance of such necessary party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1876, 1879-1882, 3057; Dec. Dig. §§ 336, 338.*]

Error from Garvin County Court; W. B. M. Mitchell, Judge.

Action by W. T. Hart against Joe Sanders and others. Judgment for plaintiff, and defendants bring error. Dismissed.

Patchell & Henderson and Geo. I. Jordan, all of Pauls Valley, for plaintiffs in error. Blanton & Andrews, of Pauls Valley, for defendant in error.

WILLIAMS, J. The defendant in error, as plaintiff, sued the plaintiffs in error, Joe Sanders, Charley West, C. H. Blankenship, Will Ingram, and J. W. Weatherford, as defendants, in the county court of Garvin county. The cause was tried to a jury, and a verdict rendered in favor of plaintiff against defendants on January 21, 1910. On January 24, 1910, a motion for a new trial was filed. The same was continued from time to time until July 1, 1910, when the same was overruled. On January 31, 1911, this proceeding was commenced in this court by filing a petition in error, with case-made attached. In due time defendant in error moved that this proceeding be dismissed on the ground that the judgment obtained was joint against all of said defendants, and that said defendant J. W. Weatherford had not been made a party hereto, either as plaintiff or defendant in error. On December 5, 1911, counsel for plaintiff in error, in response to the motion to dismiss, stated: "That the omission of the name of J. W. Weatherford, as a party plaintiff in error, was an accidental oversight in counsel for plaintiffs in error in writing the petition in error, and unintentional omission; that said Weatherford is a party in interest; that he signed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the supersedeas bond for this appeal, and hereby enters his appearance as one of the plaintiffs in error in this cause, and agrees to be bound by the decision of the court herein."

All necessary parties to a proceeding in error must be brought into the appellate proceedings, either by summons in error or general appearance, within the time allowed by statute for commencing such proceeding; and, when not so done, this court has not jurisdiction of said action. *John v. Paullin et al.*, 24 Okl. 636, 104 Pac. 365; *Haynes et al. v. Smith*, 29 Okl. 703, 119 Pac. 246; *American National Bank v. Mergenthaler Linotype Co.*, 31 Okl. 533, 122 Pac. 507.

The appeal must be dismissed. All the Justices concur.

(38 Okl. 34)

STATE ex rel. CORLEY v. PITCHFORD,
District Judge.

(Supreme Court of Oklahoma. April 15,
1913.)

Application by the State, on the relation of W. A. Corley, for writ of mandamus against John H. Pitchford, Judge of the District Court of Adair County. Writ denied.

S. M. Rutherford, of Muskogee, W. L. Curtis, of Sallisaw, W. P. Harris, of Stilwell, and Scothorn, Caldwell & McRill, of Oklahoma City, for relator. W. W. Hastings, of Tahlequah, and P. Helton, of Stilwell, for respondent.

PER CURIAM. This case is an original action in this court, brought by the state of Oklahoma, on the relation of W. A. Corley against John H. Pitchford. The relator is the county judge of Adair county, and the respondent is the judge of the district court of the judicial district within which such county is located. The petition for the writ avers the election, qualification, and entrance upon the duties of his office of the relator, and avers that on the 18th day of March, 1913, the grand jury for that term of court presented an accusation against him, charging him with certain misconduct in office, during a term which ended January 6, 1913; that on the presentation of the said accusation the said respondent, as judge of the said district court, received it and ordered it filed, and set a hearing thereon for March 27, 1913; that on the 20th day of March, 1913, the relator filed with the clerk of the district court an application for a change of judge on the ground of bias and prejudice; that, notwithstanding the said bias and prejudice, the said respondent refused, and still refuses, to certify to his disqualification; and prayed that a writ of mandamus issue demanding him to so certi-

fy. On April 1, 1913, the said respondent filed his answer to the alternative writ issued in accordance with the prayer of the petition, on which day in open court a hearing was had upon the issues of fact presented. No oral testimony was taken, but by agreement a large number of affidavits by both parties have been filed.

The facts relied upon by the relator to establish the bias and prejudice of the respondent appear to be in the main substantially as follows: That in December, 1912, he granted a mandamus compelling relator to disqualify in a certain case then pending before him as judge of the county court of the said county. That the respondent, as such judge, at that time and at all times since then, has always consulted with W. W. Hastings, whose name has been entered of record as one of the prosecutors in this case. That the said W. W. Hastings is an avowed enemy of affiant. That respondent knew he had been before the grand jury which presented the accusation above referred to. That in a hearing upon an original accusation presented against affiant by the board of county commissioners of the said county, respondent granted several prayers requested by the said W. W. Hastings and his associates, none of whom were officials of the said county. That he suspended relator from his office, and enjoined him from qualifying as county judge elect for his term beginning January 6, 1913. That on the organization of the grand jury which presented the accusation he set aside the regularly qualified county attorney and appointed R. Y. Nance to serve as special prosecutor. That Nance was a witness against relator, and with whom was associated the names of W. W. Hastings and C. F. Bliss as special prosecutors, all of whom have remarked in public that relator was who they were after. That on the return of the said accusation respondent, without notice to relator or his attorneys, entered an order suspending him from office pending final hearing of the said accusation, denying himself or his attorneys two hours' time to consider the accusation. That respondent had stated in a certain barber shop, in substance, to wit: "Woe unto the minor officers, we have got them where we want them," or, "Don't sigh, little officers, don't sigh; you'll get what's coming to you, by and by," in which he had reference to this relator. And on another occasion he remarked, "I can't go back on W. W. Hastings and the Wylies, for they have put me where I am." That in December, 1912, during that term of the district court, respondent appointed three jury commissioners, two of whom were disqualified to act because of cases pending, and the third was an enemy of relator, and hence was disqualified to act as such commissioner. That he is now and has been for some time after the office occupied by relator, and that all

of these said matters were known to said respondent at the time he appointed the commissioners. There are some further averments concerning the enmity of all of the parties above named and some others, and allegations of social friendship between the said respondent and the said attorneys, which we do not deem necessary to set out at length, as the foregoing sets forth substantially the material facts upon which the relator relies to establish the bias and prejudice of the respondent.

In his answer, after admitting the formal averments, respondent denies that he has any bias or prejudice, or any personal ill feeling of any kind or character, against W. A. Corley or against the attorneys representing him, or that he has made any statements of any kind or character indicating that he had any such bias or prejudice, and denies that he cannot preside in the said case and give him a fair and impartial trial. He granted a writ of mandamus in December, 1912, compelling relator to disqualify in a certain case then pending before him; but he denies that the said writ was granted because of the alleged bias and prejudice of the said relator, but that the said relator was a stockholder in the Southern Surety Company, which was surety upon the bond of the administrator in the said case, and hence was interested in the determination of the proceedings. Respondent denies that he has been in consultation with W. W. Hastings or with any other attorney with reference to rulings or orders made. That the allegation concerning his social and personal relations with attorneys representing said relator to show bias or prejudice is immaterial. Respondent states that he was unaware that R. Y. Nance was a witness against the said W. A. Corley at any time. He admits that a petition was presented to him in chambers at Tahlequah, after notice, for the temporary suspension of the said W. A. Corley from the office of county judge, and to enjoin him from assuming office upon a new term for which he had been elected, on January 4, 1913, and that he issued an order temporarily suspending him; that said order was granted upon the petition of the duly elected, qualified, and acting members of the board of county commissioners, which petition was filed as directed by a resolution of said board; that said resolution directed the county attorney to associate with him the firm of Arnold & Chase and Pete Helton to represent them in said proceedings, and that the county attorney refused to obey the instructions and declined to prosecute the charges preferred in said proceedings. Respondent admits that he appointed R. Y. Nance as special attorney to wait upon the said grand jury at the opening of the March, 1913, term of court in and for Adair county, and states that the conditions existing made it

imperative to call a grand jury; that complaint was general throughout the county that the full-blood heirs of deceased allottees were not being protected, and respondent was aware that the outgoing county attorney, W. A. Scofield, had declined to obey the instructions of the board of county commissioners in the matter of presenting the charges above set out; that the present county attorney, W. A. Woodruff, had also declined to act in the matter; that the said Woodruff had attempted to appoint W. A. Scofield as his assistant, which said recommendation was not confirmed, but rejected by the board of county commissioners; that he was informed that the said W. A. Woodruff and the said W. A. Scofield would perhaps be investigated by said grand jury, and in order to have an absolutely fair and impartial and thorough investigation conducted respondent appointed R. Y. Nance as special attorney to wait upon the said grand jury. Respondent further states that no objection was raised to the appointment of R. Y. Nance by either W. A. Woodruff, W. A. Scofield, or the relator, W. A. Corley, on the ground that he was connected with said matters or would be a material witness; that the grand jury appeared in open court and asked for special instructions with reference to the duties of the said R. Y. Nance, stating that W. A. Woodruff had appeared before the grand jury and protested against the said Nance acting in the capacity of special attorney before said grand jury, whereupon the court specially instructed the grand jury that the said R. Y. Nance was to appear before them in all matters and things wherein the county officials of Adair county and their associates were to be investigated, and that the said W. A. Woodruff would appear in all other matters. Respondent states, further, that he is informed the said R. Y. Nance conducted said investigation honestly and without prejudice toward the said W. A. Corley or any one else; that after presentment was returned the said W. A. Woodruff admitted his disqualification to act in the prosecution of said case, and respondent appointed R. Y. Nance to act as special attorney to prosecute said case, at whose request respondent ordered the appearance of said C. F. Bliss and W. W. Hastings to be entered of record.

Concerning the alleged remarks in the barber shop, respondent states the facts to be that some parties were in the barber shop with him discussing newspaper accounts of the investigations by the state Legislature, and no mention was made of the said relator, or of any local officer, or of the grand jury then in session, when respondent in that connection, and referring only to the investigations by the Legislature, quoted from a Western Oklahoma newspaper: "Oh! you little officers, don't you cry;

you will be investigated by and by." In support of this statement is filed an affidavit of the proprietor of the barber shop. Respondent denies, further, that he ever stated at any place on any occasion, "I can't go back on W. W. Hastings and the Wylies, for they have put me where I am," and that he has counseled or advised with the said W. W. Hastings or those associated with him in the prosecution of the said relator, and denies that he has ever by word or act indicated in any way any bias or prejudice against the said relator, or that he had any desire to deny him his constitutional rights.

In reference to the allegation relative to the appointment of the jury commissioners at the December, 1912, term of the district court of Adair county, respondent states that he was not informed that one of the commissioners was an enemy of the said W. A. Corley, and that at the time the said commissioner was sworn and instructed no protest was entered against the appointment of either of them; that neither of the commissioners had a case pending in the courts of Adair county; that he had no knowledge that Frank Howard, Sr., one of the jury commissioners appointed by respondent, was an applicant for the appointment to the office of county judge in the event said W. A. Corley was removed from office, and respondent denies that said commission was appointed for the purpose of placing names in the jury box who had any bias or prejudice or were unfriendly to said W. A. Corley or any other person; that the men composing the present grand jury are men of highest integrity, and are discharging their duties faithfully, fairly, and impartially.

Accompanying as a part of the case of both relator and respondent are their own and a large number of affidavits purporting to corroborate the same. All of the evidence contained in the affidavits for the relator is specifically denied by the affidavit of the respondent and by the affidavits of other parties who, it is asserted, were acquainted with the facts. If we assume that the averments of fact set forth in relator's petition, independent of the conclusions which are drawn therefrom, are, standing alone, sufficient to authorize the issuance of the peremptory writ, still we must hold that on the showing made by relator, upon whom is cast the burden to establish his case by a preponderance of the evidence, he has not discharged this burden. The preponderance of the evidence is against him, and, while we entertain no doubt that relator believes and is confident that the court, grand jurors, and other officers who are proceeding against him, both civilly and criminally, are prejudiced against him, in view of the evidence offered by Judge Pitchford, we must find that relator has failed to establish his averments of bias and prej-

udice, and the writ prayed for is denied, the alternative writ quashed, and the proceeding dismissed.

(9 Okl. Cr. 718)

BASHAM v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 5, 1913.)

Appeal from District Court, Oklahoma County; Geo. W. Clark, Judge.

T. J. Basham was convicted of obtaining property under false pretenses, and appeals. Dismissed.

J. Q. A. Harrod, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Claud Davenport, for the State.

PER CURIAM. Plaintiff in error was convicted in the district court of Oklahoma county on an information which charged the crime of obtaining property under false pretenses from one A. M. Debolt, in said county, on or about September 1, 1911, and was in accordance with the verdict of the jury sentenced to pay a fine of \$1,820, and in default of the payment of said fine to be confined in the county jail until the same is satisfied as by law provided. From this judgment an appeal was attempted to be taken by case-made.

January 13, 1913, the Attorney General filed a motion to dismiss the appeal for the following reasons: "Because the record discloses that this is an attempted appeal, by case-made alone, from a judgment of conviction for a felony rendered in the district court of Oklahoma county on the 5th day of July, 1912, at which time the court granted 30 days to plaintiff to prepare and serve case-made on the county attorney. Thereafter, to wit, on the 3d day of August, 1912, the trial court granted 30 days additional to the time theretofore granted in which to prepare and serve said case-made. Thereafter, to wit, on September 3, 1912, the court granted 30 days additional to the time theretofore granted in which to prepare and serve said case-made, making a total of 90 days from the 5th day of July, 1912, in which to prepare and serve said case; said 90 days expiring on and with the 3d day of October, 1912. Thereafter, to wit on the 4th day of October, 1912, the trial court attempted to make another and additional order extending time to prepare and serve such case, as also attempted orders of October 31, 1912, and November 30, 1912; but such orders were wholly void, because the jurisdiction of the court to make any order extending time to serve case after the order of September 3, 1912, expired on and with October 3, 1912. Said case-made was not

served upon the county attorney until the 17th day of December, 1912."

From an examination of the record we find that it does not contain a certificate of the clerk of the district court, certifying to the record proper. Upon a hearing this day had on the motion of the Attorney General to require good and sufficient appeal bond, the court finds that no sufficient bond has been given in said cause, and further finds that said case-made was not served within the time properly allowed by the court, and that the motion to dismiss should be sustained.

The purported appeal is therefore dismissed, and the cause remanded to the district court of Oklahoma county, with direction to enforce its judgment and sentence therein.

(87 Okl. 1.)

BANK OF AMES v. LEHR et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 60*)—EXECUTION—ATTESTATION.

Under section 3583, Wilson's Rev. & Ann. St. 1903, in force prior to the taking effect of section 4427, Comp. Laws 1909, it was required that a mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto; and no further proof of acknowledgment was required to admit it to be filed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 115; Dec. Dig. § 60.*]

2. CHATTEL MORTGAGES (§ 60*)—ATTESTATION—INTEREST OF WITNESSES.

The statute in such cases made no express limitation or prohibition as to any class of persons who could act as witnesses. It was silent as to the interest of the witnesses, and, when signed in the manner prescribed, was entitled to be admitted to and filed in the office of the register of deeds. *Farmers' State Bank v. Spencer*, 12 Okl. 597, 73 Pac. 297.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 115; Dec. Dig. § 60.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Major County; M. C. Garber, judge.

Creditor's bill by the Bank of Ames against Henry Lehr and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Rush & Steen, of Enid, for plaintiff in error. W. O. Woolman, of Watonga, for defendants in error.

SHARP, C. It is insisted by plaintiff in error that the chattel mortgages executed by Henry Lehr to the Citizens' State Bank of Okeene, dated, respectively, January 11, 1908, and May 2, 1908, are void as to the plaintiff in error, who was a judgment creditor of the mortgagor at the time of the execution of

said mortgages, because of the fact that one or both of the subscribing witnesses to said mortgages were officers and stockholders of the mortgagee bank; hence were interested parties and disqualified in law as witnesses. It is agreed in the stipulations that T. H. Grennell, one of the subscribing witnesses to each of the mortgages in question, was both an officer and stockholder of the Citizens' State Bank at the time said mortgages were executed. Said mortgages each had two subscribing witnesses; the first, in addition to the name of T. H. Grennell, was signed and executed in the presence of O. G. Graalman. The testimony as to the interest of these witnesses is not clear; but, in view of our conclusions, it is not material.

[1] It will be observed that both mortgages were executed prior to the taking effect of the act of May 22, 1908 (Sess. Law 1907-08, p. 580; Comp. Laws 1909, § 4427), which expressly provides that a chattel mortgage may be either attested by acknowledgment before any person authorized to take acknowledgments of deeds, or it may be signed and validated by the signature of two persons not interested therein; and that mortgages so executed shall be admitted to record. The law in force at the time that the mortgages attacked were executed was section 3583, Wilson's Rev. & Ann. St. 1903, which reads: "A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed."

[2] In *Watts v. First Nat. Bank*, 8 Okl. 645, 58 Pac. 782, this provision of the statute was construed by the territorial Supreme Court, where it was said: "The statute makes no express limitation or prohibition as to any class or kind of persons who shall act as witnesses. It is silent as to the interest or lack of interest of the witnesses; and the only requisite expressly required is that it shall be signed by two persons as witnesses, and, when this is done, it shall be admitted to filing in the office of the register of deeds."

The question was next before this court in *Farmers' State Bank et al. v. Spencer*, 12 Okl. 597, 73 Pac. 297. There it was shown that one Helton was a stockholder in the Farmers' State Bank, the holder of the chattel mortgage, and, being such stockholder, was a party in interest; and it was claimed that his interest as a stockholder disqualified him from acting in the capacity of a witness to the mortgage. The former decision of the court in *Watts v. First Nat. Bank*, supra, was adhered to; the court observing: "Now this seems to be the only requirement [referring to the statute] and the only limitation placed upon the subject by the Legislature; and it does not seem to us that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

court should add to, detract from, or require other or different qualifications, on the part of such witnesses, than such as the Legislature in its wisdom has seen fit to prescribe." The action of the trial court in excluding the mortgage from evidence, for the sole reason that it was witnessed by a stockholder of the bank, was held to constitute reversible error. In *Kee v. Ewing et al.*, 17 Okl. 410, 87 Pac. 297, the court had under consideration a kindred statute. Section 888, *Wilson's Rev. & Ann. St. 1903* (section 1195, *Comp. Laws 1909*). There two of the mortgages were acknowledged before a notary public, who was at the time the cashier of the bank. After referring to the case of *Watts v. First Nat. Bank*, supra, it was held that, there being nothing upon the face of the instrument which disclosed any interest therein by any third person, the mortgage was entitled to record in the office of the register of deeds, notwithstanding the fact that the mortgagee was president and the notary public taking the acknowledgment the cashier of and a stockholder in the bank at the time; and that said mortgage, being recorded, operated as notice. In *Ardmore Nat. Bank v. Briggs Machinery & Supply Co. et al.*, 20 Okl. 427, 94 Pac. 533, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, the case was one arising in the Southern district of the Indian Territory. It was there held by this court that the acknowledgment of a deed of trust, executed by a corporation grantor to secure the payment of certain promissory notes, was a ministerial act; that where such an instrument was acknowledged by a notary public, who was at the time a director and treasurer of the grantor corporation, and also indebted for unpaid subscriptions to its stock, which fact was known to the grantor, but there was nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust was entitled to registration, and the registry thereof was notice to subsequent purchasers, incumbrancers, and lienors.

The rule announced and followed by the territorial Supreme Court does not commend itself to the writer of this opinion, and, we believe, is contrary to the weight of authority; but, having been followed by that court for more than 18 years, we hesitate to announce a contrary rule, particularly in view of the fact that the objection has been met by the Legislature, and the mischiefs and abuses to which continued recognition of the rule might lead were, by the act of May 22, 1908, supra, fully obviated.

The other errors assigned, not being argued, are deemed to have been waived. The judgment of the trial court should therefore be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 19)

YOUNG et al. v. CHAPMAN.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. EJECTMENT (§ 15*)—TITLE TO MAINTAIN—DEFENSES—UNEXPIRED LEASE.

In an action in ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, and where both parties claim title from a common source, all things else being equal, the first conveyance, although only a lease, if valid and unexpired, will entitle defendant to a judgment as against plaintiff, who claims under a deed. See the opinion for the facts.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

2. STATES (§ 9*)—TERRITORY—LEASES—VALIDITY—REGISTRATION.

Instruments executed in the Indian Territory prior to statehood, which were valid, under the laws in force in that jurisdiction, without registration, are valid, after statehood, notwithstanding noncompliance with registration laws extended over and put in force in the state by the Enabling Act and the Schedule to the Constitution. *Armstrong, Byrd & Co. v. Phillips*, 28 Okl. 808, 115 Pac. 870.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4; Dec. Dig. § 9.*]

3. VENDOR AND PURCHASER (§ 232*)—SALE BY LANDLORD—NOTICE TO PURCHASER.

Under the laws in force in the Indian Territory prior to statehood, where a tenant is in the actual, open, and exclusive possession of real estate at the time it is sold by his landlord, the purchaser is chargeable with notice of all the legal or equitable rights of the tenant therein.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Hughes County; John Caruthers, Judge.

Action by James A. Chapman against L. C. Young and John Adams. Judgment for plaintiff, and defendants bring error. Reversed.

Lewis C. Lawson, of Holdenville, for plaintiffs in error. Mann, Rogers & Harris, of Holdenville, for defendant in error.

ROBERTSON, C. This action in ejectment was commenced in the district court of Hughes county on December 20, 1909. Trial was had to a jury on November 22, 1910, resulting in a verdict by direction of the court, in favor of plaintiff and against defendants, for the possession of the land in controversy and for damages. Motion for new trial being duly presented and overruled, defendants appeal, and assign many alleged errors of the trial court, any one of which, as they contend, would be sufficient to authorize a reversal of the judgment entered in the lower court.

The first question to challenge our attention is the instruction of the court to the effect that defendant in error, Chapman, had the legal title to the land in controversy, and therefore was entitled to recover. The facts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index 130 P.—19

relative to this subject are as follows: the land sought to be recovered is part of an allotment, set apart from the general domain of the Creek Nation, to the heirs of Ida McCosar, a full-blood Creek Indian, who died on or about the 16th day of July, 1900, leaving surviving her father, Bunnie McCosar, Elliott McCosar, a brother, and Kate Gooden, née McCosar, a sister, all full-blood Creek Indians. Bunnie McCosar, the father, was the guardian of Kate and Elliott; the mother having died before Ida.

On August 25, 1905, Bunnie McCosar, the father and guardian, leased the land in question for a period of five years, to J. J. Armstrong, who, for a valuable consideration, sold and transferred the same to plaintiff in error L. C. Young, who sublet the same to John Adams, the other plaintiff in error, and who held and occupied said land at the time this action was instituted. It appears that on July 10, 1907, Bunnie McCosar and wife attempted to convey said lands to the Hughes County Land Company; that on September 25, 1907, they also attempted to convey the same to the Sherman Land Company; that on September 28, 1907, Kate Gooden attempted to convey the same to the Sherman Land Company; that on December 17, 1909, the said Sherman Land Company attempted to convey the same to Chapman, the defendant in error; that on October 5, 1909, Bunnie McCosar and wife, Kate Gooden and husband, and Elliott McCosar, joined in another deed to Chapman, which last-named deed was approved by the county court of Hughes county on the same date.

[1] Counsel for plaintiff in error, in an elaborate brief, insists that we pass upon the question of the title to the land in controversy. This is wholly unnecessary except in so far as the decision of this case is concerned. The record before us does not contain sufficient necessary facts to warrant this court in attempting to pass upon the whole title, and the character of the estate claimed by plaintiffs in error is not such as will permit them to insist upon such determination. There can be no dispute, however, but that Bunnie McCosar and his two children, Elliott McCosar and Kate Gooden, née McCosar, were the owners of the land in controversy under the facts of this case, at the time they executed the lease to Armstrong, and whether they took by inheritance or purchase, or whether the land constituted an ancestral estate, or whether it was a new acquisition, need not, of necessity, concern us at this time. Under the doctrine first announced in this court in *Hancock v. Mutual Trust Co.*, 24 Okl. 391, 103 Pac. 566, and *Hoteyabi et al. v. Vaughn et al.*, 32 Okl. 307, 124 Pac. 63, and later by the Supreme Court of the United States in *Mullen et al. v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, the fee to the land in question, at the death of Ida McCosar, passed di-

rectly to, and vested in, her heirs, and the same became immediately alienable; the Act of Congress of April 21, 1904, c. 1402, 33 Stat. L. p. 204, having removed all restrictions thereon. *Godfrey v. Iowa Land & Trust Co.*, 21 Okl. 293, 95 Pac. 792; *Goat v. U. S.*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841; *Rentle et al. v. McCoy et al.*, 128 Pac. 244; also, *Parkinson v. Skelton*, 128 Pac. 130. The heirs of Ida McCosar took the land described under and by virtue of section 28 of the Original Creek Agreement (Act March 1, 1901, c. 676, 31 Stat. L. 863) free from restrictions. Therefore, if the heirs of Ida McCosar took said land free from restrictions, and with full power to alienate, it necessarily follows that the lease to J. J. Armstrong, executed August 25, 1905, was valid (*Groom v. Wright*, 30 Okl. 652, 121 Pac. 215), and this lease having been executed long prior to the deed, under which defendant in error claims, vested in plaintiffs in error, so far as the right of possession is concerned, a title superior to that of defendant in error. In other words, defendant in error, claiming title to said land through a deed executed subsequent to the lease, took the same subject to the rights of plaintiffs in error, who were rightfully in possession of the premises at the time of the commencement of this action. In an action in ejectment begun in the Indian Territory, prior to statehood, plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, and where both parties claim title and right of possession from a common source, all things else being equal, the first conveyance, though but a lease, if valid and unexpired, will entitle defendant to a judgment, as against plaintiff, who claims under a deed. It is contended, however, in this connection, that, the execution of the lease not having been proved, the judgment should not be reversed, having been entered for the right party. This contention cannot be sustained. The converse is true.

[2] It is also further urged that the lease was void for that it had never been recorded. Such a lease as the one under consideration, having been executed in the Indian Territory prior to statehood, was valid, and its validity was in no wise impaired by the advent of statehood, and the extension of the Oklahoma recording laws. In *Armstrong, Byrd & Co. v. Phillips*, 28 Okl. 808, 115 Pac. 870, it is said in the syllabus: "Instruments executed in the Indian Territory prior to statehood which were valid, under the laws in force in that jurisdiction, without registration, are valid after statehood, notwithstanding noncompliance with the registration laws extended over and put in force in the state by the Enabling Act and the Schedule to the Constitution." This authority sustains fully the validity of the lease as to the objection urged against it.

[3] It is next insisted by defendant in error that even though the validity of the lease be sustained, though not recorded, Chapman, the purchaser of the title, had no actual notice of plaintiffs in error's adverse claims or of their possession of the premises. In *Whitham v. Lehmer*, 22 Okl. 627, 98 Pac. 351, it is held that where a tenant is in the actual, open, and exclusive possession of real estate at the time it is sold by his landlord, the purchaser is chargeable with notice of all the legal or equitable rights of the tenant therein. See, also, *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Wade on Notice*, § 275; *Devlin on Deeds*, § 770; *Jones on Landlord & Tenant*, § 427; *Jowers v. Phelps*, Adm'r, 33 Ark. 465; *Friedlander v. Ryder et al.*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700. Thus, even though the deeds from McCosar and children to Chapman were valid and conveyed good title, yet the lease being also valid, and of prior date, Chapman would take the land subject to the tenant's legal and equitable rights, and inasmuch as the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's, this in itself would require the reversal of the judgment herein. It might be well in passing to say that there is ample evidence in the record to warrant a jury in finding that Chapman had actual notice of the possession of the premises by plaintiffs in error.

It is therefore unnecessary to pass on the other questions raised by plaintiff in error. For the various reasons hereinabove noticed, it necessarily follows that the judgment of the district court of Hughes county should be reversed.

PER CURIAM. Adopted in whole.

(37 Okl. 24)

GAULT LUMBER CO. v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 100*)—INTERSTATE SHIPMENTS—LAST CONNECTING CARRIER—DEMURRAGE.

The last connecting carrier of an interstate shipment has authority to apply the proper interstate tariffs, and collect demurrage due, on foreign cars in its possession, which have been used in transporting interstate shipments.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 427-433; Dec. Dig. § 100.*]

2. CARRIERS (§ 100*)—INTERSTATE SHIPMENT—LIEN FOR DEMURRAGE.

A carrier, engaged in transporting interstate commerce, has a lien for demurrage charges on the shipment left in a car after the expiration of the free time allowed by the interstate tariffs under which the shipment was made.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 427-433; Dec. Dig. § 100.*]

3. CARRIERS (§ 100*)—DEMURRAGE CHARGES—LIEN—WAIVER.

A carrier does not waive its lien for demurrage charges on shipments left in cars after the "free time" for unloading same has expired, notwithstanding the carrier has "spotted" the car and has permitted the consignee to remove a portion of the shipment. Such a delivery, on the part of the carrier is not an unconditional delivery, but is a qualified delivery for the purpose of permitting the consignee to remove the shipment within the "free time" allowed; if more time is used than allowed by the tariffs in force, the carrier may, to enforce its lien for demurrage, take possession of the car, notwithstanding a part of the cargo has been unloaded by the consignee.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 427-433; Dec. Dig. § 100.*]

(Additional Syllabus by Editorial Staff.)

4. CARRIERS (§ 100*)—INTERSTATE SHIPMENT—DEMURRAGE—"OTHER CHARGES."

Demurrage is one of the "other charges" authorized by section 2 of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1238]).

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 427-433; Dec. Dig. § 100.*]

Commissioners' Opinion, Division No. 1. Error from Oklahoma County Court; Sam Hooker, Judge.

Action by the Gault Lumber Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Warren K. Snyder, of Oklahoma City, for plaintiff in error. Cottingham & Bledsoe and Charles H. Woods, all of Oklahoma City, for defendant in error.

ROBERTSON, C. This is an action in replevin to recover possession of certain lumber contained in car No. 13112, initials S. W., of the value of \$320.50, and certain other lumber contained in car No. 70397, initials M. K. & T., of the value of \$92.91. The cause was tried to the court, without a jury, on an agreed statement of facts (and other evidence).

The agreed statement reads as follows: "That the two cars containing the lumber and building material involved in the above-entitled cause bear numbers and initials as follows: 'S. W. No. 13112,' and 'M. K. & T. No. 70397.' That car S. W. No. 13112, and the shipment therein contained, originated from Minden, in the state of Louisiana. That the car M. K. & T. No. 70397, and the lumber and material therein contained, originated and was shipped from Groveton, in the state of Texas. That the car S. W. No. 13112, reached the tracks of the Missouri, Kansas & Texas Railway Company at Oklahoma City on the ——— day of ———. That the Gault Lumber Company was notified of the arrival of car No. 13112 at 8:20 o'clock a. m. on the 26th day of June, 1908. That the Gault Lumber Company was notified of the arrival of car No. 70397 at 8:30 o'clock a. m. on the 24th day of June, 1908.

That car No. 13112 was set on the spur track of the defendant at the rear of the place of business of the plaintiff, the Gault Lumber Company, in Oklahoma City, at 5:10 o'clock p. m. of June 29, 1908. That car No. 70397 was actually set or placed on the track of the defendant in the rear of the place of business of the plaintiff in Oklahoma City, state of Oklahoma, at 5:10 p. m. on the 2d day of July, 1908. That car No. 13112 was locked by the defendant on the 3d day of July, 1908, at 10 o'clock a. m. of said day. That car No. 70397 was locked by the defendant at 9:30 o'clock a. m. July 7, 1908. That, at the time said cars were locked, they contained the lumber described and set out in plaintiff's petition and affidavit of replevin, and the said cars had been unloaded, save and except lumber contained in them at the time they were locked by the defendant. It is stipulated and agreed that this agreement as to the facts and the extent herein agreed shall not be considered as being a full agreement as to all the facts, but the other things necessary to make out a cause or make a defense may be proven by the parties acting through their attorneys just as though this agreement had not been entered into." The evidence further shows that immediately after the expiration of the 48 hours "free time," allowed by the railway company for unloading these cars, had expired, demand was made by the railway company for payment of demurrage charges, on each car, at the rate of \$1 per day for each day after the so-called "free time" had expired; that the plaintiff refused to pay the same; and that thereupon the railway company took possession of said cars and locked the doors, whereupon plaintiff brought replevin. Judgment was entered in favor of the railway company, and the plaintiff, feeling aggrieved, brings error.

Three separate propositions are raised and urged by plaintiff in error in the presentation of this case, viz.: First, that the defendant was not the proper party to collect this demurrage charge, because it did not own the cars in which the freight was loaded; second, that the law did not give the defendant a lien for demurrage charges; and, third, if the law did give a lien, that lien was waived by delivery of the shipments.

[1] The proposition first above set out is thoroughly and completely disposed of by defendant in error in its brief, wherein it is shown:

First. That it was the last connecting carrier of an interstate shipment. U. S. v. Stockyards Co. (C. C.) 162 Fed. 556; Railway Co. v. Wichita Who. Gro., 55 Kan. 525, 40 Pac. 899; Railway Co. v. Rock Island, 109 Ill. 135, 50 Am. Rep. 605; Ky. Wagon Mfg. Co. v. R. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326; Reymann v. Railroad Co., 203 U. S. 270, 27

Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130; McNeill v. Railroad Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Stockyards Co. v. L. & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213; Interstate Commerce Comm. v. Chicago Ry. Co., 186 U. S. 320, 22 Sup. Ct. 824, 46 L. Ed. 1182; Walker v. Keenan, 73 Fed. 755, 19 C. C. A. 668; Houston & Tex. Central v. Mayes, 201 U. S. 821, 26 Sup. Ct. 491, 50 L. Ed. 772; West Tex. Fuel Co. v. Tex. & Pac., 15 Interst. Com. Com'n R. 443.

Second. That the cars while in its possession were detained by the plaintiff for such a period as to call into operation an interstate tariff.

Third. That, being one of the connecting carriers of an interstate haul, it became the duty of this defendant to apply the proper interstate tariffs to the facts arising and as they arose.

Fourth. This tariff provides, among other things, as shown by the Record, p. 60, that it applies to all cars and applied to the cars in question. We quote two sections of this tariff:

"Applying at all stations on the A., T. & S. F. Ry. Co., in Missouri, Kansas and Oklahoma and Indian Territories; also all stations on the Leavenworth & Topeka Ry. in Indian Territory, Ardmore and North, and Superior, Neb."

"Rule 2. Car Service Charges.—After the expiration of the free time allowed, a charge of one dollar (\$1.00) per car for each twenty-four (24) hours or fraction thereof shall be made and collected for the detention of all cars held for loading or unloading or subject to orders of consignors, consignees, or their agents."

[2, 4] The second proposition, that the law does not give a carrier a lien for demurrage charges, on first thought, under the early decisions of the courts, might seem to be tenable, yet an examination of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]), convinces us that demurrage is one of the "other charges" authorized by section 2 of said act, and that the company is given a lien on shipments, for demurrage, as well as for freight, or other terminal charges. Michie v. New York, N. H. & H. R. Co. (C. O.) 151 Fed. 694.

This being an interstate shipment, the state law, of course, gives way to the federal statute, and by the Hepburn Act, supra, it is provided that the carrier shall provide and file, with the Interstate Commerce Commission, and print and keep open to public inspection, schedules, showing all rates, fares, and charges of transportation between different points on its own route and points on the route of any other carrier, and provides "that the schedule printed as aforesaid by any such carrier, shall plainly state the places between which property and passengers will be carried, and shall contain the

classification of freight in force, and shall also state separately all *terminal charges, storage charges, icing charges, and all other charges*, which the Commission may require, etc."

The railway company, at the trial, offered, and the same was admitted by the court as evidence, the interstate tariff kept on file at its office in Oklahoma City, and also showed that it had been filed with the Interstate Commerce Commission as required by section 2 of the Hepburn Act, *supra*. The existence of the tariff, the filing of the same with the Interstate Commerce Commission, and the keeping of two copies at the depot in Oklahoma City as required in the Hepburn Act, are not in any manner denied by plaintiff. The reasonableness of these interstate charges, as shown by these tariffs, cannot be here inquired into. If the rates therein embodied are excessive, unfair, or unreasonable, complaint must be made to the Interstate Commerce Commission, which has exclusive jurisdiction, in the first instance, to inquire relative thereto. By the terms of said tariff, which is practically the same as the old car service rules, it is provided that, "after the expiration of the free time allowed, a charge of one dollar (\$1.00) per car for each twenty-four (24) hours or fraction thereof shall be made and collected for the detention of all cars held for loading or unloading or subject to orders of consignors, consignees, or their agents." It is admitted that the cars were in use for a period of time longer than the 48 hours of free time after the same had been spotted for unloading. It is also admitted that the charges were properly made under the tariff above referred to, but it is strenuously insisted that after having spotted the cars and delivery thereof, for the purpose of unloading same, no lien on the lumber in the cars could be enforced for the demurrage due, even though the demurrage be lawfully charged. It is true that the statute does not, in specific terms, provide a lien for demurrage charges, or furnish a method for foreclosing the same; but, without doubt, the great weight of authority is to the effect that a carrier has a lien for demurrage, as well as freight.

Counsel for plaintiff in error cites section 1570, vol. 4, Elliott on Railroads, as authority that a connecting carrier has no lien for charges on freight received from another or initial carrier. We cannot agree with this construction. That section reads: "It is well settled that a carrier is entitled to a lien upon the goods transported by it to secure the freight which is justly due for their transportation, * * * but, a connecting carrier which receives goods, with notice that the freight has been paid in advance for through transportation, or that the goods have been wrongfully diverted to its route, is not entitled to a lien." The author had in mind freight which could be, and had been,

paid in advance, and not demurrage. Demurrage cannot be paid in advance, for it is not to be supposed that there will be demurrage in any case. Demurrage is a penalty imposed for failure to perform a duty. Consignees are supposed to unload cars as soon as practicable, and within the 48 hours' free time, but if, for any reason, the cars are not unloaded within that time, then a penalty, called "demurrage," is imposed.

The reason for the imposition of charges in the form of demurrage are many, and have been fully and succinctly set forth by Judge Toney in *Kentucky Wagon Mfg. Co. v. Ohio & M. Ry. Co.*, 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326, as follows: "Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of their cars by consignees, railroads would be at the mercy of individual shippers. In order to fulfill the chief end of their creation, viz., the service of the public as common carriers, they should be left free to establish general and reasonable rules and regulations governing the delivery of freight and charges for the unnecessary or unreasonable detention of their cars by consignees. It is a matter of the highest public interest that they should be accorded this right and power. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety, and facility in the movement of the freight of the country, which must of necessity be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight upon their side tracks into warehouses for the storage of freight at the suggestion of their convenience or interest. As we have seen, railroads are a public necessity; the general welfare of the country being dependent upon their untrammelled interconnection, and untrammelled liberty to accomplish the legitimate public purposes of their organization. Promptness, regularity, and safety in the transportation of passengers and freight are essential requisites to the successful administration of the railroad common carrier's system of the country. These characteristics or qualities are demanded by the public interest. Regularity and system in the movement of their cars, in the handling of freight, both in receiving, transporting, and delivering it, so that the public can know what to expect and what it can depend upon, are demanded of railroads by law and by public policy. But how can this be expected of railroads if their rolling stock may be tied up and water-logged upon the private side tracks and switches of private consignees to serve as storerooms and warehouses for their freight, without any power on the part of the railroad companies to enforce reasonable rules against such consignees, requiring diligence in the unloading

and redelivery of their cars? These public carriers rely upon the rolling stock to meet the demands of the volume of business which they have to carry. How can they insure to consignees and shippers in general, and to the public, that facility of commercial interchange which they are required to afford both by charters and by public law? How can they furnish cars and transportation to shippers in general, and discharge the volume of traffic business of their respective systems, if their rolling stock can be locked up in the private yards of special consignees? How can such carriers know with any reasonable degree of certainty whether their rolling stock at any given time is or will be fully up to the demands of the business along their lines? Promptness, uniformity, and safety in the railroad traffic business of the country can only be secured by the adoption and strict enforcement by railroad companies of uniform and reasonable rules and regulations, which shall be binding upon all shippers and consignees alike, with reference to the reception, transportation, and delivery of freight. These qualities in railroad administration it requires no philosopher to see are indispensable to the proper accommodation and service of the interests of the public; and it should be the leading principle of action with all railroad managers to adopt and impartially enforce such rules and regulations as will most effectually secure these desired ends for the public."

Section 1567, Elliott on Railroads, treats of this subject as follows: "It has been said that the right to demurrage exists only in maritime law, and is confined to carriers by water. But, while it is probably true that this right is derived by analogy from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed, and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload or who unreasonably delays the unloading of a car for his own benefit ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably de-

tained in this way. Railroad companies as common carriers are 'bound to furnish cars for transportation of freight, and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an incumbrance. If A. be allowed to hold a car unloaded (or loaded) at his pleasure or convenience, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B., it is obvious that both the railroad company and the public will suffer injury.' It is also well settled that common carriers may make reasonable rules and regulations for the convenient transaction of their business. It follows, from this line of reasoning, that railroad companies may adopt and enforce general rules, which are, or ought to be, known to their customers, making a reasonable charge for the unreasonable detention of their cars. In a number of cases a charge of \$1 a day for the detention of a car after the lapse of 48 hours, Sundays and legal holidays excepted, has been held not to be unreasonable as a matter of law."

In *Railroad Co. v. George*, 82 Miss. 710, 35 South. 193, it is said: "It is admitted that the amount charged under the demurrage rules is reasonable, and it appears to us that the rules, so far as applicable to this controversy, in themselves are fair, and based upon that fundamental maxim of justice, 'The greatest good to the greatest number.' The carrier of freight is responsible in damages if it unreasonably delays the transportation of freight delivered to it, and exact justice demands equal diligence of the consignee. When freight has been transported to its destination and the consignee legally notified of its arrival, it then becomes the duty of the consignee to promptly receive the same, so that the car may again be placed in service. These rules work no hardship to the consignee who displays proper diligence in the handling of his freight. Ample time is granted him. But they prevent the dilatory dealers, who seek to save storage or warehouse charges, from keeping the tracks blocked with idle cars; thereby impeding the carriers in the prompt handling of freight, and depriving other dealers of the use of necessary cars to haul their freight or transport the products of the country to market. Certainly no reason, founded in justice, can be given why consignees should not pay for any unreasonable or unnecessary detention of cars. Prompt handling of freight by both carrier and consignee is for the best interests of both, and of the commercial world at large. This question was never before in this court, but this view is in full accord with an almost unbroken line of decisions in other states; and, precedent aside, it is supported by justice and right."

The authorities are practically unanimous

in holding that a carrier has a lien on goods for freight. We can see no difference in principle between a lien for freight and one for demurrage. There seems, however, to be some conflict in the decisions on the subject; yet a close examination will disclose that the conflicts are more apparent than real. Thus in *Nicoletti Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550, 5 Ann. Cas. 387, it is held that there can be no lien in the absence of a specific agreement to that effect. To the same effect, see, also, *East Tenn. & C. R. Co. v. Hunt*, 15 Lea (Tenn.) 261. But, to the contrary, see *Southern R. R. Co. v. Lockwood Mfg. Co.*, 142 Ala. 322, 37 South. 667, 68 L. R. A. 227, 110 Am. St. Rep. 32, 4 Ann. Cas. 12; *Pittsburgh, C., C. & St. L. Ry. Co. v. Moor Lumber Co.*, 27 Ohio Cir. Ct. R. 588; *New Orleans & N. E. Ry. Co. v. George*, supra; *Miller v. Mansfield*, 112 Mass. 260; *Darlington v. Missouri*, etc., Ry. Co., 99 Mo. App. 1, 72 S. W. 122; *Schumacher v. Chicago*, etc., Ry. Co., 207 Ill. 199, 69 N. E. 825; *Barker v. Brown*, 138 Mass. 340; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, and note; *Steinman v. Wilkins*, 7 Watts & S. (Pa.) 466, 42 Am. Dec. 254, and note; *Alden v. Carver*, 13 Iowa, 253, 81 Am. Dec. 430; *Kan. Pac. R. Co. v. McCann*, 2 Wyo. 3.

The above cases had to do with charges imposed by car service association rules, which consisted of a voluntary association of railways, for the purpose of making fair and reasonable charges, and which was designed, not only to protect the various railways, but shippers as well, and tended to produce uniformity of charges. Since the passage of the Hepburn Act, supra, these matters can be better cared for by the interstate tariffs exacted from the carriers by the Interstate Commerce Commission, and, as has been hereinbefore mentioned, these tariffs embody all the essential terms and rules of the former car service associations, and the point made by plaintiff in error that there is no evidence in the record as to any car service association rule is not, therefore, well taken, in that no attempt was made to prove such rules, but the tariff introduced in evidence was an embodiment of the essentials of such car service associations, and should be construed accordingly. "The mere failure to refer by number to a car service tariff in the tariff rates can in no way relieve a shipper from the payment of demurrage." *Cudahy Packing Co. v. Chicago & N. W. Ry. Co.*, 12 Interst. Com. Com'n R. 446.

[3] This brings us to the last proposition relied upon by plaintiff, to wit, the lien, if any there was, has been waived by the railway company, by delivery of the cars to consignee. Counsel quotes from section 1572, *Elliott on Railroads*, as follows, "The lien of the carrier is lost by an unconditional de-

livery or voluntary surrender of the goods upon which it was held," and cites many cases in support of that theory. We concede the correctness of the above rule, but insist that the same is wholly inapplicable to the case at bar for that here there was no *unconditional* delivery, but only a qualified delivery instead. The mere fact that the railway company spotted the cars on the private switch and permitted plaintiff to enter thereon and unload a portion of each, under the facts and circumstances of this case and the nature of the business, was not such a complete delivery of the lumber as would prevent a seizure of the balance left in the cars, to enforce a lien. In other words, the railway company had a right to presume that the cars would be unloaded within the free time; both parties knew the contents of the tariff which provided for the demurrage charges after the expiration of 48 hours, and from the very nature of the business the company was bound to deliver possession for at least that time for the purpose of unloading, and before any lien existed; after the free time had elapsed, the lien was created, and the company had the right to take possession of the cars for the purpose of enforcing the same. Without this right, the lien, under such circumstances, would be of no value whatever, and as was said in *Railroad Co. v. George*, supra: "There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage, and would breed a multiplicity of suits."

This identical question was considered in the case of *Southern Ry. Co. v. Lockwood Mfg. Co.*, 142 Ala. 322, 37 South. 667, 68 L. R. A. 227, 110 Am. St. Rep. 32, 4 Ann. Cas. 12, where Dowdell, J., speaking for the court, says: "The foregoing authorities fully sustain the doctrine of the right of the carrier to a lien upon the goods transported for demurrage charges. Coming then to the main question in the case before us: Was the placing of the car of lumber on the 'team track' of the railway company for the purpose of being unloaded by the consignee such an absolute and unqualified delivery of the lumber into the possession of the consignee as would cut off any future right of lien for legitimate charges for car service, or demurrage, subsequently accruing? We think not. The delivery of the possession of the lumber, in the manner in which it was made, and under all the conditions and circumstances, was a qualified delivery. The delivery was conditioned upon the lumber being unloaded from the car within a fixed time, and upon a failure of the consignee to comply with this condition additional rights and liabilities between the parties arose. The right of the consignee's possession of

the lumber was accompanied with the duty on his part to remove the same from the car. It would hardly be contended that the placing of the car for the purpose of unloading terminated all liability of the railway company both as carrier and warehouseman while the lumber yet remained on its car. Upon the same principle that a railroad company, when its relation becomes that of a warehouseman, has a lien upon goods for storage charges, it has a lien upon goods for demurrage, or car service. * * * The indefinite detention of cars by shippers would naturally tend to impair the ability of the carrier to meet the demands of commerce and lessen the facility of transportation. The case of *Lane v. Old Colony & Fall River R. R. Co.*, 14 Gray (Mass.) 143, is somewhat similar in principle to the case at hand. In that case the railroad company had placed a shipment of coal in a bin on the company's ground to be removed by the consignee, and, after a part had been hauled away, the consignees refused to pay the freight and storage charges. It was held that the railroad company still had a lien on the coal which had not been hauled away for such charges. We think in principle there can be no difference between a delivery of the coal in a bin to be taken and hauled away by the consignee, and a delivery of the lumber on the car on the railway company's 'team track' for a like purpose. Our conclusion is that a lien for the subsequent charges for car service attached to the lumber in favor of the railway company."

The quotation from *Rapalje & Max*, Dig. of Railway Law, vol. 2, § 252, p. 107, which appears on page 18 of plaintiff's brief, does not hold to the contrary. It is there held that a railway company is released from liability for any loss by fire that may occur while unloading goods from the car, when a sealed car has been placed on the switch at request of the owner of the goods, who had surrendered the bill of lading, paid the freight, and opened the car themselves, and was removing the goods. It does not in any wise support the contention of the plaintiff. Having thus disposed of these various questions, it necessarily follows that the judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 369)

TATE v. STONE.

(Supreme Court of Oklahoma. Jan. 23, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1051*)—PLEADING (§ 290*)—VERIFICATION—EFFECT—ADMISSIONS.

In all actions allegations of the execution of written instruments and indorsements thereon of the existence of a corporation or partnership, or of any appointment of authority,

or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney.

(a) Where a petition alleges that H. was the legal guardian of N., and the answer is a general denial, being unverified, it is admitted that H. was the legal guardian of said N.

(b) It being admitted under the pleadings that H. was the guardian of N., it was error without prejudice to admit parole evidence, without any predicate being laid for the introduction of such evidence, that H. was the legal guardian of N.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051; Pleading, Cent. Dig. §§ 859-863, 881, 886½; Dec. Dig. § 290.*]

2. INDIANS (§ 16*)—LEASE OF ALLOTMENT.

No allottee of the Choctaw or Chickasaw Tribes of Indians was permitted to lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

3. INDIANS (§ 16*)—LEASE OF LAND—VALIDITY.

Every such lease, which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States court for the district in which the land is allotted, or proper register of deeds' office, within three months after its execution shall be void; and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder. Act June 28, 1898, c. 517, 30 U. S. Stat. 507.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

4. JUSTICES OF THE PEACE (§ 178*)—APPEAL—INSTRUCTIONS IN COUNTY COURT.

As to cases commenced in the justices of peace courts after the erection of the state and appealed to the county court under section 12, art. 7 (section 197, Williams' Anno. Const.), of the Constitution of this state, the judge of said court, as a court of record, is authorized to instruct the jury as to the law applicable to the case; and said jury is bound by said instructions.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 701; Dec. Dig. § 178.*]

5. APPEAL AND ERROR (§ 1032*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Error must affirmatively appear to have been committed in the exclusion of evidence in the trial court before a reversal on such ground may be had in this court.

(a) Evidence excluded will not operate as reversible error, unless it affirmatively appears to have been material under the issues framed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

Error from Grady County Court; N. M. Williams, Judge.

Action by L. D. Stone against A. P. Tate. Judgment for plaintiff, and defendant brings error. Affirmed.

F. E. Riddle, of Chickasha, for plaintiff in error. Bond & Melton, of Chickasha, for defendant in error.

WILLIAMS, J. On March 23, 1909, the defendant in error, as plaintiff, commenced a forcible detainer action against the plaintiff

in error, as defendant, in a justice of the peace court for the possession of a certain tract of land. On March 16, 1909, plaintiff served notice upon the defendant to quit.

In his petition he declares that he was "entitled to immediate possession of said land * * * by virtue of a contract with Geo. A. Harrison, of Ada, Oklahoma, guardian of Chilly Nelson, a citizen of the Choctaw Nation, and the allottee of the land above described, which said contract has been duly approved by the court as in such cases made and provided." A copy of said contract, together with the order of the court approving the same, was attached as a part thereof and identified as an exhibit. It was further declared that the defendant "is now unlawfully detaining the possession of said lands from this plaintiff, after due and legal demand made therefor."

The lease contract, attached to the petition, on said lands was in favor of the plaintiff for a term of five years, commencing with the date of the lease.

The defendant demurred to the petition, on the ground (1) it neither stated facts sufficient to constitute a cause of action, nor (2) to give the court jurisdiction. Said demurrer having been overruled, defendant answered by way (1) of general denial, and (2) "defendant denies that the plaintiff is entitled to the immediate possession of said land, or any part thereof; denies that he is now unlawfully detaining the possession of said land from said plaintiff, after due and legal demand, as alleged." Said answer was unverified.

Judgment having been rendered in the justice of the peace court in favor of plaintiff, an appeal was prosecuted to the county court, where, after a trial, judgment was again rendered in favor of the plaintiff.

Plaintiff in error raises the following questions: (1) The trial court erred in permitting the plaintiff to introduce in evidence the lease attached as exhibit to said petition, (2) in refusing to permit defendant to introduce in evidence a certain lease contract under which he claimed to be holding possession of said land, which was not recorded within three months after its execution, and (3) in directing a verdict in favor of plaintiff.

[1] Section 5648 of the Compiled Laws of Oklahoma 1909 (section 3986, Statutes of Oklahoma Territory 1893) provides: "In all actions, allegations of the execution of written instruments and indorsements thereon of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

In McCabe & Steen Const. Co. v. Wilson, 17 Okl. 355, 87 Pac. 320, the petition of the

plaintiff contained the allegation that J. Pratt was the general superintendent of construction for defendant, and that one Fallahay was the foreman of the bridge gang for the defendant; and, further, it was alleged that the defendant was employed through Pratt, its general superintendent, etc. The answer, which was unverified, contained (1) a general denial, (2) allegation that the injury was caused by the act of the fellow servant, and (3) contributory negligence and assumption of risk. It was held that under the issues as framed the defendant was not entitled to prove that neither was Pratt its superintendent nor Fallahay its bridge foreman. See, also, St. L. & S. F. R. Co. v. Cate, 25 Okl. 227, 105 Pac. 322; St. L. & S. F. R. Co. v. Phillips, 17 Okl. 264, 87 Pac. 470; United States v. Alexander et al., 2 Idaho (Hash.) 386, 17 Pac. 746; Griswold v. Trustees of Peoria University, 26 Ill. 41, 79 Am. Dec. 361.

Under the pleadings it was admitted that George A. Harrison was the legal guardian of the allottee, Chilly Nelson; and therefore no prejudicial error was committed in permitting plaintiff to testify that said Harrison was her legal guardian. There being no controversy as to the execution of said lease, in view of the admission as to the guardianship, in any event the lease was admissible in evidence.

[2] 2. By the Atoka Agreement (Act June 28, 1898, c. 517, 30 U. S. Stat. 495) it is provided that no allottee can lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. The lease must be evidenced by writing, setting out specifically the terms, and recorded in the proper recorder's office of the district or county in which the land is located within three months after its execution; and any lease not meeting with such requirements is void, and the lessee acquires no right whatever to hold thereunder. See Bledsoe's Indian Land Laws, § 70, p. 101; 30 U. S. Stat. 507.

[3] The lease which the defendant offered in evidence for the purpose of justifying his holding possession of said land was executed prior to the act of April 26, 1906, c. 1876, 34 U. S. Stat. 137, and was not recorded, as required by the provisions of the Atoka Agreement (30 U. S. Stat. 507).

[4] 3. Did the court err in directing a verdict in plaintiff's favor? This cause arose after the erection of the state, and having been appealed to the county court, which was a court of record, the judge of said court was authorized to instruct the jury as to the law applicable to the case; and the jury was bound by such instructions. Baker v. Newton, 27 Okl. 436, 112 Pac. 1034; Crump et al. v. Pitchford, 24 Okl. 808, 104 Pac. 911.

The defendant offered in evidence a certain lease contract from Chilly Nelson to Whiteman; but the record does not disclose

when said contract was made, or whether it was acknowledged and recorded in due time. The plaintiff objected to its introduction on the following grounds: That it was not recorded within the time provided by law, and is therefore void, also that the lease has never been signed by Whiteman, and for the further reason that the lease has never been acknowledged by Whiteman, as provided by law, being for a period of more than one year.

Unless the lease was acknowledged and recorded within the time prescribed by law, it was void. However, it might be admissible to show that the lessee went into possession under it. Though the lease was void, the obtaining possession might create a relation of tenancy at will. The record further states that the defendant offered in evidence a lease contract from Whiteman to Bassett, recorded at page 323 of volume 16 of the Register of Deeds, of Grady county, Okl., covering the lands in controversy. Plaintiff objected to the introduction of the same, for the reason that it had not been shown that Whiteman had any authority to make such lease, or that Whiteman had any interest in the lands in controversy. Nowhere are these leases set out in the record.

[5] In *National Drill & Mfg. Co. v. Davis*, 29 Okl. 625, 120 Pac. 976, paragraph 2 of the syllabus is as follows: "Error must affirmatively appear to have been committed in the exclusion of evidence in the trial court before a reversal on such ground may be had in this court. (a) Certified copies of the records of G. county, relating to the transaction on which the action was based, having been offered in evidence by the plaintiff in error, the defendant in error objected, on the ground that the same was not properly authenticated; but such alleged copies, including the authentication, are not made a part of the record before this court. Held that, in the absence of copies of such alleged certificate, this court cannot determine whether error was committed, and in that event no reversible ground is shown. (b) Evidence excluded will not operate as reversible error, unless it affirmatively appears to have been material under the issues framed." See, also, *Herron v. M. Rumley Co.*, 29 Okl. 317, 116 Pac. 952.

If the defendant obtained a lease from the allottee, and on account of failure to comply with the requirements of the act of Congress, relative to acknowledgments and recording the same, it was void, yet, if he took possession under said void contract and held for a year, and then held from year to year, a tenancy at will might be established, and this void contract might be introduced, in order to show what notice was essential in order to terminate the tenancy. But the contract sought to be introduced in evidence in this case was from the allottee to one White-

man, and then from Whiteman to the defendant. If the contract was void between the allottee and Whiteman, Whiteman would have no right to contract with the defendant as to the possession of said land.

The burden is upon the plaintiff in error to show error. Under the status of this record we are unable to tell whether any error was committed by the trial court. The presumption is in favor of the judgment of the lower court being free from error.

The judgment of the lower court is affirmed. All the Justices concur.

(35 Okl. 260)

MURPHY v. FITCH.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

1. INJUNCTION (§ 2*)—ABOLITION OF WRIT.

That part of section 5755 of Compiled Laws of Oklahoma 1909 abolishing the writ of injunction was not continued in force by section 2 of the Schedule of the Constitution at the erection of the state.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. INJUNCTION (§§ 1, 2*)—AUTHORIZATION OF WRIT.

The writ of injunction was made available at the erection of the state by sections 2 and 10, art. 7, of the Constitution.

(a) The writ of injunction is not an exclusive remedy in this state.

(b) The statutory provisions as contained in sections 5755, 5756, and 5757, Compiled Laws of Oklahoma 1909, except that part of section 5755 which abolishes the writ of injunction, were continued in force after the erection of the state by section 2 of the Schedule to the Constitution, and are cumulative remedies.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 1, 2.*]

3. INJUNCTION (§ 47*)—WHEN GRANTED.

Where certain lots were in possession of F., claiming title thereto, and the same are sought to be taken forcible possession of by M., who claimed an adverse title, F.'s possession may be preserved until the final determination as to the title by means of injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 100; Dec. Dig. § 47.*]

4. APPEAL AND ERROR (§ 213*)—OBJECTIONS NOT MADE BELOW.

It is too late to make objection, for the first time, in the Supreme Court that a waiver of a trial by jury had not been made, or did not appear of record in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1165, 1304-1308; Dec. Dig. § 213.*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action between Uriah Murphy and G. F. Fitch. From the judgment, Uriah Murphy brings error. Affirmed.

R. W. Skipper, of Isabel, Steven & Meyers and T. B. Orr, all of Lawton, for plaintiff in error. Hudson & Whalin, of Lawton, for defendant in error.

WILLIAMS, J. Plaintiff, in his petition, alleged as follows: "That he is now and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

was at all times hereinafter set out and ever since * * * the owner in fee simple and in the lawful possession of lots 7 and 8, in block 46, in the town of Temple, Comanche county, state of Oklahoma, together with the appurtenances thereunto belonging, and the defendant herein, on the 14th day of January, 1911, unlawfully entered upon said premises of this said plaintiff and with gun in hand then and there threatened and attempted to shoot and kill said plaintiff, and then and there threatened to take possession of said lots and the buildings and improvements thereon from this plaintiff; that said defendant still continues to threaten to hurt said plaintiff, and to take from said plaintiff said premises, and to possess himself therewith, and to take the household effects therein belonging to this plaintiff and hold them and said house and said lots against the interests and to the great and irreparable injury and loss to this plaintiff. Plaintiff further says that, unless said defendant is restrained and enjoined from molesting said plaintiff in his possession of said premises, he will carry his said threats into execution, and will harm and injure said plaintiff in his person and in his effects, and especially will he do irreparable injury to the said premises; that said premises consist of two lots, a 13-room house, a cistern and out-house, a storm cave, and other improvements, and that said house is partially furnished with beds and other furnishings and fixtures, all the property of this plaintiff, and all of which is liable to be and will be injured by said defendant, unless he is restrained and enjoined, as aforesaid; that said defendant has threatened to scare and drive this plaintiff away from said premises, and has threatened to shoot and kill this plaintiff if he did not quit and leave said premises, and deliver the same up to said defendant, and plaintiff verily believes he will do harm to the person of said plaintiff and great and irreparable injury to the property of said plaintiff if he is not restrained from so doing; that said defendant is insolvent, and this plaintiff has no adequate remedy at law." Then follows a prayer that all parties interested "with him [defendant] in any manner in the disturbance of the peaceful possession of this plaintiff, including any one acting with him as agent, employé, or otherwise, be perpetually enjoined and restrained from entering upon plaintiff's said premises, and from in any manner interfering with said plaintiff in his possession of said premises, or in any manner attempting to interfere with the household effects of said plaintiff, and for all other and further relief and for costs."

On January 17, 1911, a temporary injunction was granted as prayed for. On January 18, 1911, defendant filed a motion asking that said injunction be dissolved, said motion being supported by affidavits; but said motion and affidavits are sought to be brought

before this court as a part of the transcript, which is not permissible, and therefore cannot be considered here on review for any purpose. *Richardson v. Beidleman*, 126 Pac. 816, and authorities therein cited.

On February 4, 1911, the record discloses that by a court order the motion of the defendant to dissolve the injunction granted on January 17, 1911, was overruled, and that the injunction theretofore granted on January 17, 1911, was in all matters and things sustained; and the journal entry further states: "It is further ordered and adjudged by the court that the defendant, Uriah Murphy, do quit, vacate, and surrender up the premises hereinafter described to the plaintiff, G. F. Fitch, within 10 days from this date, and upon his failure to do so the sheriff of Comanche county is hereby directed to move the said Uriah Murphy, and any household effects and properties that he may have placed on said premises, off of said premises and put the said Fitch in full possession of said premises; the said premises being lots seven (7) and eight (8), in block forty-six (46), and the improvements thereon, in the town of Temple, Comanche county, state of Oklahoma."

The defendant had challenged the sufficiency of plaintiff's petition by general demurrer. It appears from the record that evidence was heard by the court before said order was entered.

Did the petition state (1) a cause of action, and was the order (2) entered in excess of the power of the court?

[1] The statutes in force in this state relative to injunctions and the granting of the same are as follows:

"The injunction provided by this Code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy, and, when so allowed, it shall be by order. The writ of injunction is abolished." Section 5755, Compiled Laws of Oklahoma 1909.

"When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It

may, also, be granted in any case where it is specially authorized by statute." Section 5756, Compiled Laws of Oklahoma 1909.

"The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." Section 5757, Compiled Laws of Oklahoma 1909.

[2, 3] The writ of injunction was abolished by said section 5755, but the same seems to have been revived by sections 2 and 10 (sections 195 and 187, Williams' Anno. Const.), art. 7, of the Constitution of this state. *Baker v. Newton et al.*, 22 Okl. 658, 98 Pac. 931; *Newhouse v. Alexander*, 27 Okl. 46, 110 Pac. 1121, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912B, 674.

However, the writ of injunction is not the exclusive remedy in this state. The statutory provisions as contained in sections 5755, 5756, and 5757, except that part of section 5755 which attempts to abolish the writ of injunction, appear to have been brought over by section 2 of the Schedule (section 364, Williams' Anno. Const.), and to be cumulative. *Newhouse v. Alexander*, supra; *State ex rel. Huston*, 27 Okl. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380.

The petition stated a cause of action. *Glasco v. School District*, 24 Okl. 236, 103 Pac. 687, and authorities therein cited; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801.

[4] It is too late to make objection, for the first time, in this court that waiver of a trial by jury had not been made, or did not appear of record in the trial court. *Farmers' Nat. Bank v. McCall*, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217; *Johnston et ux. v. Haynes*, 68 N. O. 500.

So, too, the question as to the parties hereto being entitled to a right of trial by jury on the issue as to the ownership of the title to said premises is not involved in this review. The parties to said action being entitled to a jury trial, unless the same was waived as to such issues, a verdict of a jury should have been had and judgment rendered thereon, and then, as an incident thereto, the mandatory relief could have been properly awarded.

On the matters as disclosed to this court by the transcript, no error is apparent. *Pomeroy*, Eq. Jur. (Student's Ed.) § 1359; *Smith v. Speed*, 11 Okl. 95, 66 Pac. 511, 55 L. R. A. 402; *Long v. Kasebeer*, 28 Kan. 226; *Webster v. Cooke*, 23 Kan. 640; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *Hodge v. Gliese*, 43 N. J. Eq. 342, 11 Atl. 484; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E.

67, 2 Am. St. Rep. 405; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Church v. Gristgau*, 34 Wls. 323; *Big Six Development Co. v. Mitchell*, 138 Fed. 283, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; *Sugar-Pine Lbr. Co. v. Lbr. & Imp. Co.* (C. C.) 86 Fed. 528; *United States v. Brighton* (C. C.) 26 Fed. 218; *In re Lennon*, 166 U. S. 543, 17 Sup. Ct. 658, 41 L. Ed. 1113; *Garretson v. Cole*, 1 Har. & J. (Md.) 373; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; *Manchester v. Worksoop*, 23 Beav. 198; *Spencer v. London Ry. Co.*, 8 Sim. 193; *Harblison v. White*, 8 Rep. (N. S.) 586; *Goddson v. Richardson*, 9 Chan. Ap. 221; *Martyr v. Lawrence*, 2 De G., J. & S. 261; *Cole-Silver Mining Co. v. Virginia*, 1 Sawy. 685, Fed. Cas. No. 2,990.

We have treated the order appealed from as a final order or decree, as contended for by the counsel for the plaintiff in error, and examined the record carefully and passed on the only questions that could probably be raised on a transcript.

The judgment of the lower court is affirmed. All the Justices concur.

(35 Okl. 653)

COOK et al. v. STATE et al.

(Supreme Court of Oklahoma. Dec. 3, 1912.
On Rehearing, Feb. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 327*)—JOINT JUDGMENT—PARTIES.

All parties to a joint judgment must be joined in a proceeding in error in this court to review such judgment, either as plaintiffs or defendants in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814-1820, 1822-1835; Dec. Dig. § 327.*]

2. APPEAL AND ERROR (§§ 632, 633*)—JOINT JUDGMENT—SERVICE OF CASE-MADE.

If a joint judgment is sought to be reviewed by petition in error with case-made attached, the case-made must be served upon all parties against whom the joint judgment is rendered.

(a) When such service is not had, unless all such parties waive same or do acts that amount to entering an appearance at the presentation and settling of the case-made, such case-made is a nullity.

(b) The fact that the party upon whom service was not had as to the case-made and the signing and settling of the same made default in the trial court before the joint judgment was rendered does not take the case-made, as to service, etc., out of the rule.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2771, 2772-2774; Dec. Dig. §§ 632, 633.*]

(Additional Syllabus by Editorial Staff.)

On Rehearing.

3. PLEADING (§ 34*)—CONSTRUCTION—OBJECTIONS NOT RAISED BELOW.

Where a petition is attacked for the first time on appeal as not stating a cause of action, it will be liberally construed to uphold the

judgment, as required by Comp. Laws 1909, § 5655.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

4. APPEAL AND ERROR (§ 858*)—REVIEW ON TRANSCRIPT.

Objections to the introduction of evidence, on the ground that the petition did not state a cause of action, cannot be reviewed on a transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3435, 3439, 3440, 3446; Dec. Dig. § 858.*]

5. APPEAL AND ERROR (§ 213*)—OBJECTIONS NOT RAISED BELOW.

Where parties are entitled to a trial by jury, unless waived, yet, if the record on appeal fails to show waiver entered of record, as required by statute, objection on that ground may not be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1165, 1304-1308; Dec. Dig. § 213.*]

6. TRIAL (§ 392*)—TRIAL BY COURT—FINDINGS.

Under Comp. Laws 1909, § 5809, on trial by the court it is not necessary for the court to state its findings, except generally, unless a request therefor was made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 916-919; Dec. Dig. § 392.*]

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by the State and James Kanard against W. J. Cook and A. Z. English and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

W. W. Wood and Moore & Noble, all of Okmulgee, for plaintiffs in error. J. W. Childers, Co. Atty., of Okmulgee, for defendants in error.

WILLIAMS, J. Counsel for the state of Oklahoma moves to "strike the case-made from the files and dismiss the appeal and petition in error," on the ground (1) that the case-made was neither served on James Kanard, one of the defendants in error, nor was he present at the presentation, signing, and settling of the same; nor was the presentation, signing, and settling thereof waived by him; nor did he have notice thereof; (2) that notice of the presentation, signing, and settling of the case-made was neither served on the defendant in error James Kanard or his attorney, nor was notice thereof waived by him or his attorney.

[1] The judgment sought to be reviewed by this proceeding is a joint one, the same, however, having been rendered against James Kanard by default; the other defendants, Frederick B. Severs and Molleanna Snakaya, plaintiffs in error, having defended in the lower court.

It was essential that the said James Kanard be either joined as a plaintiff or defendant in error. May et al. v. Fitzpatrick et al. (No. 2,444) 127 Pac. 702, decided by this court on October 8, 1912, and authorities therein cited:

[2] If the judgment of the trial court was

to be reviewed by means of a petition in error with case-made attached, the same should have been served upon James Kanard. Thompson v. Fulton, 29 Okl. 700, 119 Pac. 244; Price v. Covington, 29 Okl. 854, 119 Pac. 626.

The fact that the joint judgment against Frederick B. Severs, Molleanna Snakaya, and James Kanard was rendered as to the said Kanard by default does not change the rule. Jones v. Balsley & Rogers et al., 25 Okl. 344, 106 Pac. 830, 138 Am. St. Rep. 921. Such rule obtained in Kansas, whence our statute was taken (Atlantic Trust Co. et al. v. Prescott et al., 5 Kan. App. 172, 48 Pac. 926; Paper Co. v. Hentig, 31 Kan. 322, 1 Pac. 529), until the same was changed by statute. Jones v. Balsley & Rogers et al., supra.

The appeal must be dismissed. All the Justices concur.

On Rehearing.

Since the filing of the opinion holding the case-made a nullity and dismissing the proceeding in error, counsel for plaintiffs in error have presented to this court a motion asking for modification of said order, "so as to provide therein only that the case-made shall be stricken from the record, and not that the appeal shall be dismissed, for the reason that it appears by the certificate of the clerk * * * that said record is duly certified as a full and complete transcript of the proceedings in the court below."

Counsel for plaintiffs in error also state that "It has been suggested that they did not, in their original brief in opposition to the motion to dismiss, call the attention of the court to the fact that errors were assigned which appeared upon the face of the record proper," and concede such to be the fact, but state that it was an oversight, and ask that we consider a motion for modification, that justice may be done their clients.

The county attorney, for the defendants in error, in reply, insists that the assignments sought to be raised by transcript are without merit, and that the motion to modify should not be sustained as a matter of form, and therefore should be denied in the interest of justice. McLaughlin et al. v. Nettleton, 25 Okl. 319, 105 Pac. 662; Id., 25 Okl. 322, 105 Pac. 663; Young v. Severy, 5 Okl. 630, 49 Pac. 1024.

The bond declared on is made an exhibit and a part of the pleading by proper reference.

It is contended that the petition does not state a cause of action, for the reason that it is not therein alleged that the penalty of the bond is either due or unpaid. The breach of the bond, as alleged, is that the principal, Abe Snakaya, failed and neglected to appear in said court, and failed to remain thereat, as by said bond he was required to do; that thereupon the said bond was by said district

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

court duly forfeited, which said forfeiture was then and there duly entered of record, whereby, and by reason thereof, this action accrued in favor of the plaintiff, the state of Oklahoma, "and the said defendants then and there became indebted to the said plaintiff the state of Oklahoma in the sum of \$5,000. Wherefore, premises considered, plaintiff prays judgment * * * for \$5,000, and for its costs laid out and expended in the prosecution of this action."

[3] Section 5655, Compiled Laws of Oklahoma 1909 (section 3993, Statutes of Oklahoma Territory 1893), provides: "In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

In harmony with the spirit of said statute, it is a settled rule of construction in this jurisdiction that, where a petition is attacked for the first time in this court, for the reason that it does not state a cause of action, it will be liberally construed in order to uphold the judgment of the trial court. *Wass et al. v. Tennent-Stribbling Shoe Co.*, 3 Okl. 152, 41 Pac. 339; *Young v. Severly*, 5 Okl. 630, 49 Pac. 1024; *Bohart v. Mathews*, 29 Okl. 315, 116 Pac. 944.

[4] Without challenging the sufficiency of the petition, the defendant (plaintiff in error) *Molleanna Snakaya* answered by an unverified general denial. The defendant *F. B. Severs* interposed a demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, but waived same by securing permission of the court for its withdrawal, and then answered by an unverified general denial. The demurrer was never passed on. Had it not been withdrawn and an answer filed by permission, without it being passed on, that would constitute a waiver. The question as to the objection to the introduction of evidence in the trial court, on the ground that the petition did not state a cause of action, is not before this court on review on a transcript. But see *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890; *Caddo National Bank v. Moore*, 30 Okl. 148, 120 Pac. 1003. The petition, its sufficiency being questioned for the first time in this court, should be held here to sustain the judgment.

Section 5663, Compiled Laws of Oklahoma 1909 (section 4001, Statutes of Oklahoma Territory 1893), has no application to this case, as that applies to actions founded on instruments providing for the unconditional payment of money. The instrument here under consideration was conditioned that if the principal forfeited said bail that then the sureties would pay a certain stipulated sum.

It is further insisted by the plaintiffs in error that the findings of the court, as set out in the judgment, are insufficient to support the judgment, because there is (1) no finding as to what charge the principal in

the bond was to answer, nor (2) that he was bound to appear to answer any charge whatever, and (3) that there was no finding that the prisoner was discharged by reason of the giving of the bail bond, or that he was discharged at all.

Every reasonable intendment and presumption is in favor of the trial court. *National Drill & Mfg. Co. v. Davis*, 29 Okl. 625, 120 Pac. 976; *Herron v. M. Rumley Co.*, 29 Okl. 317, 116 Pac. 952; *Tate v. Stone*, 130 Pac. 296, decided at this term, but not yet officially reported.

[5] We have held that, although a party is entitled to a trial by jury in a case, unless same is waived, yet, if the record in this court fails to show waiver entered of record, as required by statute, objection on that ground may not be made for the first time in this court. *Murphy v. Fitch*, 130 Pac. 296, decided at this term, but not yet officially reported; *Farmers' National Bank v. McCall*, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217.

Section 21, art. 7, of the Constitution, provides: "In all jury trials, the jury shall return a general verdict, and no law in force, nor any law hereafter enacted, shall require the court to direct the jury to make findings on particular questions of fact; but the court may, in its discretion, direct such special findings." This provision of the Constitution superseded section 5805 (section 4176, Statutes of Oklahoma Territory 1893) of the Compiled Laws of Oklahoma 1909. *King v. Timmons*, 23 Okl. 407, 100 Pac. 536.

[6] Section 5809, Compiled Laws of Oklahoma 1909 (section 4180, Statutes of Oklahoma Territory 1893), is as follows: "Upon the trial of questions of fact by the court it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law."

Neither does it appear that any findings of fact or conclusions of law were requested by plaintiffs in error, or that any attempt was made by the trial court to state, in writing, the findings of fact separately from the conclusions of law.

When we examine this record carefully, we think it is obvious that no effort was made by the trial court to state, in writing, the findings of fact separately from the conclusions of law, but that the judgment was intended to be a general finding on all the issues. The substantial rights of the plaintiffs in error could not have been adversely affected by this action of the trial court in the form in which he rendered this judgment; and the effort to defeat the recovery on this bail bond by a technicality should not pre-

vall. Section 5680, Compiled Laws of Oklahoma 1909.

In *Stadel v. Aikins*, 65 Kan. 82, 68 Pac. 1088, it is said: "The finding, as will be observed, is not that he had no notice of the lien, but it is that he had no actual knowledge that a lien was claimed during the time that the corn was being hauled. There is no finding that he was without constructive notice of the lien before a sale was consummated, and the general verdict implies the existence of all necessary facts not inconsistent with those special findings. The plaintiff in error has not preserved the evidence, and the findings of fact do not cover the question of notice. 'In the absence of the testimony or of a special finding upon a material question in the case, it will be presumed that the facts disclosed in evidence were such as to support the general finding and judgment of the court.' *Pennell v. Felch*, 55 Kan. 78, 39 Pac. 1023. See, also, *Kellogg v. Bissantz*, 51 Kan. 418, 32 Pac. 1090."

As it appears that the assignments of error that are reviewable by means of a transcript are without merit, the motion to modify the order dismissing the proceeding in error will be overruled. All the Justices concur.

(37 Okl. 12)

CARSON et al. v. COOK COUNTY LIQUOR CO.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. PAYMENT (§ 38*) — APPLICATION — DIRECTION BY DEBTOR.

The general rule is that, when a creditor holds more than one claim against his debtor, the latter, on making a payment, may direct on which debt it shall be credited, and it is the duty of the creditor to so apply it.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

2. PAYMENT (§ 38*) — APPLICATION — SECURED AND UNSECURED DEBTS.

A debtor, when making a payment, has the primary right to direct its application to such debt as he may choose, whether secured or unsecured.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

3. PAYMENT (§ 38*) — APPLICATION — DIRECTION BY DEBTOR.

It is not necessary that a debtor should direct application of payment at the precise time the money is paid. A direction made prior to such payment, and not changed before or at the time payment is made, is a manifestation at the time of the intention or desire of the debtor as to the application of such payment.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

4. PAYMENT (§ 36*) — APPLICATION — MEDIUM OF PAYMENT.

The rule of the application of payments is not confined to payments made in money, but may include monthly credits, to which an employé is entitled, for a portion of his wages;

a direction of the application being made by the employé prior to the entering of said monthly credits.

[Ed. Note.—For other cases, see *Payment*, Dec. Dig. § 36.*]

Commissioners' Opinion, Division No. 1. Error from Carter County Court; I. N. Mason, Judge.

Action by the Cook County Liquor Company against A. J. Carson and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Sigler & Howard, of Ardmore, for plaintiffs in error. Orville T. Smith, of Oklahoma City, and Wm. Pfeiffer, of Ardmore, for defendant in error.

SHARP, C. Plaintiffs in error, defendants below, were indebted to defendant in error, plaintiff below, on two promissory notes, one for \$368.50, secured by chattel mortgage; a second for \$500, which was unsecured. The note secured by the chattel mortgage was executed in the month of December, 1908; the unsecured note, in January, 1909. At the time of the execution of the notes, plaintiff in error, A. J. Carson, was a salesman in the employ of plaintiff, and it was agreed between the parties that the plaintiff was to deduct \$50 per month out of each and every month's wages or earnings, the same to be credited on the said A. J. Carson's indebtedness. On the evening of the day that the second note was executed, it is claimed by said A. J. Carson that he notified David Dreeben, one of the partners of plaintiff company, that the accruing monthly credits should be applied on the secured note, and Dreeben, on behalf of the partnership, so agreed. The latter in his deposition testified that no such agreement was ever made by him as claimed by Carson. Defendant A. J. Carson continued in the employ of the plaintiff for something over a year, and was entitled to a total credit of \$625. Instead of applying the credits to the payment of the secured note, they were first applied by plaintiff to the payment of the unsecured note, and, after its payment, the balance was credited on the secured note. The case was tried before the court without the intervention of a jury. Special findings of fact and conclusions of law were made, of which the following form a part: "I find that the defendant A. J. Carson at some time after the making of the two notes, one secured and one unsecured, to the plaintiff, requested one of the plaintiffs, Mr. Dreeben, to credit his payments, to wit, \$50 a month, upon the secured note. I find, however, that the said Dreeben did not positively agree or enter into a contract so to do. I find that the defendant A. J. Carson did not make a demand for payment to be credited to the secured note at the time he made each particular payment thereon."

[1] The conclusions of law predicated upon

the findings of fact, in brief, were that the credits were properly applied, and that the plaintiff was entitled to recover a judgment for the possession of the property mortgaged to secure the payment of the first note. In the first place, it was not necessary that any agreement be made as to the application of the payments. The general rule is that, when a creditor holds more than one claim against his debtor, the latter on making a payment has the right to direct upon which debt it shall be credited, and it is only where no direction is given that the creditor can make the application; that, where a direction by the debtor to apply payments exists at the time that the payments are made, it is the duty of the creditor to so apply them. *Kent & Barnett v. Marks & Gayle*, 101 Ala. 350, 14 South. 472; *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Bell et al. v. Bell (Ala.)* 56 South. 926, 37 L. R. A. (N. S.) 1203; *Farris et al. v. Morrison*, 66 Ark. 318, 50 S. W. 693; *Briggs v. Steele*, 91 Ark. 458, 121 S. W. 754; *Wendt v. Ross*, 33 Cal. 650; *Frutig v. Traf-ton*, 2 Cal. App. 47, 83 Pac. 70; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; *Boyd v. Agricultural Ins. Co.*, 20 Colo. App. 28, 76 Pac. 986; *Nichols v. Culver*, 51 Conn. 177; *Cavanaugh et al. v. Marble*, 80 Conn. 389, 68 Atl. 853, 15 L. R. A. (N. S.) 127; *Pickering v. Day*, 2 Del. Ch. 333; *Randall v. Parramore & Smith*, 1 Fla. 409; *Green v. Ford*, 79 Ga. 130, 3 S. E. 624; *Austin v. Southern Home Loan Ass'n*, 122 Ga. 439, 50 S. E. 382; *Dorris Lbr. Co. v. Cummins*, 157 Ill. App. 10; *Murphy v. Schnell*, 248 Ill. 182, 93 N. E. 738; *Barrett v. Sipp et al. (Ind. App.)* 98 N. E. 310; *Huffman et al. v. Couble*, 86 Ind. 591; *Trentman v. Fletcher et al.*, 100 Ind. 106; *Conduitt et al. v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *First Nat. Bank v. Hollingsworth*, 78 Iowa, 575, 43 N. W. 536, 6 L. R. A. 92; *Irwin v. Paulett*, 1 Kan. 418; *Koehler v. Bierbaum (Ky.)* 122 S. W. 524; *Howard v. London Mfg. Co.*, 72 S. W. 771, 24 Ky. Law Rep. 1934; *Slaughter & Crosby v. Milling*, 15 La. Ann. 526; *Blake v. Sawyer*, 83 Me. 129, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762; *Starrett v. Barber*, 20 Me. 457; *Treadwell v. Moore*, 34 Me. 112; *Trustees of Church v. Helse & Co. et al.*, 44 Md. 455; *Lee v. Early*, 44 Md. 80; *Reed v. Boardman*, 20 Pick. (Mass.) 441; *Ramsay v. Warner*, 97 Mass. 8; *Blair v. Carpenter et al.*, 75 Mich. 167, 42 N. W. 790; *Harper v. Concrete Pub. Co.*, 166 Mich. 429, 131 N. W. 1112; *Solomon v. Dreschler*, 4 Minn. 278 (Gil. 197); *Crisler v. McCoy*, 33 Miss. 445; *Sparks v. Jasper County*, 213 Mo. 218, 112 S. W. 265; *Burchard v. Western Commercial Travelers Ass'n*, 139 Mo. App. 606, 123 S. W. 973; *Murray v. Schneider*, 64 Neb. 484, 90 N. W. 206; *City of Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 93 N. W. 766; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Bean v. Brown*, 54 N. H. 395; *Benson v. Reinshagen et ux.*, 75 N. J. Eq. 358, 72 Atl. 954;

Marsh v. Vanness, 75 N. J. Eq. 607, 74 Atl. 47; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *New York, etc., Brewing Co. v. Angelo*, 144 App. Div. 655, 129 N. Y. Supp. 713; *Lee v. Manley*, 154 N. C. 244, 70 S. E. 385; *Bank v. Roberts et al.*, 2 N. D. 195, 49 N. W. 722; *Eureka Ins. Co. v. Doble*, 3 Ohio Dec. (Reprint) 316; *Stewart et al. v. Hopkins et al.*, 30 Ohio St. 502; *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708; *Risher v. Risher*, 194 Pa. 164, 45 Atl. 71; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004; *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366; *Fulton et al. v. Davidson et al.*, 3 Helsk. (Tenn.) 614; *White v. Blakemore*, 8 Lea (Tenn.) 49; *Bussey v. Grant's Adm'r et al.*, 10 Humph. (Tenn.) 238; *John B. Bonner Memorial Home v. Collin County Nat Bank*, 57 Tex. Civ. App. 313, 122 S. W. 430; *Robinson et al. v. Doolittle et al.*, 12 Vt. 246; *Ayer v. Hawkins*, 19 Vt. 26; *Chapman v. Commonwealth*, 66 Va. 721; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Post-Intelligencer Pub. Co. v. Harris*, 11 Wash. 500, 39 Pac. 965; *Ross-Higgins Co. v. Rook*, 65 Wash. 546, 118 Pac. 744; *Hempfield R. R. Co. v. Thornburg*, 1 W. Va. 261; *Johnston et al. v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641; 30 Cyc. 1228; 4 Enc. L. & P. 1058; 2 A. & E. Enc. L. 435; *The Menmon*, 62 Fed. 482, 23 U. S. App. 647, 10 C. C. A. 502; *Field et al. v. Holland et al.*, 6 Cranch, 8, 3 L. Ed. 136; *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384; *United States v. Kirkpatrick et al.*, 9 Wheat. 720, 6 L. Ed. 199; *Jones v. United States*, 7 How. 631, 12 L. Ed. 870; *Nat. Bank of New York v. Mechanics' Nat. Bank*, 94 U. S. 439, 24 L. Ed. 178. It is, therefore, immaterial that the plaintiff did or did not agree or consent to the debtor's request. The money was due, and belonged to Carson, and he had a right to direct upon which note monthly credits should be made.

[2] Nor is the rule of the application of payments affected by the fact that one of the debts owing is secured, while the other is unsecured. *Green v. Ford*, 79 Ga. 130, 3 S. E. 624; *Briggs v. Steel*, 91 Ark. 458, 121 S. W. 754; *Kent & Barnett v. Marks & Gayle*, 101 Ala. 350, 14 South. 472; *Howard v. London Mfg. Co.*, 72 S. W. 771, 24 Ky. Law Rep. 1934; *Marsh v. Vanness et al.*, 75 N. J. Eq. 607, 74 Atl. 47; *Lee v. Manley*, 154 N. C. 244, 70 S. E. 385; *Baum v. Trantham*, 42 S. C. 104, 19 S. E. 973, 46 Am. St. Rep. 697; *John B. Bonner Memorial Home v. Collin County Nat. Bank*, 57 Tex. Civ. App. 313, 122 S. W. 430; *Post-Intelligencer Pub. Co. v. Harris et al.*, 11 Wash. 500, 39 Pac. 965.

[3] It was not necessary that Carson should direct the application of the payments at the precise time that the payments were made or credits entered. This he could do beforehand. Having once notified the creditor upon what debt the credits should be entered, it was unnecessary to repeat this notice at

the end of each month, or on each pay day. *Petty v. Dill*, 53 Ala. 641; *Wendt v. Ross*, 33 Cal. 650; *Bank v. Roberts et al.*, 2 N. D. 195, 49 N. W. 722; *Taylor et al. v. Jones*, 1 Ind. 17; *Huffman v. Cauble*, 86 Ind. 591; *Burchard v. Western Commercial Travelers' Ass'n*, 139 Mo. App. 606, 123 S. W. 973; *Wittkowsky v. Reid*, 82 N. C. 116; *Baum v. Trantham*, 42 S. C. 104, 19 S. E. 973, 46 Am. St. Rep. 697; *Reynolds et al. v. McFarlane*, 1 Tenn. (1 Overt.) 488; 4 Enc. L. & P. 1061; 2 A. & E. Enc. L. 444; 80 Cyc. 1230.

[4] It is insisted, however, by counsel for plaintiff in error that the performance of work by a debtor for the creditor is not a payment within the rule allowing the debtor to direct the application of payment to a particular debt. Treating the payment made as services rendered, the general rule is to the contrary, as it is not necessary that the payment be made in money. It may be made in notes, or property, or labor. 4 A. & E. Enc. L. & P. 1057. In *Smith v. Vaughan*, 78 Ala. 201, the obligations given by the defendant were for cotton as the consideration or price of lands. It was held that the rules applicable to the deliveries of cotton were the same as to general payments, where a debtor owes two or more debts to the same person. In *State v. Thomas*, 33 N. C. 251, the payment was in horses and cattle received as money, and it was held that the general rule of the application of payments applied. In *Ross v. Crane et al.*, 74 Iowa, 375, 37 N. W. 959, the plaintiff had purchased a span of horses and given a note and chattel mortgage thereon in payment, which were at once assigned. The day following he agreed in writing with the assignee to work for him, and his wages should be applied in payment of the note. Sufficient work was done to pay the note, when the assignee credited the amount on another account, and sold the note and mortgage to a third person, who seized the team. It was held in an action to recover the horses that earnings of the plaintiff under the contract were a payment of the mortgage. Other cases in point are *Murray v. Schneider*, 64 Neb. 484, 90 N. W. 206; *Martin v. Draher*, 5 Watts (Pa.) 544; *Young v. Harris*, 36 Ark. 162.

For the foregoing reasons, the judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(35 Okl. 416)

SCHECHINGER v. GAULT et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 116*)—AGREEMENTS RELATING TO REALTY—APPOINTMENT OF AGENT.

An agreement for the sale of real property, or of an interest therein, if made by an

agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, and subscribed by the party sought to be charged.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 251-260; Dec. Dig. § 116.*]

2. FRAUDS, STATUTE OF (§ 132*)—OPERATION AND EFFECT.

If a promisor or vendor is ready and willing to perform, and carry out the sale of the land in accordance with his parol agreement, he cannot, as a rule, be compelled to give up or pay for the consideration received, on the sole ground that the agreement is invalid because of the statute of frauds, and cannot be compelled to perform.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 285, 286; Dec. Dig. § 132.*]

3. VENDOR AND PURCHASER (§§ 108, 306, 334*)—RESCISSION OF CONTRACT—GROUNDS—FRAUD.

As a rule, one who has entered into a contract to purchase realty under the influence of fraudulent representations of the seller may rescind the contract and recover the purchase money if paid, or avoid its payment, if unpaid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 873-876, 959-980; Dec. Dig. §§ 108, 306, 334.*]

4. VENDOR AND PURCHASER (§ 334*)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY PAID.

A petition, which alleges that G., the agent, represented to S., the vendee, that M., the vendor and principal, was the absolute owner in fee of the realty; that he (G.) as agent of said M. had full and complete authority to make and enter into a contract for said sale; that S. relied upon said representations made by G., the agent, and, believing them to be true, signed said agreement, and in accordance with its terms drew a draft on the Bank of P. for \$1,000, which was honored and transmitted to F. bank for G., as agent of the vendor; that afterwards plaintiff ascertained that M. was not the owner in fee of said land, but the title was vested in M. and his wife, the said premises being then and there the homestead of said M. and his wife, and that G. was not the agent of the said M., nor had he ever had authority to make the contract of sale of said premises on behalf of the wife of said M.; that thereafter the wife of said M. notified plaintiff, both by word of mouth and letter, that she had never consented to the sale of said premises, the same being her homestead, and that she never would do so, and that she would refuse to sign any deed or contract affecting the same, or for the sale thereof; that plaintiff then notified the defendants that he refused to be longer bound by the agreement and thereby rescinded the same—held to state a cause of action for the recovery of said sum of money.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

Error from District Court, Canadian County; John J. Carney, Judge.

Action by Martin Schechinger against F. M. Gault and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with instructions.

C. F. Dyer, of Geary, and Geo. S. Pearl, of El Reno, for plaintiff in error. Wm. O. Woolman, of Watonga, for defendants in error.

WILLIAMS, J. Plaintiff in error, as plaintiff, sued the defendants in error, as defendants, in the district court, declaring on a certain contract entered into with J. D. Miller, by F. M. Gault, agent, which is in words and figures as follows: "Whereas, the party of the first part has sold and agrees to convey to the party of the second part the following real estate, to wit: N. E. $\frac{1}{4}$, sec. 6, T. 13, R. 10; also the land south of the Rock Island R. R. in the N. W. $\frac{1}{4}$, sec. 5 T. 13, R. 10, for the sum of \$13,500 and payable as follows: \$1,000 cash in hand to be placed in the First National Bank, of Geary, Oklahoma, with the deed and abstract and the same to show a perfect title, the balance of said money to be paid as follows, \$5,000 Jan. 1st, 1909, and the balance \$7,500 on the 1st day of March, 1909. Accept (except) the right of way through the N. E. $\frac{1}{4}$, sec. 6, T. 13, R. 10, now used by the R. R. Co. Party of the second part is to have possession of the land on January 1, 1909, the loose wire now on the fence not stretched is to remain in place, and the party of the second part is to have three ricks of alfalfa hay now on the farm, and the party of the second part is to have the privilege of cutting the alfalfa now growing on the farm; also he has the privilege of plowing the wheat and oats ground." In said contract J. D. Miller is designated as party of the first part, and Martin Schechinger as party of the second part. Defendants each demur to the petition, on the ground that it does not state facts sufficient to constitute a cause of action. Each of said demurrers was sustained by the trial court, and judgment rendered in favor of the defendants.

[1] As a rule, under the original statute of frauds it is not necessary that an agent should be authorized in writing to sign written contracts for the sale of land, or memorandum of an oral agreement for such sale. 20 Cyc. 277; *Ledbetter v. Walker*, 31 Ala. 175. In many jurisdictions, however, the Legislatures have specifically provided that the agent must be authorized in writing in order to make a binding contract or memorandum. Section 1089, Comp. Laws Okl. 1909, par. 5; section 847, Stats. Okl. Ter. 1893; 20 Cyc. 276. It has been held that it is immaterial whether the agent's authority was in writing, if the principal, with full knowledge of the sale and the terms and conditions thereof, ratified the same in writing. *Butman v. Butman*, 213 Ill. 104, 72 N. E. 821. In Michigan it has been held that the authority of an agent to execute a written contract for the purchase of lands may be shown by an oral ratification. *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490.

[2] Under the allegations of the petition, which are admitted to be true by the demurrer interposed by the defendants in error, the contract for the sale of the land having been executed by the vendor through an agent, who was not authorized thereto in writing, the same was void as in contra-

vention of the statute of frauds; the vendee not having gone into possession of such premises. Section 1089, Comp. Laws of Oklahoma 1909; section 847, Stats. of Okl. Ter. 1890; *Halsell et al. v. Renfrow et al.*, 14 Okl. 674, 78 Pac. 118, 2 Ann. Cas. 286. But that fact does not necessarily entitle the vendee to recover the partial payment. If a promisor or vendor is ready and willing to perform and carry out the sale of land in accordance with his oral agreement, he cannot be compelled to give up or pay for the consideration received, on the sole ground that he could not be compelled to perform. *Venable v. Brown*, 31 Ark. 564; *McDonald v. Beall*, 52 Ga. 576; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Crabtree v. Welles*, 19 Ill. 55; *Brockhausen & Fischer v. Bowles, Jr., et al.*, 50 Ill. App. 98; *Duncan v. Baird & Co.*, 8 Dana (Ky.) 101; *Nelson v. Forgey*, 27 Ky. (4 J. J. Marsh.) 569; *Dougherty's Administrator v. Goggin*, 1 J. J. Marsh. (Ky.) 874; *Plummer v. Bucknam*, 55 Me. 105; *Riley v. Williams et ux.*, 123 Mass. 506; *Coughlin v. Knowles*, 48 Mass. (7 Metc.) 57, 39 Am. Dec. 759; *Sims v. Hutchins*, 8 Smedes & M. (Miss.) 328, 47 Am. Dec. 90; *Sennett v. Shehan*, 27 Minn. 328, 7 N. W. 286; *La Du-King Mfg. Co. v. La Du*, 36 Minn. 473, 31 N. W. 938; *McClure v. Bradford*, 39 Minn. 118, 38 N. W. 753; *Keystone Iron Co. v. Logan et al.*, 55 Minn. 537, 57 N. W. 156; *Perkins v. Allnut (Mont.)* 130 Pac. 1; *Collier v. Coates*, 17 Barb. (N. Y.) 471; *Dowdle v. Camp*, 12 Johns. (N. Y.) 451; *Ketchum & Sweet v. Everton*, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; *Abbott v. Draper*, 4 Denio (N. Y.) 51; *Lane v. Shackford*, 5 N. H. 130; *Green v. North Carolina R. Co.*, 77 N. C. 95; *Durham Consolidated Land & Improvement Co. v. Guthrie et al.*, 116 N. C. 381, 21 S. E. 952; *Foust v. Shoffner*, 62 N. C. 242; *Mack v. Bragg*, 30 Vt. 571; *Cobb v. Hall*, 29 Vt. 510, 70 Am. Dec. 432. *Alabama (Nelson v. Shelby Mfg. & Imp. Co.)*, 96 Ala. 515, 11 South. 695, 88 Am. St. Rep. 116; *Michigan (Scott v. Bush)*, 28 Mich. 418, 12 Am. Rep. 311; *Virginia (Brown v. Pollard)*, 89 Va. 696, 17 S. E. 6; and *Wisconsin (McKinnon v. Vollmar)*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178) support a rule to the contrary.

[3, 4] This contract, whilst declared by statute to be invalid, is neither illegal nor against good morals, nor against the public policy of the state, other than it was not entered into in the manner prescribed by the statute. Obviously what was intended by declaring that such contract should be invalid, unless in writing, was that the same should not be enforceable; for if it was intended, in declaring the contract to be invalid on that ground, that it should be void as against public policy, then all parties thereto would be in pari delicto, and, though the vendor may have been unwilling to convey or perform, yet the vendee still could not recover his partial payment, for the reason that a court of law would grant neither relief, but leave them as it found them.

Plaintiff alleged that G. represented to him that M. was the absolute owner in fee of said premises; that he (G.), as agent of said M., had full and complete authority to make and enter into said contract for the sale of said premises, and that said premises were free and clear of and from all former incumbrances; that plaintiff relied upon the representation so made by G., and, believing them to be true, signed said agreement and in accordance with its terms, drew a draft on the Bank of P. for \$1,000, which said draft was honored, and the money transmitted to the defendant First National Bank; that thereafter plaintiff ascertained that the said M. was not the owner in fee of said land; but that the title was vested in M. and his wife, the said premises then and there being the homestead of the said M. and his said wife, and that said G. was not the agent of said M., nor had he ever had authority or right to contract for the sale of said premises on behalf of the wife of said M.; that thereafter said wife of the said M. notified plaintiff, both by word of mouth and letter, that she had never consented to the sale of said premises, said premises being her homestead, and that she never would do so, and that she would refuse to sign any deed or contract affecting the same or for the sale thereof; that thereafter plaintiff notified defendant G. that he refused to be longer bound by the agreement, and rescinded the same; that after said notice was served he demanded of G. the return of the said \$1,000 which was refused. By the demurrer these allegations were admitted to be true.

In *Harris et al. v. Carter's Adm'rs et al.*, 3 Stew. (Ala.) 233, it is said: "It is certainly a correct rule that one who has purchased an estate under the influence of the fraudulent representations of the seller may rescind the contract and recover back the purchase money if paid, or avoid its payment if unpaid; but a purchaser, with knowledge of his vendor's title, cannot object that he had no title at the time of the sale if he afterwards consummate his title before the vendee has performed the conditions on which he is authorized to demand it."

But it seems to be settled by authority and reason that if the contract is made by the vendor in good faith, and he has such an interest in the subject-matter of the contract, or is so situated, that he can reasonably convey a good title at the proper time, that is sufficient. *Gray v. Smith* (C. C.) 78 Fed. 525; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213; *Easton v. Montgomery et al.*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Provident Loan & Trust Co. v. McIntosh et al.*, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; *Dresel v. Jordan*, 104 Mass. 415; *Boehm v. Wood*, 1 Jac. & Walk. 419; *Salisbury v. Hatcher*, 2 Y. & Col. Ch. 54; *Dutch Church v. Mott*, 7 Paige (N. Y.) 77; *Baldwin v. Salter*, 8 Paige (N.

Y.) 473; *Seymour v. Delancy*, 8 Cow. (N. Y.) 445, 15 Am. Dec. 270; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Richmond v. Gray*, 3 Allen (Mass.) 25, and cases cited; *Barnard v. Lee*, 97 Mass. 92; *Hazleton v. Le Duc*, 10 App. D. C. 395; *Flanagan v. Fox*, 5 Misc. Rep. 589, 25 N. Y. Supp. 514; 29 Am. & Eng. Encyc. of Law (2d Ed.) 608.

It follows that the trial court committed error in sustaining the demurrer and holding that the petition did not state a cause of action.

The judgment of the lower court is reversed and remanded, with instructions to proceed in accordance with this opinion. All the Justices concur.

(8 Okl. Cr. 716)

Ex parte GRAVES.

(Criminal Court of Appeals of Oklahoma.
March 4, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 6*)—POWERS OF TERRITORIES — LAWS DEFINING AND PUNISHING MURDER AND MANSLAUGHTER.

Oklahoma Territory had the authority and power to enact laws defining the crimes of murder and manslaughter, and to prescribe punishment therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 5; Dec. Dig. § 6.*]

Application of Theodore Graves for writ of habeas corpus. Writ denied.

W. D. Halfhill, of Muskogee, for petitioner. Chas. West, Atty. Gen., and Jno. L. Hull, Special Asst. Atty. Gen., for respondent.

DOYLE, J. This is a petition for writ of habeas corpus, and is filed for the purpose of setting at liberty Theodore Graves. It is alleged in the petition that he is restrained of his liberty, and is unlawfully imprisoned in the state penitentiary at McAlester, by R. W. Dick, warden.

It appears from the petition that Theodore Graves was in the district court of Washita county, Oklahoma Territory, duly convicted of the crime of manslaughter in the first degree, and was on November 22, 1904, sentenced to imprisonment for a term of 10 years; that on February 9, 1909, he was paroled by the state board of pardons and paroles; and that, by direction of the Governor of the state of Oklahoma, said parole so granted was later revoked. It is alleged: "That the Governor of the state of Oklahoma has no constitutional or lawful right or authority to order the imprisonment, in the penitentiary of the state of Oklahoma, this petitioner; that, upon the contrary, said warrant and imprisonment of petitioner aforesaid is a violation of the rights of this petitioner, in this, to wit: That said order of the Governor aforesaid, if carried out, will imprison this petitioner for a longer time than he would have been imprisoned by the order, judgment, and decree of the court in which he was originally sentenced; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Governor of the state of Oklahoma has no judicial authority, or any legal right or capacity, to fix a time in which the petitioner should be imprisoned, beyond the time fixed and limited by the court, where said petitioner was tried, convicted, and sentenced by said court aforesaid; and that his present imprisonment and restraint of this petitioner is an imprisonment "without due process of law," and in violation of the Constitution of the United States of America." It is also alleged that the Code of Criminal Procedure of the territory of Oklahoma was never duly enacted, in that the same was never signed by the presiding officer of the council, nor of the House of Representatives, nor the Governor of the territory of Oklahoma, as required by the "organic act" of said territory. It is further alleged that the district court of Washita county had no jurisdiction to try said cause for the reason that, at the time of the passage of the organic act (Act May 2, 1890, c. 182, 26 Stat. 81), there was in force in the territory, included within the limits of Oklahoma, certain laws of the United States, which covered specifically the offense of murder and manslaughter, when committed in a place or district under the exclusive jurisdiction of the United States.

The petition was filed with the clerk of this court September 17, 1912, but was not presented to the court, or any member thereof. Later a brief was filed, and the Attorney General filed an answering brief. No proof was offered in support of the averments of the petition. The petition does not contain a copy of the original judgment of conviction, nor of the parole, nor of the order revoking the parole; nor is a copy of the warrant and order of arrest issued upon the revocation of the parole attached to the petition. Therefore no question is properly presented by the averments relating thereto; the jurisdictional questions sought to be raised having been heretofore determined, adversely to the contentions of petitioner's counsel. Oklahoma Territory had the right and power to enact laws defining the crime of murder and of manslaughter, and to prescribe punishment therefor.

We are clearly of opinion that the application is wholly destitute of merit. Therefore the writ of habeas corpus is denied.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

(8 Okl. Cr. 682)

BILLY v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 1, 1913.)

(Syllabus by the Court.)

HOMICIDE (§§ 255, 300*)—EVIDENCE—SUFFICIENCY—INSTRUCTIONS.

In a prosecution for murder, the evidence is held sufficient to support the verdict of

manslaughter in the first degree, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541, 614, 616-620, 622-630; Dec. Dig. §§ 255, 300.*]

Appeal from District Court, Pushmataha County; Malcolm E. Rosser, Judge.

Lyman Billy was convicted of manslaughter, and appeals. Affirmed.

C. E. Dudley, of Antlers, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Hiram A. King, Sp. Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, Lyman Billy, hereinafter referred to as the "defendant," was convicted of manslaughter in the first degree in the district court of Pushmataha county, on an information filed in said court December 21, 1910, charging him with the murder of Julius Hobson, on or about the 19th day of November, 1910. In accordance with the verdict of the jury he was sentenced to serve a term of 10 years' imprisonment in the state penitentiary. The judgment and sentence was entered on February 18, 1911. To reverse the judgment the defendant prosecuted an appeal by filing in this court August 12th a petition in error with case-made.

The errors assigned are: First, the admission of improper and incompetent evidence; and, second, the refusal to give a requested instruction.

The circumstances under which the homicide was committed are, briefly, as follows: Julius Hobson, the deceased, David Charley, and Samson Jackson, on the day of the homicide, went to Sina Homer's house and passed by the defendant's house; it being about 200 yards from where they were going. The deceased's sister was staying at Sina Homer's, and he was trying to persuade her to go home with him, when the defendant appeared and told her to come to his house. The parties concerned were Choctaw Indians. David Charley, who the evidence shows had been living in adultery with Martha Hobson, told her she had better go home with the deceased, as he was her brother. The defendant then pulled a pistol, and the deceased ran towards him and fell over the fence. David Charley then pulled a pistol and fired at the defendant, and the defendant fired back, shooting all his cartridges at David Charley and the deceased; David Charley also shooting at the defendant. No one was hit by any of these shots. During the shooting Martha Hobson ran away from the scene, going west. After the shooting the defendant went south 200 yards to his house. Before reaching his house he was overtaken by David Charley, who told him that it would be better to let the deceased alone, that he was drunk, and the defendant answered, "I am not making any trouble for you." David Charley then returned to where the difficulty first started, and with Samson Jackson and the deceased

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

they went towards the west, thus going away from the defendant's house. All three were on horseback.

The testimony of C. M. Whatley, who lived on the defendant's place, and J. J. Matthews, who was there at the time, and who, we gather from the record, were not related to any of the parties to the difficulty, shows that the defendant went into his house and immediately came out with a Winchester, and went back to Sina Homer's house.

The evidence tends further to show that the defendant followed the deceased at least 200 yards before shooting him, and that the deceased was about 200 yards from him when he shot him. The evidence clearly establishes the fact that the defendant was pursuing the deceased when he fired the shot, and that the bullet entered his back.

The defendant testified on his own behalf that he was a Gospel worker and that his wife was Martha Hobson's aunt. That David Charley tried to shoot him and he ran home. The record then shows his testimony as follows: "Q. What did you do after you got home? A. I went in the closet of the house. Q. What did you get there, if anything? A. I was so excited and so scared that I do not know what I did get or what I was doing, but I found out I had a gun. Q. After you got that gun, did you shoot at anybody? A. The witnesses testify that I did, and I reckon I must have shot at him. Q. How far were you from your house when you shot? A. About 100 yards. Q. How far was Julius away from you when you shot at him? A. About 200 yards. Q. Was Julius walking or riding? A. He was horseback. Q. Did he get down off his horse after you shot? A. Yes. Q. Did he get down immediately, right where you shot? A. After I shot he went on about 200 yards, and I saw him get off his horse. Q. Why did you shoot at Julius? A. I knew that they would kill me or hurt me, and I was excited, also scared, and that is why I shot at him."

Coming now to the errors assigned: First, objection is made to the ruling of the court in permitting the state's witness David Charley, on redirect examination, to state, over objection of counsel for the defendant, that he had been convicted that morning for the part he took in the difficulty. Witness had just testified on cross-examination as follows: "Q. David, you were convicted for hog theft in the Choctaw court and whipped, were you not? A. Yes, sir; I was whipped. Q. For hog stealing? A. Yes, I stole him and got whipped." The record does not disclose for what offense witness was convicted of that morning. So far as this court knows, it was beneficial to the defendant in tending to discredit the witness.

In support of this assignment, the case of *Rhea v. Territory*, 3 Okl. Cr. 230, 105 Pac. 314 is cited. In that case it was held that: "Although evidence may be improperly admitted against the defendant, on account of

which his conviction would be reversed, yet, if the defendant takes the witness stand and testifies to the same thing, the error in receiving the other evidence will become harmless, and then will not be ground for reversal." However, the court properly permitted this evidence to be received.

The second objection is made to the ruling of the court in refusing to let Martha Hobson, a witness for the defendant, answer the following question: "State to the jury how you happen to live with David Charley." On the state's objection, the following ruling was made: "The Court: Q. You can prove the actions of her brother at the time of the trouble, but it makes no difference how she commenced to live with David Charley. If her brother wanted her to live with David Charley in the beginning, or forced her to do so, it would make no difference now, or at the time of this transaction; but his conduct then is a proper matter for the jury." This evidence would not have been admissible under any rule. However, the defendant was permitted to prove by the witness that on the day of the homicide her brother wanted her to go back and live with David Charley.

The only other error assigned is based upon the action of the court in refusing to give a requested instruction as follows: "If you believe from the evidence that deceased and David Charley ran defendant almost to his house, and that, when defendant secured his Winchester, deceased and David Charley retreated, and defendant believed that they were retreating with the intention of renewing the attack, you are instructed that the defendant had a right to pursue them and slay them if he were not acting in revenge, nor after his defense had ceased." This instruction is clearly erroneous and was properly refused. It leaves out the question of imminent danger and the question as to who was the aggressor. The facts in this case could not have justified such an instruction. The undisputed facts are that, before the defendant left his home after going there to get his Winchester rifle, the deceased and the other parties were riding away on their horses; that there was a contest between the deceased and the defendant over Martha Hobson, who during the difficulty at Sina Homer's house had run towards the west. While the defendant was going to his home, the deceased had followed and overtaken Martha Hobson. The defendant followed them far enough, after getting his Winchester, to see that the deceased was about to win out and get Martha Hobson to go home with him. He stopped and, taking deliberate aim, shot Julius Hobson in the back as he was fleeing from him.

It cannot be doubted, we think, that the testimony of the defendant alone warranted the jury in finding him guilty of manslaughter in the first degree.

Our conclusion is that the defendant had

a fair and impartial trial and has nothing to complain of at the hands of the court or the jury.

The judgment of the district court of Pushmataha county is affirmed.

ARMSTRONG, P. J., and FURMAN J.,
concur.

(8 Okl. Cr. 718)

FOSTER v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 5, 1913.)

(Syllabus by the Court.)

1. ESCAPE (§ 1*)—IMPRISONMENT IN COUNTY JAIL—MISDEMEANOR.

Under section 7073, Code of Criminal Procedure, it is merely a misdemeanor for a person imprisoned, pursuant to a sentence of imprisonment in the county jail, to break jail and escape.

[Ed. Note.—For other cases, see *Escape*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ESCAPE (§ 1*)—BREAKING JAIL—PUNISHMENT.

Section 2164 of the Penal Code, and section 7073, Code of Criminal Procedure, are not repugnant.

[Ed. Note.—For other cases, see *Escape*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from District Court, Garvin County; R. McMillan, Judge.

Jonah Foster was convicted of escaping jail, and appeals. Reversed, with directions.

Carr & Field, of Pauls Valley, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and John M. Stanley, Co. Atty., of Pauls Valley, for the State.

DOYLE, J. Plaintiff in error was convicted in the district court of Garvin county on an information which charged that, on or about the 19th day of May, 1911, Jonah Foster did escape from the county jail of Garvin county, a prison other than the state prison; the said Jonah Foster being then and there a prisoner confined in said county jail of Garvin county. The information was filed May 23d, on the same day he was arraigned and entered a plea of guilty, and was thereupon sentenced to imprisonment in the penitentiary for a term of one year and one day. The following day plaintiff in error employed counsel and had a motion prepared asking that he be permitted, upon the grounds and reasons therein set forth, to withdraw his plea of guilty, and that he be granted a trial, which motion was overruled.

On May 27, 1911, in execution of the judgment, plaintiff in error was delivered to the warden of the penitentiary, where he remained confined until released upon an order of supersedeas made by this court, when his appeal to this court had been perfected. April 10, 1912, the Attorney General and the coun-

ty attorney filed in this court a motion to remand, with instructions to dismiss, in part as follows: "This prosecution was had under the provisions of section 2164, Compiled Laws of Oklahoma 1909, Snyder, when in truth this plaintiff should have been prosecuted under the provisions of section 7073, Id., as the admitted facts in this case are that plaintiff in error had been convicted of the offense of selling intoxicating liquor in said county, and pursuant to such conviction was confined in the county jail of said county, and was by order of the board of county commissioners required to work on the public highways therein; that, while so employed, he escaped and was thereafter captured by the sheriff, and this charge was lodged against him. Such escape was accomplished without the use of force or fraud. Plaintiff in error has already been committed in the state penitentiary under this charge for the period of four months, and the county attorney of Garvin county is of the opinion that he has been sufficiently punished under a mistaken apprehension as to what the law was. Therefore we respectfully suggest that the district court of Garvin county was without jurisdiction in this case, and the same should be remanded to the said district court, with instructions that it be dismissed." Presumably the district court assumed jurisdiction on the theory that a violation of section 2164 of the Penal Code was charged.

[1] Section 7073, Code of Criminal Procedure, provides: "If any person who may be imprisoned pursuant to a sentence of imprisonment in the county jail, or any person who shall be committed for the purpose of detaining him for trial, for any offense not capital, shall break prison and escape, he shall be imprisoned in the county jail for the term of six months."

The offense charged in the information constitutes a misdemeanor under the aforesaid section 7073, and the district court was without jurisdiction or power to try the information, or to render the judgment of conviction, or to issue the commitment thereon.

[2] In *Ex parte Martin*, 8 Okl. Cr. 224, 118 Pac. 155, it is said: "As we view these provisions, they are not repugnant; and, while they were passed by the same Legislature, section 7073 is the later act, having been approved subsequently to section 2164. If there is any repugnancy, the later act must prevail."

The confession of error is confirmed, and the judgment of the district court of Garvin county is reversed, and the cause remanded thereto, with direction to dismiss.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(8 Okl. Cr. 703)

ADDINGTON v. STATE.(Criminal Court of Appeals of Oklahoma.
March 1, 1913.)*(Syllabus by the Court.)***1. CRIMINAL LAW (§§ 588, 1151*)—APPEAL—REFUSAL OF CONTINUANCE.**

An application for continuance in a criminal case is addressed to the discretion of the trial court; and its action thereon will not be disturbed, unless there appears to have been a clear abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. §§ 588, 1151.*]

2. CRIMINAL LAW (§ 629*)—FURNISHING LISTS OF WITNESSES—DEFAULT—FAILURE TO OBJECT.

Section 20 of the Bill of Rights provides: "In all criminal prosecutions the accused shall have the right * * * to be heard by himself and counsel, and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of witnesses that will be called in chief to prove the allegations of the indictment or information, together with their post office addresses." *Held*, that it would be error to allow witnesses to testify against him in chief whose names have not been so furnished, if he seasonably asserts his constitutional right. But if he fails to object to going to trial on this ground, but announces ready for trial, he cannot afterwards avail himself of this objection; and the constitutional right given him by this section will be waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

3. HOMICIDE (§ 216*) — "DYING DECLARATIONS."

Proof that decedent was shot in the afternoon and died the next day about midday, that his wounds were necessarily fatal, and that he stated to persons present, immediately after he was shot, that he was dying, and that he expressed no hope of recovery, sufficiently shows that decedent appreciated the certainty and imminence of his impending death, and is, in itself, a sufficient predicate for the admission of his statements of the circumstances of the homicide as "dying declarations."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. § 216.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

4. HOMICIDE (§ 215*)—DYING DECLARATIONS—ADMISSIBILITY.

Where decedent, mortally wounded and without hope of recovery, under the solemn conviction of impending death, makes several statements of material facts concerning the cause and circumstances of the homicide, one of which statements was reduced to writing, the prosecution is not confined to the written statement, but may offer evidence of other statements, whether the several statements were similar or not. Should any of said statements be inconsistent or contradictory, it is open to the defense to show this fact.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451-456; Dec. Dig. § 215.*]

5. HOMICIDE (§ 200*) — CONFRONTING WITNESSES—DYING DECLARATIONS.

The constitutional provision (Bill of Rights, § 20) that in all criminal prosecutions the accused shall "be confronted with the witnesses against him" refers to living witnesses, and not to dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425-427; Dec. Dig. § 200.*]

6. CRIMINAL LAW (§ 1170*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of evidence to prove particular facts is harmless, if the facts sought to be proved are subsequently proved by other evidence, and it is apparent that the evidence excluded could not have changed the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

Appeal from District Court, McCurtain County; Summers Hardy, Judge.

Henry Addington was convicted of manslaughter, and appeals. Affirmed.

Hosey & Leggett, of Idabel, for plaintiff in error. Chas. West, Atty. Gen., Smith O. Matson, Asst. Atty. Gen., and Jos. L. Hull, Special Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, Henry Addington, hereinafter referred to as the defendant, was convicted of manslaughter in the district court of McCurtain county on an information filed in said court on February 6, 1911, charging him with the murder of Boliver McWhorter, in said county, on or about December 18, 1910, and in accordance with the verdict of the jury was sentenced to serve a term of 10 years' imprisonment in the state penitentiary.

The judgment and sentence was entered on March 4, 1911. To reverse the judgment, the defendant prosecuted an appeal by filing in this court, August 3, 1911, a petition in error with case-made.

In order to better understand the errors assigned, the following brief statement of the facts disclosed by the testimony is made, also extracts from the testimony of certain witnesses for the state and of the defendant, describing the immediate facts and circumstances of the homicide:

The deceased and the defendant, residents of Idabel, were, respectively, 21 and 18 years of age. The deceased, son of a Methodist minister, and the defendant, a store clerk, were rivals for the hand of one Miss Myrtle Suggs, which caused a misunderstanding. The evening before the killing there was a party at the Garrison's home, about two miles from Idabel. That day the deceased received a note, warning him to be a little slow, and that if he continued to take the stand which he had in the past he could have some one there to haul him home, signed "H. A." That evening they met at the party, and the deceased threatened to whip the defendant. The next day the defendant armed himself with a pistol, avowedly to settle with the deceased. After stating to several persons that he was looking for the deceased, he rode on horseback about a mile out of town and met the deceased coming to town. They talked for some time, and the defendant fired two shots at the deceased; one of them penetrating his bowels. The defendant then mounted his horse and rode back to Idabel, there meeting some

of the persons he had talked to before leaving town. He said, "I killed him out on the big road."

Several witnesses testified to dying declarations, and a written statement was admitted also. The written declaration was as follows: "Dec. 18, 1910. I, J. B. McWhorter, being aware of approaching death, make this my dying statement: We, Henry Adlington and I, met and were talking, and he said he had started to my house to settle a difficulty that we had had. I asked him to read a letter. He did so, and wanted to keep it, and drew his revolver. I remarked that he could shoot; that I had no arms. He put his gun in his pocket, and again drew it. I saw a buggy coming, and we walked up the road about a $\frac{1}{4}$ mile. We were comparing paper. I pulled off my glove to get the paper in my pocket, to get the paper, and he shot me. Had no knife in my hand. I asked him not shoot any more; he had shot me once. Made in the presence of C. T. Coonrod, Guy Short, C. H. Morris, A. F. Kerley."

W. M. Moore and two of his neighbors were standing in his yard, near the scene of the tragedy, and, hearing the first shot, their attention was directed to where the shot was fired. They testified: That when the defendant fired the second shot he was advancing upon the deceased, who was backing away from him. That they went to where the deceased had fallen, and reached there with four or five other neighbors. The deceased said that he was dying and commenced to vomit, and asked for water. A search for weapons was made, but none found. Two doctors from Idabel appeared and placed the deceased in an automobile and took him to town, where he died the next day about midday.

The defendant, as a witness in his own behalf, testified: That his first quarrel with the deceased was at the store where he was employed on the Saturday evening before the tragedy, and that the deceased said to him, "You have been knocking on me;" and "I told him that I did not understand it," and he said: "You are; before I get through with you, if everything proves up like I think it is, you will have me to kill, or I will kill you." That about 8 o'clock he hired a horse and went to a party at Mrs. Garrison's, a couple of miles in the country. That his horse was turned loose, and he went out in the yard, where the deceased was standing, and asked who turned his horse loose. That the deceased said, "No one," but "you have sent to Idabel for officers." That the deceased said: "Come on down the road. I will settle that with you." And the defendant said, "I don't want to fight." That the deceased pulled a gun and said, "Now, if you don't run, I am going to kill you," and came up to him and put his hand on his shoulder, and said: "Your mother and sister are both ladies; you are

a G— d— son of a b—; right here is where we get together." And the defendant said: "I am not able to fight you fair; all you hold in your hand is all that keeps me from getting on you right here." That the deceased turned around with two or three oaths and said: "No; he will not fight." That the next day, after dinner, he went to the livery stable and got a horse and started to Bill Mayhall's.

The record then shows his testimony to be as follows: "Q. Why were you going to Bill Mayhall's? A. Going to Bill Mayhall's to see the one that made up the party on Saturday night and asked me to go. I goes out there to see him. I was going to see if he would give another party, and I wanted to see him to see if he asked me, or merely told these boys to ask me, or merely told me to come. I don't know whether I was invited or not. I was going to see him to see whether I was invited before I said anything about the racket between me and Boliver McWhorter. Q. Begin and state what occurred from the time you left town on that trip. A. I gets out of town. Something near a mile out southwest of town here two boys were standing on the roadside, Belton Taylor, and Suggs, I think, made the remark if I knew who Boliver McWhorter was; I said 'Yes' and sort of laughed; I was going in a close place, but managed to get out. They asked me where I was going. I said I was going to Mayhall's. 'Do you know where he lives?' 'Yes; but he has gone to Shawnee town in a wagon along about 2 o'clock.' I said, 'I am going to see him to-night.' I goes ahead and goes up a long lane and rode up a hill; it was about a quarter from where I met these boys there was a top of a hill. You couldn't see any one coming from the south, or any one going towards the north, until you both got nearly to the top of the hill. When I got up to the top of the hill, I seen McWhorter coming on the other side of the hill. There we were with a fence on both sides, and the only way I could get away was to go back the way I went. I thought I had best not do it, although I was thinking of what he had said the night before. I was going in a lope; I gets up pretty close together. He was headed north and me south. He turns his pony angling in the road in front of me and kind of pulled his glove off. I asked him what he was pulling his glove off for. Before he told me, he never said anything, but just started with his hand towards his pocket. I made for my pocket. He stopped a minute and said, 'I haven't got anything to harm you with.' I says: 'How do I know? You had last night; I don't know what you have done with it.' I says: 'Don't you go to your pocket; I am prepared to-day; I ain't going to let you run over me to-day.' He looked up the road and saw a buggy coming, and says, 'Yonder comes father and mother.' I kept my eyes on him;

I was afraid if I looked around he might get the advantage of me; I was afraid of him on account of the way he had done me. I gets down off my horse. He got down, and he pulled a note out of his pocket, and I stayed on the west side of my horse; I was still afraid. On that side I kept my horse between us, provided he got out his gun, or anything he may have had. I looked at the note; I couldn't make out the words; I told him I didn't know anything about the note. He says, 'I received this at the post office yesterday evening.' I denied it, and said if he could prove that I wrote the note I would make him a present of \$20 bill. He said: 'Let's walk on down the road; I don't want that buggy to get closer.' I walks with him. While I was looking at the note, my horse broke loose; it was a scary horse. He started back down the road. I says: 'Yes; I guess I will. My horse is loose; if I had my horse, I would go on where I started.' He said, 'Where are you going?' I says, 'I am going down to see Bill Mayhall' I said, 'I heard he was going to Shawnee town.' He says: 'Yes; he is down there in a wagon with some girls, in a wagon down the road.' He kept talking about the note. I says: 'I don't know anything about it; I don't have the least idea who wrote the note.' We came on up the road; we passed a buggy; it was a negro and a white man; it wasn't his father and mother. I was still looking; I was scared of him. We came on up the road, I guess, a quarter from where we first met; my horse got away from me. Q. Did you turn back towards town? A. Yes; came on up the road, and I stopped by the fence. We walked out of the road a little piece. Some people come along in a wagon. I always kept him in front of me some way, so I could watch him. He says, 'Have you a book in your pocket?' We didn't say but a few words there; he kind of walked around, and kind of got angling a little to the left of me. The fence run north and south, and the road run the same; the woods was right east of us towards town. He come a little northwest of me, and was standing talking, and I was standing by the fence, with my arm upon the fence. He was standing nearly in front of me. I was watching him all of the time. He said the trouble wasn't nothing; one or the other of us would have to go to our grave. I says: 'I don't want to die; I am in the prime of life; I suppose you are.' While I was in my pocket to get out everything I had—I was going to show him in regard to that note; I had been trying with my head down; I had a little book with some papers in my pocket; they had got crossways in my pocket—while I was trying to get them, there is where he got at me with the pocketknife. As he run up, I pulled my gun; I had it in my pocket. As I pulled it around, he caught it in his left hand. As he caught it, it fired. As he made a strike, I

run backwards. When it fired, he turned the barrel loose; he made a strike. I fired, and hit him in the stomach or chest. He threw his hands up, and I backed up. He leaned over on his face; he says, 'Don't shoot me any more.' I says, 'I won't.' I laid my gun down, and put him down on the stump. I pulled his clothes out and saw where I had hit him. He says: 'I am going to die; get me a doctor.' I says, 'I will do anything for you.' I gets on my horse. I says, 'Which doctor do you want?' He says, 'McCaskell.' I telephoned for the doctor and telephoned for the sheriff to come out."

Lawrence Jones testified that a few days after the killing he went to the place of the shooting with Mr. Leggett, at his request, and Mr. Woods went with them to make a diagram of the place; that while he was there he found a pocketknife lying in the leaves, and he gave it to Mr. Leggett.

[1] The first assignment of error is that the court erred in overruling the defendant's application for a continuance. The defendant's affidavit for continuance sets forth "that Albert Addington and Claud Addington live at Bethel, and Robert Addington lives at Lukfata, and that he has used due diligence to obtain the attendance of these witnesses; that he has been informed and believes that the state will attempt to introduce a note threatening the life of the deceased, purported to have been written and mailed to the deceased; that said witnesses are defendant's brothers, and are familiar with his handwriting, and if present would testify that the handwriting of said note is not his handwriting; that the defendant has not had said witnesses subpoenaed because of the fact that immediately after his examining trial he was taken to Hugo, and there placed in the county jail for safe-keeping, by reason of which he was unable to have free intercourse and discussion of his defense with his attorneys, Hosey & Leggett, who reside in Idabel; that he was brought from Hugo to Idabel upon convening of the district court at Idabel at the February, 1911, term thereof, was arraigned, and given one day in which to plead; that the district court was adjourned before the fixing of a day for trial of this defendant in said term, and the defendant was then transferred to the county jail of Carter county, at Ardmore, and was not brought back to Idabel until the 27th day of February, 1911, on which day his case was assigned for trial, and he did not have an opportunity to talk with his attorneys and arrange with them for his defense herein, and has not been able to properly prepare for trial at this time and to obtain the above said witnesses herein by reason of that fact, and cannot at this time go to trial without said witnesses, and if forced to trial would not be given that fair and impartial trial that is guaranteed him by the Constitution."

It will be noticed that the defendant did not contend in said motion that he had not had sufficient time to prepare his defense, and the continuance is not asked on that ground. The allegations of the affidavit, as to the time allowed him for preparation, were made for the sole purpose of showing due diligence on his part in trying to obtain the testimony of these three witnesses, and did not contend that it injured him in any other manner.

Upon the hearing the record shows the following proceeding: "The Court: I will not overrule it; I will hold the matter open until you have an opportunity to get these witnesses. If they don't come, I will permit you to use that as a deposition. Are you gentlemen now ready to proceed with the understanding you have? Mr. Leggett: Yes; I guess so. The Court: The court will see that you have ample opportunity to get these witnesses."

Presumably the defendant had such opportunity; for nowhere else in the record is any complaint made against proceeding with the trial on this ground. On the other hand, the record shows that two of these witnesses were sworn and testified for the defendant. Besides these, four other witnesses testified to the same facts which the defendant expected to prove by the witnesses named in his affidavit for continuance. "The rule is well settled that the granting or refusal of a continuance, particularly for causes not enumerated in the statute, is a matter largely within the sound discretion of the trial court; and nothing but the abuse of this discretion will warrant the appellate court in interfering with the judgment." *Milton v. State*, 7 Okl. Cr. 407, 124 Pac. 81. The court certainly did not abuse its discretion in refusing the continuance in this case; nor was the defendant in any manner injured by the court's action.

[2] The second assignment is "that the court erred in overruling the defendant's motion to dismiss the information against him," and the same objection goes to assignments Nos. 3, 4, and 5, and will here be considered as one.

These assignments of error are based upon the contention that a list of witnesses was not served upon the defendant as is required by the Constitution of the state of Oklahoma. Section 20, Bill of Rights, provides: "He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief to prove the allegations of the indictment or information, together with their post office addresses."

The record shows as follows: "State of Oklahoma v. Henry Addington. Murder. Now, on this the 18th day of February, 1911, the defendant, Henry Addington, is present in open court in his own person and represented by his attorneys, Hosey & Leggett, and the defendant is arraigned by the information herein being read to him in open court by N. W. Gore, county attorney pro tem. of McCurtain county, Oklahoma; and the defendant says that his true name is Henry Addington, and asks and is by the court allowed a day in which to plead to the charge contained in said information; and thereupon the defendant, Henry Addington, is served in open court with a true and correct copy of the information herein, together with a list of witnesses, containing their post office addresses, to be called by the state to testify in chief in this case. Summers Hardy, District Judge."

The record further shows that on March 1st, when the case was called for trial: "And now both the state and the defendant announce ready for trial, the state being present and represented by G. M. Barrett, county attorney of McCurtain county, Oklahoma, and T. A. Hope, and the defendant, Henry Addington, still being present in open court and represented by his attorneys, Hosey & Leggett."

In the case of *State v. Frisbie*, 8 Okl. Cr. —, 127 Pac. 1091, it is held: "Any person prosecuted in Oklahoma for a capital offense has the constitutional right to have furnished to him, at least two days before the trial begins, a list of the witnesses to be produced against him in chief by the state; and it would be error to force him into trial and allow such witnesses to testify against him whose names have not been so furnished, if he seasonably asserts his rights. But if he fails to object to going to trial on this ground, but announces ready for trial, he cannot afterwards avail himself of this objection; and the constitutional right given him by this provision will be waived." See, also, *Blair v. State*, 4 Okl. Cr. 359, 111 Pac. 1003; *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356.

On the face of the record, the objections made in these assignments are not well taken.

[3] The sixth, seventh, eighth, ninth, and tenth assignments of error relate to the ruling of the court upon the admission of dying declarations, and will be considered together.

It is contended that "there is nothing in the record to show that the deceased made the statements under a sense of impending death." The record shows that the evidence, when offered, was not objected to on this ground. However, we think the evidence conclusively shows such a sense of impending death as to make such dying declarations admissible. The record shows that he was shot Sunday afternoon, and died about mid-day Monday; that in the presence of seven

or eight witnesses, who reached him immediately after the shooting, he said he was dying. Dr. McCaskell testified that he found his intestines punctured in 11 different places, and that he stated to witness several times that he knew that he was going to die. There is no testimony tending to show that he had any hope of recovery.

In the case of *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030, it is said: "It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the prosecution, that they were made under a sense of impending death. This may be made to appear from what the injured person said, or where, from the nature and extent of his injuries, it is evident that he must have known that he could not survive. It is sufficient if it satisfactorily appears that they were made under the sense of impending death, whether it be directly proven by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical attendants, stated to him, or from other circumstances of the case, such as the length of time elapsing between the making of the declarations and his death, and the fact that the declarant was so weak that he could not sign his name and so affixed his mark, all of which are resorted to in order to ascertain the state of declarant's mind."

[4, 5] It is next contended that the court erred in admitting testimony as to an oral statement of the deceased, first admitted by the court and then rejected, because it appeared that the deceased had acquiesced in a written statement; and counsel insist that the error in admitting it was not cured by its rejection.

The oral statement made by the deceased, to which the witness testified, was made contemporaneously with the written statement admitted. The only material difference is that when the buggy was coming the deceased said: "There comes father and mother; don't let them see we are having any trouble; I would not have them know it for anything in the world." The only error was the ruling of the court rejecting the oral statement.

In *Morris v. State*, supra, it is said: "We think the sound rule, supported by reason and authority, is that, where statements of material facts concerning the cause and circumstances of the homicide are made at different times by the victim, under the solemn conviction of impending death, one of which was reduced to writing, the prosecution is not confined to the written statement, but may offer oral evidence of the statements made at other times, whether the several statements were similar or not." See *Wigmore on Evidence*, §§ 1332, 1449, and 1450; *State v. Carrington*, 15 Utah, 480, 50 Pac. 526; and 4 *Encyc. of Ev.* 1012, and notes.

We know of no law or rule that would confine either the state or the defendant to the

written dying declaration, where other and different statements are made contemporaneously with the written declaration, or made subsequent thereto. Should any of such separate statements be inconsistent or contradictory, it is open to the defense to show the fact. "Dying declarations are statements of material facts concerning the cause and circumstances of the homicide, made by the victim under the solemn conviction of impending death, and as such are to be distinguished from other admissible declarations, such as declarations which constitute a part of the *res gestæ*, or declarations made in the presence of the accused. Such declarations are admissible as evidence against the accused, because they were admissible at common law. The constitutionality of this rule has been so uniformly affirmed that the question is no longer an open one. They may be oral or in writing. Being a substitute for sworn testimony, they must be such narrative statements as would be admissible had the victim been sworn as a witness. Mere conclusions or matters of opinion or belief, which would not be received if the declarant was a witness, are inadmissible; and, upon objection properly made, such statements or clauses should be rejected. In the absence of a statute, the rule requiring a dying declaration to go in as a whole has no application here." *Mulkey v. State*, 5 Okl. Cr. 75, 113 Pac. 532.

The eleventh assignment is that the court erred in permitting the note, warning the deceased not to attend the party, to be admitted in evidence over their objection, for the reason that said note was not sufficiently identified to be admissible. There can be no doubt about its identification, if the evidence of the oral dying declarations be admitted. We have herein shown that this testimony was competent, and was erroneously rejected by the trial court after first being admitted. But in that part of the testimony which was allowed to go to the jury the witness Coonrod identifies this note as being the one he took out of the pocket of the deceased, and that he showed it to the deceased, who identified it as the one "that the racket came up over." This part of the testimony is not excepted to, and was not rejected by the court. The note was not admitted as proof of a prior threat of the defendant, but as a circumstance attending the shooting. The testimony on the part of the state and the defendant's own testimony show that the defendant and the deceased were looking at and discussing this note at the time the killing occurred. It was clearly competent as a part of the *res gestæ*.

The last assignment is that the court further erred in refusing to allow witness W. H. Neal to testify as to the general reputation of the deceased for violence. The state objected, for the reason that no proper foundation had been laid in this: That the wit-

ness has not stated that he knew that the deceased lived at the place named, and that the time was too remote, being three or four years prior thereto.

[8] If the court's ruling was erroneous, we think it was harmless, as the defense was allowed to offer proof as to decedent's reputation while living at Idabel; and the testimony of these witnesses was not contradicted by any evidence offered by the state. "The exclusion of evidence, whether it is or is not competent, is harmless, where it reasonably appears that its admission would not have affected the verdict." And: "The exclusion of evidence to prove particular facts is harmless, if the facts sought to be proved are subsequently proved by other evidence, and it is apparent that the evidence excluded could not have changed the result." 12 Cyc. 925 and 926, and cases cited in notes 85 and 87.

No complaint is made to the charge. The court instructed the jury fully and liberally for the defendant.

After a most careful review of the record, we have been unable to discover any prejudicial error. The defendant was convicted only of manslaughter in the first degree. As we view the record, his youth and the humanities of the law are all that saved him from a conviction of murder.

The judgment is affirmed.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

(3 Okl. Cr. 686)

STATE v. COYLE et al.

(Criminal Court of Appeals of Oklahoma.
March 1, 1913.)

(Syllabus by the Court.)

1. STATUTES (§ 47*)—INDEFINITENESS OF ANTI-TRUST ACT.

The anti-trust law of 1908 (Comp. Laws 1909, §§ 8800-8819) is not void for uncertainty, but the definitions of "trusts," "monopolies," and "unlawful combinations in restraint of trade and against public policy" therein contained are sufficient to define the offenses prescribed by said statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

2. CONSTITUTIONAL LAW (§ 238*)—UNJUST DISCRIMINATION—ANTI-TRUST LAW.

An exception in favor of labor unions from an anti-trust law (Comp. Laws 1909, §§ 8800-8819) may constitute such a reasonable classification as will not invalidate such law upon the ground that it discriminates against and does not afford equal protection to all of the citizens of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-699, 706-708; Dec. Dig. § 238.*]

3. MONOPOLIES (§ 31*)—INDICTMENT—SUFFICIENCY.

In an indictment or information for any offense named in our anti-trust legislation it is sufficient to state the purpose or facts of the trust, monopoly, or unlawful combination in

restraint of trade, and that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purpose without giving the name or description of such trust, monopoly, or unlawful combination, or stating how, when, or where it was created.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

4. MONOPOLIES (§ 31*)—INDICTMENT—SUFFICIENCY.

For indictments for violating the provisions of our anti-trust law (Comp. Laws 1909, §§ 8800-8819), which are held not to be bad for duplicity and to sufficiently state the offense charged, see opinion.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

Motion for rehearing. Denied.

For former opinion, see 7 Okl. Cr. 50, 122 Pac. 243.

Charles West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State. Flynn, Chambers, Lowe & Richardson, of Oklahoma City, and Devereaux & Hildreth, Dale & Blerer, and C. G. Horner, all of Guthrie, for appellees.

FURMAN, J. Counsel for appellees have filed a printed brief of 105 pages in support of their motion for a rehearing, in which the entire field of legal learning has been exhausted and everything has been said which ingenuity could suggest and argument could enforce from their standpoint.

Without intending in the least to be disrespectful to any court, yet it is a fact well known to the legal profession and to the country, that many of our appellate courts, both state and federal, have in the past been largely dominated by men, who, before their elevation to the bench and while they were practicing lawyers, were more or less under monopolistic influences. It matters not how honest, able, and learned a judge may be, his decisions are more or less colored by the viewpoint from which he considers questions which are submitted to him. Two judges of equal learning, ability, and integrity considering the same question from different viewpoints may, and often do, reach different conclusions. So the question of the viewpoint from which a case is considered is of the utmost importance. The viewpoint of a judge can sometimes be discovered by inquiring into his antecedents. All judges were once lawyers. A lawyer is necessarily and involuntarily affected by the views and interests of his clients with whom he is identified and upon whom he is dependent for his income. In fact, the lawyer who cannot sympathize with his clients, and who does not make their cause his cause, never attains eminence at the bar.

It is no secret that corporations and monopolies are active and tireless in their efforts to secure control of the appellate courts of this country and thereby by judicial construction defeat the will of the people as expressed in legislation. As these influences

are powerful and well organized, they often succeed in securing the election or appointment of judges who are under obligations to them for past favors. This evil has been carried to such an extent and has become so open and notorious that many good people have almost lost hope and have largely ceased to have confidence in the fairness, impartiality, and integrity of the courts where corporations, trusts, and monopolies are concerned. This constitutes one of the most alarming conditions now existing in America. A judge may desire to be entirely honest, yet if he is under influences which are antagonistic to the rights of the people, he will make an exceedingly dangerous judge. We are repeatedly told in the Bible that "a gift doth blind the eyes of the wise and pervert the words of the righteous." Deut. xvi, 19; Ex. xxiii, 8. So we have the highest possible authority for the statement that, although a judge may ordinarily be a wise and righteous man, yet, if he has been the recipient of favors at the hands of trusts and monopolies, he cannot safely be relied upon to reach just and correct conclusions in cases where their interests are involved, and that in such cases his eyes may become blind to the rights of the people and his judgment may become perverted without his being aware of the fact. It may not be popular in some circles to say this, but we believe that it is the absolute truth and that this is the main cause of the manifest bias of many of our courts against all anti-trust legislation.

In view of the antecedents of many of the appellate judges of the United States and the general disposition which exists among American lawyers and courts to blindly follow precedents, and the further fact that trusts and monopolies always secure the services of the best lawyers obtainable who have the ability to make the worse appear to be the better cause, we are not surprised at the number and respectability of the authorities supporting the contentions of counsel for appellees. But we are of the opinion that they prove too much, for if they are to be followed it would be almost impossible to frame a law which would reach and destroy conspiracies in restraint of trade and commerce. To sustain the contentions of counsel for appellees would be in effect to decide that in the state of Oklahoma trusts and monopolies are practically above and superior to the law, and that they may at pleasure through their combinations and conspiracies grind the people like grain beneath the upper and nether stone, take from the mouth of labor the bread which it has earned, and divert the stream of wealth produced by hard and honest toil from its rightful channels and pour it into the undeserved and already overflowing coffers of the few.

In this case, as in all other such cases,

appellees are represented by lawyers who have few equals and no superiors in the United States and who have their clients' interests at heart. They have certainly used every legal weapon at their command in their presentation of their side of the case. With this we find no fault. It is as it should be. We admire and commend their zeal and ability. But we are not unmindful of our duty to the entire people of Oklahoma, and that we should carefully consider the ground upon which we act and the consequences and effects of the decision which they have asked us to render. If we concede the premises which they have laid down and follow the precedents which they have cited, we freely admit that we would be involved in a maze of perplexities from which we would find it difficult to extricate ourselves and escape from the conclusions at which they would have us arrive. We differ radically with counsel for appellees at the very threshold of the case as to the principles which should control in its decision. It would therefore be useless consumption of time to consider in detail the cases which they have cited and the arguments which they have made. As we understand it, the ancient learning of the common law has outlived the conditions which brought it into existence and has survived the reasons upon which it was based. In the early case of *Slater v. United States*, 1 Okl. Cr. 275, 98 Pac. 110, this court announced that precedents should be weighed and not counted, and that we would not follow any precedent unless we understood and approved the principles upon which it was based, and that a multiplicity of errors did not make right that which was based upon false premises and was therefore erroneous at its very inception.

In the case of *Byers v. Territory*, 1 Okl. Cr. 702, 103 P. 534, this court said: "Justice demands that in the administration of law its processes should never be allowed to become a game of skill between contending counsel. There has been entirely too much of this in the past. It has resulted in the miscarriage of justice in many cases and has bred a spirit of disgust for law and contempt for courts in the public mind." In the same case this court also said: "Appellate courts should faithfully and fearlessly do their duty and decide every question presented with reference to the substantial merits of the case in which it arises. In this way only can justice be administered. Ignoring justice and deciding cases upon technicalities has not only largely lost the courts the confidence and respect of the people, but it has also greatly alarmed the profession of law itself."

We have endeavored to adhere strictly to these principles in passing upon all questions submitted to us. As applicable to the questions now before the court, we reiterate

what was said in the case of *Turner v. State*, 8 Okl. Cr. —, 126 Pac. 452, as follows:

"These statutes are largely a radical departure from the old common law with reference to criminal law and criminal procedure, and were evidently intended to place criminal law in Oklahoma upon the strong, sound, and safe basis of common sense, reason, and justice. It is on account of these statutes that some parties are unable to understand the policy of this court. We are simply trying in good faith to discharge the obligation of our oaths of office, for we have sworn that we would support the Constitution and laws of Oklahoma. If those who are disposed to criticize this court for its policy would place themselves in the position which we occupy, we believe that they would take a different view of this matter. It is natural for us to be prejudiced in favor of those things with which we are familiar. The writer knows from personal experience that it is an exceedingly difficult thing to break away from preconceived ideas and conditions, for the principles embodied in these statutes are the reverse of the school of law in which he was educated and which he practiced for many years. Herein lies the greatest difficulty in the way of reform in legal procedure. Judges and lawyers have been educated in and are accustomed to an antiquated system of procedure, and have been taught to look with reverence upon old legal theories, and are thereby unduly biased against any change in legal procedure. The result is that, even when the Legislatures attempt to reform legal procedure, many courts and lawyers are disposed to construe such legislation in the light of their preconceived ideas. They often do this without being aware of it, and in this way the purpose intended to be accomplished by remedial legislation is defeated. While this court respects the wisdom of the past and can see much in it to admire and to follow, yet we also believe that the world should be ruled by the living, and not by the dead; that the law should keep even step with the march of civilization and the necessities of society in the relation of its members to each other; and that the people have the right by legislation to alter the rules of legal procedure. When the Legislature has made a change in legal procedure, it is the duty of the courts to lay aside their preconceived ideas, and construe such legislation according to its spirit and reason. We are not in sympathy with those who believe in the infallibility of the common-law rules of criminal procedure, or that form, ceremony, and shadow are more important than substance, reason, and justice. This court does not propose to grope its way through the accumulated dust, cobwebs, shadows, and darkness of the evening of the common-law rules of procedure; but it will be guided, as the statutes above quoted direct, by the increasing light and in-

spiration of the rising sun of reason, justice, common sense, and progress. As was well said in the November, 1911, issue of the *Journal of the American Institute of Criminal Law and Criminology*: 'As some people think more of a man's clothes and style than of his principles, so some lawyers are concerned more with the mere procedure in a trial than with the triumph of the party that ought to succeed on the merits of the case. The quibbling of the logicians and disputants of the middle ages has often formed the subject for satire; but our present-day legal disputes over technical questions of procedure are pettier, less profitable, and more indefensible than the fine-spun arguments and theories of the much-abused schoolmen of the middle ages.'

"The effect of the statutes hereinbefore quoted is to prevent disputes over mere technical questions of procedure. If properly construed, they destroy legal quibbling. Their purpose is to eliminate from a trial all immaterial matters, and thereby better secure the triumph of the party who ought to succeed upon the actual merits of the case. Sections 2027 and 6457 repeal the common-law doctrine of a strict construction of penal statutes, and substitute in its place the equitable doctrine of a liberal construction of such statutes. Courts of this state are not bound by the strict letter of a penal statute, but must construe it according to its spirit and reason, so as to enable it to reach and destroy the evil at which it was aimed, and thereby effect the object for which it was enacted and promote justice. Section 6657 with one stroke of the pen wipes out and destroys that ancient heresy of the common law that error presumes injury, and by its terms absolutely binds this court to disregard any and all technical errors, defects, and exceptions, unless the party complaining thereof can show from the record that he has been deprived of some substantial right thereby to his injury. Sections 6704 and 6705 do away with all of the artificial distinctions of the common law in indictments or informations, and destroy that ancient refuge, stronghold, and citadel of defense of murderers, thieves, perjurers, and all other desperate criminals, that indictments must be certain to a certain intent in every particular, and place them upon a common-sense basis, and make an indictment sufficient if a person of ordinary understanding can know what was intended, and forbid the courts from holding insufficient any indictment or information, unless the defects therein are of such a character as to prejudice the substantial rights of the defendant upon the merits. All of these statutes are contrary to the common law and to the procedure in force in many of the states, but they are binding upon the courts of this state. For this reason it is an utter waste of time for lawyers in their briefs and oral ar-

guments to cite and discuss decisions from states which have different statutes. It is not a question as to whether we like these statutes. It is enough for us to know that they are the law of Oklahoma. This court is not a forum of legislation. Our duty is ended when we obey the law, and we should either do this or resign and allow others to take the places which we occupy who will regard the obligation of their oaths of office. The great trouble with the judiciary of the entire country is that many judges try to so twist and evade statutes as to enable them to substitute their own private views for regularly enacted statutes. This evil has become so great that there is now more judge-made law in the United States than there is law enacted by the people. If the courts do not correct this evil, no one can tell what the result will be. It will end in one of three things, viz., peaceable reformation, bloody revolution, or a judicial oligarchy. This court proposes to do its duty by rendering a ready and willing obedience to the regularly enacted laws of Oklahoma, and by doing all in its power to see that they are followed by the trial courts of this state."

In the case of *Burns v. State*, 8 Okl. Cr. —, 129 Pac. 657, this court said: "It is the duty of this court to decide all questions submitted to it in the light of the moral atmosphere in which they are surrounded, and never to permit the law to become a cloak of protection for men to trample upon the sacred rights of others, and bid open defiance to decency and the best interests of society."

From this standpoint we reaffirm all that was said by Judge Doyle in the original opinion in this case. See 7 Okl. Cr. 50, 122 Pac. 243.

There are only three questions with reference to which we desire to make any additional suggestions: First. It is contended that the law upon which the indictments in these cases are founded is void for uncertainty. Second. It is contended that, as certain combinations of labor are excepted from the penalties of the law, thereby all classes of citizens are not afforded that equal protection of the law which the Constitution of the United States guarantees to every citizen of the United States. Third. It is contended that, even if the Oklahoma anti-trust law is valid, the indictments do not charge any offense against any of the appellees.

[1] First. The statutes upon which these indictments are founded are copied in full in the original opinion of this court. See *State v. Coyle et al.*, 7 Okl. Cr. 50, 122 Pac. 243. They are also to be found on pages 1766, 1767, 1768, 1769, and 1770, Comp. Laws 1909. If the Legislature had adopted the plan suggested by counsel for appellees and had attempted to give a fixed definition of a trust or of a monopoly, it would have been found by experience that many abuses would arise to which the law would not be appli-

cable, because they would not be included in the fixed definitions given. It would doubtless have been very gratifying to those persons engaged in such unlawful undertakings if the Legislature had attempted to give fixed definitions of trusts and monopolies, for then their able attorneys could point out how the same purposes could be accomplished by a slight variation in the methods used, and thereby they could do as they wished and escape the penalties of the law prescribed for a violation of the fixed definitions. It is simply impossible to please those persons who seek to violate the law. If a fixed definition of a trust and of a monopoly had been given, then they would have so shaped their business as to place it outside of this fixed definition, and under their favorite doctrine of a strict construction of penal statutes they would have been allowed to defy the law and rob the people at pleasure. The only way in which they can be reached is by general definitions and the doctrine of a liberal construction of penal statutes, and that is just what we have in Oklahoma; hence the law is going to be enforced, and those gentlemen must either abstain from their illegal conduct or suffer the consequences. We think that the definitions contained in the statutes are as certain as the nature of the evils at which they are aimed will admit. It would be unreasonable and would defeat the very objects of the law to require greater certainty than the nature of the subject-matter under consideration would reasonably admit. Trusts and monopolies can be organized and built up under so many different and varying conditions that nothing except a general definition would grant relief from the evils which they inflict upon the people. We do not think that there is any danger of innocent men engaged in legitimate business enterprises being prosecuted and convicted under the provisions of our anti-trust law. We think it is the best the Legislature could do under the circumstances.

For these and the reasons given in the original opinion of this court in this case we cannot hold that the law is invalid for uncertainty.

[2] Second. As a matter of first impression the second contention of counsel for appellees appears to present the most serious objection urged against the anti-trust law of Oklahoma. That objection is based upon section 4042, Comp. Laws 1909, which was enacted at the same session of the Legislature and at a later date than the passage of the anti-trust law and was intended to and does constitute a part of the anti-trust law itself. By the provisions of section 4042 no agreement, combination, or contract by or between two or more persons to do or procure to be done, or not to do or procure to be done, any act in contemplation or furtherance of any trade dispute between em-

ployers and employes in the state, shall be deemed as criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination, or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued in relation thereto, provided that force or violence are not used.

The contention of counsel for appellees is that, if the law protects combinations of labor or of any class of citizens of the state, it must also protect combinations of capital; otherwise a class of citizens who are not afforded this protection are discriminated against and deprived of that equal protection of the laws which the Constitution of the United States guarantees to every citizen of the United States. A careful consideration of this matter will show that the contention of counsel for appellees is not tenable. It must be conceded that the Legislature has the right and power to make reasonable classifications with reference to any proper subject of legislation. The assumption of counsel for appellees is that the rights of capital are equal to the rights of labor. Good morals do not sustain this assumption. While labor and capital are both entitled to the protection of the law, it is not true that the abstract rights of capital are equal to those of labor, and that they both stand upon an equal footing before the law. Labor is natural; capital is artificial. Labor was made by God; capital is made by man. Labor is not only blood and bone, but it also has a mind and a soul, and is animated by sympathy, hope, and love; capital is inanimate, soulless matter. Labor is the creator; capital is the creature. If all of the capital in the world was destroyed, a great injury would thereby be inflicted upon the entire human race; but the bright minds, the brave hearts, and the strong arms of labor would in time create new capital, and thus the injury would be ultimately cured. If all of the labor on earth was destroyed, capital would lose its value and become absolutely worthless. The strength and glory of this country lies, not in its vast accumulations of capital, but it depends upon the arms that labor, the minds that think, and the hearts that feel. Labor is always a matter of necessity. Capital is largely a matter of luxury. Labor has been dignified by the example of God. The Savior of mankind was called the "carpenter's son." We are told in the Bible that "the love of money is the root of all evil." This statement is confirmed by the entire history of the human race. The love of money is the cause of the organization of trusts and monopolies. With what show of reason and justice, therefore, can the advocates of monopoly be heard to say that capital is the equal of labor? But if we

concede that the assumption of counsel for appellees is well founded, and if we arbitrarily and in disregard of good morals place capital and labor upon an absolute equality before the law, another difficulty confronts them. Capital organizes to accomplish its purposes. Then, according to their own logic, it would be a denial of equal rights to labor to deny to it the right to organize and act without a breach of the peace to meet the aggressions of capital.

We therefore hold from either view that the provisions of section 4042 constitute a reasonable classification such as the Legislature had the right to make, and that the anti-trust law of Oklahoma does not on this account violate the clause of the Constitution of the United States which guarantees equal protection to all of the citizens of the United States. We deny that trusts and monopolies are entitled to protection as citizens of the United States.

[3, 4] Third. Do the indictments charge an offense against appellees? The indictments in substance allege that at the date mentioned therein the appellees entered into a conspiracy, agreement, and combination to form a pool or trust for the purpose and with the intent to restrain trade and commerce in Logan county in cotton and the products thereof, all of which was against public policy and was done with the illegal, unlawful, and felonious intent of monopolizing the market for cotton and its products and to control and regulate the prices thereof, unreasonably in restraint of trade and commerce and against public policy in Logan county at said date. The indictments then go further and allege by name the location of the different gins which appellees owned and controlled in Logan county in furtherance of such conspiracy, and that in pursuance of said conspiracy appellees did not operate certain specified gins, and that thereby the farmers of Logan county were forced and compelled to patronize the gins which were run and operated by appellees in pursuance of said agreement, and that thereby competitive bidding on seed cotton or ginning seed cotton in Logan county was destroyed and other buyers of both lint cotton, seed cotton, and cotton seed were excluded from the market of Logan county, and that as a result thereof appellees had raised the price of ginning cotton from \$3.50 to \$5 per bale, and that said price of \$5 per bale for ginning cotton was unreasonable. The indictments are set out in full in the original opinion in this case. It is not necessary for us at this time to decide just what allegations an indictment or information should contain in charging the offense of a conspiracy in restraint of trade, but we do not think that appellees can be heard to complain that the indictments in these cases are duplicitious because they allege the specific acts done by appellees in pursuance of the conspiracy

charged, as all of these acts relate to the same general purpose and are only so many different parts of the same general conspiracy. It is the agreement, contract, or combination in restraint of trade under which the acts alleged were committed which constitutes the crime of conspiracy.

The seventh section of our anti-trust law is as follows: "In an indictment or information for any offense named in this act it is sufficient to state the purpose, or facts, of the trust, monopoly, unlawful combination in restraint of trade or commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purpose without giving its name, or description, or stating how, when or where it was created."

It occurs to us that the allegations of these indictments fully meet the requirements of this provision of our statute.

Section 6704, Comp. Laws 1909, provided that an indictment is sufficient if it can be understood therefrom that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

We think that the indictments do not charge separate and distinct offenses, but that they each do charge one offense only, and that is that appellees had entered into an illegal conspiracy in restraint of trade and against public policy, for the purpose of preventing competition in the matter of ginning cotton and also in the matter of the price of cotton and cotton seed in Logan county, and of forcing the farmers of that section of the state to patronize gins owned by appellees, and of forcing such farmers to pay an unjust and unreasonable price for ginning their cotton. We think that a person of common understanding could not be mistaken as to what was intended by the allegations contained in these indictments, and, if this is true, all that the law requires has been complied with. The very idea of coercion and force, except when necessary to secure obedience to law, is repulsive to reason and natural justice and has always been odious to the American people. While Oklahoma has many different resources, yet agriculture is and will remain to be her chief reliance. Those who cultivate the soil constitute the most numerous portion of our population, and certainly there are none more meritorious. Their isolated condition and the constant attention which their farms require renders effective organization and united action among them exceedingly difficult, if not practically impossible. Of all classes they are the easiest victims of greed and conspiracies and must depend entirely upon the law for their protection. Agriculture is the only occupation followed by men which was instituted by divine command. Savages

and barbarians may exist without the cultivation of the soil, but civilization in its true sense begins and ends with the plow. The farmer gives value received for every dollar he digs out of the ground. He not only earns every dollar he gets, but he earns a great many dollars he never gets. For these reasons the facts charged in these indictments constitute a natural crime, for their result would be to enable appellees to reap where they had not sown and to eat in idleness the bread earned by the sweat of the farmer's brow. A single drop of sweat upon the brow of honest labor shines more brightly and is more precious in the eyes of God and is of more benefit to the human race than all of the diamonds that ever sparkled in the crown of any king. If the state did not protect the farmers of Oklahoma against such conspiracies as this, the law would be a miserable, contemptible farce, a snare, a mockery, a burden, and a delusion.

We are glad to know that there is a growing disposition upon the part of the appellate courts of the United States to recognize the justice of and to sustain anti-trust legislation, and that common sense and substantial justice are taking the place of the obsolete and unjust distinctions and intricacies of the common law. This is shown by an opinion rendered on the 13th day of January, 1913, by the Supreme Court of the United States in the case of United States v. James A. Patten, 187 Fed. 664. Patten was prosecuted in the United States Circuit Court for the Southern District of New York for violating the anti-trust act of the United States by running a corner in the cotton market. Demurrers to the indictment were sustained in the lower court and Patten was discharged. The case was carried by the government by writ of error to the Supreme Court of the United States. In reversing the judgment of the lower court and in holding that the indictment did charge an offense against the law, the Supreme Court of the United States said:

"Although ruling that there was no allegation of a specific intent to obstruct interstate trade or commerce and that the raising of prices in markets other than the Cotton Exchange of New York was 'in itself no part of the scheme,' the court assumed that the conspirators intended 'the necessary and unavoidable consequences of their acts,' and observed that 'prices of cotton are so correlated that it may be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country.'

"Upon the second argument the defendants contended, and counsel for the government expressly conceded, that 'running a corner' consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, 'one of the important

features of which,' to use the language of the government's brief, 'is the purchase for future delivery, coupled with a withholding from sale for a limited time'; and, as this definition is in substantial accord with that given by lexicographers and juridical writers, we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of attaining substantially the same end.

"Whilst thus agreeing upon what constitutes running a corner, the parties widely differ as to whether what is so styled in this instance contained the elements necessary to make it operative. The point of difference is the presence or absence of an adequate allegation that the purchasing for future delivery was to be coupled with a withholding from sale, without which, it is conceded by both parties, the market could not be cornered. But the solution of the point turns upon the right construction of the counts, and that, as has been indicated, is not within our province on this writ of error. We must assume that the counts adequately allege whatever the Circuit Court treated them as alleging. Its opinion given at the time, although not containing any express ruling upon the point of difference, shows that the counts were treated as alleging an operative scheme, one by which the market could be cornered. The court spoke of it as 'contrary to public policy,' as 'arbitrarily controlling the price of a commodity,' and as 'positively unlawful in any state having a statute against corners.' Evidently, it was assumed that every element of running a corner was present. We accordingly indulge that assumption, but leave the parties free to present the question to the District Court for its decision in the course of such further proceedings as may be had in that court.

"We come, then, to the question whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the states, and thereby to enhance artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of section 1 of the anti-trust act, which makes it a criminal offense to 'engage in' a 'conspiracy in restraint of trade or commerce among the several states.' The Circuit Court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact, rather than as a mere economic theory of the pleader, the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and now pressed upon our attention, are: (1) That the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce and agree to suppress competition among themselves; (2) that running a corner, in-

stead of restraining competition, tends, temporarily at least, to stimulate it; and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute.

"Upon a careful reflection we are constrained to hold that the reasons given do not sustain the ruling and that the answer to the question must be in the affirmative.

"Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. *Loewe v. Lawlor*, 208 U. S. 274, 293, 301 [28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815]. As was said of this action in *Standard Oil Co. v. United States*, 221 U. S. 1, 59 [31 Sup. Ct. 502, 515 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734)]: 'The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense.'

"It well may be that running a corner tends for a time to stimulate competition, but this does not prevent it from being a forbidden restraint; for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

"It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton, a product of the Southern states, largely used and consumed in the Northern states. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern states. The corner was to be conducted on the Cotton Exchange in New York City,

but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country: Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent. See *Swift & Co. v. United States*, 196 U. S. 375, 396-400 [25 Sup. Ct. 276, 49 L. Ed. 518]; *Loewe v. Lawlor*, 208 U. S. 274 [28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815]; *Standard Oil Co. v. United States*, 221 U. S. 1 [31 Sup. Ct. 502, 55 L. Ed. 619, 84 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734]; *United States v. American Tobacco Co.*, 221 U. S. 106 [31 Sup. Ct. 632, 55 L. Ed. 663]. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243 [20 Sup. Ct. 96, 44 L. Ed. 1361]; *United States v. Reading Co.*, 226 U. S. 324, 370 [33 Sup. Ct. 90, 57 L. Ed. —].

"The defendants place some reliance upon *Ware & Leland v. Mobile County*, 209 U. S. 405 [28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1081], as showing that the operation of the conspiracy did not involve interstate trade or commerce; but we think the case does not go as far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a state of the business of a broker who was dealing in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country and which was to be executed, in part only, through contracts for fu-

ture delivery. It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Montague & Co. v. Lowry*, 193 U. S. 38, 45, 46 [24 Sup. Ct. 307, 48 L. Ed. 608]; *Swift & Co. v. United States*, 196 U. S. 375, 386, 387 [25 Sup. Ct. 276, 49 L. Ed. 518]."

We are entirely satisfied with the citation and discussion of authorities contained in the original opinion of this court and merely quote the case of *United States v. Patten* because it was rendered since the rendition of the original opinion in this case and is in harmony with the conclusion at which we had previously arrived.

The motion for a rehearing is denied, and the judgment of the district court sustaining the demurrers to the indictments in each of these cases is set aside, and the cases are remanded, with directions to the district court to proceed therein in accordance with the views expressed in the original opinion of this court and in this opinion.

ARMSTRONG, P. J., and DOYLE, J., concur.

(54 Colo. 236)

ELDER v. WOOD.

(Supreme Court of Colorado. Oct. 7, 1912.
Rehearing Denied March 3, 1913.)

APPEAL AND ERROR (§ 118*)—ENTRY OF JUDGMENT IN ACCORDANCE WITH MANDATE—REVIEW.

An appeal from a judgment entered in exact accordance with the mandate of the Supreme Court, remanding the cause with directions, cannot be entertained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 813-822; Dec. Dig. § 118.*]

En banc. Appeal from District Court, Lake County; M. S. Bailey, Judge.

Action by Alice J. McCombe, administratrix of John McCombe, deceased, and others against Tingley S. Wood and others. From a judgment for defendant named, plaintiff George R. Elder, successor in interest to Samuel McMillen, deceased, appeals. Dismissed.

George R. Elder, pro se, of Leadville, for appellant. Frazer Arnold and Samuel Huston Thompson, both of Denver, for appellee.

PER CURIAM. This case was determined by this court in *Wood, Impleaded, etc., v. McCombe et al.*, 37 Colo. 174, 86 Pac. 319, 119 Am. St. Rep. 269, and the cause was remanded, with directions to the lower court to vacate its judgment and enter another one in favor of Wood. A writ of error from the Supreme Court of the United States was sued out to review the judgment of this court, and that judgment was affirmed in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Elder v. Wood, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. Ed. 464. Thereupon the district court entered judgment in obedience to the mandate of this court. The present appeal is from the latter judgment. There were no proceedings subsequent to the entry of that judgment. The appellee, Wood, has filed a motion to dismiss this appeal. The motion must be sustained.

Every question now raised by appellant, including the question whether a construction of the Constitution of the United States or of this state was involved, was discussed by him in his principal brief, or his brief on his motion for rehearing in the former appeal, and therein determined. The judgment appealed from is, in effect, the judgment of this court entered in exact accordance with our mandate, and an appeal therefrom cannot be entertained. *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044.

Motion to dismiss appeal granted.

CAMPBELL, C. J., and BAILEY, J., not participating.

(54 Colo. 237)

PEOPLE ex rel. MORGAN, Dist. Atty., v.
FIRST JUDICIAL DISTRICT COURT
et al.

(Supreme Court of Colorado. Jan. 6, 1913.
Rehearing Denied March 3, 1913.)

1. CRIMINAL LAW (§ 639*)—SPECIAL ATTORNEYS—APPOINTMENT.

Under the statute authorizing the court to appoint a special attorney if the district attorney is interested in a case which it is his duty to prosecute, the special prosecutor having declined to act further, and his withdrawal having been allowed, the court may appoint another special prosecutor; new charges against the same persons growing out of the same matter being filed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1485-1495; Dec. Dig. § 639.*]

2. PROHIBITION (§ 28*)—GROUNDS.

The question whether there are objections or defenses to the charges cannot be considered on prohibition against the appointment of a special prosecutor to take action on the charges, as this would be to turn the writ of prohibition into one of error.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 77; Dec. Dig. § 28.*]

Hill, J., dissenting.

En Banc. Original proceeding by the People, on the relation of Walter M. Morgan, District Attorney for the First Judicial District, against the District Court of such district and the Honorable Charles McCall, Judge thereof, and another. Dismissed, and writ denied.

T. E. Watters, of Denver, for petitioner. Crump & Allen and E. M. Sabin, all of Denver, for respondents.

BAILEY, J. This is an original application for a writ of certiorari and prohibition.

At a primary election, held September 3, 1910, at the residence of John W. Maloney in a South Englewood precinct, Arapahoe county, an altercation ensued which ended in an affray. It is out of prosecutions over that difficulty that this application arises.

A petition was filed, October 5, 1910, on affidavit by Maloney, charging the petitioner here and Luke J. Kavanaugh, District Attorney and Deputy District Attorney, respectively, and Claude E. Street, Joseph Kille, John D. Frederick and P. Z. Fogle with an assault, with a deadly weapon, upon him, praying the appointment of a special prosecutor to take charge of and investigate the matter, because of the personal interest therein of the regular prosecuting officers. The court thereupon appointed J. W. B. Smith, Esq., an attorney of the Colorado bar, to act in that capacity. On November 11, 1910, he filed an information against the parties named, charging them jointly with the alleged offense. Morgan and Kavanaugh were put to trial separately. Under court instructions, the jury returned a verdict of not guilty, and they were discharged. Thereupon Smith entered a nolle prosequi as to the defendants Street, Kille, Frederick and Fogle, and they also were discharged. Presently thereafter Smith filed his report with the district court, showing, among other things, the matters above set forth, and withdrawing from the prosecution, which withdrawal was by formal order duly accepted.

Thereafter Maloney filed another affidavit, charging the same persons with instigating, at the time and place previously designated, a riot, and charging them with an assault, not only upon himself, but upon members of his family as well. On the same day E. M. Sabin, Esq., an attorney, filed a motion for the appointment of a special prosecutor, based on Maloney's affidavit, showing the disqualification of the district attorney and deputy because of interest. Pursuant to that motion, an order was entered appointing Sabin as such prosecutor, duly empowered to take such action on the affidavit as to him might seem proper. In making this order the court found that both Morgan and Kavanaugh had a personal interest in any investigation of the offenses of which complaint was made.

Later, Maloney filed two more affidavits, one charging Street, Frederick, Kille and Fogle with an assault on his person, the other charging Morgan with unlawfully beating Mary E. Maloney, the wife of affiant, a new offense, but all growing out of the difficulty at the primary. Sabin thereupon informed against these parties for the alleged respective offenses. The petitioner, Morgan, filed a motion to quash the information against him, setting up, by affidavit, that there was no lawful charge upon which he could be tried, for the reason that the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had exhausted its power, relative to this matter, by the appointment of Smith as special prosecutor, and that therefore the information filed by Sabin was a nullity; and also because the alleged offense prosecuted by Smith, against him, is the same offense charged in the information filed by Sabin. The motion was overruled, and Morgan applies for a writ prohibiting the respondents from further acting under the order naming Sabin special prosecutor, because of the supposed lack of authority in the court to make the appointment.

[1] We have examined the record with the utmost care and are persuaded, beyond question, that it was within the jurisdiction of the court to name the second special prosecutor. The interest of Morgan and Kavanaugh, district attorney and deputy, respectively, in the matter to be examined, remained the same as originally. Attorney Smith, first appointed, had withdrawn as such officer, the withdrawal having been allowed by the court and noted of record. Thereafter new affidavits, embodying new charges, were formally presented. Some disposition must be made of them. By the affidavits the power and authority of the court were invoked. In this state of the record it seems that nothing was left for the court to do but designate a suitable person to represent the people. The regular prosecuting officers were disqualified, and the special prosecutor having declined to act further, plainly it was not only within the power of the court, but was its clear duty to appoint an attorney to take action upon the matters thus presented. There was no attempt to direct the action of that officer or control his discretion. The whole controversy is as to the authority of the court to make the second appointment. If it had jurisdiction, the information must be met and defended against in the court where filed, and if it did not have jurisdiction, then further proceedings should be prohibited. The sole question is, Did the court have authority to act? If it did, whether it exercised that authority correctly or erroneously are matters which may not be inquired into in this proceeding. That it had such authority seems too clear for argument. New and different charges were before the court, the special prosecutor first named had withdrawn, the regular officers were disqualified, and unless a substitute may be named, the whole machinery of the court, so far as this matter is concerned, is completely blocked. It was never contemplated that such a situation could be brought about by any one, or by any set of facts or circumstances. All conditions were present to give the court authority, under the statute, to appoint a special prosecutor, and we are unable to see why it did not have the power to do so, although such appointee be a second one, just the same as, under like circumstances, it had power to appoint originally. The jurisdic-

tion of the court was complete, and there is nothing in the statute, which confers the power of appointment, to indicate a limitation upon the court in respect to its exercise. The discretion is with the court to appoint, or decline to, as public interest seems to require and demand.

The petitioner relies upon the case of Gray, District Attorney, v. District Court, reported in 42 Colo. 298, 94 Pac. 287, as determining that the court had no jurisdiction to appoint in this case. The two cases are clearly distinguishable. The thing in the Gray Case which disclosed lack of jurisdiction in the court to remove him, was the fact that it did not appear that he had any personal interest in the subject-matter of the trial. In this case it is shown that the petitioner has precisely the sort and kind of interest in the matter to be examined that is, by statute, made cause for the removal of a regular district attorney and the appointment of a special prosecutor. In the Gray Case the interest contemplated by statute was wholly lacking; while here such interest fully appears. Under the facts and circumstances of this case, the court below clearly had authority to appoint Sabin, and the informations presented by him were lawfully and properly filed and must be disposed of in the manner prescribed by law for the disposition of all criminal charges.

[2] Since the informations were presented by one duly authorized, whatever objections or defenses there may be to them, some of which have been suggested in these proceedings, either in law or fact, must be offered and urged in the trial court, in the usual and ordinary way, where a complete, adequate and speedy remedy at law is afforded, with full opportunity for review should there be occasion for it. To hold otherwise would be, in effect, to convert the writ of prohibition into a writ of error, a course which is contrary to reason and unsupported by precedent.

The application and alternative order are dismissed and the writ of prohibition denied.

HILL, J., dissents. MUSSEY, J., not participating.

HILL, J. (dissenting). I cannot agree with the conclusion reached by the majority. In *People ex rel. v. District Court*, 23 Colo. 406, 48 Pac. 500, it was held that the district attorney has power to discontinue any criminal cause without the consent of the court, and that prohibition lies to restrain a district court from trying a criminal cause after the district attorney has entered a nolle prosequi. It is an elementary principle of law that nothing can be done indirectly which cannot be done directly. This applies to the courts as well as to every one else. It appears to me that our refusal to grant this writ is to allow a violation of this elementa-

ry principle. In *Gray v. District Court*, 42 Colo. 298, 94 Pac. 287, we held that the writ of prohibition will lie against the appointment of a special prosecutor to act as district attorney where the facts disclosed were not sufficient to authorize the appointment.

The record discloses that the court (Hon. Charles McCall, judge presiding) upon October 3, 1910 (after the filing of Maloney's first affidavit), appointed Attorney Smith as special prosecuting attorney therein, to investigate and take such steps in the premises as he deemed proper, with all the powers of a duly qualified district attorney and as fully as if his powers were especially set forth and enumerated in the order. He performed these duties unquestionably proper, lawful, and right, as they appeared to him. In so doing upon November 11, 1910, he filed an information against six persons, among which were the district attorney and his deputy; these latter two, upon November 21 and 22, 1910, were tried, and by court instructions (Hon. Charles Cavender, judge presiding) the jury returned verdicts of not guilty and they were discharged. There does not appear to have been any steps taken to have the rulings of Judge Cavender reviewed by this court, as provided for by law in case the district attorney feels that such rulings were wrong. Thereafter, Special Prosecutor Smith entered a nolle prosequi as to the other defendants named in the information and they were discharged. Upon January 21, 1911, Attorney Smith filed his report in said court (addressed to and considered by Hon. Charles McCall, judge presiding). This report discloses that he made a full investigation of the entire matter by talking with Maloney and members of his family, with other election judges and others who were present and saw what took place at the time referred to; that, after having made this investigation, he prepared and filed the information charging, not only those named in the Maloney affidavit (who were Morgan, Street, Kavanaugh, Kille, and Frederick), but also one Fogle, with the commission of a crime in connection with the transaction. After filing this report and its acceptance, he was discharged from any further duty in respect to said matters. Thereafter, on March 11, 1911, Maloney filed another affidavit charging sundry crimes to have been committed by the same persons at the same time, all growing out of the same transaction covered in his former affidavit.

In the second affidavit he sets forth the fact of filing his former one, the actions taken thereunder, the result of said trial and dismissal. He also sets forth therein his version of the trial of Morgan and Kavanaugh and the dismissal as to the others and his reason for being dissatisfied therewith. His second affidavit reads in part as follows: "That this honorable court has heretofore appointed an attorney at law to

inquire into and investigate the riotous conduct and assault of the said parties hereinbefore mentioned, and the said attorney so appointed, after due investigation, filed a certain information in this court therein, making certain charges against the said Morgan and Kavanaugh, and the said mentioned Morgan and Kavanaugh were brought to trial and a jury impaneled to try the charges therein made against the said Morgan and Kavanaugh, and the affiant herein took the stand and testified in said cause; that upon the conclusion of affiant's testimony, the honorable judge then sitting directed a verdict in favor of the defendants in said cause, and suggested to the special prosecutor that all other cases in which informations had been filed be nolledd; that thereupon the said special prosecutor stated to the court that he had several competent and credible witnesses present who could and would testify to the effect that Claude E. Street on said September 3, 1910, drew a gun or revolver upon this affiant, and that the said witnesses would testify as to the facts concerning said assault; that the judge then sitting refused to hear such testimony and dismissed said suit, and upon the suggestion of the judge then sitting, the said special prosecutor nolledd all other cases in which informations had been by him filed. This affiant respectfully represents and states that in his opinion the ends of justice were not meted out, and that the parties who participated in said riot and assault should and ought to be prosecuted, and all the facts presented to a jury touching the guilt of the said parties of the matters charged herein."

It was upon this affidavit that the court (Hon. Charles McCall, judge presiding) appointed a second special prosecutor to investigate the matters set forth therein, holding, that the district attorney and his deputy, being interested, were disqualified. Upon August 10, 1911, Maloney filed another affidavit charging Street, Frederick, Kille, and Fogle with an assault upon his person with a deadly weapon, being the same charge stated in his first affidavit against the first three, and the same charge included in the information against all of them theretofore nolledd by Attorney Smith. August 10, 1911, a second special prosecutor filed informations against all of said parties, as stated in the opinion. These included the identical charges against Street, Frederick, Kille, and Fogle covered by the informations theretofore nolledd by Smith.

The motion of the district attorney includes and involves the validity of the appointment of the second special prosecutor, and his right to review the work of the first one, as well as to file new informations and try defendants thereunder where similar ones were theretofore nolledd by the former special prosecutor, as well as to continue a

disability against the district attorney in the performance of duties belonging to that office in his district.

I have set forth at length the facts in order to show that the efforts of Mr. Maloney were, as stated in his second affidavit, to secure an investigation by a second special prosecutor, of the same matter for which the first one was appointed and acted, in hopes that he might reach a different conclusion from the first and also to secure another trial covering the same transaction, or practically so, by making the charges slightly different from those theretofore tried, and also to secure the filing of two new informations charging the identical offenses against some of the same defendants that were contained in the first information which the first special prosecutor had nollied, and also to secure trials thereunder.

If as held in the case of *People ex rel. v. District Court, supra*, prohibition lies to restrain a district court from trying a criminal case after the district attorney has entered a nolle prosequi therein, then it appears to me that by denying this writ we are allowing this court to do indirectly what we have heretofore held that it cannot do directly, to wit, by appointing a second special prosecutor; it also allows him to file new informations and try the identical charges contained in the information nollied by the first special prosecutor, without any showing that the first special prosecutor was in any way disqualified to act or had failed or refused to act. Likewise, we are allowing a complaining witness, who is dissatisfied with the district attorney's (in this case the special prosecutor's) investigation of matters without making any showing against him to have another appointed to investigate the same transaction, who, perchance, may arrive at a conclusion in harmony with the views of the complaining witness. In my opinion, the court was without jurisdiction to do so. It will be observed that there is no contention made that Mr. Smith was disqualified or that he did not perform his duties as he saw them, or that he refused to act in the matter; but, to the contrary, the record throughout discloses that he investigated the entire matter. This is self-evident, not only from his reports, but from the fact that he informed against Fogle, whose name is not mentioned in Maloney's first affidavit. To my mind, unless there is some showing to the contrary, no other rational view can be given his acts; for these matters he was the district attorney, he was learned in the law, he knew if dissatisfied that he could have had Judge Cavender's rulings on law points reviewed by this court, also that the authority to enter a nolle prosequi against the other defendants, or to file any other informations pertaining to this entire transaction was vested in him; having done nothing further than as above

stated, we must assume, until a showing is made to the contrary, that he took all action therein he thought proper, and that he disposed of the entire matter as seemed lawful and proper to him before making his report and receiving his discharge.

It was after all these matters had transpired that Maloney filed his second affidavit, and, without making any charge to disqualify Mr. Smith or impeach his good faith or honesty, he attempts to again have the entire matter reviewed by another special prosecutor. Under the rulings in *Gray v. District Court, supra*, in my opinion, under such circumstances the court was without jurisdiction to make the second appointment. It will be observed that it is the actions of Mr. Smith as special prosecutor which it is sought to have thus reviewed. If it were alleged that he was interested or otherwise disqualified, then the trial court would have had something to pass upon, but this is not the case; neither is there any showing that Mr. Smith had failed to investigate, had overlooked or left unfinished before his discharge any portion of the entire transaction, but, to the contrary, his report discloses that he had finished and disposed of the entire matter. Mr. Maloney's second affidavit informs the court of Mr. Smith's appointment and his investigation and disposition of the matter, but in a manner not satisfactory to him. This was the state of the record upon the filing and presentation of Mr. Maloney's second affidavit and upon which the majority opinion says the power and authority of the court were invoked, and that nothing remained for the court to do but to designate a representative of the people to act upon the matters thus presented to the court. As I view it, the second Maloney affidavit, when considered in connection with the Smith report (on file) to which it refers, discloses to the court the necessary facts showing that it was without jurisdiction to appoint a second special prosecutor, unless the rulings announced in both of the decisions above referred to are to be overruled; or we are to now say that things can be done by the courts indirectly which we have heretofore held cannot be done directly.

(54 Colo. 242)

SILFORD et al. v. STRATTON.

(Supreme Court of Colorado. Feb. 3, 1913.)

1. ADVERSE POSSESSION (§ 85*)—CLAIM UNDER TAX DEED—GOOD FAITH—SUFFICIENCY OF EVIDENCE.

In an action to quiet title in which plaintiff claimed under a void tax deed by virtue of the seven-year limitation, where the holder of the tax deed was kept undisclosed to avoid legal process, evidence held to show that the claim was not made in good faith.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-508, 656, 660, 668; Dec. Dig. § 85.*]

2. ADVERSE POSSESSION (§ 85*)—EVIDENCE—VOID TAX DEED.

While a void deed is sufficient color of title to claim under the seven-year limitation, such deed, coupled with payment of taxes, is not conclusive evidence of good faith in making the claim, so as to preclude contrary evidence.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-503, 656, 660, 668; Dec. Dig. § 85.*]

3. ADVERSE POSSESSION (§ 84*)—PAYMENT OF TAXES—GOOD FAITH.

Good faith is essential to claim title under Rev. St. 1908, § 4090, providing that any person having color of title made in good faith to vacant land, who pays all taxes for seven successive years, shall be adjudged the legal owner to the extent of his paper title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. § 84.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Charles A. Silford and another against W. S. Stratton. From a judgment for defendant, plaintiffs appeal. Affirmed.

Allen & Webster, of Denver, for appellants. John F. Mail, of Denver, for appellee.

BAILEY, J. Complaint, in the usual form, was filed March 22, 1909, to quiet title to the land in controversy. The answer denies the allegations of the complaint, except wherein it alleges that defendant claims an interest in the land; it then sets up title in fee from the United States, by mesne conveyances, in defendant; also title through a decree of the district court of Washington county, rendered and entered April 11, 1908, in favor of defendant and against one E. P. Dalander, through whom plaintiffs claim title. In the complaint in that suit it is alleged, among other things that no person other than E. P. Dalander claimed any interest in the land in dispute, of record or otherwise, at the time the suit, in which that decree was rendered, was commenced, October 31, 1907. By replication all new matter in the answer is denied. For a further reply, plaintiffs set up title in themselves through a tax deed executed and recorded on the 27th day of January, 1901, from the county treasurer of Washington county, conveying to the remote grantors of plaintiffs the land described in the complaint; that such deed purported to convey these lands in fee simple, and was color of title made in good faith; that thereafter, under such color of title, the land being meanwhile vacant and unoccupied for more than seven successive years prior to the commencement of this action, plaintiffs and their grantors paid all taxes assessed thereon, and plaintiffs are therefore, under the statute, the legal owners thereof, according to the extent and purport of their paper title, for which reason the claim of title by the defendant is barred by the statute of limitations. Section 4090, Revised Statutes of Colorado,

1908. The decree and judgment was for the defendant, that he is the owner in fee and entitled to the possession of the premises; that the treasurer's tax deed in question and all conveyances thereunder be canceled and set aside and the cloud thereby created removed; and that defendant refund to the plaintiffs all taxes, paid by them and their predecessors, on the land, with interest and penalties. Plaintiffs bring the case here for review on appeal.

[1] The sole question is whether the claim of plaintiffs, under color of title, was made in good faith. The tax deed offered in evidence is void on its face, because it shows that it is based upon a certificate of sale of the property to the county which was assigned by the county clerk of Washington county more than three years after its issuance; so that this deed may only be counted upon as color of title. Plaintiffs rely upon title through it, and the payment of taxes for more than seven successive years, to defeat the claim of defendant. The proof, in addition to the tax deed, and mesne conveyances which purport to vest title in plaintiffs, shows that the taxes assessed upon this land for the years 1900 to 1908, inclusive, were paid by the plaintiffs and their grantors and predecessors in interest. If the claim of title was made in good faith, then it appears that the statute has in fact run, and that the title of the defendant is barred.

The record shows that the tax deed was issued to Frederick H. Davis and Charles T. Kountze on January 26, 1901, and passed to record on that day in the office of the county clerk. On July 20, 1906, Davis and Kountze conveyed to E. P. Dalander, which deed was duly recorded. On February 16, 1907, E. P. Dalander conveyed to S. A. Dalander, but this deed was not recorded until January 1, 1908. Notice of lis pendens in the suit of Stratton v. Dalander, begun October 31, 1907, was filed December 18th next thereafter. S. A. Dalander conveyed to Ida C. Silford, December 21, 1907, deed not recorded until June 15, 1908. March 19, 1908, E. P. Dalander filed a disclaimer in the Stratton suit. On April 11, 1908, decree was entered in that suit in favor of Stratton, quieting title in him. On June 13, 1908, Ida C. Silford conveyed to Charles A. Silford, one of the plaintiffs herein, which deed was recorded June 15, 1908, on the same day that the deed from S. A. Dalander to Mrs. Silford was recorded. On February 4, 1909, Charles A. Silford conveyed an undivided one-half interest in the premises to August Muntzing, which deed was recorded on the same day.

The testimony shows that Muntzing, one of the plaintiffs, was a member of the law firm of Muntzing & More, at Akron, Colorado, which had charge of the litigation between Stratton and Dalander, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the correspondence of that firm concerning the same was mainly had with the other plaintiff Charles A. Silford, residing in Iowa. The testimony of Silford shows that he is a brother-in-law of E. P. Dalander; that he was entirely familiar with the purchase by the latter of this property from Davis and Kountze; that he knew of the conveyance of E. P. Dalander to S. A. Dalander, in February, 1907, and of the pendency of the suit between Stratton and Dalander, to quiet title in the former to the land in question, but does not think this knowledge came to him before January 1, 1908; that he knew of the filing of the disclaimer by E. P. Dalander on March 18, 1908, and knew that Muntzing & More were Dalander's attorneys; that he had had correspondence with them relative to the defense of suits involving several pieces of land in Washington county; that he knew when they filed the disclaimer for E. P. Dalander that the title had been conveyed to S. A. Dalander; that Ida C. Silford, to whom S. A. Dalander conveyed on December 21, 1907, ten days before the latter's deed was recorded, is his wife, and he knew of the conveyance to her; his wife conveyed to him on the 13th of June, 1908, and he afterward conveyed an undivided one-half interest to August Muntzing, the other plaintiff in the suit. In short, it satisfactorily appears from Silford's testimony, although he was an unwilling witness, called by the defense, that he had intimate knowledge of the entire transaction and was fully apprised of all the facts connected with it. The suit by Stratton to quiet title against E. P. Dalander was instituted before a single deed included in the chain of title under which plaintiffs now claim was seven years old. That suit had been begun in apt time, against the only person then of record as owner of the land, to have the tax deed declared void, of which fact Silford was well aware. Muntzing was attorney for Dalander, and must have been equally well advised. The tax deed through which plaintiffs claim was void on its face. No title could come from it except through the statute of limitation, upon proof that everything needful to be done to make it applicable had been done. Therefore it would not do to permit the owner of the patent title to reach the holder of the tax title in a suit to cancel the same before the statute had fully run, otherwise this worthless claim would be completely overthrown. It must be apparent to the most casual observer that it was to avoid that inevitable result that the title to this land was juggled among members of the family, deeds withheld from the record and the actual holder of the tax title kept undisclosed for the express purpose of allowing the limitation statute to run before the holder of the tax deed could be reached by legal process. A careful inspection of the record shows any other conclusion untenable. Un-

der such circumstances it is impossible to say that the claim of plaintiffs under color of title is made in good faith. On the contrary, it clearly appears from the facts in the case that the element of good faith was entirely lacking, and that plaintiffs knew that the title relied on was in fact no title.

Under the statute of limitations relied upon, in addition to the fact that the land must have been vacant and taxes paid for seven successive years, three things are essential: there must be color of title; the party must claim under it; that claim must be made in good faith. If any one of these elements be lacking the title will be defeated.

[2] While this court has held that a deed void on its face is sufficient color to set the seven-year statute of limitation in motion, it has never held that such a deed, coupled with the payment of taxes, is conclusive of good faith. So that it was competent for the defendant in this case, as was done, to introduce affirmative proof to establish the fact that the plaintiffs did not act in good faith in the transaction. It was within the power of Silford to have the question of the validity of the tax title determined once for all, by having the holder of it appear in the Stratton suit. He not only did not do this, but instead, by affirmative action, put it beyond the power of Stratton to locate that title and so reach and bring into court the actual holder thereof. His conduct in this particular furnishes additional proof of lack of good faith. It being clear that the element of good faith is absent, the plaintiffs ought not to be permitted to successfully rely upon the statute of limitation.

[3] That good faith is essential, where in asserting a claim under color of title the statute of limitation is relied on, is settled by a number of authorities in our own state. In *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 Pac. 661, discussing the matter of good faith, in connection with claim and color of title, under a plea of the statute of limitation, which at that time was five years instead of seven, as now, the court said:

"We come now to the second question presented in this case, viz.: Appellant's affirmative defense, the statute of limitations. Under the act referred to (see General Statutes, § 2188 et seq.), the possession must have been for five years with 'claim and color of title in good faith.'

"It is extremely doubtful, particularly in view of section 2188, being section 4 thereof, if this act was intended to apply in cases where the disputed territory is patented ground; but we are not obliged to pass upon that question. The possession is averred in the answer to have continued for about five and a half years prior to this suit. In view of what has already been said, it appears that such possession could not have been for five years under claim of title in good faith, for the *Wolfey Case* [4 Colo. 112], was decid-

ed some time previous to the expiration of that period. Moreover, the matter of good faith is expressly made material by the statute. It was appellant's duty to prove not only his claim and color of title, but also the bona fides thereof; this it made no effort or offer to show. We do not think the court erred upon this branch of the case."

In that case the appellant was claiming through a patent which had been theretofore declared not to include the ground in controversy. The court held, in substance and effect, that inasmuch as the patent had been held not to cover the disputed premises, no presumption of good faith obtained in favor of one claiming under it, with full knowledge of the previous holding, but that good faith must be established by other proof.

And again in *Arnold v. Woodward*, 14 Colo. 164, beginning at the bottom of page 168, 23 Pac. 444, at page 446, it was said:

"The claim of a bar by the statute of limitations (Gen. St. § 2186) is not well taken. Arnold's entry in the land office had been set aside or disregarded, and the patent from the United States had issued to Woodward. Such issuance of the patent necessarily indicates that all steps required in connection therewith were duly taken. During a large part of the period covered by Arnold's alleged adverse holding, these facts existed and were known to him. Under the circumstances, there was not such a 'claim and color of title made in good faith' as laid the foundation for an application of the statute."

In the case of *Warren v. Adams*, 19 Colo. 515, on pages 525, 526, 36 Pac. 604, on page 608, the court said:

"Nor can the appellants avail themselves of the provisions of section 2187 of the General Statutes, by reason of the payment of these taxes. The 'color of title' therein referred to must arise out of some conveyance purporting to vest in the grantee an interest in his own right adverse to the true owner, and not from one that constitutes him a trustee of the title for the use and benefit of such owner. And, furthermore, such claim or color of title must be made in good faith."

And again in *De Foresta v. Gast*, 20 Colo. 307, at page 311, 38 Pac. 244, at page 246, the court said:

"In this case, defendant having color of title to the land by virtue of his tax deed, and having paid all taxes on the land for more than twice the period prescribed by the statute, is entitled to its protection, provided he has acted in good faith in the transaction."

In the case of *Hardin v. Gouveneur*, 69 Ill. 140, the Supreme Court of Illinois used this language:

"In a number of cases it has been inaccurately said, that a deed purporting to convey title is claim and color of title, made in good faith. Such a deed is undoubtedly color of

title, and having been received by the grantee, and acted under as though it conveyed title, such action implies claim of title. But color and claim may be made in good faith or in bad faith. The good or bad faith is not a result of color of claim. The faith, whether good or bad, depends upon the purpose with which the deed is obtained, and the reliance placed upon the claim and the color. A party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render it availing, because of the want of good faith."

The foregoing statement fits the facts in the case at bar and supports the conclusion here reached. The court below having determined the controversy in accordance with the views herein expressed, the judgment must be affirmed.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

(54 Colo. 255)

SILFORD et al. v. HAYES et al.

(Supreme Court of Colorado. Feb. 3, 1913.)

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Charles A. Silford and another against Mary Hayes and her unknown grantees. From a judgment for defendants, plaintiffs appeal. Affirmed.

Allen & Webster, of Denver, for appellants. John F. Mail, of Denver, for appellees.

BAILEY, J. This case was tried below, and argued here, in connection with case No. 7,611, *Charles A. Silford and August Muntzing, Appellants, v. W. S. Stratton, Appellee*, 130 Pac. 327, just decided. The proofs and pleadings are substantially alike in both cases. The conclusion in No. 7,611 is decisive of and determines the matters at issue in this case, and requires an affirmation of the judgment.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

(54 Colo. 256)

COLORADO NAT. LIFE ASSUR. CO. v. CLAYTON, Insurance Commissioner.

(Supreme Court of Colorado. Jan. 24, 1913.)

Rehearing Denied March 3, 1913.)

1. STATUTES (§ 6*)—ENACTMENT—"REVENUE MEASURES."

Laws 1907, p. 441, § 16, requiring all insurance companies doing business in the state to pay to the commissioner of insurance 2 per cent. of the amount of premiums received, is not a revenue measure within the constitutional provision requiring revenue measures to originate in the House, though it provides that the excess over that required to regulate the insurance business of the state shall be turned into the general fund; its primary object being to regulate insurance companies, while "revenue measures" have for their object the levying of taxes in the strict sense of the words.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 5; Dec. Dig. § 6.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. STATUTES (§ 64*)—PARTIAL INVALIDITY—REGULATION OF INSURANCE COMPANIES.

The fact that the provision of Laws 1907, p. 441, § 16, exempting from taxation all property of insurance companies except realty, is unconstitutional, does not invalidate the provision of such section fixing an annual 2 per cent. tax on the gross amount of premiums; it appearing from the circumstances of the enactment of such section and from the history of legislation to regulate insurance companies that these two provisions are not interdependent, and that the exemption provision was not an inducement to the passage of the tax provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

3. STATUTES (§ 64*)—PARTIAL INVALIDITY.

A statute is unconstitutional which contains an unconstitutional clause which was the inducement for its passage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by the Colorado National Life Assurance Company against William L. Clayton, Commissioner of Insurance, etc. Judgment for defendant, and plaintiff brings error. Affirmed.

Clarence A. Brandenburg and Jacob Fillius, both of Denver (William E. Hutton, of Denver, of counsel), for plaintiff in error. Benjamin Griffith, Atty. Gen., and Archibald A. Lee, Deputy Atty. Gen., for defendant in error.

GARRIGUES, J. 1 December, 1909, plaintiff filed a complaint in the district court at Denver, alleging its incorporation under the laws of Colorado; that the Legislature in 1907 passed an act (Laws 1907, p. 441) regulating insurance companies within the state, and that defendant is the commissioner of insurance provided by the act; that section 16 of the act provides, "all insurance companies engaged in the transaction of the business of insurance in this state, shall annually, on or before the first day of March, in each year, pay to the commissioner of insurance two per cent. on the gross amount of premiums received within this state during the year ending the previous 31st day of December. Insurance companies shall not be subject to any further taxation except on real estate, and the fees provided by this act;" that section 74 repeals all laws relating to insurance in force prior thereto; that section 16 is a revenue measure and unconstitutional, because it originated in the Senate, instead of the House; also, that it violates sections 6, 9, and 10, art. 10, of the Constitution; that prior to March 1, 1909, plaintiff was enjoying in this, and other states, a large and profitable life insurance business; that its right to continue in business in this state depended upon its securing annually on the 1st of March a license from the commissioner of insurance, and its right to transact

business in other states depended upon its right to continue in business in this state; that the insurance act provides that, should the commissioner of insurance refuse to renew plaintiff's license, it becomes his duty to publish the fact in one or more of the Denver daily papers, and prohibits plaintiff from transacting any insurance business in this state until its authority shall have been restored by the commissioner; that its success depends on securing new business, and a failure to obtain a license upon the 1st of March would have destroyed its business in Colorado, and would have caused the revocation of its license to do business in other states, because it is prohibited from transacting business without a license, notwithstanding which defendant, as commissioner of insurance, on March 1, 1909, refused to renew the petitioner's license, or to issue to it a license, unless it paid to him as commissioner of insurance a 2 per cent. tax on the gross amount of premiums it received within the state during the year ending the previous 31st day of December, and threatened in that event to publish that plaintiff's license had not been renewed, and that it could no longer transact business within the state, and alleged, should it attempt to do so, that its officers and agents would be liable to fine and imprisonment; that to prevent the destruction of its business, and to secure the required license, plaintiff then and there, under duress and under protest, and claiming and insisting that section 16 was unconstitutional and void, and that defendant as commissioner of insurance had no right to insist upon payment to him of the 2 per cent. tax, paid defendant as commissioner of insurance the sum of \$3,842.48, which was 2 per cent. of the gross amount of premiums received within the state during the year ending the previous 31st day of December, and thereupon defendant issued to plaintiff a license; that, when the license was refused, plaintiff had complied with all the remaining insurance laws of Colorado; that defendant refused to return the money, though requested so to do, and it prays judgment for \$3,842.48, with 8 per cent. interest from March 1, 1909, and costs. December 13, 1910, the court sustained a general demurrer to the complaint, and plaintiff, electing to abide by its complaint, entered judgment for defendant, and plaintiff brings the case here upon error.

2. The Legislature passed insurance acts in 1883, 1895, and 1907, all of which required the payment of certain enumerated fees and a 2 per cent. tax on premiums. The act of 1883 (Laws 1883, p. 217, § 12) required the payment of enumerated fees, a 2 per cent. tax annually on net premiums, and exempted insurance companies from further taxation except upon real estate. The act of 1895 (Laws 1895, p. 196, § 12) required the fees, the payment of a 2 per cent. tax annually

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon gross premiums received during the year, but made no exemptions. The act of 1907 repeals all prior acts, reorganizes and re-establishes the department of insurance with a commissioner of insurance at its head, and is a comprehensive code of insurance laws intended to protect the people and regulate the insurance business and insurance companies doing business within the state. It requires the payment of enumerated fees, a 2 per cent. tax annually on gross premiums, and exempts them from further taxation except on real estate.

3. This exempting clause in section 16 was held unconstitutional in *Imperial Co. v. Denver*, 51 Colo. 456, 118 Pac. 970; that is, it was there held that insurance companies must pay taxes on all their property, and that the exemption was illegal on account of constitutional restrictions, and it is claimed this makes the 2 per cent. tax illegal because the exemption was the consideration or inducement for its passage.

[1] 4. Plaintiff contends the tax is a revenue measure, and unconstitutional because the act originated in the Senate, instead of the House. This contention does not meet with our approval. A bill designed to accomplish some well-defined purpose other than raising revenue is not a revenue measure. Merely because, as an incident to its main purpose, it may contain provisions, the enforcement of which produces a revenue, does not make it a revenue measure. Revenue bills are those which have for their object the levying of taxes in the strict sense of the words. If the principal object is another purpose, the incidental production of revenue growing out of the enforcement of the act will not make it a bill for raising revenue. The primary object and purpose of this bill was to regulate insurance companies and the insurance business in the state. It is a regulation or supervision tax, and the method of arriving at the amount, or because of its operation the act produces an excess which is required to be turned into the general fund, does not affect its validity or render it an act for revenue. 26 Am. & Eng. Enc. of Law, 539; 1 Story on the Constitution (5th Ed.) § 880; 1 Andrews' Am. Law, 241; *Twin City Nat. Bnk. v. Nebeker*, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134; *Northern Counties Trust v. Sears*, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188; *French v. People*, 6 Colo. App. 311, 40 Pac. 463; *Home Ins. Co. v. N. Y.*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025.

[2] 5. The remaining question is, What effect does the exemption clause in the section have upon the 2 per cent. tax, does it destroy the tax, or does the remainder of the section stand without the exemption? Will the intent of the Legislature be defeated by holding the exemption invalid, and the 2 per cent. tax valid?

[3] It is fundamental in the construction

of legislative acts, if a statute contains an unconstitutional clause which was the inducement for its passage, and all its parts are so closely connected as to warrant the belief that the Legislature would not have passed the valid part alone, then the law should be declared void. The power of the Legislature to impose the 2 per cent. tax may well be conceded; but in determining its legality we should try to ascertain the object and intent of the Legislature, and, if we find the 2 per cent. tax on premiums is so dependent upon and closely connected with the exempting clause that the former would not have been passed without the latter, then it is illegal. It is claimed by plaintiff the intention in imposing on insurance companies the 2 per cent. tax on premiums was contingent upon their being exempt from the payment of other taxes except on real estate, and, as the contingency is unconstitutional, the tax does not express the legislative intent; that the exemption was the inducement for imposing the tax, and the Legislature would not have passed one without the other. If it is true the exemption was the inducement for imposing the tax on premiums, and the two clauses are so intimately connected as to make it clear that the tax on premiums would not have been imposed without the exemption, then both should be declared illegal.

We have attempted to show that the object of the Legislature was to regulate insurance companies and insurance business in the state, and the intent was to create a fund for this purpose and for the maintenance of the insurance department. We have also said because it produces an excess, which is required to be transferred into the general fund, does not make it a revenue measure or change the primary purpose of the Legislature.

In arriving at the legislative intent, it is proper that we should consider the legislative history of this 2 per cent. tax. Insurance companies have been required since 1883 to pay a regulation tax of 2 per cent.—sometimes with, and sometimes without, exemptions; sometimes on gross, and sometimes on net, premiums—but they have always been required to pay it in some form. This shows that it has always been the legislative intent since 1883 to require them to pay a regulation tax. The exemption has nothing to do with the necessity for requiring this tax, and we are not at liberty to presume it would not have been imposed without the exemption. We have no right under the circumstances and history of this tax to say that, because the exemption is unconstitutional, the tax would not have been imposed. The purposes for which it is needed are just as necessary and just as pressing with or without the exemption. The exemption does not change the necessity for, or the object of, the tax, or the in-

tent of the Legislature in requiring it. So it is not apparent that the exemption was the inducement which caused the Legislature to impose it. The tax and the exemption are not so closely related or connected that the tax cannot stand and the exemption fall without doing violence to the legislative intent. Because the exemption is illegal does not change the general object and purpose of the Legislature requiring insurance companies to pay a regulation tax. If the Legislature had made no exemption, and carried out its object, it is evident it would have required a regulation tax. We believe the tax can stand without the unconstitutional part, and that, when the invalid exemption is expunged, the act is still operative, and that the legislative intent can be carried into effect without the exemption.

If the section stood alone, as a primary and independent revenue measure, there would be force in the contention that the enactment of the 2 per cent. tax was intended to be contingent upon insurance companies being exempt from the further payment of taxes. But, as we have said, the 2 per cent. tax is primarily for the purpose of raising necessary funds for carrying the insurance act into effect, and would have been just as necessary without the exemption. *State of Iowa v. Santee*, 111 Iowa, 1, 82 N. W. 445, 53 L. R. A. 763, 82 Am. St. Rep. 489; *N. W. Mut. Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.

The judgment is affirmed.

Affirmed.

SCOTT, J., not participating.

(54 Colo. 262)

IN RE SENATE RESOLUTION NO. 4.

(Supreme Court of Colorado. Feb. 28, 1913.)

1. COURTS (§ 208*)—ADVISORY OPINION—QUESTION SUBMITTED BY LEGISLATURE—ACTS HELD PASSED.

The constitutional provision that the Supreme Court shall give its opinion upon important questions when required by the Senate or the House of Representatives was intended to avoid unconstitutional legislation by determining, in advance, the validity of proposed acts, but the court cannot express any opinion as to the validity or effect of acts purporting to be completed legislation, since rights may have arisen under them which should not be determined in a purely *ex parte* proceeding, and since the Legislature cannot call for a construction of acts held passed.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.*]

2. STATUTES (§ 149*)—REPEAL—CONSTITUTIONAL RESTRICTIONS—"MEASURE."

Under the constitutional amendment known as "the Initiative and Referendum," which provides that it shall not be construed to deprive the General Assembly of the right to enact any measure, an act repealing an act is a

"measure," and the General Assembly may repeal any statute, however adopted or passed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 218; Dec. Dig. § 149.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7719.]

3. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—ENACTMENT OF STATUTES—REFERENDUM—TIME OF TAKING EFFECT—"EMERGENCY CLAUSE."

Under the constitutional amendment known as "the Initiative and Referendum," which provides that the referendum may be ordered except as to laws necessary for the immediate preservation of the public peace, health, or safety, the question whether a law is of such character is for the general assembly to determine, and its declaration to that effect, in the body of a proposed act, is conclusive upon all departments of government and all parties in so far as it abridges the right to invoke the referendum, such a declaration being a part of the act which may be passed by the majority required to pass any act, and in no sense an emergency clause within Const. art. 5, § 19, requiring emergency clauses to be expressed in the act.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

4. CONSTITUTIONAL LAW (§ 69*)—ADVISORY OPINIONS—QUESTION SUBMITTED BY LEGISLATURE.

All departments of government are of equal constitutional dignity, and the legislative department must determine the question of its constitutional duties for itself, independent of either of the other departments of the government, by passing such legislation as in its judgment the Constitution requires; and hence an answer to a question submitted by the Senate as to whether any duty devolves upon the General Assembly under a constitutional clause, or whether such duty has been fully performed, is not within the province of the Supreme Court.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 128; Dec. Dig. § 69; *Courts*, Cent. Dig. §§ 492, 493.]

En Banc. Opinion of the Supreme Court in response to questions submitted by the Senate. Questions answered in part.

The honorable Senate, now in session, has submitted questions to this court, with the request that it give its opinion upon, and answer thereto, which are preceded by a resolution, reciting, in substance, that the Twelfth Session of the General Assembly, passed an eight-hour act, which was thereafter declared unconstitutional; that at the election on the 4th day of November, 1902, a constitutional amendment was adopted (section 25a, art. 5), which empowered and directed the General Assembly to provide by law for a period of employment not to exceed eight hours within any 24 hours, except in cases of emergency, where life or property was in imminent danger, for persons employed in underground mines, or other underground workings, blast furnaces, smelters, and any ore reduction works, or branch of industry or labor that the General Assembly might consider injurious or dangerous to health, life or limb, and to prescribe suitable penalties for the violation of such law; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at the Fifteenth Session of the General Assembly an act was passed providing for an eight-hour day in underground mines and underground workings, and in specified ore reduction works (Laws 1905, p. 284); that at the Eighteenth Session of the General Assembly an act was passed (Session Laws 1911, p. 454) which declared that employment in the mines, workings, smelters, and other reduction works mentioned in the title was injurious to health and dangerous to life and limb; that the period of employment of men engaged in such workings and reduction works should not exceed eight hours within any twenty-four hours, except in cases of emergency, where life or property was in imminent danger, and prescribed a penalty for a violation of its provisions, and in express terms repealed the act passed in 1905. The act of 1911 was approved June 2, 1911. It did not contain any declaration to the effect that it was necessary for the immediate preservation of the public health or safety.

The resolution then recites that on the 3d day of August, 1911, and within 90 days after the Eighteenth General Assembly had adjourned for the session, there was addressed to, and filed with, the Secretary of State a petition, purporting to be signed by the requisite number of legal voters, asking that the 1911 act be referred to the people for ratification at the ensuing general election; that thereafter, and on the 2d day of July, 1912, there was addressed to, and filed with, the Secretary of State, a petition, purporting to be signed by 8 per cent. of the legal voters of the state, requesting that there be submitted to the people at the next regular general election, for adoption or rejection, a proposed measure, which was entitled the same as the act of 1911, except that instead of reciting, "and repeal chapter 118 of the Session Laws of 1905, approved March 21, 1905, and all other acts and parts of acts in conflict with this act," it recites, "to repeal all other acts and parts of acts in conflict with this act." Section 1 of this proposed act declared, in substance, that employment in all underground mines, underground workings, open cut workings, open pit workings, or directly attending the reduction works or ovens mentioned in the title, was injurious to health, and dangerous to life and limb, whenever such employment was continuously in contact with noxious fumes, gases, or vapors. By the next section it was provided that the period of employment of men working in all underground mines, underground workings, open cut workings, open pit workings, or directly attending the reduction works mentioned in the title should not, during any one month, exceed an average of eight hours within any twenty-four hours, whenever such employment was continuously in contact with noxious fumes, gases, or vapors, except where life or property was in imminent danger:

The act then provided a penalty for its violation, and purported to expressly repeal the act of 1905 and the act of 1911. Both these measures were published by the Secretary of State, and appeared on the official ballot at the general election in November, 1912, at which time, according to the certificate of the canvassing board of the state, both measures were adopted. The resolution then continues: "And, whereas, no proclamation was made by the Governor as to the adoption or rejection of either of said two measures; and, whereas, uncertainty exists in the minds of many as to the effect of said election on said act of the Eighteenth Session of the General Assembly, approved June 2, 1911, and as to whether or not the said act is now in existence, or whether or not it has been repealed; and, whereas, the Constitution of the state of Colorado provides, as hereinbefore quoted, that 'the General Assembly shall provide by law, and shall prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight hours within any twenty-four hours (except in cases of emergency where life or property is in imminent danger), for persons employed in underground mines, or other underground workings, blast furnaces, smelters; and any ore reduction works or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb;' and, whereas, a question exists as to whether or not the duty thus imposed upon the General Assembly has been carried out, or whether the obligation and duty thus imposed on the General Assembly still exists; and, whereas, the members of this session of the General Assembly are desirous of performing any duty that may have devolved upon them by the Constitution; and, whereas, there has been introduced in the present session of this House, and is now pending, an act in the words and figures following, to wit: 'Senate Bill No. 47 (By Senator Bellesfield).'" The title then recites that it is a bill to regulate and limit hours of employment in mines, specified workings connected therewith, reduction works named, and coke ovens, and to declare certain employments injurious to health and dangerous to life and limb; to provide a penalty for its violation; to repeal the eight-hour law of 1905; to repeal the eight-hour act submitted by initiative petition at the last November election; and to declare that the act is a law necessary for the immediate preservation of the public health and safety, and shall be in effect from and after its passage, and to repeal all other acts and parts of acts in conflict with it. Section 1 of this proposed act declares that employment in the mines, reduction works and ovens mentioned in the title, is injurious to health, and dangerous to life and limb. By section 2 it is provided that the period of employment of men working in such mines

or workings connected therewith, and reduction works and ovens mentioned in the title, shall not exceed eight hours within any twenty-four hours, except in cases of emergency, where life or property is in imminent danger. By section 3 a penalty is provided for the violation of the act. By the sections following it is provided that the eight-hour law of 1905 and the act submitted through initiative petition at the last general election in November, 1912, are repealed, and that any adoption of the latter was annulled and should be held for naught, and that any and all other acts and parts of acts in conflict with the present proposed act of the Nineteenth Session of the General Assembly are repealed. Sections 6 and 7 of the proposed act are as follows:

"Sec. 6. It is hereby declared and enacted that this present act is a law necessary for the immediate preservation of the public health and safety.

"Sec. 7. In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage."

The resolution then continues: "And whereas, the Constitution of the state of Colorado provides that the Supreme Court shall give its opinion upon important questions upon solemn occasions, when required by the Senate or the House of Representatives; and, whereas, there has been much contention, strife, agitation and controversy throughout the state of Colorado for many years over the eight-hour question, and it is of the highest importance to the people that all such questions be speedily settled and determined; now, therefore, be it resolved by the Senate of the Nineteenth Session of the General Assembly of the state of Colorado, that the Supreme Court of the state of Colorado be, and it is hereby requested, to give its opinion upon, and in answer to the following questions: (1) Was the said act approved June 2, 1911, such an act as could be referred to a vote of the people at the November, 1912, election upon a referendum petition? (2) If the said 1911 act of the General Assembly was a measure that could be referred by a referendum petition, could there legally be submitted to the people by initiative petition at the same election another measure containing a clause repealing said 1911 act? In other words, was it legal when the 1911 act was to be ratified or rejected at the election, to also submit at said election, by initiative petition, a measure repealing, or attempting to repeal, a measure which the people were, at said election, to ratify or reject, and what was the legal effect, if any, of said repealing clause in said initiative measure? (3) What was the legal effect of both said initiative measure and said referred act receiving a majority vote at the same election? Did both of said measures become the law, or only one of them, and if only one of

them, which one? (4) Is there now any duty devolving upon the General Assembly, under the constitutional clause hereinbefore quoted, or has the duty of the General Assembly been fully performed?"

This resolution and the foregoing interrogatories were accompanied by a certificate, stating that the resolution had been duly adopted by the Senate, and that the proposed act mentioned in the resolution which the Senate now has under consideration and is designated Senate Bill 47 has passed second reading.

Fred Farrar, Atty. Gen., Francis E. Bouck, Deputy Atty. Gen., and Henry A. Dubbs and Horace N. Hawkins, both of Denver, Harry B. Tedrow, of Boulder, and John H. Gabriel, of Denver, amici curiæ.

PER CURIAM. From the foregoing resolution it is evident the honorable Senate is confronted with an anomalous situation, from the fact that it appears two acts are upon the statute books upon the same subject, both, apparently, adopted, the initiated one containing a repealing clause which creates uncertainty, and that the Senate has under consideration a proposed act on the same subject, which has passed second reading, the purpose of which is to take the place of both the others, and that from the questions propounded, though not directly expressed, it is the desire of the Senate to pass an act which cannot be successfully attacked for any of the reasons which the first three questions impliedly suggest, provided it has authority to do so in such manner as will prevent the situation now presented from being repeated in the future. We think we are justified in deducing this conclusion from the fact that, if the Senate were not in doubt regarding its authority in the premises, the proposed act would be passed in due course, for by so doing the two acts mentioned would be repealed, their validity, so far as the future is concerned, no longer open to question, and in their place there would be but one act, the validity of which, on the score of its passage, would be unsailable.

[1] We think this presents the question of the constitutionality of the proposed act in particulars we shall later consider, within the constitutional provision under which the resolution and questions have been submitted, the purpose of which was to have unconstitutional legislation avoided by having the validity of proposed acts determined in advance. In re Senate Bill 65, District Attorneys, 12 Colo. 466, 21 Pac. 478. We cannot express any opinion with respect to the validity of the referred and initiated acts, which, if either, is in force, or when they took effect, or what was the legal effect of the repealing clause in the initiated measure, for the reason that both purport to be

completed legislation, that under them rights may have arisen or attached which should not be determined in a purely *ex parte* proceeding; and for the further reason that, so far as the validity of legislation is involved, in response to legislative questions, it is confined to proposed acts, in order that unconstitutional legislation may be avoided, and cannot call for a construction of acts already passed. The results which would follow any other rule demonstrate that the validity of completed legislation cannot be made the subject of legislative inquiry; otherwise, this court, at the request of the legislative department, could be called upon to determine the validity of any number of acts which have been upon the statute books for many years, and under which rights, public and private, have attached.

That we should not determine, in any respect, the validity of the referred and initiated acts, however, does not prevent us from furnishing the information at least impliedly sought which will enable the honorable Senate to clear the situation. The proposed act expressly repeals the act of 1905, and also the one initiated, and all other acts in conflict therewith. There can be no question about the authority to repeal the act of 1905.

[2] The question regarding the power to repeal the initiated and referred acts (if it can be said the latter is included in the general repealing clause) turns upon a construction of the constitutional amendment usually spoken of as "the Initiative and Referendum." That is, does this provision prevent the General Assembly from repealing an initiated act, or one which has been referred? We think not, for it expressly provides: "This section shall not be construed to deprive the General Assembly of the right to enact any measure." This language is broad and comprehensive. An act repealing an act is a measure, and, as the General Assembly is not deprived of the right to enact any measure, it clearly has the power to repeal any statute law, however adopted or passed.

[3] The next question is, Can the General Assembly lawfully prevent the proposed act

from being referred by the declaration contained in section 6 thereof? To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the "Referendum" "may be ordered, except as to law necessary for the immediate preservation of the public peace, health or safety." Whether a law is of this character is for the General Assembly to determine, and, when it so determines, by a declaration to that effect in the body of a proposed act, we are of the opinion that such declaration is conclusive upon all departments of government, and all parties, in so far as it abridges the right to invoke the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by article 5, § 19.

[4] As to the fourth question, it is not in our judgment within the province of this court to say whether or not the General Assembly has performed the duties imposed by the Constitution. All departments of government stand on an equal plane, and are of equal constitutional dignity. The Constitution defines the duties of each. Neither can call the others directly to account for actions within their province, and so it follows that the judicial cannot say to the legislative department that it has, or has not, performed its constitutional duties; that the legislative department must determine for itself, independent of either of the other departments of government, by passing such legislation as, in its judgment, the Constitution requires. The views we have expressed are simply intended to aid the General Assembly in solving this important question.

In conclusion, we add that this court will always take pleasure in rendering to each house of the General Assembly such assistance, under the constitutional provision by virtue of which the honorable Senate has propounded the interrogatories considered, as shall be consistent with its position as a separate and independent branch of our state government, and in harmony with what is deemed a sound exposition of the Constitution—the paramount law of the state.

(72 Wash. 355)

BURNHAM v. WASHINGTON MACHINERY DEPOT.

(Supreme Court of Washington. March 4, 1913.)

WORK AND LABOR (§ 6*)—SERVICES—RELATION BETWEEN PARTIES.

Involuntary proceedings in bankruptcy were instituted against plaintiff after his purchase of machinery from defendant, under a conditional contract of sale, which provided that the property might be retaken if plaintiff neglected to take proper care of it. Upon the threat of the receiver to discharge the watchman, defendant wrote plaintiff that it desired him to keep supervision over the property until it could get matters straightened out with H., who claimed under a contract with plaintiff. *Held* that, as plaintiff still claimed under the contract of sale, this letter was no basis for recovery by plaintiff from defendant on a quantum meruit for services as caretaker; plaintiff being bound, under the contract of sale, to take care of the property.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 11; Dec. Dig. § 6.*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by H. A. Burnham against the Washington Machinery Depot. From a judgment for plaintiff, defendant appeals. Reversed, and cause ordered dismissed.

Huffer, Hayden & Hamilton, of Tacoma, and Frank C. Owings, of Olympia, for appellant. Thos. M. Vance, Harry L. Parr, and Troy & Sturdevant, all of Olympia, for respondent.

MOUNT, J. This action was brought by the plaintiff to foreclose a lien claim of \$2,150 upon a certain lot of sawmill machinery. The lien claim is based upon a quantum meruit account for alleged services performed by the plaintiff at the request of the defendant, between September 3, 1909, and November 18, 1910, as watchman and caretaker of the machinery. Upon the trial of the case a judgment and decree of foreclosure in the sum of \$1,320.40 was entered in favor of the plaintiff. The defendant has appealed.

The substantial facts are that the mill machinery was delivered by the defendant to the plaintiff in May, 1906, and October, 1907, under two contracts of conditional sale. These contracts provided that the title to the property should remain in the defendant until paid for by the plaintiff. The plaintiff did not pay for the property, but remained in possession, using it, until July 30, 1909. On that day involuntary proceedings in bankruptcy were instituted in the United States District Court for the Western district of Washington against the plaintiff by certain creditors. A receiver was appointed, who took immediate possession of the property and placed a watchman in charge. At that time the receiver had no funds available to pay the watchman. The defendant and other creditors advanced money to pay for a

watchman for one month. At the end of that month, namely, August, 1909, the defendant refused to advance more money to the receiver, who threatened to discharge the watchman. Three days later, on September 3, 1909, the defendant wrote to the plaintiff a letter, as follows: "Mr. H. A. Burnham, Rainier, Wash.—Dear Sir: We note that the watchman, Mr. Lawrence, has been let out, and we trust that you will keep some sort of supervision over this property of ours until such time that we can get matters straightened out between ourselves and Mr. Hill. It is our intention to at once take some steps in regard to the matter contained in the affidavit given your attorney by us, and we would like to have your attorney call on Mr. F. A. Huffer at his office in the Bank of Commerce Bldg., this city, and confer with him in reference to that matter. It would also be well to have you present at the same time in order to verify any statements made in the affidavit, as well as to give our attorney any further information that he may need. Yours truly, Washington Machinery Depot, by C. O. Bosse, President." The watchman was not discharged at that time, but was continued by the receiver and subsequently by the trustee in bankruptcy; and the custody of the property remained in the possession of the United States District Court, through its trustee, until July 14, 1910, when, by order of that court, it was abandoned as "burdensome." The plaintiff was then in possession of the property. On September 20, 1910, the defendant notified the plaintiff that he (defendant) had sold some of the trucks; but the plaintiff refused to deliver possession to the purchaser. Soon after that time the plaintiff made demand upon the defendant for compensation, at the rate of \$150 per month, as caretaker, from September 3, 1909, to the date of the demand in September, 1910. The defendant refused to pay this demand, for the reason stated that plaintiff was interested in the property as a purchaser, and that there was no employment of the plaintiff by the defendant. On November 18, 1910, the defendant was proceeding to retake possession of the machinery under the terms of the contract of conditional sale. On the next day this claim of lien sued upon was filed in the office of the county auditor, and this action was at once begun to foreclose the lien claim, and to restrain the removal of the property. A restraining order was issued in the case.

Several questions are presented upon the record; but it seems so clear that there was no contract of employment that we shall not consider any other question. The possession of the property was delivered to the plaintiff under conditional sale contracts. The title was reserved in the vendor. It was the duty of the plaintiff to take care of the property while it was in his possession. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—22

contract so provides; for it says, "If plaintiff shall fail or neglect to take proper care of any of said property," the defendant may take possession, etc. When the possession of the property was taken from the plaintiff by the bankruptcy proceedings, and when the defendant supposed the watchman for the receiver in bankruptcy was about to leave the property without protection, the latter wrote the letter above quoted, stating: "We note that the watchman, Mr. Lawrence, has been let out, and we trust that you will keep some sort of supervision over this property of ours until such time that we can get matters straightened out between ourselves and Mr. Hill." Mr. Hill was interested in the property by reason of the contract with the plaintiff. This was clearly not a contract of employment. The letter called upon the plaintiff to do only what he was bound to do under the conditional sale contract with the defendant. If the defendant at that time had resumed possession of the property, so that the plaintiff had been released entirely from the contract and had no further interest in the property, some claim might thereafter have been reasonably made for services as caretaker; but such is not the fact. The plaintiff claimed under this conditional sale contract until the last, and refused to permit the defendant to take possession of or to remove the property. In short, the plaintiff does not contend that the conditional sale contract had been rescinded, or that the property had been redelivered to the plaintiff. Until that occurred, the defendant held the title, while the plaintiff held possession, and was bound to care for the property while in his possession. There is nothing in the record or the letter which shows an employment of the plaintiff by the defendant for wages.

The judgment is reversed, and the cause ordered dismissed

CROW, C. J., and PARKER, CHADWICK, and GOSE, JJ., concur.

(72 Wash. 284)

PETERSON v. SMITH et al

(Supreme Court of Washington. Feb. 24, 1913.)

1. APPEAL AND ERROR (§ 925*)—PRESUMPTIONS.

The Supreme Court must presume that the trial court tried the case upon the issues made by the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3729-3734; Dec. Dig. § 925.*]

2. ACCORD AND SATISFACTION (§ 2*)—EVIDENCE.

Where it was agreed that, if plaintiff took over a certain contract and lost money thereon, defendants would pay him \$150 a month for his services in executing the contract, and plaintiff thereafter accepted a sum in settlement for such services, it was an admission of a loss on the

contract, and that there was nothing due thereon, and constituted an accord and satisfaction, so as to bar any recovery on the contract.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 14-21, 33; Dec. Dig. § 2.*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by August Peterson against Grant Smith and another, doing business as Grant Smith & Co. From a judgment for defendants, plaintiff appeals. Affirmed.

Jas. Kiefer, of Seattle, for appellant. Fred W. Drickken and Randolph E. Hilbert, both of Seattle, for respondents.

CHADWICK, J. Suit upon contract. Defense, an accord and satisfaction. From a judgment in favor of defendants, plaintiff has appealed, relying upon the principle laid down in *Seattle, Renton & Southern Ry. Co. v. Seattle-Tacoma Power Co.*, 63 Wash. 639, 116 Pac. 289. It is there held that, where there are several items of account, the payment of a liquidated debt and agreed item does not satisfy an unliquidated item or debt, upon the theory that there is nothing left to operate as a consideration for the accord and satisfaction. To sustain his contention plaintiff, in his brief, as well as in the bill of exceptions, undertakes to make it clear that plaintiff had three separate contracts with the defendants; that only one of them is or could be affected by the accord and satisfaction. Notwithstanding the witnesses have been made to speak of three contracts in the bill of exceptions, we think the case, when viewed in the light of the pleadings, will not bear that construction.

[1] Plaintiff sets out a contract to do certain work, and as a part of the same cause of action says: "In addition thereto, the plaintiff performed the following work not embraced in his aforesaid contract." He then sets out four items of work and service which, he says, were made necessary in the proper execution of his contract. These items were denied, and were properly treated as issuable under the pleadings; the obvious question being whether they were a part of the main contract. We must presume that the court tried the case upon the issues made by the pleadings, and so presuming we find that there was an accord and satisfaction of all differences existing between the parties.

[2] The amount alleged to have been paid in accord and satisfaction of all claims existing between the parties was the sum of \$550.80. The payment is evidenced by receipt, saying that it is "in full for all work on north trunk sewer to date." Although the bill of exceptions is not complete upon this point, there is enough in the pleadings and briefs to warrant us in saying that this sum was given in payment of a monthly sal-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ary, and was provided as a part of the original contract between the plaintiff and the defendants. The defendants alleged that it was agreed that, if plaintiff took over a certain contract and made a loss thereon, they would in any event pay him \$150 per month. Looking at the case in this light, the money paid would not be, as plaintiff now contends, a liquidated sum; it would only be due in case of a loss, and the acceptance of it would not bring plaintiff within the rule he relies upon. He is entitled, either to a recovery upon his contract, or his salary in case of a loss. He was not entitled to the salary in any event. He has accepted his salary, and such acceptance implies the truth of the allegations contained in the answer of the defendants that there was a loss upon his contract.

Judgment affirmed.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

(72 Wash. 233)

STATE v. HANLON.

(Supreme Court of Washington. March 8, 1913.)

LARCENY (§ 65*)—SUFFICIENCY OF EVIDENCE. Evidence held to sustain a conviction of grand larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 160; Dec. Dig. § 65.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Herbert L. Hanlon was convicted of grand larceny, and he appeals. Affirmed.

Will H. Thompson, of Seattle, for appellant. John F. Murphy, Hugh M. Caldwell, and H. R. Butler, all of Seattle, for the State.

PARKER, J. The defendant was convicted of the crime of grand larceny in the superior court for King county, and sentenced to imprisonment in the state reformatory, from which conviction and sentence he has appealed to this court.

The only contention here made by appellant's counsel is that the evidence was not sufficient to justify the verdict of the jury. This question was first raised in the trial court by motion for a new trial; there being no motion for nonsuit or directed verdict upon the trial. The evidence introduced upon the trial was in many particulars in serious conflict. However, a painstaking reading of the entire record convinces us that there was competent evidence produced before the jury warranting them in believing the following facts to be established:

It is conceded that the goods in question were stolen by some person or persons on or about Sunday, January 28, 1912, from a room in a Seattle business block occupied

by the owners of the goods, Mr. and Mrs. Douglas. The goods stolen were furs and some small articles belonging to Mrs. Douglas, and a dress suit, two white vests, and an overcoat of Mr. Douglas. At that time, and for some time previous thereto, appellant had been engaged in newspaper work, and, by permission of a tenant of an adjoining room, used his room occasionally during evenings and on Sundays. Appellant did typewriting and mimeograph work there at those times, in making out his reports to the various newspapers to which he was furnishing material for publication. He did not have a key of his own to the room, but would get the key from time to time from the tenant occupying it, as occasion might require. He procured the key and occupied the room on Saturday and Sunday afternoon and evenings of the 27th and 28th of January, and also probably occupied it Monday evening, the 29th, though this is not entirely clear from the evidence. He was, however, seen to leave the building on that evening. There is a door leading from this room into the adjoining room occupied by Mr. and Mrs. Douglas. In what manner this door was locked or fastened it does not appear, but, in any event, there was nothing in common between the people occupying the different rooms, and neither had any occasion to pass through this door; each room having access to the hall of the building through an outer door of its own. Mr. and Mrs. Douglas discovered the theft on the following Wednesday, January 31st. They had been absent from their room since Friday evening, January 26th. During this time, and for some time thereafter, appellant, his mother, and a younger brother, named Howard, made their home in an apartment house in the city; their apartment being leased in the name of appellant, who was practically the head of the family. He is 26 years old, and his brother Howard is 17 years old. On February 21st most of the goods were found by an officer while executing a search warrant in the apartment occupied by appellant, his mother, and brother. The larger part of the goods were found in a closet of the apartment. Some of the smaller things were found in a bureau in the room occupied by Mrs. Hanlon. A pair of shoes and an art bag were produced by appellant from the room occupied by Howard. The two white vests were also produced by appellant. It is not clear from just where he got them. They had previously been sent away and returned with the family laundry. A silver purse was taken from Mrs. Hanlon, or rather given to the officer by her upon demand, after she had removed some cards and car tickets therefrom, which she claimed belonged to her. All of these articles, save the cards and car tickets, belonged to Mr. and Mrs. Douglas. While the officer was there, and in

the presence of other witnesses, Mrs. Hanlon said to appellant, in substance, "Herbert, why did you do it?" evidently referring to the taking of the goods, to which he replied, in substance, "Never mind, mother." Appellant, his brother, and mother all knew of the presence of the stolen goods in their apartment for about a week previous to this time, and no report of the fact had been made to the police. Their version of the manner of the goods coming there we will notice later. Appellant was then arrested and taken to police headquarters with the goods. On the way he asked a brother of Mr. Douglas, who had been present at the apartment and was going along with them, if all of the stuff had been found, and asked what was missing. He was informed that a fraternity pin, a gold chain, and a scarf pin were missing. He asked about how much they would be worth, and was informed about \$75. He then replied to Mr. Douglas: "I will have to make that up, won't I?" He then asked Mr. Douglas if he (Douglas) would speak to his brother and have it kept quiet, and suggested that it could be fixed up. Mrs. Hanlon testified, in substance, that she had told Mr. Douglas, when the search was being made and appellant was being arrested, that they were taking the wrong man; and appellant also testified that he heard her make this statement. He also testified that he denied to Mr. Douglas that he had stolen the goods. All of this is flatly contradicted by Mr. Douglas and other witnesses present. Appellant also testified, in substance, that he gave the officers at the police headquarters to understand that his mother could tell them who was the person who stole the goods. This is also denied by the state's witnesses.

We think the jury were warranted in believing that appellant made no denial of his stealing of the goods at that time, nor at any time until after Howard's alleged confession, which was made upon the following day to the prosecuting attorney, that he (Howard) had stolen the goods. On that day (February 22d), appellant being still under arrest and detained at police headquarters, Mrs. Hanlon took Howard to Mr. Murphy, the prosecuting attorney, where Howard confessed that he had entered the room of Mr. and Mrs. Douglas and stolen the goods and taken them to their apartment. Howard testified, in substance, that he was helping his brother at the room adjoining that of Mr. and Mrs. Douglas on Sunday afternoon, the 28th of January, doing some mimeograph work; that his brother went away from the room about an hour before he did, and that soon thereafter he noticed that the door leading into the adjoining room of Mr. and Mrs.

Douglas was ajar several inches; that he then pushed the door back and went into the room and took the goods away; that his brother (appellant) had nothing to do with it, and knew nothing of it, until about a week before they were discovered by the officer with the search warrant. According to the testimony of appellant and Mrs. Hanlon, the goods were discovered by them in a closet of Howard's room about February 17th. They then attempted to get Howard to explain where the goods came from; but he refused to do so until after appellant was arrested, when Howard made the statement to the prosecuting attorney. The only testimony offered in behalf of appellant was that of himself, his mother, and brother; and, while their testimony is fairly consistent as between themselves, there is sharp conflict between their testimony and the state's witnesses upon a great many of the details brought out, especially as to the acts and statements of those present, including appellant, his mother, and brother, at the time the search was being made.

Counsel for appellant places great reliance upon the confession of Howard made to the prosecuting attorney, insisting that reasonable minds cannot differ as to the truth of that confession. We may accept as true that confession, in so far as it implicates Howard in the taking of the goods; but it does not follow that the jury were not warranted in believing that appellant was guilty. The guilt of Howard is not at all inconsistent with the guilt of the appellant.

In view of the fact that the goods were stolen by some person or persons from the room of Mr. and Mrs. Douglas on or about January 28th, the opportunity of appellant to take the goods at the time the theft was committed, the knowledge of appellant of the presence of the stolen goods in the apartment occupied by himself, mother, and brother for about one week before they were discovered by the officer, and no report having been made of that fact, the finding of the goods in the apartment, some of them, at least, under circumstances which would warrant the jury in believing they were in the possession of appellant, the acts and statements of appellant at the time of and immediately following the search of the apartment, together with all the circumstances shown, we do not feel warranted in disturbing the verdict of the jury finding appellant guilty. The record discloses that appellant had a fair trial, with instructions to the jury quite favorable to him.

The judgment is affirmed.

CROW, C. J., and CHADWICK and MOUNT, JJ., concur

(72 Wash. 298)

JOHNSON v. CITY OF SPOKANE.

(Supreme Court of Washington. Feb. 28, 1913.)

EMINENT DOMAIN (§ 243*)—CONDEMNATION PROCEEDINGS—RES JUDICATA—CHANGE OF GRADE.

A judgment of condemnation assessing damages to abutting property on account of the change of a street grade was a bar to a subsequent action for damage from such change of grade, brought by a property owner who had appeared in the condemnation proceedings.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 551, 627-629, 700; Dec. Dig. § 243.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Charles Johnson against the City of Spokane. From a judgment for defendant, plaintiff appeals. Affirmed.

Morrill, Chester & Skuse, of Spokane, for appellant. H. M. Stephens and Bruce Blake, both of Spokane, for respondent.

MAIN, J. This is an action for damages to abutting property by reason of changing the grade and the regrading of a street. The plaintiff is the owner of lot 19, in block 5, in First addition to the West Riverside addition to the city of Spokane, which lot fronts on Clark avenue, one of the public streets of the city. On June 12, 1900, the city council passed an ordinance which established the grade of Clark avenue, but the street was never improved under this ordinance by bringing the surface of the street to the grade line thus established. On January 14, 1910, an ordinance was passed by which the grade of Clark avenue was changed and re-established. This ordinance provided for the improvement of the street by grading, sidewalking, etc. The contract for this work was entered into on February 18, 1910, and thereafter the work was prosecuted. On July 28, 1911, while the work of regrading and sidewalking was in progress, the plaintiff in this action filed a verified claim with the city, demanding damages on account of the lowering of the surface of the street in front of his property to the grade line established by the ordinance of January 14, 1910. On October 26, 1911, the city council passed an ordinance providing for the institution of a condemnation proceeding for the purpose of ascertaining the amount of damages to abutting property by reason of the changing and re-establishing of the grade of Clark avenue. Pursuant to this ordinance, condemnation proceedings were begun, a trial had, and judgment was entered therein on December 27, 1911. The plaintiff here was a party to that action, and appeared therein by counsel. The judgment in the condemnation suit has never been vacated or set aside. During the month of January, 1912, the present action was begun on the claim that had been filed

July 28, 1911. In due time the cause came on for trial. At the conclusion of the plaintiff's evidence, a motion for nonsuit was interposed by the defendant. The motion was granted, and dismissal of the action followed. The plaintiff has appealed.

The sole question presented is whether the judgment in the condemnation suit is res adjudicata as against appellant's right to prosecute the present action. To ascertain the amount of the damage which the appellant's property would suffer by reason of the change of grade of Clark avenue was one of the purposes for which the condemnation action was brought. The appellant appeared therein. It was his right and his duty to litigate in that action the very question which he is seeking to have determined in the present action. In *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757, a similar question was presented to this court, and the decision in that case is conclusive as against the appellant's right to maintain the present action.

The judgment will therefore be affirmed.

MORRIS, ELLIS, FULLERTON, and MOUNT, JJ., concur.

(73 Wash. 320)

LEWIS v. SEATTLE TAXICAB CO.

(Supreme Court of Washington. Feb. 28, 1913.)

MUNICIPAL CORPORATIONS (§ 706*)—CONTRIBUTORY NEGLIGENCE—PEDESTRIANS—AUTOMOBILES.

Whether a pedestrian going diagonally down the street to take a street car was guilty of contributory negligence in failing to look for an approaching automobile held, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Morris, J., dissenting.

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Gustave Lewis against the Seattle Taxicab Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brightman & Tennant, of Seattle, for appellant. Chas. M. Fouts, of Seattle, for respondent.

FULLERTON, J. The respondent was struck by an automobile driven by a chauffeur of the appellant, and received injuries for which he recovered in the court below. In this court but one principal question is urged in the argument, namely: Was the respondent guilty of negligence contributing to his injury?

The respondent was injured while on Yesler Way in the city of Seattle at a point near the junction of the Way and James street. At this place cars from various parts of the city have a common track, and stop there to receive and discharge passengers.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

The respondent approached the place at about 5:15 o'clock in the evening intending to take a car for his home. There were two cars then standing on the car tracks, neither of which were bound for the vicinity of his residence, and he waited the approach of the proper car. Shortly thereafter his car was seen approaching, and he alternately looked at it and at the cars then standing on the street to see whether the latter moved out before the other car approached, as it made a difference as to the place his car would stop whether the cars then on the track remained there or moved out before his car arrived. Finally concluding that the car would stop further down the street than its usual stopping place, he started in that direction, walking diagonally across the street from the place where he left the sidewalk. He had gone perhaps 15 feet and was probably 10 feet from the sidewalk when he was knocked down by the appellant's automobile, which approached him from behind. He testified that before leaving the sidewalk for the street he looked in the direction from which the automobile approached, and that in looking at the standing street cars his field of vision naturally took in its line of approach, but failed to see it, and that he did not again look in that direction after leaving the walk before he was struck by the automobile. The jury, however, in answer to special interrogatories returned with their general verdict, found that he could have seen the automobile prior to leaving the sidewalk had he glanced in the direction from which it was approaching, and also that after he left the sidewalk and prior to being struck there was nothing to prevent him from seeing the approaching automobile had he looked in that direction. The evidence was conflicting on the question whether or not any alarm was sounded as the automobile approached the respondent; and in conflict also as to the distance the car was from the respondent at the time he left the walk, and as to the speed at which it was running. There was, however, evidence in the record from which the jury could have found that no alarm was sounded, and that the automobile was upwards of 75 feet from the respondent when he left the walk, and that it was running at a speed of from 8 to 12 miles an hour.

The appellant does not dispute that the evidence was sufficient to take the case to the jury on the question of the negligence of the chauffeur, but contends that the act of the respondent in stepping into the street and starting across the same without looking for approaching automobiles, or looking so carelessly as to fail to see one approaching him at a distance of 75 feet, was such negligence as to prohibit a recovery on his part on the doctrine of contributory negligence. But it has seemed to us that the trial judge rightfully submitted the question to the jury.

The respondent did not step from the street immediately in front of the automobile, nor did he in crossing the street any time obstruct its path. He was as much in the view of the driver of the automobile as the automobile was in his view, and, as there was room to pass him on either side, we think it too much to say as a matter of law that he was required to take notice of the particular part of the street the automobile driver desired to use, and keep off that particular part. We think it was a question for the jury to say whether, under the circumstances, he did not have the right to assume that an automobile coming towards him from a direction opposite to that in which he was going would pass him on one side or the other instead of running him down.

On the question of the degree of care required of persons while crossing public streets used by passing vehicles, the appellant cites from this and other courts a number of cases of injury caused by railroad trains and passing street cars; but it is at once apparent that these cases can hardly be said to be in point except as they may state general principles. The degree of care required of a pedestrian crossing a railroad or street car track is much higher than is the care required of one crossing an ordinary public street where only passing teams or automobiles are to be encountered. Railroad trains and street cars must move on a fixed track, and the track is for that reason at once a warning of danger and a marking of the zone of safety; the cars are heavy and cumbersome and cannot turn aside to avoid a collision or be brought to a stop when once in motion; hence the persons directing the movements of such cars are limited in their powers to protect persons found upon the track. But this is not true with reference to ordinary vehicles. The driver of these has freedom of choice as to the part of the street he will drive them upon; they can be turned quickly to one side or the other, and are capable of easy control otherwise. As to these, therefore, the footman may rely on the presumption that so long as he occupies one place or pursues a given course he need not be run into, and to fail to keep a lookout for the approach of such vehicles is not necessarily want of care. The degree of care required of such a person, of course, varies with the circumstances. It depends largely upon place and upon the condition of the street; whether the street is crowded with traffic or comparatively free therefrom; whether he enters the street at a place usually used by travelers on foot, and perhaps on many other conditions. But the degree of care required is ordinary care under the circumstances, and this, as we say, may be vastly different from ordinary care with reference to crossing fixed tracks upon which railway or street cars are operated.

Neither do we think the case of *Minor v.*

Stevens, 65 Wash. 423, 118 Pac. 313, in point with the contention of the appellant. That case was reversed and remanded because the court thought the jury had not determined the question of the injured person's contributory negligence, not that he was guilty of contributory negligence as a matter of law.

The special findings of the jury are not inconsistent with the general verdict. Failing to look for an approaching automobile before stepping into a street to take passage on a street car at the car's usual stopping place, or failing to look for an automobile while on the way to such a car, is not negligence as a matter of law under all circumstances, and we do not think the facts in the case before us justify the conclusion that it was negligence as a matter of law in this instance.

The judgment is affirmed.

MOUNT, ELLIS, and MAIN, JJ., concur.

MORRIS, J. I dissent. The automobile came from the east, while the respondent was walking southwest. The right front wheel of the automobile ran over the right foot of respondent as he advanced it for an additional step. It will thus be seen that part of the automobile passed a part of respondent's body before it hit him. A second later and respondent would have walked into the machine. I am convinced respondent centered his entire attention on the street cars and gave no attention at all to other traffic on the street. Had he done so, he would not have been injured.

(72 Wash. 188)

METZ v. WASHINGTON WATER POWER CO. et al.

(Supreme Court of Washington. Feb. 19, 1913.)

1. ELECTRICITY (§ 16*)—NEGLIGENCE—WHAT CONSTITUTES.

Where the employees of a telegraph company whose wires were below the high-tension wire of a power company brought a rope in contact with the wire causing it to burn out and break, one of the ends falling on a wire fence, they were guilty of negligence, and their act in leaving it in that condition without warning their master or the power company was gross negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 16*)—NEGLIGENCE—PROXIMATE CAUSE.

Where an injury was caused by the current running down the wire fence, a telegraph company cannot escape liability on the ground that the negligence of its servants in making a short circuit by which the high-tension wire of a power company burned out, the ends falling on the wire fence, was not the proximate cause of the injury because the power company had turned on the current after the automatic circuit breaker had cut it off upon the breaking of the wires; it appearing that this was the customary meth-

od of testing a line for breaks before making a search.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

3. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR.

As joint tort-feasors are jointly and severally liable for the entire injury, a telegraph company jointly liable with a power company for injuries caused by a break in the latter's high-tension wire cannot complain on appeal that the latter's motion for nonsuit was sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.*]

Department 2. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Marie D. Metz against the Postal Telegraph Cable Company and another. From a judgment against the named defendant, it appeals. Affirmed.

Morrill, Chester & Skuse, of Spokane, for appellant. Lloyd E. Gandy and Fred J. Cunningham, both of Spokane, for respondent.

FULLERTON, J. The respondent was injured by coming in contact with an electric current escaping from the wires of the defendant Washington Water Power Company due to a break in such wire caused by the appellant Postal Telegraph Cable Company, and brought this action against both companies to recover therefor. On the trial, at the conclusion of the respondent's case in chief, the court sustained a challenge to the sufficiency of the evidence interposed by the Washington Water Power Company, and granted a judgment in its favor. The trial was then continued against the Postal Telegraph Cable Company, and resulted in a verdict against it and in favor of the respondent in the sum of \$2,500. From the judgment entered on the verdict the Postal Telegraph Cable Company appeals.

The facts are not seriously in dispute. The defendant Washington Water Power Company owns and operates an electric railway running between the cities of Spokane and Cheney in Spokane county. The electric current for operating its cars is carried on a high-tension wire suspended above the railway track from projecting arms fastened to poles set alongside the track. The appellant Postal Telegraph Cable Company maintains a system of telegraph wires between the cities named. Its wires follow the common highways, and are suspended from poles set along the margin of the highway. At a point called Beltmeler Station the highway crosses the railway track, and at that place the telegraph wires cross the track and high-tension wire of the railway company some few feet above the wire. It seems that the guards intended to keep the telegraph wires from coming into contact with the railway high-tension wire got out of repair at this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

crossing, and the appellant sent certain of its employes to readjust it. In the performance of the work the employes allowed a rope to come into contact with the high-tension wire. The rope in some manner formed a point of resistance to or short-circuited the electric current, causing the wire to burn and sever at the point of contact. The respondent lived at the home of her brother-in-law a short distance from the road crossing. The home was inclosed with a wire fence. The ends of the high-tension wire after the severance dropped to the ground, and one end came into contact with the wire fence, charging the wires composing the fence with electricity. This caused a fire to break out in a pine tree to which the wire fence was fastened, and the respondent seeing the fire sought to quench it by throwing a bucket of water thereon. In doing so she came into contact with the electric current, receiving a severe shock and some painful burns, causing the injuries for which she sues.

The employes of the appellant after breaking the high-tension wire did not notify any one of the break or of the dangerous condition in which it was left, not even their home office, but immediately gathered up their working tools and left the place. The fact that there was "trouble" on the high-tension wire was made known at a power station of the power company shortly after the severance of the wire by means of an appliance known as a "circuit breaker," which automatically shut off the electric current from the wire. It did not, however, make known the precise nature of the trouble, and, to ascertain whether it was of a permanent or temporary nature, the company turned the current back onto the wire three distinct times at intervals of practically twenty minutes each, letting it remain there until the circuit breaker would again cut it off; periods of time ranging from five to seven seconds.

As grounds for reversal the appellant first urges that the court erred in denying its motion for a nonsuit, and sustaining a like motion on the part of its codefendant, the Washington Water Power Company. But we think it manifest there was no error in the ruling of the court in so far as it related to the motion of the appellant.

[1] It was negligence on the part of the appellant's employes to cause the line to break in the first instance, and gross negligence to go away and leave it in its dangerous condition, especially as they failed to notify either their employer or the railway company of the fact of the break, or to notify the persons living in the vicinity of the place of the break of the dangers likely to be encountered because thereof. As an employer is liable to third persons for injuries caused by the negligent acts of his employes, so the appellant is in this instance responsible to the respondent for her injuries, if the

negligence of its employes was the proximate cause thereof.

[2] The appellant contends, however, that the negligence of its employes was not the proximate cause of the injury to the respondent, but that such proximate cause was the turning back of the electric current onto the line by the power company after it had been shut off by the automatic circuit breaker. And it argues that for this act the power company was alone responsible; that it turned the current on after it had knowledge of trouble on the line, and of the dangers likely to be caused thereby, and must be held to have assumed the risk of all such dangers. But the contention is not tenable. Since the appellant originated the trouble, it owed a primary duty to notify the power company thereof. This it did not do, and hence is responsible to third persons for any injury caused by this neglect of duty, and we think it too much to assume that the power company would have turned the current back onto the line had it known of the actual conditions. Again, the evidence tended to show that the power company in turning the electric current back onto the line in the manner in which it did turn it back acted according to its usual custom in such cases, a custom also common and usual with all companies transmitting power by electricity. This being so, the appellant was bound to take notice of such custom and take such action as was within its power to prevent injury thereby. Moreover, we think that the employes of the appellant as reasonably prudent persons should have anticipated that the power company would test out the line by turning the electric current back thereon before making a search along its entire length to locate the trouble, and that it was negligence on their part not to anticipate such a cause and guard against injury therefrom.

[3] The second part of the objection, namely, that the court erred in granting a nonsuit in favor of the Washington Water Power Company, is not an error, if it be error at all, of which the appellant can avail itself. If the power company was guilty of negligence contributing to the injury of the respondent, it was a joint tort-feasor with the appellant, and both companies were liable severally and jointly to the respondent for the entire injury suffered by her. And, this being true, the nonsuit of the power company gives the appellant no cause of complaint, however erroneous the order might be when viewed from the respondent's standpoint.

Errors are assigned on the instructions of the court to the jury, but, as they merely suggest in a different form the questions already discussed, they require no separate consideration.

The judgment is affirmed.

MOUNT, MORRIS, MAIN, and ELLIS, JJ.
concur.

(72 Wash. 300)

CITY RETAIL LUMBER CO. v. TITLE GUARANTY & SURETY CO.

(Supreme Court of Washington. Feb. 28, 1913.)

MUNICIPAL CORPORATIONS (§ 347*)—PUBLIC IMPROVEMENTS — CONTRACTS — BONDS OF CONTRACTORS—LIABILITY.

A contractor for a street improvement gave a bond conditioned as required by Rem. & Bal. Code, § 1159, on his paying all persons furnishing supplies for carrying on the work. A materialman sold lumber actually used in the construction of the improvement, and also furnished ties to be used for a temporary railway over which dump cars were run for the removal of dirt from the street improvement. The ties were actually used by the contractor in the prosecution of three contracts and were finally sold at a bankrupt sale on the contractor becoming a bankrupt. The materialman knew at the time of furnishing the ties that they would not be consumed in making the improvement. *Held*, that the surety on the bond was not liable for the price of the ties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the City Retail Lumber Company against the Title Guaranty & Surety Company. From a judgment for plaintiff, defendant appeals. Reversed and corrected.

Frank Beam, of Aberdeen, and Murphy & Wall, of Seattle, for appellant. Hogan & Graham, of Aberdeen, for respondent.

PARKER, J. The plaintiff seeks recovery from the defendant upon a bond executed by it as surety for William Dutcher to the city of Aberdeen, under section 1159, Rem. & Bal. Code, to secure performance on his part of a street improvement contract which he had theretofore entered into with the city, which bond was also conditioned as follows: "Now, therefore, if the above-bounden principal, William Dutcher, * * * shall pay * * * all persons who shall supply such contractor * * * with provisions and supplies for the carrying on of the work contemplated in said contract, * * * then this obligation to be void, otherwise to be and remain in full force and effect." The cause proceeded to trial before the court without a jury, resulting in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

A careful reading of the entire record, which includes all of the evidence introduced upon the trial, convinces us that there is practically no room for controversy as to the controlling facts here involved, which may be summarized as follows: In July, 1910, the city of Aberdeen entered into a contract with Dutcher for the improvement of portions of Spur, Tenth, and Broadway streets by grading and constructing wooden sidewalks, curbs, and gutters thereon. Immediately upon the entering into of this contract, appellant, as surety for Dutcher, exe-

cuted to the city the usual statutory bond, conditioned in the language above quoted, as required by section 1159, Rem. & Bal. Code. Thereafter respondent sold and delivered to Dutch lumber amounting in value to \$681.33. This lumber was so furnished with the understanding upon the part of both respondent and Dutcher that it was to be used in connection with the construction of the improvement, as follows: \$390.79 worth of the lumber was furnished for and used in the construction of the sidewalks, curbs, and gutters of the improvement, and actually went into and became a part thereof; \$290.54 worth of the lumber consisted of railway ties, which were furnished for and used in the construction of a temporary narrow gauge railway, over which dump cars were run for the removal of surplus dirt from the portions of the street being improved. The trial court found, among other things: "That while said 'ties' did not actually go into the streets themselves so as to actually form a part of the improvement, yet the use of said 'ties' for the construction of the dump-car line above mentioned practically consumed the lumber comprising the 'ties' so that after the use of the lumber for 'ties,' as above mentioned, the lumber would have little or no value."

We cannot agree with this finding, if it have reference to the consumption of the ties in the construction of the particular improvement for which appellant executed the bond here sued upon, and we think that the question of the consumption of the ties in this improvement and the furnishing of them with a view that they were to be consumed therein becomes of vital importance here in determining appellant's liability upon its bond to pay for the ties. Mr. Davenport, respondent's manager and its only witness upon the trial, testified as follows: "Q. On July 30, 1910, there were 1,121 pieces 4x8 ties sold. Do you know what they were supposed to be used for? A. They were gotten to build a railroad to Tenth, Broadway, and Spur. Q. Do you know whether or not those ties were used up in doing that work or were used for other purposes after that? A. I could not say. I presume they were used afterwards; I don't know. * * * Q. Do you know whether or not there was an improvement at the other end of the line, the lower end? A. I think there was. Q. What was that improvement? A. I think that was First street. Q. So they made the track to extend from Spur and Broadway down to First? A. Yes. Q. That was a public improvement on First street? A. Yes. Q. Mr. Dutcher was doing both contracts? A. Yes." This is the substance of all the information he gives us as to the purpose for which the ties were furnished and as to the use they were actually put to.

Dutcher, the contractor to whom the ties were furnished, testified as follows: "Q.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Where were these ties used? A. On Spur, Broadway, and Tenth to run away the surplus dirt. Q. Were they used any place else? A. A few, I guess, were used on Eleventh. Q. How many contracts did you have at this time with the city of Aberdeen? A. I had four. Q. Did you use these same ties on all four contracts? A. I think I did. I used them with some old ones I had before I got these. Q. Did you put the old ones down first or later? A. Later; I used the new ones first and the old ones afterwards. Q. And these ties were used on the First street improvement as well? A. Some of them were. Q. All of them? A. No, we used most of the old ones on First street. Q. At the time you were taking down Spur you were filling in First with the dirt? A. Yes. Q. So that the cars were worked over First as well as Spur street? A. I suppose you might call it that way. Q. Did you make use of these ties on Eleventh street? A. I don't think we did. Q. You did not haul any cars from Eleventh street over this railroad? A. Yes, but we did not use those; we had some old planks. Q. The dirt hauled from Eleventh street all went over this track, over these ties? Q. Yes. Q. And you had the E street contract at this time? A. Yes. Q. State whether the dirt that went into E street went over this track. A. It did. Q. Which was the largest contract of these four? A. First street. Q. First street had more yards of dirt? A. Yes. Q. Which was the smallest yardage as far as it went over this track? A. E street was the smallest. Q. And was Spur next? A. I cannot remember whether Spur was larger than Eleventh, or whether Eleventh was the largest. Q. But this track was used for all four jobs? A. Yes, to run the dirt from the hill down. Q. Were these ties used up? A. They were laying where I laid them with the rails on the last I seen them. Q. Do you know what became of these ties? A. I don't know of my own knowledge; hearsay is all I know about that. Q. Did they become part of this work; that is, are they still up there in the work? A. They are not where I left them, I know that. Q. You think the ties were good when you quit there, were they? A. Of course they were secondhand material. I don't know what they were good for; they might be used again. Q. In your idea they were good enough to run a track over? A. Yes. Q. You don't know what became of them? A. No, not of my own knowledge I don't." This testimony is uncontradicted. Dutcher became insolvent about the time these contracts were completed, leaving, among other debts unpaid, that which was incurred in the purchase of the ties and the other lumber mentioned. The ties were thereafter sold by Dutcher's trustee in bankruptcy for \$12. Thus we think it is established that the ties were actually used by Dutcher in the prosecution of three other contracts, at least one of which was a larger contract than the

one for which appellant executed this bond, and thereafter the ties proved to be still of some value even at a bankrupt sale. We also think that it is a fair conclusion from the entire evidence that respondent's manager knew, at the time he furnished the ties, that they would not necessarily be consumed in making this particular improvement, though they were furnished with a view to being used thereon.

Counsel for respondent rest their contention as to appellant's liability for the debt incurred by Dutcher in the purchase of these ties principally upon our decision in *National Surety Co. v. Bratnaber Lbr. Co.*, 67 Wash. 001, 122 Pac. 337. In that decision we reviewed at considerable length the law upon this subject, noticing the distinction between the provisions of section 1159, Rem. & Bal. Code, and the general lien statute, holding that certain items are recoverable upon bonds given under this section which would not be recoverable under the general lien statute. Relying upon the broader language of this section and our view of it as expressed in that decision, counsel for respondent insist that these ties constituted an item recoverable upon the contractor's bond, given for the purpose of protecting persons supplying the contractor with provisions and supplies. A careful reading of that decision, however, will show that it involves: (1) Fuel for steam shovel; (2) the service of teams with drivers; and (3) feed for horses—all furnished for the carrying on of the work in question, and all necessarily entirely consumed in the prosecution of the work. The fuel, service, and feed in a sense did enter into and become a part of the finished structure, possibly not a physical part of it in the sense that material actually going into the structure would, but in the sense that labor performed upon the structure would. In the recent case of *Standard Boiler Works v. National Surety Co.*, 127 Pac. 578, we held that the expense of making repairs upon a steam shovel which was used in prosecuting public work was not secured by the contractor's bond given under this section, upon the theory that such repairs were not work going into and becoming a part of the finished structure, because they were not necessarily all consumed therein, but became a part of the machinery or equipment which the contractor is presumed to be provided with for the purpose of carrying on his work. The evidence in this case clearly shows, as we have noticed, that these ties were in like manner a part of the equipment of the contractor, and not only were not such material as was consumed in the prosecution of the work, but plainly were such material and furnished under such circumstances as to show that it was not contemplated by the parties that they would be consumed in the prosecution of the work. We are unable to see that these ties performed any office different in principle from that performed by

any other tool or appliance used in the prosecution of the work, though they may have been of such nature as to become very materially lessened in value in the prosecution of the work. It may be well doubted whether a tool or appliance which becomes entirely worn out in a particular contract of this nature would come within the protection of a bond given under section 1159, though we need not express our opinion upon that question at this time.

The judgment of the trial court is reversed in so far as it awards recovery against appellant for the \$290.54 incurred in the purchase of the ties, and it is directed that the judgment be corrected accordingly.

CROW, C. J., and CHADWICK, GOSE, and MOUNT, JJ., concur.

(72 Wash. 290)

KNUTSON v. MOE BROS., Inc.

(Supreme Court of Washington. Feb. 26, 1913.)

1. EVIDENCE (§ 582*)—TESTIMONY AT FORMER TRIAL—CERTIFICATION.

Under Rem. & Bal. Code, § 1247, providing that, where any witness is unable to appear, his testimony, given in a former action between the same parties, and reduced to writing and certified by the trial judge, may, upon three days' notice, together with the service of a copy proposed to be used, be given in evidence in a subsequent trial, a copy of testimony given at the original trial, and certified by the trial judge to be used on appeal, may, upon appropriate notice, be introduced on the subsequent trial without recertification.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2419-2423; Dec. Dig. § 582.*]

2. EVIDENCE (§ 553*)—OPINION EVIDENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS—VARIANCE FROM FACTS.

A hypothetical question should be fairly based on facts outlined by the testimony; consequently one which assumes that a plaintiff, in a personal injury action, was in bed a month after the injury is improper, where the testimony merely showed that he was laid up about the house a month.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

3. TRIAL (§ 84*)—OBJECTIONS TO EVIDENCE—EXAMINATION OF EXPERTS.

Where a hypothetical question contains several hypotheses, an objection that it contained a mass of irrelevant matter, and that the hypothesis stated was not supported by the evidence, is too general to call the attention of the court to an alleged defect in improperly assuming that being "laid up about the house" was equivalent to being "in bed."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.*]

4. EVIDENCE (§ 553*)—EXPERT TESTIMONY—HYPOTHETICAL QUESTION.

The court, in the exercise of its discretion, may, upon proper objection, require irrelevant matter to be eliminated from a hypothetical question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

5. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURY.

Where a lumberman engaged in logging, after being injured, remained at home a month, and then resumed his former occupation, following it for a year, and the only medical treatment he had during the time was to have a scalp wound sewed, an award of \$5,000 was excessive by \$2,500; it appearing that after the injury he joined a mutual benefit association, and in his signed application stated that he had not been treated by physicians for over seven years and was in sound health, free from disease or injury, and the only injury apparent being a curvature of the spine, which was found by radiographic examination.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Louis Knutson against Moe Bros. From a judgment for plaintiff, defendant appeals. Remanded, with directions to grant a new trial, unless plaintiff enters a remittitur.

Peterson & Macbride, of Seattle, for appellant. Martin J. Lund, of Seattle, for respondent.

GOSE, J. The plaintiff in this action seeks to be recompensed for a personal injury sustained while employed by the defendant, in consequence of its alleged negligence. There was a verdict and judgment in his favor for \$5,000, which the defendant seeks to reverse or modify by this appeal.

The errors suggested are: (1) That the respondent was guilty of contributory negligence; (2) that the testimony of Bert Nelson should not have been admitted; (3) that an objection interposed to a hypothetical question should have been sustained; and (4) that the verdict was excessive. These questions will be considered in the above order.

The first inquiry was settled adversely to the appellant's contention on a former appeal, upon substantially the same facts as are shown by the record on this appeal. Knudsen v. Moe Bros., Inc., 66 Wash. 118, 119 Pac. 27.

[1] After showing that Bert Nelson, who had testified in the former trial, could not be found, and the exercise of due diligence in endeavoring to find him, the respondent, having given three days' notice to the opposite party, together with a copy of his testimony in the other trial, was permitted to read it in evidence. The statute (Rem. & Bal. Code, § 1247) provides: "The testimony of any witness, deceased, or out of the state, or for any other sufficient cause unable to appear and testify, given in a former action or proceeding, or in a former trial of the same cause or proceeding when reported by a stenographer or reduced to writing, and certified by the trial judge, upon three days' notice to the opposite party or parties, together with service of a copy of the testi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mony proposed to be used, may be given in evidence in the trial of any civil action or proceeding, where it is between the same parties and relates to the same matter." The testimony at the former trial had been reduced to writing and certified by the trial judge, to be used on the first appeal. The appellant's contention is that it was incumbent upon the respondent to give it three days' notice of his intention to have the testimony recertified, and that having failed to do so, and there having been no recertification, the testimony was inadmissible. The statute does not require so useless a formality.

[2] The respondent propounded a hypothetical question to a physician, covering 1½ pages of the printed brief. The objection was: "Just a minute, now, before that is answered. We object to that question as, first, containing a mass of irrelevant matter, which might have effect upon the opinion of the physician, yet it is not properly considered in a case of this character; and, second, that the hypothesis stated is not supported by the evidence." The argument is that the hypothetical question is not a fair statement of the material facts which the evidence tends to establish, and that it embraces facts not within the testimony. The respondent testified that, after he was injured, he succeeded in reaching the camp a half mile distant, unaided, by walking and crawling, with intervals of resting. The hypothetical question assumed that he was taken to the camp. The variance was immaterial. He further testified that he was taken to his home from the camp, and taken to Seattle the following day, where he was attended by a physician; but there is no testimony that he was taken home from Seattle, as the question assumed. This would seem too immaterial a circumstance to require a reversal. He also testified, and his wife corroborated his statement, that he "was laid up" at home for about a month. The question assumes that he "stayed at home in bed for about a month." The variance was a material one, had it been properly called to the attention of the court. It is the duty of counsel to frame his hypothetical question so as to fairly come within the scope of the testimony. Stated in another form, there must be evidence tending to prove the material facts assumed in the hypothetical question.

[3, 4] The objection that the question contained "a mass of irrelevant matter," and that the "hypothesis stated" is not supported by the evidence, was not sufficiently specific to direct the attention of either the court or counsel to the substance of the objection. To say that a question of such length embraces a mass of irrelevant matter was too general to rise to the dignity of an objection. The court, in the exercise of the discretion which the law gives it (*State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702), would have been warranted in requiring the

elimination of the immaterial matter embraced in the question; but the failure so to do neither benefited the respondent nor prejudiced the appellant. And the objection that the "hypothesis stated" is not borne out by the evidence, when there were several hypotheses, is equally unavailing. The appellant should have fairly pointed out wherein the hypothesis varied from the evidence. Had this been done, the court would have been afforded a basis for an intelligent ruling, and counsel could then have recast his question, or could have temporarily withdrawn it for the purpose of putting in evidence, if he had any, to meet the situation. This view has the support of the following authorities: 38 Cyc. 1388; *In re Barber's Estate*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; *Styles v. Village, etc.*, 131 Mich. 443, 91 N. W. 622; *Missouri v. Hall*, 66 Fed. 868, 14 C. C. A. 153; *Burlington, etc., v. Miller*, 60 Fed. 254, 8 C. C. A. 612.

The reason for the rule is thus succinctly stated in the case last cited: "Appellate courts have on many occasions condemned the practice of stating objections to testimony in language that is so general or obscure that it may not have served to advise the trial court, or the opposite party, of the precise nature of the objection intended to be urged and to be relied upon. A specification of the particular reasons upon which a party asks the trial court to exclude or to admit certain testimony is essential for three reasons: First, to prevent a violation of the fundamental rule that a litigant must abide in an appellate court upon the theory which he has advocated at nisi prius; second, to prevent an appellate tribunal from becoming something quite different from a court of review; and, lastly, that the opposing party and the trial court may be fairly advised of the force and nature of the objection intended to be urged, and have a fair opportunity to consider it, and, if need be, obviate it. *Insurance Co. v. Frederick*, 58 Fed. 144 [7 C. C. A. 122]; *Turner v. People*, 33 Mich. 363, 382; *Shafer v. Ferguson*, 103 Ind. 90, 2 N. E. 302; *State v. Hope*, 100 Mo. 347, 13 S. W. 490 [8 L. R. A. 608]; *Lewis v. Railroad Co.*, 123 N. Y. 496, 501, 26 N. E. 357; *Ward v. Wilms*, 16 Colo. 86, 27 Pac. 247; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Elliott, App. Proc.* §§ 770, 779. While an objection to testimony for the reason that it is 'incompetent and immaterial' may be adequate in some cases, where the testimony is obviously or clearly inadmissible, yet, as every practitioner knows, it frequently happens that an objection in that form is not sufficient to advise the court or the opposite party of the ground on which the objection is predicated." While the objection that the "hypothesis stated" is not supported by the evidence may be sufficiently specific in cases where the question embraces a single hypothesis, which is clearly without the legitimate meaning of the testimony, yet it frequently

happens, as in this case, that an objection in that form is altogether too wanting in precision to direct the mind of either the court or counsel to the vice sought to be eradicated.

The appellant, in support of the sufficiency of his objection, has cited *Frigstad v. Great Northern, etc.*, 101 Minn. 40, 111 N. W. 838. It may well be doubted whether the objection was sufficient under this authority. We quite agree with the court, in the *Frigstad* Case, that it is the duty of counsel to frame his hypothetical questions with care and accuracy, and that he should not be permitted to throw the burden of correcting its defects upon opposing counsel. The question here objected to was not carefully prepared, and it was not accurate. There is, however, a duty on objecting counsel. He must state his grounds of objection specifically, in order that the court may rule intelligently, keeping in view the all-essential fact that the promotion of justice is the object of all litigation.

[5] The objection that the damages awarded by the jury and carried into the judgment by the court are excessive is meritorious. The respondent was injured on the 25th day of March, 1909. He returned to his work in less than a month, and continued to work for the appellant, in his former position, for nearly a year, at an increased wage on account of the rise in wages. He testified that he resumed work on account of his necessities circumstances; that he was not well; and that he had a boy to help him the last week he worked for the appellant. He also said, "Well, I am not well;" that his feet and back had troubled him ever since the injury; and that his back hurt him when he worked. After he left the employ of the appellant, he worked as a loader for about a month for another party; then worked as a fisherman, fishing for halibut with a helper, as he says, where he was required to lift heavy fish. In speaking of his present condition, he said "that his back is sore and limber," so that he cannot do any hard work; that his "feet are weak"; and that he has not been "well or sound" since he sustained the injury. The day following the injury he called upon a physician at Seattle, who put a few stitches in his forehead, where the scalp had been cut. This was practically all the treatment he received prior to the trial. On the 24th day of July, 1909, about four months after he sustained the injury, he applied for membership and benefits in the "Modern Woodmen of America." In his signed application he was asked, "Have you, within the last seven years, been treated by or consulted any person, physician, or physicians in regard to personal ailments?" and answered, "No." He was asked, "Have you ever had any local disease, personal injury, or serious illness?" and answered, "No." He was asked, "Are you of sound body, mind, and health, and free from disease or injury?" and an-

swered, "Yes." He was asked, "Has your weight recently increased * * * or diminished?" and answered, "No."

Dr. Teepell, a witness for the respondent, made an X-ray examination of the appellant's spine in May, 1912, and testified that he had a curvature of the spine, and that the eleventh rib had been wrenched from the backbone. He made a radiograph which was put in evidence. He had never seen the respondent before that day. His testimony as to the permanency of the injury was, "Well, my opinion is that it would be more or less permanent;" that the "injury to which he testified was caused by violence"; that it "could very easily cause the symptoms"; that the injury showed by the radiograph would interfere, "to a certain extent," with his work; and that "it is rather difficult to say just to what extent." He further said that a curvature of the spine in adults is not infrequent. He also testified that, if the respondent worked the same as he had worked before he met the injury, he would say that the injury was not very serious. He further testified: "Q. Assuming that the evidence here shows that he called for no medical treatment as to that portion of his body—the ribs—would that indicate to your mind that he was probably not injured there at that time? A. I assumed a few minutes ago that he had been injured in the ribs and treated for such. Q. I am asking you now, assuming that he had not been treated at all, and did not ask for any treatment in that line, what would that indicate to your mind? A. That he had not any injury. Q. That is it. Ordinarily speaking, then, a person that is suffering from a broken rib or ribs, he feels it at the time? A. Ordinarily; yes, sir. Q. That is quite painful; isn't that right? A. Well, now, not always. There are many cases where a fractured rib has been known; a patient goes about with some little inconvenience for some length of time. Q. Well, if that is the case, then, Doctor, that he does not particularly experience any pain or trouble, isn't that of itself evidence that he was not very severely injured? A. One should say so; yes, sir. Q. Yes. You never saw this man before you took the X-ray? A. No, sir."

Dr. Noble, a witness for the respondent, testified that he examined the respondent during the trial; that from the X-ray examination, and from the symptoms, he was led to believe that he had a "fractured rib and a twisted spine"; that it was due to some injury; that in his opinion he was not able to perform "the labor he did before." "I do not think he is capable of doing logging work." He further stated that he had to rely upon the history of the case as given him by the respondent, and that "we have to rely, to a certain extent, upon the patient's word."

The physicians who testified for the appellant said that there was no indication of a fracture of the rib; that he had a slight cur-

vature of the spine, a condition commonly found in adults; and that there was no evidence of a present disability. A number of the witnesses for the appellant testified that, when the respondent returned to work, he made no complaint; and that he resumed his former position and worked the same as before. The record evidence shows that he resumed work on April 19th, six days less than a month after his injury, and that he worked until the 16th day of March, 1910, a period of about 11 months. He was receiving \$3.50 per day when he met his injury; and, after he returned to his work, he was paid at the rate of \$4 per day, while he remained in the employ of the appellant.

The writer has read all of the evidence in the case, and we find that the appellant resumed hard labor within three weeks after he was injured; that he continued in the employ of the appellant for a period of 11 months, working for it when it had work to do; that he received no medical aid other than to have a few stitches put in his forehead for a period of three years. This, supplemented by his own solemn written statement when he sought to become a member of the Woodmen's Lodge, and to receive its benefits, forces the conclusion that the damages awarded by the jury are so excessive as to conclusively show passion and prejudice. We are always reluctant to interfere with the verdict of the jury upon questions of fact; but, when the facts are as recounted, a considerate regard for our duty requires that we should not permit the verdict to stand. We think a verdict of \$2,500 would have been liberal, and that the jury was not warranted in allowing a greater sum.

The case will be remanded, with directions to grant a new trial, unless the respondent elects, within 30 days after filing of the remittitur below, to accept a judgment for \$2,500.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

(72 Wash. 224)

MCDOWELL et al. v. BECKHAM et al.
(Supreme Court of Washington. Feb. 21, 1913.)

1. JUDGMENT (§ 660*)—CONCLUSIVENESS—ERRONEOUS JUDGMENT.

Where a judgment admeasuring a widow's dower as a life estate in certain lands was never appealed from, grantees of the widow, in deeds conveying the fee in the land, cannot subsequently attack the judgment, on the ground that, under the statutes then in force, she was entitled to one-half of her husband's lands in fee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.*]

2. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION.

Rem. & Bal. Code, § 156, providing that the period for the commencement of actions for the recovery of real property shall be limited to ten years, does not operate against a

remainderman in favor of a life tenant and her grantees during the life of the life tenant; for the estate of the remainderman, though vested, is not in possession.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

3. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—DEEDS AS NOTICE.

Registry acts are for the benefit of subsequent holders, and not for the protection of prior owners, and conveyances in fee by a life tenant and her grantees will not initiate adverse possession as against the remainderman; for he is not bound to take notice of recorded deeds subsequent in time to the creation of his interest.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

4. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—"TITLE."

Seven years' possession by the grantees of a life tenant, under Rem. & Bal. Code, § 786, providing that actions for the recovery of lands which any person may be possessed of by actual possession, having title in law or equity, shall be brought within seven years will not bar the remaindermen; for the word "title" means a fee-simple title, or one that equity will convert into a fee simple, and the possessor had only a limited fee.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6979-6982.]

5. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—COLOR OF TITLE.

While a void deed may be color of title sufficient to start the statute, the right to hold land under Rem. & Bal. Code, § 789, providing that every person having color of title, made in good faith, to vacant lands, who shall pay all the taxes assessed for seven successive years, shall be adjudged the legal owner, does not depend upon the deed alone, but on a claim of title asserted in good faith; and consequently, as a purchaser from a life tenant takes no greater interest than that of his grantor, the grantee of a life tenant, although the deed be in fee, has no color of title.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

6. LIFE ESTATES (§ 23*)—PURCHASERS.

A purchaser from a life tenant can take no greater interest than the estate of his grantor.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42-45; Dec. Dig. § 23.*]

7. REMAINDERS (§ 17*)—ACTION AGAINST LIFE TENANT AND GRANTEES—LACHES.

Though the grantees of the life tenant claimed the property in fee, the remainderman may not, under Rem. & Bal. Code, § 785, maintain an action against them during the existence of the life estate; and hence the doctrine of laches cannot apply.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 17.*]

8. REMAINDERS (§ 10*)—RIGHTS OF ACTION—WASTE.

That a remainderman failed to exercise his privilege to bring an action for damages for waste, which consisted of the cutting of timber, will not bar his right to the estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 28; Dec. Dig. § 10.*]

9. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—PAYMENT OF TAXES.

As it is the duty of a life tenant to pay taxes, the payment of taxes by the grantee of the life tenant, who claimed the estate in fee

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

simple, will not support a claim of adverse possession as against the remainderman.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

In the matter of the petition of the City of Seattle to condemn land. M. Louise McDowell and others filed a claim to the proceeds as remaindermen. From a judgment for claimants, H. C. Beckham and another appeal. Affirmed.

P. V. Davis, of Seattle (S. S. Langland, of Seattle, of counsel), for appellants. Higgins & Hughes, of Seattle (Hyman Zettler, of Seattle, of counsel), for respondents.

CHADWICK, J. One Marshall F. Moore died intestate on February 27, 1870, leaving a widow, Fanny Moore, and three children, M. Louise Moore, now McDowell, now aged 49 years, Thomas Ewing Moore, now 43 years old, and Frank Moore, now 46 years old. The decedent left an estate consisting of real property, situate in King and Thurston counties. The estate was administered in Thurston county, where the dower interest of the widow was admeasured. A life estate in the property in King county was set over and accepted by her. These proceedings were had on August 1, 1871. On April 29, 1870, Fanny Moore, the widow, duly made, executed, and delivered to one B. P. Van Trump her general power of attorney, authorizing and empowering him to "enter into and take possession of all lands in which she then was or might thereafter be entitled to or interested in, and to grant, bargain, sell the same, or any parcel thereof, for such sum or price, and on such terms, as to him should seem meet; and for her and in her name to make, execute, acknowledge, and deliver good and sufficient deeds of conveyance for the same," etc. This instrument was duly recorded on April 3, 1871, in the record of deeds of King county. On February 17, 1883, Fanny Moore, acting by and through her attorney in fact, Van Trump, conveyed the King county lands to Samuel C. Woodruff. This deed was executed for a valuable consideration, and purported to convey the full, fee-simple title to the lands in controversy. The land passed from Woodruff and, through a chain of title regular upon its face, to various grantees. The land was at one time platted as an addition to the city of Seattle, and afterwards vacated and then platted again, and is now embraced within the plat lines of Dwight's addition to the city of Seattle, of which the appellants Beckham are the owners of lots 78 and 79, which they have held under a paper title since June 5, 1889, since which time they have paid all taxes and assessments levied thereon. The land was originally covered by a growth of merchantable timber, which has been logged off.

The land, so far as the record shows, although we do not go beyond the lots in controversy, is still open and unoccupied. Under a municipal improvement proceeding prosecuted by the city of Seattle, damages were awarded to respondents for the taking and damaging of the lots owned by appellants; whereupon the respondents, the heirs of Moore, claiming the remainder, petitioned the court for an order distributing the award between them and the grantee of their mother, whose life tenancy is admitted. This the court did. The effect of this ruling being to limit the estate of appellants to the life of Fanny Moore, she being still alive, they have brought the case here, asserting their title under several theories, which we will discuss in their proper order.

[1] We are invited to a discussion of the statutes of 1869, 1871, and 1873, abolishing dower and creating our community property system, it being contended that, at the time of the death of Marshall F. Moore, the community property statutes were in effect and conclusive of the rights of the deceased and his relict; that, admitting that the Legislature could not so legislate as to deprive an owner of his property by taking one-half thereof and giving it to his spouse, yet, nevertheless, the right of dower being inchoate and resting in expectancy, that it was within the power of the Legislature to abolish it, and in lieu thereof substitute for the life estate a full estate in one-half of the property owned by the deceased spouse; that upon the death of the owner, although the statute be inoperative in his lifetime, it would nevertheless operate as a statute of descent; and that, Fanny Moore having then one-half of the property in her own right, and having conveyed the whole thereof, her children, being also the owners of one-half in their own right, would be foreclosed to assert title as against the plea of the general and special statutes of limitations, laches, and estoppel, all of which are asserted in aid of appellants' claims. However this might be as between Fanny Moore and these appellants, the rule cannot be invoked against the respondents, who were put in the position of remaindermen, subject to the life estate of Fanny Moore, by a court of competent jurisdiction. We may admit that the decree admeasuring dower was entered upon a mistaken conception of the law; but it was duly entered and not appealed from, and it has fixed the relation of the respondents to the land in controversy. We so held in *Re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990. The holding in that case was elaborated in the later case of *Alaska Banking, etc., Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492, and needs no further discussion. This rule is well founded in reason, and is sustained by the authorities; the leading case being that of *Broder-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ick's Will, 21 Wall. 503, 22 L. Ed. 599, where it was sought to show in a collateral proceeding that, notwithstanding an order of a probate court admitting the will to probate and fixing the status of those interested in the inheritance, the will was forged.

[2] Passing this point, we will discuss the pleas in bar. The ten-year statute of limitations reads: "The period prescribed in the preceding section for the commencement of actions shall be as follows: Within ten years, —1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within ten years before the commencement of the action." Rem. & Bal. Code, § 156. Clearly, under this statute, the basis of a claim of title must rest in adverse possession. It assumes ownership and seisin, and, as we have heretofore held, these are presumed to continue until an adverse possession of the property has continued for the ten-year period. See cases collected in note, section 156, Rem. & Bal. Code. Now, assuming that the respondents are remaindermen, and that their estate is dominant to the present life estate of Fanny Moore, they were not bound to assert their title, or take notice of the acts or transmissions of the title to the subordinate estate during the life of the ancestor; for, under the well-known principles of the common law, their estate, although vested, is not to be enjoyed until the determination of the life estate (2 Black. Com. 164; 4 Kent, Com. 197); this under the theory that possession in another is not hostile to, but consistent with, the dominant estate.

[3] There has been no physical possession, except the cutting of the timber; and this is not necessarily an act of possession, but is an act of waste. But granting possession, the only act from which an adverse possession might be implied is the transmission of title through the several recorded deeds. Here, again, we are met by the common-law rule that a remainderman is not bound to take notice of, nor is he bound by deeds made subsequent in time to, the creation of his interest. This rule is general, and applies to all. An owner, as against an outstanding, subordinate estate, may rest secure in reliance upon his record title; for if it were otherwise a lessee for a term, or any one in possession, might secure a deed from a stranger and thus initiate a paper title. That the object of our registry acts is for the benefit of subsequent holders, and not for the protection of prior owners, has been held by this court. McDonald & Co. v. Johns, 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57. We find no place to apply the ten-year statute, unless the alleged waste was sufficient to start the running of the statute—a question we shall discuss presently.

[4] The seven-year statute of limitations:

It is next contended that, the appellants having been in actual, open, and notorious possession of the property for seven successive years, as evidenced by the platting and cutting of the timber and payment of taxes (section 786, Rem. & Bal. Code), or, if these features be eliminated, and we hold that the land is vacant and unoccupied, that, having color of title, as evidenced by the deed from the life tenant, and having paid taxes for seven successive years, they should be held to be the owners according to the purport of their paper title. Section 789, Rem. & Bal. Code. What we have said with reference to the ten-year statute answers, in the main, the arguments made under these sections of the Code. These sections are not to be extended beyond their terms and necessary implications. They were drawn to protect rights, not to defeat them. Section 786 is not available, because respondents have no connected title in law or equity deductible of record, etc., as therein provided. The word "title," as there employed, means a fee-simple title, or one that equity will convert into a fee simple. Here the title was, and must remain during the life of the ancestor, a limited fee, beginning with the apportionment of her dower and ending with her life.

[5, 6] Nor does section 789 aid appellants. While this court has held, in *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462, and cases there cited, that a void deed is a sufficient color of title to start the statute, the right to hold land under these statutes does not depend on a deed alone, but upon a claim of title asserted in good faith. *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166. There can be no such claim where the grantee takes a deed with knowledge, either actual or constructive, that his grantor is conveying that which is not his own. *Petticrew v. Green-shields*, 61 Wash. 614, 112 Pac. 749; *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275. "A purchaser from the life tenant takes no greater interest than the interest of the life tenant." *Blair v. Johnson*, 215 Ill. 552, 74 N. E. 747. In this case appellants either knew, or should have known, of the outstanding estate, and that their title was subordinate to it. Persons may assert title to land, but the law fixes the time for the statute to begin to run against the remainderman, and, unless that time has come, all pleas of the statutes of limitations must be unavailing; for the law is that a remainderman is, during the continuance of the precedent particular estate, under legal disability. *Jewett v. Jewett*, 10 Gray (Mass.) 31. "The statute of limitations does not begin to run against the right of a remainderman to recover his remainder interest or establish his title to the same until after the determination of the preceding particular estate; nor is he guilty of laches in failing to assert his claim before his right to the possession of the property accrues. But this rule as to actions

of a possessory nature does not apply to actions for injuries, which the remainderman may maintain during the continuance of the preceding particular estate." 16 Cyc. 659, and cases there cited. Hence, where a life tenant wrongfully conveys land in fee, limitations do not begin to run until the death of the life tenant. *Griffin v. Thomas*, 128 N. C. 310, 38 S. E. 903; *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209; 1 Cyc. 1058.

[7] It is further argued that the object of section 785 is to give a right of action "against the person claiming the title or some interest therein," and that, having this right, the appellants have been guilty of laches, aside from the fact that we will not, in the absence of some controlling equity, ignore the statutes of limitations and apply the doctrine of laches. *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749; *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272; *Cordner v. Finch*, 54 Wash. 574, 103 Pac. 829; *Starr v. Long Jim*, 52 Wash. 138, 100 Pac. 194. We find that a remainderman "is not guilty of laches in failing to assert his claim before his right to the possession of the property accrues." 16 Cyc. 659; *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445; *Gibson v. Jayne*, 37 Miss. 164; *Graham v. Stafford*, 171 Mo. 692, 72 S. W. 507; *Pettyjohn v. Woodroof*, 77 Va. 507; *Alkin v. Suttle*, 4 Lea (Tenn.) 103. As covering both the seven-year statute and the charge of laches, we quote from *Higgins v. Crosby*, 40 Ill. 260: "There is no dispute that possession and payment of taxes, under claim and color of title for seven successive years, will bar a recovery in all cases, where there is a present right of possession during the period for which the statute is required to run, and its requirements are performed. The act of 1839 has been repeatedly held by this court to be a limitation law, and it can only be sustained upon that ground. And it is believed to be universally true that the bar of the statute can never be invoked, unless the party against whom it is sought to be used has had the opportunity of asserting his right during the statutory period. If the right is of such a character that a party is not entitled to make an entry, the statute can never run. It can only begin after the right to enter has accrued. Where the title sought to be defeated by the bar is a reversion or a remainder, the holders of such titles have no right of entry, and, having none, they are guilty of no laches in failing to make any entry, or in asserting the right. Such titles are not present and existing rights of possession, but only a present interest, with a future right of possession. It would be unprecedented to hold that a right of entry was barred, where such a right had never accrued. A party cannot be prejudiced by the nonassertion of a right that does not exist. * * * When the particular estate

is spent, the bar falls with that estate, and the right of entry then accrues to the remainderman or reversioner, and then, and not till then, the statute begins to run against him."

[8] It follows from what we have said that respondents are not estopped by their failure to restrain or recover damages for the waste committed. Formerly a remainderman could not maintain an action for waste at all; he must have had possession, either actual or constructive. The right of action became a matter of equitable grace, and has since been generally recognized or declared by statute. Section 938, Rem. & Bal. Code: *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76. The action for waste is personal in its character, and may be waived by the remainderman; at any rate, the act would neither create nor defeat a title to the estate.

[9] Neither can any right be predicated upon the payment of taxes. It is the duty of a life tenant to pay taxes. Consequently the remaindermen are not estopped thereby. 16 Cyc. 632; 12 Dec. Dig. tit. Life Estates, § 18.

Finally, the acid test is put onto this case when we assert that at no time since the rights of appellants and their grantors were initiated could the respondents have stated a cause of action against them, either to recover possession or to quiet title.

This being so, the judgment of the lower court is affirmed.

CROW, C. J., and PARKER, MOUNT, and GOSE, JJ., concur.

(72 Wash. 343)

DOLAN et ux. v. PUGET SOUND TRACTION, LIGHT & POWER CO. (CITY OF SEATTLE, Intervener).

(Supreme Court of Washington. March 8, 1913.)

1. STREET RAILROADS (§ 24*)—ORDINANCES—CHARTER PROVISION.

A city ordinance, granting a franchise to a street railway company to extend its lines for two blocks along a city street, and providing that nothing therein should authorize the city to acquire any property in the public streets thereof previously constructed or located under any franchise previously granted, nor should any franchise or property constructed or located thereunder be considered altered, amended, repealed, or in any way modified by such ordinance, was in conflict with City Charter, art. 4, § 20, providing that when a franchise is granted and accepted the grantee voluntarily agrees that all the property of the grantee within the limits of the public streets may be taken by the city at a fair and just value, which shall not include the valuation of the franchise itself.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 34-38, 43, 50-55, 69-76; Dec. Dig. § 24.*]

2. MUNICIPAL CORPORATIONS (§§ 680, 681*)—INCONSISTENCY—REPEAL.

Laws 1911, c. 17, relating to the form of government of cities of the first class, and authorizing charters of such cities to provide for

the recall, initiative, and referendum, did not repeal Laws 1903, c. 175, as amended by Laws 1907, c. 89, which vests in the legislative authority of such cities power to grant franchises, etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

3. MUNICIPAL CORPORATIONS (§ 46*)—CHARTER AMENDMENT—STREET RAILROAD FRANCHISE.

Laws 1903, c. 175, as amended by Laws 1907, c. 89, giving the legislative authority of a city having control of any public street the power to grant authority for the construction of street railways thereon, and to prescribe the terms and conditions thereof, rendered invalid *Seattle City Charter*, art. 4, § 20, providing that every grant of a franchise for the use of the streets shall provide for the purchase of the property placed in the streets by the grantee at a proper valuation, exclusive of the franchise, which was not revived by Laws 1911, c. 17, relating to the form of organization of cities of the first class, and providing that such cities may adopt a charter providing for the initiative, referendum, and recall.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 46.*]

En Banc. Appeal from Superior Court, King County; King Dykeman, Judge.

Suit by Patrick H. Dolan and wife against the Puget Sound Traction, Light & Power Company; City of Seattle, intervenor. From a decree dismissing the plaintiffs' complaint and intervenor's petition, they appeal. Affirmed.

Raymond D. Ogden, Edwin S. Douglas, and Jas. E. Bradford, all of Seattle, for appellants. Jas. B. Howe and Hugh A. Tait, both of Seattle, for respondent.

MOUNT, J. The trial court sustained defendant's demurrers to the complaint of the plaintiff and to the complaint in intervention filed by the city of Seattle. The plaintiffs and the city both elected to stand upon the allegations of their complaints, and the action was dismissed. This appeal followed.

The facts are substantially as follows: On November 18, 1912, the city council of Seattle passed an ordinance granting a franchise to the respondent to extend its street car lines a distance of two blocks upon one of the public streets of the city. This ordinance, which was duly passed and approved by the mayor, contained the following provisions: "It is expressly stipulated and agreed by the city of Seattle and its successors that nothing in this franchise contained shall in any manner affect any franchise previously granted by the city of Seattle or by the county of King or by any other municipal corporation, nor shall anything herein contained authorize the city of Seattle or its successors to acquire any property in the public streets of the city heretofore constructed or located under any franchise previously granted, nor shall any franchise or any property constructed or located thereunder be considered altered, amended,

repealed, or in any manner modified by this ordinance." The city charter (article 4, § 20) provides as follows: "Every grant of a franchise, right or privilege shall be subject to the right of the city council, or the people of the city acting for themselves by the initiative and referendum, at any time subsequent to the grant, to repeal, amend or modify the said grant with due regard to the rights of the grantee and the interest of the public; and to cancel, forfeit and abrogate any such grant if the franchise granted thereby is not operated in full accordance with its provisions, or at all; and at any time during the grant to acquire, by purchase, or condemnation, for the use of the city itself, all the property of the grantee within the limits of the public streets, at a fair and just value, which shall not include any valuation of the franchise itself, which shall thereupon terminate; and every ordinance making any such grant shall contain a reservation of these rights of the city council, and of the people of the city acting for themselves by the initiative and referendum, to so repeal, amend or modify said ordinance and to so cancel, forfeit and abrogate the grant, and to so acquire the property of the grantee in the public streets, as hereinbefore set forth. The city council shall not consider or grant any application for extension of the period of any franchise, nor any new franchise covering all or any substantial part of the rights or privileges of any existing franchise, until within three years of the expiration of the existing grant, and then only after submission to and approval by majority vote of the qualified electors."

[1] After the ordinance above referred to was passed, and all the preliminary steps taken by the city authorities and the respondent to carry out the terms of the ordinance, this action was brought to restrain the respondent from accepting the franchise provided for by the ordinance, upon the ground and for the reason that the ordinance is void. The appellants Dolan and wife contend that the ordinance is void, because it is in conflict with section 20, art. 4, of the city charter, as above quoted. The city contends that the ordinance is valid, because it does not conflict with the city charter. The respondent contends that the charter provision is void, and the ordinance is therefore valid. The trial court, in passing upon the demurrers, was of the opinion that section 20, art. 4, of the city charter, was void; and that the ordinance passed by the city council and approved by the mayor was a valid exercise of legislative authority. The real question in the case, therefore, is whether the ordinance is valid. There can be no doubt that the ordinance is in conflict with section 20 of the city charter, above quoted, because this provision of the charter is to the effect that every franchise granted shall be subject to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the right of the city council or the people to acquire "all the property of the grantee within the limits of the public streets," which shall not include any valuation for the franchise itself; "and every ordinance making any such grant shall contain a reservation of these rights of the city council and of the people." The ordinance in question does not reserve these rights, but expressly declares "that nothing in this franchise contained shall in any manner affect any franchise previously granted by the city of Seattle or by the county of King or by any other municipal corporation, nor shall anything herein contained authorize the city of Seattle or its successors to acquire any property in the public streets of the city heretofore constructed or located under any franchise previously granted." It seems plain that this provision of the ordinance is in the face of the charter, because the apparent purpose of the charter provision is that, when a franchise is granted and accepted, the grantee thereby voluntarily agrees that "all the property of the grantee within the limits of the public streets" may be taken at a fair and just value, which shall not include any valuation of the franchise itself. The provision is not "all the property of the grantee within the limits of the franchise granted," as counsel for the city seem to contend, but "all the property of the grantee within the limits of the public streets." We think there is no escape from the conclusion that the ordinance is in conflict with the city charter. The question then arises whether this provision of the city charter is valid.

In *Benton v. Seattle Electric Co.*, 50 Wash. 156, 96 Pac. 1033, in considering this same charter provision, we held it was void, because it was in conflict with the Laws of 1903, p. 364 (Laws of 1907, p. 192), which vests in the legislative authority of the city the power to grant franchises, and because the legislative authority of the city means the *mayor and city council*. In *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, we again held that the state law authorizing the mayor and the city council of cities to grant franchises to street railways is conclusive, and controls charters of cities of the first class. In that case we said, at page 240 of 55 Wash., at page 262 of 104 Pac.: "If that charter amendment did not legally require the legislative authority of the city to embody the conditions therein specified in the franchise, and did not legally require the submission of the franchise to a vote of the people of the city, because of the broad powers given by the state Legislature in these laws, then, upon the same principle, the legislative authority of the city was not legally required to invite bids for the franchise, nor legally required to grant the same to the highest bidder. If the charter provision does not limit or control the exercise of the power granted by the state law in the one instance,

it is manifest it does not do so in the other. It having become the settled law of this state, by the construction repeatedly placed upon the Constitution, that a general law enacted by the Legislature is superior to and supercedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the Legislature, by the Laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street railway franchises, and also the power to '*prescribe the terms and conditions on which such railways * * * shall be constructed, maintained and operated*,' that power cannot be limited or prescribed by freehold charter provisions. The legislative power given by these laws to the mayor and council, to grant such franchise, includes the power to name the grantee, which power, under such laws, is as purely legislative as any other part of the power conferred. To hold that a freehold charter provision may so limit this power as to reduce the exercise of it to a mere ministerial or, at most, a judicial act, thus rendering it reviewable by the courts, would be to take from the mayor and council a portion of the legislative power directly conferred upon them by a general law of this state."

[2] It is argued by counsel for the city that the act of 1911, p. 54, relating to the form of organization and exercise of powers of cities of the first class, repeals the act of 1903, as amended by the act of 1907, relating to the electric street railways, and validates section 20 of article 4 of the Seattle charter, which this court had theretofore held invalid. But we are satisfied that the act of 1911, referred to in the briefs as the Gandy act, was not so intended, and does not repeal the act of 1903, as amended in 1907, relating to electric railways. The act of 1911 is as follows:

"Section 1. The form of the organization and the manner and mode in which cities of the first class shall exercise the powers, functions, and duties which are or may be given by law to such cities, with respect to their own government, shall be as provided in the charters thereof.

"Sec. 2. Any such city may provide in its charter for the recall of election officers and for direct legislation by the people upon any matter within the scope of such powers, functions or duties of any such city by the initiative and referendum.

"Sec. 3. This act shall apply to any charter of any such city heretofore adopted or approved by the electors at an election duly held."

It is clear that this act relates to the form of organization and the exercise of powers "*with respect to their own government*." It authorizes such cities to adopt their own charters, and authorizes direct legislation upon any matter within the scope of "*such powers*," that is, with respect to their own

government. The power to grant franchises is a sovereign power. It may be delegated by the state; but it is not within the powers of cities, unless expressly delegated by the state. *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 547, 82 Pac. 888.

[3] When the Legislature of the state authorizes cities of the first class to frame their own charters, and says that the powers, duties, and functions shall be as provided therein with respect to their own government, it cannot be reasonably claimed that the right to grant franchises is included therein; (1) because such grants must be direct and clear, and (2) because the grant of franchises is not a part of their "own government," but is a delegated power of the state. We are satisfied, therefore, that the act of 1911 did not revive section 20 of article 4 of the Seattle charter, and did not repeal, by implication or otherwise, the act of 1903, as amended in 1907, relating to electric railways. That act is in full force and effect in cities of the first class. The ordinance in question, passed by the legislative authority, is therefore valid.

The judgment is affirmed.

CROW, C. J., and PARKER, GOSE, MAIN, and CHADWICK, JJ., concur.

(72 Wash. 174)

STATE v. MILLER.

(Supreme Court of Washington. Feb. 19, 1913.)

1. CONSTITUTIONAL LAW (§ 65*)—INTOXICATING LIQUORS (§ 14*)—LOCAL OPTION—SUBMISSION TO POPULAR VOTE.

The local option law (Rem. & Bal. Code, § 6292 et seq.) is not unconstitutional as an unwarranted delegation of legislative power to the electors of the various units defined by the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65; Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.*]

2. WITNESSES (§ 355*)—IMPEACHMENT—COMPETENCY OF IMPEACHING WITNESSES.

A witness, who knew nothing of another witness' reputation for truth and veracity, except what he learned by inquiry of about 40 or 50 people, extending over a period of about seven days, was not qualified to testify as to such reputation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1154-1156; Dec. Dig. § 355.*]

3. CRIMINAL LAW (§ 742*)—INSTRUCTIONS—COMMENT ON FACTS.

An instruction that the testimony of detectives or police officers should be weighed with great care and closely scrutinized, owing to the nature of their business and their almost unavoidable tendency to overdraw their testimony, was properly refused, under Const. art. 4, § 18, providing that judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. § 742.*]

4. CRIMINAL LAW (§ 1127*)—APPEAL—REVIEW—TAXATION OF COSTS.

The Supreme Court cannot review the taxation of costs in a criminal case, where the record does not show any disposition by the trial court of a motion to retax.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2918; Dec. Dig. § 1127.*]

Department 1. Appeal from Superior Court, Lincoln County; F. K. B. Baske, Judge.

B. J. Miller was convicted of unlawfully selling intoxicating liquor, and he appeals. Affirmed.

Martin & Wilson, of Davenport, for appellant. James S. Freece and C. A. Pettijohn, both of Davenport, for the State.

PARKER, J. The defendant was convicted in the superior court for Lincoln county of selling intoxicating liquor in the city of Davenport, while that town was a unit within which the sale of intoxicating liquor was prohibited by virtue of an election held therein under the local option law. Laws 1909, p. 153; Rem. & Bal. Code, § 6292, and following. He has appealed to this court.

[1] It is first contended by counsel for appellant that the local option law is unconstitutional and void, in that it constitutes an unwarranted delegation of legislative power to the electors of the various units defined by the law. This contention is fully answered in favor of the prosecution by our decision in *State v. Donovan*, 61 Wash. 209, 112 Pac. 260, and cases there cited.

[2] It is contended that the court erred in excluding the offered testimony of the witness Kelly, as to the reputation for truth and veracity of the witness Butler, who had testified for the prosecution. This offered testimony was excluded, upon the ground that the witness Kelly did not show himself qualified to testify as to the reputation of the witness Butler. Kelly testified concerning his knowledge of Butler as follows: "Q. Do you know where this man lives, where he makes his home? A. I don't know where his home is. I know where he stopped in Spokane. Q. How long have you known him? A. Several days, while I was looking him up. Q. About how many days were you looking him up? A. Along about the first of the month up until the time he was arrested. Q. How many days? A. About seven days. * * * Q. And you were employed by some one to look him up, were you? A. I was asked by the sergeant of detectives to go out and look him up. * * * Q. How many people did you ask him about? A. Forty or fifty. * * * Q. This inquiry extended over a period of about seven days? A. Yes, sir. Q. And you asked these people what they knew about him, and from what they told you, after you made inquiry about him, as to where he was and what he was, you arrived at your conclusion as to his reputation? A. Yes, sir." We are of the opinion

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that this does not show such an acquaintance with Butler's reputation as to qualify Kelly to testify relative thereto. In the text of 40 Cyc. at page 2630, it is said: "A stranger sent out by one party to learn the character of a witness of the other party should not be permitted to testify as to the result of his inquiries." This rule seems to be fully supported by the decisions. In the case of *Curtis v. Fay*, 37 Barb. (N. Y.) 64, 69, the court said: "The witness Pritchard was not qualified to testify in relation to Jones' character or reputation. He did not know, himself, anything about Jones' reputation. All he could testify on the subject of his reputation was what some persons at Geneva, whom he did not know, told him it was. An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time—sufficient, at least, to enable him to gather the general estimation in which he is held in the community where he resides." *Reid v. Reid*, 17 N. J. Eq. 101; *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462. Our decision in *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179, is in harmony with this view.

[3] The prosecution relied for conviction principally upon the testimony of two witnesses who, for the sake of argument, we may regard as detectives. Counsel for appellant requested the court to instruct the jury as follows: "You are instructed that, if you find from the evidence that any detective or police officer has given testimony herein, under the law you are to weigh the testimony of such witnesses with great care and to closely scrutinize the same, owing to the nature of their business and the almost unavoidable tendency of such witness to overdraw their testimony." The refusal to give this instruction is assigned as error. There might possibly be some ground for the giving of such an instruction in jurisdictions where the court may comment upon the facts, though even in such jurisdictions we think that the giving of such an instruction would be within the discretion of the trial court, with which the appellate court would not interfere. Section 16, art. 4, of our Constitution, provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision is contained, in substance, in the statutes of Texas, and disposing of a similar question in *Copeland v. State*, 36 Tex. Cr. R. 575, 38 S. W. 210, the Court of Criminal Appeals said: "We think the court did not err in refusing to give this instruction. It singles out two witnesses and charges upon the weight of the evidence, and calls the attention of the jury specially to these facts, as weighing upon their credibility.

We know of no statute in our state that authorizes the court to single out a particular witness and charge upon the weight of his testimony, except in cases of perjury and in those cases where the state relies upon the testimony of an accomplice. In all cases the courts are prohibited from commenting upon the weight of the testimony of witnesses, and inhibited from charging upon the weight of a particular witness or class of witnesses, unless that power is conferred by the statute; and wherever those statutes create or give that power they constitute exceptions to the general rule, prohibiting the court from charging upon the weight of the evidence. The two witnesses referred to in this case are not accomplices. They were simply employed as detectives to ferret out that character of violations of the law about which they testified, to wit, gambling and the violations of the whisky law. See *Muely v. State*, 31 Tex. Cr. R. 155, 18 S. W. 411, 19 S. W. 915." A similar question raised under the Montana statute was disposed of by the Supreme Court of that state in harmony with this view in *State v. Paisley*, 36 Mont. 237, 253, 92 Pac. 566. *Hronek v. People*, 134 Ill. 139, 24 N. E. 961, 8 L. R. A. 837, 23 Am. St. Rep. 652. It seems clear to us that the giving of the requested instruction would have been a comment upon the facts, and in direct violation of our constitutional provision above quoted.

Some contention is made upon the sufficiency of the evidence to sustain the verdict. We deem it sufficient to say that we have read the entire evidence brought here in the statement of facts, and are satisfied that we would not be warranted in interfering with the conviction upon the ground of this contention.

[4] Some contention is made against some small items of cost charged against appellant in the cost bill. While we find in the record a motion to retax costs on the part of appellant, we do not find any disposition made thereof by the trial court. We therefore think the question is not properly before us for consideration.

Other contentions made by counsel for appellant, we think, are wholly without merit, and are not such as call for further discussion.

The judgment is affirmed.

CROW, C. J., and MOUNT, J., concur.

GOSE, J. (concurring). I think the requested instruction, cautioning the jury to weigh the testimony of a detective with care and to give it close scrutiny, goes further than the law would warrant. Had it stopped with this caution, I would think its refusal was error. The closing words, however, "owing to the nature of their business and the almost unavoidable tendency of such witnesses to overdraw their testimony," are

a comment on the facts, and inhibited by section 16, art. 4, of the Constitution. I therefore concur.

CHADWICK, J., concurs.

(72 Wash. 309)

PARKER et al. v. BRUGGEMANN et al.

(Supreme Court of Washington. Feb. 28, 1913.)

1. BROKERS (§ 43*)—EMPLOYMENT OF REAL ESTATE AGENT—CONTRACTS—VALIDITY.

Under Rem. & Bal. Code, § 5289, requiring an agreement employing a broker to sell real estate to be in writing, a contract by a joint owner of real estate for the employment of a broker to procure a purchaser of real estate must be in writing to be enforceable.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. BROKERS (§ 53*)—COMMISSIONS — WHEN EARNED.

A broker employed to procure a purchaser of real estate but not given an exclusive agency must, to recover commissions, show that he was the procuring cause of a sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. § 53.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by W. R. Parker and another, doing business as Parker & Emory, against M. B. Bruggemann and another, doing business as M. B. Bruggemann & Company, as co-partners and as individuals. From a judgment for defendants, plaintiffs appeal. Affirmed.

John P. Hartman, of Seattle, for appellants. Douglas, Lane & Douglas, of Seattle, for respondents.

ELLIS, J. Action for a balance of commissions claimed to be due upon an exchange of real estate. The plaintiffs were real estate brokers operating in Island county, Wash. The defendants were doing a general real estate business in the city of Seattle. The plaintiffs had listed for sale a tract of land on Whidby Island, containing about 549 acres. They approached the defendants with a view to selling them this land at a price of \$15 an acre, and were informed that the defendants did not have sufficient money to make the purchase, but would endeavor to get some one to go in with them, put up the money, and buy the land. Such an arrangement was finally made by the defendants with one Ernest Carstens, a banker of Seattle, who advanced \$2,000, took the title in his own name, and gave a mortgage upon the land for the balance of the purchase price, with the understanding that he was to be repaid his money with interest, and he and the defendants would be joint owners of the land subject to this charge, and would share equally in any profits made upon the venture. The defendants were to have the management of the land and endeavor to

make a sale of it so as to realize a profit for themselves and Carstens. Carstens testified to the same agreement. This agreement seems to have been verbal, or, if any memorandum of it was made, it was never recorded. The plaintiffs claim that they knew nothing of this agreement, and thought Carstens was purchasing for himself alone, and that the defendants were merely his agents. The plaintiff Parker, however, in his testimony referred to the sale as a sale to the defendants and Carstens. Moreover, the plaintiffs brought a prior action for this same commission against the Bruggemanns and Carstens as owners, and took a voluntary dismissal. We think the evidence at least tends to justify a belief that the plaintiffs knew the nature of the defendants' agreement with Carstens.

After the transfer of the land to Carstens in March, 1910, the plaintiffs and the defendants entered into a verbal arrangement to again sell the lands; the plaintiffs to act as respondents' agents at Oak Harbor, Whidby Island, and to receive as their commission 10 per cent. of the sale price. Both parties concede that nothing was said as to the agency being exclusive. So far there was little dispute as to the facts. There was, however, as to the following particulars a sharp conflict in the evidence. Both the plaintiffs testified that this arrangement was unlimited as to time, while both the defendants testified that it was limited to a period of six months from the transfer to Carstens; that the plaintiffs represented that they could sell in three to six months, but wanted an agreement for one year; that the defendants refused to give any written agreement, but did agree verbally that, if the plaintiffs sold the land within six months, they would be allowed a commission of 10 per cent. The plaintiffs testified to the effect that they were merely to aid in making sales, and were to receive their commissions on sales made to any purchaser sent to them by the defendants to be shown the land. The defendants testified, in effect, that the commissions were to be paid only on sales to purchasers procured by the plaintiffs. Circulars were sent out by the defendants, advertising the advantages of the land and referring to the plaintiffs as resident agents. When these circulars were sent out is not made plain, but that they were still in circulation, when the transaction upon which the commission is claimed took place, seems clear.

Within six months after this agreement was made, the plaintiffs, through their own efforts, found a purchaser and sold 30 acres of the land for \$50 an acre. The sale was approved by the defendants, and the plaintiffs were paid \$150 commission out of the purchase price. In order to facilitate further sales, the defendants, apparently at the plaintiffs' suggestion, had the remaining land

surveyed into 40-acre tracts; the defendants paying the expense of the survey. No further sales were made within the six months, and the defendants testified that, at about the expiration of that time, they verbally notified the plaintiffs that the arrangement was at an end. Both of the plaintiffs denied that any such notice was given. After the expiration of the six months, the defendants were approached by West & Wheeler, a real estate firm of Seattle; with an offer on the part of one Murphy, a client of the last-mentioned firm, to exchange certain real estate in Seattle for the remaining 519 acres of the Whidby Island land. The defendants and Carstens examined the Seattle property and were satisfied to make the exchange, assuming a \$6,000 mortgage upon it if Murphy would assume a mortgage for something more than that amount upon the land. The exchange was finally made on these terms. Prior to this time Wheeler and the two defendants had visited the land and gone over it in company with the plaintiff Parker. In February, 1911, Wheeler and Murphy visited the island and examined the land. Wheeler testified that Parker, of his own accord and without request from either Wheeler or Murphy, went with them to the land. This seems to have been all that was done by either of the plaintiffs in connection with this exchange, except that, when the deeds in exchange were made, Parker had the deed of the land and a power of attorney recorded and the abstract extended to show these; the fees being paid by the defendants. The defendants paid West & Wheeler a commission of \$500 for their services in connection with the exchange, but refused to pay the plaintiffs any commission thereon. The Seattle property exchanged for the land was estimated at a value of about \$25,000. The plaintiffs sued for a commission of \$2,604. The cause was tried to the court without a jury. The court, after hearing all of the evidence, dismissed the action and awarded the defendants their costs. The motion for new trial being overruled, the plaintiffs have appealed.

[1] The appellants contend that the respondents were interested in the land merely as agents for Carstens, and only to the extent of a commission on any sale, to be measured by one-half of the net profits; that therefore, under the rule announced in *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19, and followed in *Leigh v. Yancey*, 67 Wash. 18, 120 Pac. 512, holding valid verbal agreements between real estate agents to divide commissions, they were entitled to the commission verbally agreed upon in this case. The respondents contend that, under the evidence, they were joint owners with Carstens, and as such managing the joint enterprise for themselves and Carstens, and that therefore the verbal agreement to pay a commission, even if held

to apply to the exchange in question, was unenforceable as falling within the purview of the statute (Rem. & Bal. Code, § 5289), requiring an agreement employing a broker to sell real estate to be in writing. Unquestionably, if the respondents and Carstens were joint owners of the land, and if the appellants knew or should have known that fact, the agreement to pay the commission could only be proved by a written contract, and the respondents' contention must be sustained under the uniform decisions of this court. *Keith v. Smith*, 48 Wash. 131, 89 Pac. 473, 13 Ann. Cas. 975; *Briggs v. Bounds*, 48 Wash. 579, 94 Pac. 101; *Ross v. Kaufman*, 48 Wash. 678, 94 Pac. 641; *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103; *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837.

[2] While the evidence seems plain that the respondents were in fact equitably joint owners with Carstens, it is not entirely clear that, at the time of their agreement with the respondents, the appellants knew of that fact, though the evidence points that way. We find it unnecessary, however, to decide just what effect a lack of such notice would have upon the agreement, since in any event it was incumbent upon the appellants to prove, by a preponderance of the evidence, a contract extending over the time when the exchange was made, exclusive in its character and entitling them to a commission upon sales to purchasers not procured by themselves and on sales of which they were not the efficient cause. We think the evidence wholly fails to establish these things. In our summary we have touched upon every material fact adduced. On all of these points save one the evidence as to what the agreement was presents a direct conflict. There was no evidence that the appellants' agency was exclusive. While the testimony of the appellants that the agreement was not limited to six months was to a slight degree corroborated by the circulars designating them as resident agents, that circumstance had no tendency to establish an exclusive agency in the face of the admission that nothing was said on that point. And again, while the appellants testified to the effect that they were to earn their commissions merely by showing the land to purchasers by whomsoever found, they were directly contradicted in this by the respondents, who, so far as we can know from the printed record, were as much entitled to credit as were the appellants. There was no claim that the appellants produced Murphy as a prospective purchaser or person willing to make the exchange. There was no evidence that they were the procuring cause of the exchange. These things were clearly attributable to West & Wheeler. In the absence of proof of an exclusive agency, proof that Murphy was produced by them, or that the exchange was the result of their

efforts, was indispensable to a recovery on their part.

Even assuming that the respondents were merely agents for Carstens, and that the agreement sued on was still in force when the exchange was made, the plaintiffs signally failed in their proof as to these other elements essential to their case.

The judgment is affirmed.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

(72 Wash. 241)

JACKSON ESTATE v. SUYDAM et al.
(Supreme Court of Washington. March 3, 1913.)

APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

Under a bond to secure the performance of a lease by the lessee, providing that, upon the lessee's failure to carry out the terms of the lease, the lessor might recover a sum therein specified as liquidated damages, a lessor who was actually damaged in excess of the sum specified therein was entitled to recover the full amount of the bond whether it provided for a penalty or for liquidated damages; and hence it was unnecessary to determine for which it provided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Jackson Estate, a corporation, against Hendrick Suydam and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Reed & Hardman, of Seattle, for appellants. Robt. F. Booth, of Seattle, for respondent.

MORRIS, J. On May 11, 1910, respondent leased to appellant Suydam an apartment house in Seattle, known as the Belgravia, for a term of five years, at a monthly rent of \$1,250. On the same day Suydam and the other appellants executed and delivered to respondent a bond, conditioned for the faithful performance of the lease, and providing, "in the event the said Hendrick Suydam shall fail to faithfully carry out all the terms of said lease, the said lessor may collect the full sum of six thousand two hundred and fifty (\$6,250) dollars herein agreed to be paid, said sum being hereby agreed upon as liquidated damages." Subsequently, default having been made in the terms of the lease, respondent brought this action upon the bond, alleging damages in the sum of \$10,000, and demanding judgment against appellants for the sum nominated in the bond. From the judgment so entered this appeal is taken.

The only question presented on the appeal is whether the \$6,250 shall be held to be liquidated damages as stated in the bond, or

as a penalty. It does not seem to us it is necessary to determine that question, or that, in the light of the findings, such a determination is decisive of this appeal. The court below found that respondent had been damaged, by reason of the failure of Suydam or his assignee to carry out the terms of the lease, in excess of \$7,000, because of a depreciation in the rental value of the premises. This being found and the finding being sustained by the evidence, respondent was plainly entitled to a judgment against appellants in the sum of \$6,250, whether that sum be held as a penalty or liquidated damages. The Georgia Land & Cotton Co. v. Flint, 35 Ga. 226. We decline, therefore, to discuss the legal phase of the matter as between liquidated damages and a penalty, inasmuch as under either holding respondent is entitled to judgment under the findings.

Judgment affirmed.

CROW, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(72 Wash. 233)

FRIEDMAN v. BRANNER (SULLIVAN, Garnishee).

(Supreme Court of Washington. March 3, 1913.)

FRAUDULENT CONVEYANCES (§ 182*)—SALES IN BULK—LIABILITY OF PURCHASER.

Where a purchaser of merchandise in bulk or of substantially an entire business or interest therein does not obtain from the seller an affidavit as to the seller's creditors, the creditors may recover a personal judgment against such purchaser without first pursuing the property, or showing that such purchaser has sufficient of such property still under his control or in his possession to satisfy the judgment, since, under the express provision of the sales in bulk law (Rem. & Bal. Code, § 5296 et seq.), the sale is fraudulent and void, and the property, or its proceeds if sold by the purchaser, belongs to the original seller, and is recoverable by his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 568-577; Dec. Dig. § 182.*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Paul Friedman against A. W. Branner, in which a writ of garnishment was issued against Patrick E. Sullivan. From a judgment for plaintiff, the garnishee appeals. Affirmed.

Richard Saxe Jones, of Seattle, for appellant. Morris B. Sachs, of Seattle, for respondent.

MORRIS, J. This appeal involves the construction of the sales in bulk law, and the proper judgment to be entered against garnishee defendants, who purchased the goods and business in bulk from the original debtor without taking the required affidavit. The material facts presenting these questions are about these: Defendant purchased a saloon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

business from one G. W. Crowe, borrowing \$2,000 from respondent to pay upon the purchase price, and giving Crowe notes for the balance. Branner proceeded to do business at the location and under the license purchased from Crowe until the expiration of the license. He then obtained a new location and a new license, moving the fixtures and such merchandise as was not disposed of, from the old to the new location. Branner carried on his saloon business in his new location from April until the following October, when he sold the business, license, and good will to Sullivan, receiving the full purchase price in cash. At this time Branner was indebted to Crowe upon the purchase from him, and to respondent upon the loan obtained at the time of the Crowe purchase. Shortly thereafter Branner disappeared, leaving no trace of his whereabouts. Sullivan at the time of his purchase was informed by Branner that there were no debts against the saloon. In order to satisfy himself of this fact, he examined the records in the county auditor's office, and found no record evidence of any indebtedness. It was suggested to Sullivan by the attorney who drew the bill of sale from Branner to Sullivan that the statutory affidavit be taken, but Sullivan having known Branner for some time, and being satisfied with the statement that there were no debts, waived this protection, and the transfer was completed. After the disappearance of Branner, actions were commenced by Crowe and respondent, to recover the balance due upon their respective claims, serving Branner by publication, and obtaining a writ of garnishment against Sullivan. In due course a personal judgment was entered against Sullivan for the respective amounts due Crowe and Branner, and Sullivan has appealed. This appeal involves only the respondent's judgment; it having been stipulated that the Crowe judgment shall abide the court.

Appellant submits these questions: Can a personal judgment be entered against the garnishee, under the circumstances here present, without first pursuing the property, and without showing that the garnishee has sufficient property of the defendant under his control or in his possession to satisfy the judgment? The statute and its interpretation as found in our previous holdings answers each of these questions in the affirmative. The statute is found in Rem. & Bal. Code, § 5296 et seq. It provides that in cases of all transfers of merchandise in bulk, or whenever substantially the entire business or an interest therein is disposed of, an affidavit shall be required, showing the names of all creditors, with the indebtedness due or to become due, and that when such affidavit is not taken, or the purchaser shall

not see to it that the purchase price is applied to the payment of the claims of creditors of the vendors, such sale or transfer "shall be fraudulent and void." There can be no question but that under these provisions the sale to Sullivan was void as against the creditors of Branner. The sale being void, the property was the property of Branner in contemplation of law; or, if it or any part of it had been disposed of, the money obtained from its sale was the money of Branner. It is immaterial to what extent the original property obtained from Branner remained in the possession of Sullivan at the time of the garnishment. Under this statute, Sullivan had either the property itself or its purchase price. It was immaterial which. Either was the property of Branner and subjected Sullivan to garnishment as having money or property of Branner in his possession or under his control.

In *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003, and *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941, we held that, when the statutory affidavit was not taken, the goods attempted to be disposed of by the sale remained the goods of the vendor, and as such in the hands of the vendee were to be regarded as a trust fund, and the vendee the trustee for the benefit of the creditors of the vendor. As in legal contemplation the sale to Sullivan was fraudulent, the possession resulting from the sale was wrongful. Sullivan's position is in law no better than that of a purchaser of property for the purpose of defeating the just claims of his vendor's creditors. He can retain neither the property, nor, in case of its sale, the money obtained therefrom. *Miller & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956; *Cowles v. Coe*, 21 Conn. 220. And, since he was wrongfully in possession of the property or its equivalent, Sullivan stands as does any other person who has wrongfully converted property to his use. He cannot say the remedy of those entitled to the property is against the property itself only; but must respond in damages for its conversion. It is, we think, well established that, when a trustee such as Sullivan was in legal contemplation, in violation of his trust disposes of the trust property, he is personally liable. 39 Cyc. 533; *Miller v. Butler*, 121 Ga. 758, 49 S. E. 754; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697; *McArthur v. Gordon*, 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667; *Ferguson v. Hillman*, 55 Wis. 181, 12 N. W. 389; *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89 Iowa, 618, 57 N. W. 444.

It follows that the judgment must be affirmed.

CROW, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(72 Wash. 249)

McDOUGALL v. O'CONNELL et ux.

(Supreme Court of Washington. March 4, 1913.)

1. MINES AND MINERALS (§ 34*)—TRANSFER OF CLAIMS—OPTION TO RESCIND—NOTICE—REASONABLE TIME.

Where a contract provided that if, at the end of three years, the purchaser of an interest in mining claims should be dissatisfied the vendor would return what he had paid, notice of dissatisfaction must be given within a reasonable time after the expiration of the three years.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81-86; Dec. Dig. § 34.*]

2. MINES AND MINERALS (§ 34*) — CONVEYANCE — RESCISSION — NOTICE — REASONABLE TIME.

Notice of dissatisfaction and desire for the return of the purchase price, sent by the purchaser of mining property, under a contract providing for return in case of dissatisfaction at the end of 3 years, to vendor's residence 2 weeks before his return, 2½ months after the end of the 3 years, is given within a reasonable time, where at the expiration of the 3 years the vendor was in a place inaccessible to mails and was expected back in a few months.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81-86; Dec. Dig. § 34.*]

3. TRIAL (§ 141*)—QUESTIONS FOR JURY.

The question whether notice of rescission of a contract, under an option so to do if dissatisfied at the end of a stated period, was given in a reasonable time after the close of the period, is for the court, where the facts are not in dispute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

4. MINES AND MINERALS (§ 34*)—CONVEYANCE—OPTION TO RESCIND.

Where a contract for the sale of mining property provided that in case of the purchaser's dissatisfaction the vendor would return the purchase money, the purchaser is not bound to show reasonable grounds for dissatisfaction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81-86; Dec. Dig. § 34.*]

5. MINES AND MINERALS (§ 34*)—CONVEYANCE — OPTION TO RESCIND — CONDITIONS PRECEDENT.

Where a contract provided that if the purchaser should at the end of three years be dissatisfied with an interest in mining property, he keeping up his share of assessment work, the vendor would return the purchase money, the purchaser may recover subject to deduction for assessment work, though he did not pay the assessment for the third year; it appearing that the work had not been done and that the vendor made no demand for the assessment.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81-86; Dec. Dig. § 34.*]

Morris, J., dissenting.

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Malcolm McDougall against W. L. O'Connell and wife. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

Benton Embree, of Seattle, for appellant. F. C. Reagan, of Seattle, for respondents. Wilson R. Gay, Geo. Olson, and Milo A. Root, all of Seattle, amici curiae.

MAIN, J. This is an action to recover money alleged to be due upon a contract. On May 20, 1908, at Seattle, Wash., the defendant W. L. O'Connell executed and delivered to the plaintiff a writing in terms as follows: "If Mr. McDougall is dissatisfied with the property I have sold him in Camp O'Connell, Elk county, Nevada, at the end of three years, he keeping up his share of the assessment work, I agree to return him the amount he has paid for it, \$2,500, with 10 per cent. interest. W. L. O'Connell." Some time prior to this date the parties had had certain negotiations, looking to the sale to the plaintiff by W. L. O'Connell of an undivided one-fourth interest in certain mining claims situated in Elk county, Nev. On July 28, 1908, the plaintiff, pursuant to the agreement to purchase, paid \$1,000, and on the 4th day of August, 1909, \$1,500. At the time of the latter payment, \$300 was paid for the assessment work for the year 1909. All these sums were paid to W. L. O'Connell. When the last payment on the purchase price was made, deeds were delivered to the plaintiff, conveying the interest purchased in the mining claims, which deeds were executed by John O'Connell, the brother of W. L., in whose name the filings upon the claims had been made. On November 14, 1910, the plaintiff paid his proportion of the assessment work for that year. On May 5, 1911, W. L. O'Connell and one Cameron departed on a trip to the interior of Alaska, expecting not to return until either the month of August or September following. McDougall, the plaintiff, knew of their departure and the time of their expected return. During the time that they were in Alaska, they were at a place where there was no regular mail delivery; but upon two occasions while there mail was brought in by parties coming from the outside.

The trial court found, and there seems to be no real controversy upon this question, that the three-year limitation provided for in the contract expired on May 20, 1911, at 12 o'clock midnight. The following day being Sunday, on Monday, May 22, 1911, John O'Connell was requested to come to the office of the attorney for McDougall, and he was there informed that McDougall was dissatisfied with the mining claims and desired the return of his money under the terms of the agreement. On July 22, 1911, the plaintiff, knowing the time when W. L. O'Connell was expected to return from Alaska, caused to be sent to him by registered mail addressed to his Seattle residence a notice of dissatisfaction and demand for the return of the purchase price, together with interest.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

O'Connell arrived in Seattle on his return from Alaska, August 6, 1911, and on August 22d he appeared at McDougall's office, after having received the notice of dissatisfaction by registered mail. During all of the times above mentioned, W. L. O'Connell's residence was at a place in Seattle known to McDougall, and his family were at the residence during the period of time that O'Connell was in Alaska. As has been stated, the three years mentioned in the contract, at the end of which time McDougall might demand the return of his money, expired on May 20, 1911. McDougall did not pay his proportion of the assessment work for the year 1911, which would have amounted to the sum of \$300. The assessment work upon the claims for this year was not in fact done, and on the 1st of the following January they were relocated by adverse parties. McDougall's demand for the return of his money was not responded to by O'Connell, and this suit was brought to recover the same. The cause was tried to the court without a jury. At the conclusion of the trial the court found for the defendants, apparently on the ground that McDougall did not within a reasonable time after May 20, 1911, notify W. L. O'Connell of his dissatisfaction. Thereupon the plaintiff appealed.

The questions presented upon this appeal are: (1) Was the notice of dissatisfaction communicated to W. L. O'Connell in time? (2) Must the appellant show reasonable grounds for his dissatisfaction? (3) Did the appellant forfeit his right to declare dissatisfaction by failing to meet his proportion of the assessment work for the year 1911?

[1] The first question presented requires the interpretation of the clause "at the end of three years," as used in the contract. Under this provision the appellant could not have declared his dissatisfaction prior to the expiration of the three years mentioned, for the contract specifies otherwise. Contracts with like or similar language have been frequently construed by courts of last resort to mean that notice of dissatisfaction or demand for the return of money must be made within a reasonable time after the expiration of the time stated. "At the end of three years," in contracts of this character, means within a reasonable time thereafter. *Rogers v. Burr*, 97 Ga. 10, 25 S. E. 339; *Ladlow v. El. Bement & Sons*, 119 Mich. 685, 79 N. W. 1048, 45 L. R. A. 479. In the *Rogers Case* the question is covered by this language: "This contract, on the faith of which the administrator of Chambers subscribed for 60 shares of stock in the Barnesville Manufacturing Company, stipulates that if, at the expiration of three years from December 1, 1880, the subscriber desires no longer to carry the stock, the plaintiffs in error will, 'with thirty days' notice,' pay such subscriber par value for the same. This provision gave to the subscriber the right, at the expiration of

three years from the time stated, to elect whether he would keep the stock, or turn it over to plaintiffs in error, and require them to pay him therefor its par value. He had no right to make this election before the expiration of the time. The time for such election expired at midnight on November 30, 1892, and it could not have been made until the full expiration of the time. The position that the election ought to have been made on the last moment of the last day is too absurd to seriously consider. It follows that the time for the exercise of the right was after the expiration of the three years. The word 'at,' in this contract, is equivalent in meaning to 'after.' It was held in *Annan v. Baker*, 49 N. H. 169, cited in 1 Am. & Eng. Enc. Law (1st Ed.) p. 893, note, that 'at the end of one year' means 'at the expiration of one full and entire year,' and that 'at' is equivalent in meaning to 'after.' If the word 'after' is substituted for 'at' in the contract under review, there can be no doubt about the correctness of the construction given to it in the headnote. As the election could be made after the expiration of the time limited, of course a reasonable time was allowable for this purpose."

[2] It follows that appellant must exercise his right under the contract within a reasonable time after May 20, 1911, by giving notice to W. L. O'Connell. What would be a reasonable time depends upon all the attendant facts and circumstances. At the end of the three-year period specified in the contract, W. L. O'Connell was in the interior of Alaska, where the deliveries of mail were infrequent and irregular. He was expecting to return within a period of a few months. The notice of dissatisfaction was prepared and sent to his Seattle address more than two weeks prior to the date of his return. The delay caused no prejudice. There is no showing that, had the notice been sent to Alaska, it would there have been received, or that O'Connell was in any worse position than he would have been had the notice been mailed to him immediately after the 20th day of May, 1911. Notice to John O'Connell or to the family of W. L. would be unavailing, for they were not parties to the contract.

[3] The facts not being in dispute, what would be a reasonable time becomes a question of law; and, when all the surrounding facts and circumstances are considered, we think the trial court erred in holding that the notice of dissatisfaction was not given within a reasonable time.

[4] As to the second question, the rights of the parties must be measured by the terms of the contract. The contract says that, if McDougall is dissatisfied, then the money will be repaid. It does not say that, if he is dissatisfied and has reasonable grounds for his dissatisfaction, then the money will be returned. The law on this question is

well stated in 24 Am. & Eng. Enc. Law (2d Ed.) p. 1236, as follows: "The courts have had frequent occasion to interpret contracts for the rendition of services, the sale or manufacture of articles, etc., in which it was agreed that the services should be satisfactory to the employer, or that the articles should satisfy the purchaser. And where there is an agreement that an act shall be done in a manner satisfactory to the promisee, it is generally held that he is the sole arbiter of the performance according to the agreement. It is not enough to show that the promisee ought to be satisfied and that his discontent is without reason." See, also, to the same effect, 9 Cyc. 620; *Tatum v. Geist*, 46 Wash. 226, 89 Pac. 547.

[6] The third question is that of the failure to meet the assessment work for the year 1911. This delinquency is not sufficient to forfeit the right of the appellant to recover. It does not appear that any demand had been made upon him for the payment of his portion of the assessment work for that year. Neither of the assessments for the two previous years had been met until the work was done and request for payment made. As shown by the facts stated, the work for this year had at no time been done. By the terms of the contract, however, the appellant was entitled to the return of the money; "he keeping up his share of the assessment work." Having held the property for a period of three years, he should be required to meet his portion of the assessments for that period of time. The sum of \$300 should be deducted from the total of the purchase price and interest.

The cause will therefore be reversed and remanded, with direction to the superior court to enter a judgment for the appellant for the purchase price paid, together with interest at 10 per cent. per annum thereon from the dates of payment, less the sum of \$300, the amount of the assessment work which the appellant was required to pay for the third year.

FULLERTON, ELLIS, and MOUNT, JJ., concur.

MORRIS, J. I dissent upon the ground that keeping up his share of the assessment work was a condition precedent to appellant's right of recovery, and, not having done so, his right of action failed.

(72 Wash. 314)

HOFREITER et ux. v. SCHWABLAND et al.
(Supreme Court of Washington. Feb. 28, 1913.)

1. TRIAL (§ 252*)—MISLEADING INSTRUCTIONS—ISSUES.

Where plaintiff and defendant entered into a partnership agreement to improve property held by them in severalty for the purpose of cultivation, and providing that on dissolu-

tion all the property on the lands, including buildings, should be valued and equally divided, and such a division was made, but a question arose as to who got the house under the agreement, any instruction as to fixtures, severance, etc., was misleading and erroneous; the house being personality as between them under the contract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.*]

2. TROVER AND CONVERSION (§ 35*)—BUILDINGS—BURDEN OF PROOF.

In an action for conversion of the house, the burden of showing his ownership was on the plaintiff, although he owned the land.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 215, 216; Dec. Dig. § 35.*]

3. TROVER AND CONVERSION (§ 47*)—DAMAGES—BUILDING.

In an action for conversion of a house, the measure of damages is the value of the house at the time of the conversion, with interest; and the value of the use of the house on the premises from the conversion to the trial is not recoverable in such an action.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 265, 268, 272; Dec. Dig. § 47.*]

4. APPEAL AND ERROR (§ 525*)—RECORD—WRITTEN INSTRUCTIONS—BILL OF EXCEPTIONS.

Instructions given wholly in writing, and filed in the cause, are a part of the record, and may be taken to the Supreme Court over the certificate of the clerk, and need not be embodied in a bill of exceptions under Rem. & Bal. Code, § 895, providing what the record shall contain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2376-2378; Dec. Dig. § 525.*]

Department 2. Appeal from Superior Court, King County; O. R. Holcomb, Judge.

Action by Fred Hofreiter and wife against W. W. Schwabland and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Walter A. Keene, of Seattle, for appellants. Daniel Landon and J. G. Raley, both of Seattle, for respondents.

FULLERTON, J. The respondents as plaintiffs recovered against the appellants for the value of a dwelling house alleged to have been wrongfully removed from certain lands of the respondents by the appellants and converted by the appellants to their own use. The facts out of which the controversy arises are in the main undisputed. On and prior to January 9, 1908, the respondent Fred Hofreiter and the appellant William Given were partners in a restaurant business in the city of Seattle. They at the same time severally held contracts with the state of Washington for the purchase of certain lands situated near the Columbia river, in Benton county. Being desirous of improving the lands, they, together with one Anthony Hofreiter, on the date above given, entered into a contract in writing, by the terms of which each of the parties agreed to advance a certain sum of money to be expended on the lands by Anthony

Hofreiter in making improvements thereon and in bringing the lands under cultivation. The contract was indefinite as to its duration, but contained a clause providing that, upon its termination for any cause whatsoever, an inventory should be taken of all property then upon the land, "including machinery, pipes, buildings and fixtures," and the value of the same appraised and divided equally between the parties to the contract. Acting pursuant to the agreement, the parties advanced considerable sums of money which were expended on the land in the erection of buildings, the construction of irrigating works, and in preparing the land for cultivation. The buildings were erected on the tract belonging to the respondents, and consisted of a dwelling house, a barn, a house for a pumping station, and various outbuildings. The parties also acquired personal property of a considerable value, this consisting of a team of horses with harness, fluming for irrigating purposes, and such machinery, implements, and tools as are usually kept by farmers and gardeners. After the business had progressed for a time, Anthony Hofreiter sold his interests to the respondent Hofreiter and the appellant Given. The respondent at the trial, in describing the interests in the property of the respective parties after this sale, used this language: "The house referred to and for which I am claiming damages was entirely constructed and built from funds contributed by defendant Given, Anthony Hofreiter, and myself, and, after Anthony sold out, Mr. Given and myself were equal owners in the house. The pump, pump house, barn, fluming, teams, harness, machinery, and equipment of every kind thereafter belonged to Mr. Given and myself equally. It had all been purchased from common funds." Later on Hofreiter and Given agreed to dissolve their partnership, and divide their partnership property. As a basis for doing so they valued the restaurant at \$1,200 and the farm property at \$1,500. After this appraisal had been made, Given offered Hofreiter his choice of properties, stipulating that the person taking the farm property should pay to the other one-half the difference between the appraised value of the two properties. Hofreiter chose the restaurant, and Given took the other property, paying Hofreiter one-half the difference between their appraised values.

[1, 2] The sole difference between the parties, and the sole question at the trial, was whether the house passed to Given with the other common property on the farm in the exchange. Hofreiter testified that the house was not included in the property set over to Given, while Given testified that it was so included. In submitting this issue to the jury, the court gave thereon, among others, the following instructions:

"(4) The defendant Given contends that the ownership of the house in dispute was

severed from the ownership of the land, not a permanent fixture thereon, and that he and plaintiffs were joint owners thereof, and at the time of the settlement he was given the house by plaintiff. I instruct you that the burden of proof as to the establishing of both of his contentions by a fair preponderance of the evidence is upon the defendant, and, if you believe from the evidence that the defendant has not proven that the ownership of the house was severed from the soil, and that he was expressly allowed the house by the plaintiff in the settlement, by a fair preponderance of the evidence then your verdict must be for the plaintiff.

"(5) You are instructed that the original contract between the parties provided that all buildings on the land owned by the plaintiff herein was to be considered personal property as between the said parties, at least until such time as the contract should be by them terminated, and a division or distribution made. If, therefore, the evidence shows that the original contract shown here in evidence and not disputed was terminated, then it is still incumbent on the defendant Given to show by a fair preponderance of the evidence that he became the owner of the building in question, and remained such until the time when it is alleged that he sold it and caused it to be removed from the lands.

"(6) In determining whether the buildings herein in dispute were personal property or part of the land to which it was annexed, I instruct that you shall be governed by the intention of the parties to make or not to make the same a permanent part of the land at the time of its erection, or at the time of any settlement, and in determining the intention of the parties you shall take into consideration, besides their testimony, the purpose for which it was erected to be used, the size and character of the building, the manner of its annexation to the soil, its use in application to the property on which it was erected, and the effect its removal would have on the land. If from the foregoing tests you decide it was the intention of the parties to make the same a permanent fixture to the land in the sense that buildings are considered permanent, then you shall find that the building was part of the land."

"(8) I instruct you that, if you find for the plaintiff, the measure of damages would be the value of the house and the value of the use thereof on the premises from the time of its removal to date."

Under the issues as made by the evidence, we are constrained to think each of these instructions erroneous and misleading. There was no dispute that, as between the parties, this house was personal property, as distinguished from a common-law fixture, to the same extent that all the other property on the farms was personal property. Hofreiter himself testified that the house was built with their common funds, that it was erected

on his particular land merely as a matter of convenience, that it was their common property at the time of the exchange, and his sole claim to the house is that it was awarded him in the exchange. Any reference to the doctrine of fixtures was therefore out of place, and had a tendency to mislead the jury. So also, since Hofreiter was the plaintiff, and asserting the right to recover, the burden was upon him to establish by a preponderance of the evidence a right of recovery.

The second of the instructions is erroneous, in that it places the burden upon Given to establish his ownership of the house. As we have stated, there is no dispute that at the time of the exchange he owned a half interest in the house, and the sole question was whether he was given the other half interest in the exchange, or whether his half interest went to Hofreiter. On this issue, since Hofreiter was seeking affirmative relief, the burden of proof was on him to establish the facts necessary to a recovery, not on Given to controvert his right.

The third of the instructions quoted (numbered 6) is erroneous, in that it assumes that the house was possibly a fixture, whereas, as we have stated, the law of fixtures had nothing to do with the issues. The house was owned jointly by the respondents and the defendant Given. An exchange of property was made by which the ownership of the house either passed to Hofreiter or passed to Given. If it passed to Hofreiter, then Given wrongfully removed it. If it passed to Given, he had an implied license to remove it within a reasonable time, and his removal of it was rightful, and not wrongful. An instruction as to the law of fixtures therefore was not pertinent.

[3] The fourth instruction is erroneous, in that it does not lay down a correct rule for the measure of damages. This being an action for conversion, the measure of damages was the value of the house at the time of its removal, with interest at the lawful rate on such value from the time of the removal to the time of the trial. The value of the use of the house on the premises from the time of its removal to the time of the trial is not recoverable in this form of action. There was no error in the rulings on the admission of evidence.

[4] We have not overlooked the respondents' objections to the sufficiency of the record on appeal. But instructions given wholly in writing and filed in the cause are a part of the record and may be brought to this court over the certificate of the clerk. They need not be embodied in a bill of exceptions or statements of facts. Rem. & Bal. Code, § 395. The charge to the jury was in writing and the exceptions were taken "by specifying by numbers of paragraphs * * * the parts of the charge excepted

to," and were sufficient under the statute. Id. § 384.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

MOUNT, MORRIS, ELLIS, and MAIN, JJ., concur.

(72 Wash. 234)

DOUGLAS COUNTY v. GRANT COUNTY.
(Supreme Court of Washington. Feb. 28, 1913.)

1. COUNTIES (§ 16*)—DIVISION OF COUNTY—APPORTIONMENT OF ASSETS.

In absence of statute, where a new county is created from the territory of an existing county, the old county retains all of the assets previously owned by it, and assumes all of its existing indebtedness; the new county neither being entitled to any of the assets nor bound to assume any of the existing indebtedness of the old county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 12-15; Dec. Dig. § 16.*]

2. COUNTIES (§ 16*)—DIVISION OF COUNTY—APPORTIONMENT OF PROPERTY.

Since Laws 1909, c. 17, §§ 1, 2, creating Grant county from a part of Douglas county, does not provide for an apportionment of the property of the two counties, a subsequent agreement between the counties apportioning the property was invalid and unenforceable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 12-15; Dec. Dig. § 16.*]

3. COUNTIES (§ 16*)—DIVISION OF COUNTY—APPORTIONMENT OF PROPERTY—AUTHORITY.

Only the Legislature may apportion the property and assets of a divided county upon the creation of a new county from the territory of an existing county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 12-15; Dec. Dig. § 16.*]

4. COUNTIES (§ 2*)—DIVISION OF COUNTY—STATUTES—IMPLIED REPEAL.

Since Laws 1909, c. 17, §§ 1, 2, creating Grant county out of a part of Douglas county, and requiring Grant county to pay to Douglas county its proportion of the latter's bonded indebtedness, is complete in itself, and was enacted subsequent to Rem. & Bal. Code, §§ 3826, 3827, providing for the apportionment of debts and property in case of a division of counties, the adjustment of the property rights of the two counties would be governed by such special act.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 2.*]

Department 1. Appeal from Superior Court, Douglas County; Wm. A. Grimshaw, Judge.

Action by Douglas County against Grant County. From a judgment for plaintiff, defendant appeals. Affirmed.

Merritt, Oswald & Merritt, of Spokane, for appellant. John W. Hanna, of Waterville, for respondent.

CROW, C. J. In 1909 Grant county was organized from a portion of Douglas county, by act of the Legislature (Session Laws 1909, c. 17, p. 19). Section 1 of the act fixed the boundaries of the new county. Section 2 reads as follows: "The county of Grant

shall assume and pay to the county of Douglas its proportion of the bonded and warrant indebtedness of Douglas county, in the proportions that the assessed valuation of that part of Grant county, lying within the present boundary of Douglas county, bears to the assessed valuation of the whole of Douglas county. The adjustment of said indebtedness shall be based on the assessment for the year 1908. * * *

The act contains no provision relative to the apportionment or division of any property, taxes, funds, or assets of Douglas county existing at the date of division. After the organization of Grant county had been perfected, its auditor and the auditor of Douglas county, assuming to act under the authority of sections 3826 and 3827, Rem. & Bal. Code, made a written agreement, compromise, and settlement wherein they scheduled the property, funds, real estate taxes, assets, and indebtedness of Douglas county, and as a net result finally determined that, under the sections mentioned and the act of 1909, Douglas county was indebted to Grant county in the total sum of \$52,000, and that warrants upon certain funds of Douglas county should be issued to Grant county in payment thereof. Thereupon this action was commenced by Douglas county, against its auditor and against Grant county, to have the written agreement declared void, and to enjoin the issuance of the warrants. Findings were made upon the pleadings, and a final decree was entered enjoining the issuance of the warrants, and declaring the agreement to be null and void. Grant county has appealed.

The trial court found:

"That at the time the said act of the Legislature creating said Grant county went into effect and became operative, to wit, February 24, 1909, the said Douglas county had a bonded general indebtedness outstanding against it in the principal sum of \$25,000, together with accrued interest thereon. * * *

That, by virtue of the provisions of the legislative act creating the county of Grant, said Grant county was to pay to the county of Douglas a per centum of the indebtedness of said Douglas county, based upon the per centum of the assessed valuation of the taxable property of said Douglas county, as shown by the assessed valuation of that part of Grant county lying within the boundaries of Douglas county, provided that such indebtedness was not incurred in the purchase of any county property or in the purchase of any county building falling within or being retained by the other county; that 61.5 per cent. is the proportion of assessed valuation for the year 1908 of taxable property of the county of Douglas, which lies within the new county of Grant; that at the time of the creation of said Grant county, to wit, on the 24th day of February, 1909, Douglas county was and is now the sole owner and in possession of property, moneys, and assets as

follows, to wit: One courthouse, jail, and grounds of the value of \$35,000; furniture and fixtures in the various county offices of said courthouse of the total value of \$5,552.05; 125 cords of wood of value of \$937.50. Money on hand as follows: Cash in current expense fund, \$27,403.88; cash in road and bridge fund, \$1,704.39; cash in game protection fund, \$1,093.05; cash in soldier's relief fund \$208.35; cash in building fund, \$897.47; uncollected bond redemption fund, \$8,386.65; uncollected building fund tax, \$763.61. Uncollected taxes on real estate tax roll as follows: Current expense fund, \$41,606.86; general road and bridge fund, \$9,698.77. Uncollected taxes on personal tax roll of said county as follows: Current expense fund, \$2,258.82; general road and bridge fund, \$562.67. All of said described property, money, and assets being in said Douglas county.

"That on the 26th day of April, A. D. 1909, defendant T. Cladd Bennett, then auditor of Douglas county, Wash., and J. H. Hill, then auditor of Grant county, Wash., made and entered into an agreement, by the terms of which said agreement Douglas county was to pay to said Grant county certain sums of money as specified and set out in said agreement, a copy of which is attached to plaintiff's amended complaint and made Exhibit 1 thereof; that the said action of the said T. Cladd Bennett and J. H. Hill in entering into said agreement and in awarding the payment by said Douglas county to said Grant county of any sum of money or thing of value whatsoever, or the transfer from said Douglas county to said Grant county of any part of the property, moneys, or assets belonging to said Douglas county at the time of the creation of said Grant county, was null and void, wholly without authority of law, and in violation of the rights of said Douglas county; that the said county of Grant had no right, title, interest, or lawful claim in or to the whole or any part or of any item of the property, money, and assets belonging to said Douglas county at the time of the creation of said Grant county; and that said Douglas county is not indebted to said Grant county in any sum of money or thing of value whatsoever.

"That the said T. Cladd Bennett, auditor of Douglas county, and the said J. H. Hill, auditor of Grant county, acted without warrant or authority in law in the purported settlement of the portion of the bonded indebtedness which Grant county was to assume and pay to Douglas county; as fixed by section 2 of the act creating Grant county, and that such purported settlement is null and void. That there has been no valid and legal settlement of the indebtedness between said Douglas and Grant counties; that there is no provision in the Constitution or laws of the state of Washington providing for the distribution of assets between an old and

new county in the event of the creation of the new county out of territory embraced wholly within the boundaries of the old county, and no provision in the Constitution or statutes of the state of Washington prescribing or fixing a basis for such distribution; that the basis provided in the act creating Grant county for the ascertainment and division of the indebtedness was wholly disregarded by the auditors of the respective counties, Douglas and Grant, in the settlement entered into with reference thereto."

These findings are sustained by the admitted allegations of the pleadings, and appellant has taken exceptions to only such portions of them as might be termed conclusions of law. The question now presented is whether the findings sustain the final decree. Section 3826, Rem. & Bal. Code, provides that: "The new county shall be liable for a reasonable proportion of the debts of the county from which it is taken, and entitled to its proportion of the property of the county." Section 3827 provides that: "The auditor of the old county shall give the auditor of the new county reasonable notice to meet him on a certain day at the county seat of the old county, or at some other convenient place, to settle upon and fix the amount which the new county shall pay. In doing so, they shall not charge either county with any share of debts arising from the erection of public buildings, or out of the construction of roads or bridges which shall be and remain, after the division, within the limits of the other county, and of the other debts they shall apportion to each county such a share of the indebtedness as may be just and equitable, taking into consideration the population of such portion of territory so forming a part of the said counties while so united, and also the relative advantages derived from the old county organization." It will be observed that this section makes no provision for an apportionment of existing property. Calling attention to these sections, appellant contends that, in so far as this case is concerned, they are so amended by section 2 of the creative act of 1909 that, by reading them and the creative act together, they provide that Grant county shall pay its share of the indebtedness of Douglas county in proportion to the assessed valuation of 1908, and shall also be entitled to a like proportion of the property of Douglas county; that the Legislature, by the general statutes above cited, has delegated to the auditors power to fix the reasonable proportion of the indebtedness upon which to base an enforcement of section 3 of article 11 of the state Constitution, which provides that: "* * * Every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken"—that the gen-

eral law, thus authorizing the auditors to fix such reasonable proportion in so far as Grant county is concerned, has been so limited by section 2 of the creative act that, in any settlement here made, the assessed valuation basis should prevail; that the settlement should be in proportion thereto; that Grant county should pay 61.5 per cent. of the indebtedness, and at the same time should receive a like percentage of the property; and that, as the settlement of the auditors was made upon that theory, it awards Grant county no more than the law requires. The special act of 1909, which is of later date than the sections of Rem. & Bal. Code, above mentioned, compels Grant county to assume and pay its proportion of all existing bonded and warrant indebtedness of Douglas county, and provides that the proportional assessed valuations of 1908 shall be adopted as the fixed basis for the apportionment of such indebtedness. It will be noted that the act fully meets the requirements of section 3, art. 11, of the Constitution, although it does not provide that Grant county shall receive any part of the property.

[1] The well-established rule of law, in the absence of any statute or any constitutional provision to the contrary, is that, when a new county is created from the territory of an existing county, the old county will retain all assets previously owned by it, and will be subjected to the burden of assuming all of its existing indebtedness. In other words, the new county will be entitled to none of the assets; nor will it be obliged to assume any of the existing indebtedness of the old county. 1 Cooley on Taxation (3d Ed.) p. 414; Laramie County v. Albany County, 92 U. S. 807, 23 L. Ed. 552; Tulare County v. Kings County, 117 Cal. 195, 49 Pac. 8; City of Wellington v. Wellington Township, 46 Kan. 213, 26 Pac. 415; City of Winona v. School District, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687; Washington County v. Weld County, 12 Colo. 152, 20 Pac. 273.

In the year 1887 the Colorado Legislature passed two acts creating the new counties of Washington (Colorado Laws 1887, p. 251) and Logan (Colorado Laws 1887, p. 247) by carving territory from the existing county of Weld. These acts provided that the "present indebtedness" of Weld county should be apportioned between the new counties in proportion to the ratio of the taxable property at the time of division. Weld county had no indebtedness, but did have in its treasury a surplus of \$60,000. Each of the new counties demanded its share of this surplus in proportion to, and upon the basis of, its taxable property, as specified in the act in relation to indebtedness, and brought suit to recover the same. The Colorado Constitution (article 14, § 4) required that each new county, upon its establishment, should be responsible for a "ratable proportion" of

the then existing liabilities of the county or counties from which such new county should be formed, but, like unto the Constitution of this state, was silent as to the distribution or division of assets belonging to the old county.

In *Washington County v. Weld County*, supra, the Supreme Court of Colorado, stating these facts, held: "In the absence of restrictive constitutional or statutory provision on the subject, when a new county is created by segregating a portion of the territory belonging to an existing county, the old county retains all assets previously owned by it, including rights of action, funds, and other personal property; also all real estate held in proprietary right, save such, if any, as may be within the territory taken away; it likewise remains bound by its existing contracts, and is subjected to the burden of discharging all existing obligations and liabilities. The new county receives none of the assets, and assumes none of the burdens. *Cooley Tax'n*, 176, note 2; *Laramie County v. Albany County*, 92 U. S. 307 [23 L. Ed. 552]; *Mount Pleasant v. Beckwith*, 100 U. S. 514 [25 L. Ed. 699]. The reasons for the foregoing doctrine are that the title to all property and ownership of all assets are vested in the old county as a corporate entity, this entity being in no way disturbed by the division of its territory and separation from it of a portion thereof; while, on the other hand, all existing obligations and liabilities were incurred in its corporate capacity and name. Therefore, while the Legislature has power to divest title and apportion property as well as indebtedness, yet, if such power be not exercised, there does not follow, as a legal sequence, either a transfer of the assets or liabilities to the new county." Having called attention to the fact that, although the Colorado acts then under consideration provided for an enforcement of the constitutional mandate relative to indebtedness, they did not contain any provision relative to a distribution of surplus funds or property, the Colorado court further observed: "But, in the first place, it will be noticed that there are no words that can be regarded as expressly granting to the new counties a right to share in the moneys on hand; secondly, that no basis for such apportionment is specifically named; yet, in the absence of provision in the premises, it may be doubtful if the intent to distribute the funds, admitting that such intent is shown, could be carried out. Because the Legislature adopted a certain basis for the distribution of indebtedness, it does not necessarily follow that this body intended to apply the same method to the apportionment of surplus funds."

[2] The act creating Grant county, while complying with our constitutional mandate relative to existing indebtedness, makes no

provision for an apportionment of property. Grant county, therefore, was not entitled to receive the warrants which the auditor of Douglas county was about to issue in pursuance of the written agreement.

[3] That the division of counties and the distribution of property and assets is solely a legislative function, and that legislation to provide for such apportionment is necessary, see 11 Cyc. 357, and cases there cited. In *Laramie County v. Albany County*, supra, the Supreme court of the United States, discussing the question here involved, said: "Regulation upon the subject may be prescribed by the Legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the Legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property, except what falls within her boundaries, and to all that the old corporation has no claim. *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 134; *Dil. on Mun. Corp.* § 128; *Wade v. Richmond*, 59 Va. 583; *Higginbotham v. Commonwealth*, 66 Va. 633."

[4] The special act of 1900, creating Grant county, being a complete act in itself of a later date than the sections of Rem. & Bal. Code upon which the appellant relies, is the act under which Grant county was organized, and the one to which we must look for the rule to be adopted in the matter of an adjustment of its property, financial, and business relations with the old county of Douglas. As the act creating Grant county has provided a particular basis or rule for an apportionment of existing indebtedness, but has made no provision for an apportionment of existing property, we are constrained to hold that the settlement which the auditors assumed to make is void and cannot be sustained.

The judgment is affirmed.

PARKER, FULLERTON, CHADWICK,
and GOSE, JJ., concur.

(72 Wash. 382)

GRAVES v. STONE, Sheriff, et al.
(Supreme Court of Washington. March 8,
1913.)

1. TAXATION (§ 529*)—EVIDENCE—PAYMENT—SUFFICIENCY.

Evidence in an action to enjoin collection of a personal property tax held insufficient, in connection with a delay of 10 years in attempting its collection to show payment of the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 982-984; Dec. Dig. § 529.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
130 P.—24

2. PAYMENT (§ 66*)—PRESUMPTION—LAPSE OF TIME.

Independent of any statute of limitations, lapse of time in connection with other circumstances may raise a presumption of fact that a debt has been paid, but lapse of time alone is not sufficient, and the presumption does not bar a recovery, but merely affects the burden of proof.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 176-188; Dec. Dig. § 66.*]

3. TAXATION (§ 529*)—PRESUMPTION OF PAYMENT FROM LAPSE OF TIME.

The presumption of payment arising from lapse of time in connection with other circumstances applies to tax obligations as well as other debts.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 982-984; Dec. Dig. § 529.*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by Frank H. Graves against George E. Stone, sheriff of Spokane county, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Graves, Kizer & Graves, of Spokane, for appellant. John L. Wiley and O. J. Saville, both of Spokane, for respondents.

MAIN, J. [1] This action was brought to restrain the collection of a tax on personal property. The appellant at the time of the institution of the action had resided in Spokane for about 27 years. Prior to and during the years 1900, 1901, and 1902, he had a large amount of real and personal property, not incumbered, including household goods, law library, money in bank, and bills receivable. Prior to the years mentioned the appellant and one George Turner were law partners, owning a law library and office fixtures, upon which the appellant paid the taxes, including those for the year 1900. On February 28, 1901, the appellant paid some personal property taxes assessed to him on the capital stock of the Le Roi Mining Company for the year 1898, and on February 20, 1900, appellant paid his personal property taxes for the year 1899, but according to the records in the county treasurer's office his personal property tax for the year 1900 has never been paid. Appellant permitted the taxes upon his real estate for the year 1900 to become delinquent, and certificates of delinquency were issued against the same and redeemed by the appellant on August 19, 1901. On December 10, 1910, a letter was sent to the appellant by the county treasurer, notifying him of the amount of his personal property tax for the year 1900, and requesting payment of the same. With reference to the personal property tax for the year 1900, the appellant testified as follows: "I have paid for a personal property tax for the year 1900, as I paid my personal property taxes for every year before and since then. I paid it by check drawn to the order of the county treasurer. I can-

not remember the day on which I paid it, to whom I paid it, whether I myself delivered the check to the treasurer, or to his deputy, whether I mailed it to him, or whether I sent some one from my office to do it. I can't remember the particular circumstance of paying it. I simply remember the fact that I did pay it." He also testified he had no checks or stubs running back of the year 1905 or 1906, and no receipts for personal property taxes before the year 1902. Subsequent to that time he had upon two occasions moved his offices. The effect of the appellant's evidence is that he is morally certain that the tax in question has been paid. As already stated, according to the books of the county treasurer's office, the personal property tax of the appellant for the year 1900 had not been paid. The cause was tried to the court without a jury, and the court dismissed the action. From the judgment of dismissal this appeal is prosecuted.

The question to be determined is: Do the facts stated, taken in connection with the lapse of time during which the tax was permitted to lie dormant, raise a presumption of fact that the tax in question had been paid? No statute of limitation is involved here. Indeed, the appellant in his brief concedes as much, for it is therein stated: "We invoke no limitation statute in bar of the attempt to enforce the payment of the tax, for there is no such statute applicable. What we ask is consideration of a rule of evidence, of a presumption established by the wisdom of the ages, that because of the lapse of so great a period of time as here appears, taken in connection with the other circumstances surrounding it, the tax is deemed to have been paid."

[2] Independent of any statute of limitations, lapse of time, when taken into consideration with other circumstances, may be sufficient to raise a presumption of fact that a debt has been paid, but lapse of time alone is not sufficient. *Jones on Evidence* (2d Ed.) § 65; *Smith v. Tharp*, 17 W. Va. 221. What circumstances are sufficient, when taken in connection with lapse of time, to cause a presumption of payment, cannot be accurately defined, but each case must depend upon the facts there presented. In 9 Ency. of Evidence, p. 714, this doctrine is stated as follows: "(a) The presumptions are rebuttable, and may be overthrown by any evidence showing it to be more probable than otherwise that the debt has not been paid; (b) but a shorter period coupled with other circumstances tending to show payment may be sufficient to warrant a jury in making an inference of payment. There is no precise rule as to the quantity or quality of other evidence necessary. Each case must depend upon its own circumstances." This presumption of payment does not operate as a bar, but is simply a rule of evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence affecting the burden of proof. In re Ash's Estate, 202 Pa. 422, 51 Atl. 1030, 90 Am. St. Rep. 658.

[3] The presumption of payment arising from lapse of time and circumstances applies to tax obligations as well as other debts. 2 Wharton on Evidence, § 1360; 1 Rice on Evidence, p. 70; Hopkinton v. Springfield, 12 N. H. 328.

The final question is, Are the facts stated sufficient to justify the court in making a finding of fact that the personal property tax for the year 1900 has been paid? The probative value of these facts would be greater had it not been for the evidence that the real property taxes of the appellant for the same year were also permitted to become delinquent. We think the evidence is not sufficient to enable the court to conclude as a matter of fact that the tax in question has been paid.

The judgment will therefore be affirmed.

MOUNT, ELLIS, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting). I think the evidence preponderates in favor of the view that the taxes were paid. For this reason, I dissent from the conclusion of the majority.

(72 Wash. 306)

BOYD v. PRATT et al., Commissioners of Industrial Ins. Department.

(Supreme Court of Washington. Feb. 28, 1913.)

1. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—WORKINGMEN'S COMPENSATION—COMPENSATION TO DEPENDENT.

Act March 14, 1911 (Laws 1911, c. 74), relating to the compensation of injured workmen, section 5, subd. 3, of the compensation schedule, provides that, if a workman leaves a dependent, a monthly payment shall be made to each dependent equal to 50 per cent. of the average monthly support actually received by such dependent from the workman during the preceding 12 months, and further provides that, if the workman is under the age of 21 years and unmarried at death, his parents shall receive \$20 for each month after his death until he would have arrived at 21 years of age. *Held*, that the dependent mother of an employe 19 years of age when he was killed was entitled to an allowance of \$20 a month so long as her dependent condition continued, and not merely until decedent would have arrived at the age of 21 years; the latter provision only referring to cases of nondependency by beneficiaries.

2. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—ATTORNEY'S FEES—POWER OF SUPREME COURT.

Act March 14, 1911 (Laws 1911, c. 74) § 20, makes it unlawful for an attorney engaged in an appeal in a case involving compensation to a workman to receive more than a reasonable fee to be fixed by the court, and provides that in other respects the practice in civil cases shall apply, and appeals shall lie from the judgment of the superior court as in other civil cases. *Held* that, on appeal from an order making an allowance for a workman's death,

the Supreme Court could not allow an attorney's fee or increase that allowed by the superior court.

Department' 1. Appeal from Superior Court, King County; John F. Main, Judge.

Proceedings by Catherine Boyd against C. A. Pratt and others, as Commissioners of the Industrial Insurance Department of the State of Washington. From a judgment for plaintiff, defendants appeal. Affirmed.

W. V. Tanner and S. H. Kellerman, both of Olympia, for appellants. Brady & Rummens, of Seattle, for respondent.

CHADWICK, J. The only question involved in this case is one of statutory construction. James Boyd, aged 19 years, was killed while in the employ of the Pacific Coast Coal Company. He had for about 18 months contributed to the support of his mother. That she was dependent upon him is admitted. In due time Catherine Boyd, the mother, filed a claim with the industrial insurance department, and an order was entered allowing her \$20 per month until the time when James Boyd would have arrived at the age of 21 years. From this order an appeal was taken to the superior court, where the order of the department was reversed, and an order allowing \$20 a month so long as the dependency continued was entered. From this order the department has appealed.

[1] Both the department and the respondent rely upon the same statute (subdivision 3 of the compensation schedule, being section 5 of the act of March 14, 1911 (Laws 1911, c. 74)), relating to compensation of injured workmen. The statute, so far as it is pertinent to our inquiry, reads as follows: "If a workman * * * leaves a dependent * * * a monthly payment shall be made to each dependent equal to 50 per cent. of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed \$20 per month. * * * If the workman is under the age of twenty-one years and unmarried at the time of his death the parents or parent of the workman shall receive \$20 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years." We think the interpretation of the statute adopted by the lower court is correct. It is quite clear to us that the Legislature must have intended that the first clause quoted should apply to cases of dependency, while the last clause refers only to cases of nondependency. This construction is in keeping with the spirit and object of the law; that is, to protect the injured, and to save dependents from becoming public charges. To hold that an allowance given because of dependency is to be cut off arbitrarily at a time when the

deceased would have attained the age of 21 years would defeat the humane purposes of the statute, for the dependency would not then cease, but might continue over a period of years. The second clause seems to have reference to that principle which, under the common law, gave a parent the right to demand and receive the wages of a minor child.

As suggested by counsel, any other construction would lead to an absurd result. The act being passed for the purpose of compensating dependents, the present order of the department would deny compensation if the death occurred one day before the deceased was 21; but, if it occurred one day after, the compensation would continue as long as the condition lasted. The material object of the statute was to protect dependents, and not to fix arbitrary limitations.

[2] Section 20 of the act provides that: "It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the superior court as in other civil cases." The court below fixed an attorney's fee of \$60, to be paid to the attorneys for the respondent. We are asked to make a more liberal allowance inasmuch as respondent has been put to the expense and delay of an appeal. The only warrant in the law for fixing an attorney's fee at all is to be found in the statute just quoted. The power to fix fees is there limited to the superior court. The only rights that can be claimed on appeal to this court are such as are given by the general appeal statutes, the provision fixing our right of review being: "Appeal shall lie from the judgment of the superior court as in other civil cases." We find nothing in our appellate procedure which would warrant us in allowing an attorney's fee in this or similar cases. The motion for an additional fee is denied.

Judgment affirmed.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

(72 Wash. 403)

SEATTLE NAT. BANK v. DICKINSON
et al.

(Supreme Court of Washington. March 8, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 226*)—
PRESENTATION OF CLAIMS—NOTICE TO CREDITORS—"DATE OF NOTICE."

Under Rem. & Bal. Code, § 1470, providing that the notice to creditors of a decedent's estate shall require presentation of claims with-

in one year after the date of the notice, a notice dated September 16th and first published September 17th, requiring presentation within one year after the first publication, was sufficient; "the date of the notice" within the meaning of the statute being the date of the first publication.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 806-810; Dec. Dig. § 226.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1830, 1831.]

2. EXECUTORS AND ADMINISTRATORS (§ 226*)—
PRESENTATION OF CLAIMS—NOTICE TO CREDITORS.

Under Rem. & Bal. Code, § 1470, requiring executors or administrators to publish a notice to creditors as often as the court shall deem necessary, but not less than once a week for four successive weeks, a notice published the length of time required by an order of the court was not insufficient because the order was not made until after publication had commenced, where the court afterwards adjudged that due and legal notice had been given.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 806-810; Dec. Dig. § 226.*]

3. EXECUTORS AND ADMINISTRATORS (§ 228*)—
PRESENTATION OF CLAIMS—WHAT CONSTITUTES PRESENTATION.

Under Rem. & Bal. Code, § 1474, providing that, when a claim has been presented to an executor or administrator, he shall indorse thereon his allowance or rejection, and, if he reject it, notify the claimant, and section 1475, providing that, after a claim has been allowed by the executor or administrator and the judge, it shall be filed in court, a claim was not sufficiently presented where the claimant went several times to the office specified in the notice to creditors, but failed to find the executor there, and, after the time for presentation, left the claim with an employé in the office.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 819-826, 827½; Dec. Dig. § 228.*]

4. EXECUTORS AND ADMINISTRATORS (§ 232*)—
PRESENTATION OF CLAIMS—EXCUSES.

Under Rem. & Bal. Code, § 1472, providing that, if claims against a decedent's estate are not presented within one year after the first publication of the notice to creditors, they shall be barred, and section 1479, providing that no holder of a claim shall maintain an action thereon, unless the claim is first presented to the executor or administrator; an executor or administrator cannot waive presentation of claims, the provision of section 1479 being mandatory, and for the protection of estates, and not for the protection of the executor or administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 830; Dec. Dig. § 232.*]

5. EXECUTORS AND ADMINISTRATORS (§ 232*)—
PRESENTATION OF CLAIMS—EXCUSES.

A promise by executors who were also sole devisees and legatees to pay a note on which their testator was an indorser did not estop them to rely on nonpresentation of the claim as a defense, since they could not by their promise estop creditors whose rights might be adversely affected, especially where the claimant did not rely upon the promise, but attempted to present his claim in a legal way.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 830; Dec. Dig. § 232.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Seattle National Bank against George E. Dickinson and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions to dismiss.

C. H. Winders, of Seattle, for appellants. Bausman & Kelleher, of Seattle, for respondent.

GOSE, J. This suit was brought against the executors of the estate of George W. Dickinson to recover upon a rejected claim. The executors have appealed from an adverse judgment.

[1] The notice to creditors called for the presentation of claims to the executors at room 337, Burke Building, in the city of Seattle, "within one year after the first publication" of the notice. The notice was dated September 16, 1909, and indorsed at the foot "first publication September 17, 1909." The place of business named in the notice was used as an office by the Pacific Engineering company, a corporation, and by the executors. The statute (Rem. & Bal. Code, § 1470) provides that the notice to creditors shall require a presentation of the claim "within one year after the date of such notice." The date of the notice is the date of its first publication. This is the clear meaning of the statute. The notice in this respect complies with the law.

[2] Section 1470 further provides that every executor or administrator shall, "immediately after his appointment," cause to be published a notice to creditors, and "such notice shall be published as often as the court shall deem necessary, but not less than once a week for four successive weeks." The notice was published five consecutive weeks, beginning on the 17th day of September, 1909. There was no order of the court fixing the number of publications, until the 20th day of September, three days after the date of the first publication. An order was then entered, directing that the notice be published "at least once a week for four consecutive weeks." On the 16th day of September, 1910, an order was entered reciting that the notice had been published four weeks successively, commencing on the 17th day of September, 1909, and ending on the 15th day of October following, and adjudging that due and legal notice had been given, and that the time for the presentation of claims against the estate would expire on the following day.

The contention of the respondent, that the words of the statute, "as often as the court shall deem necessary," mean that the order of the court determining the number of publications is a condition precedent to the publication of the notice, is not warranted by the language of the statute as an entirety. The notice must be published "as often as the court shall deem necessary," and not less than once a week for four successive weeks. This order may be taken at any time

before final settlement of the estate. We have held that the publication of the notice by an executor of a nonintervention will may precede the adjudication of solvency. *Strand v. Stewart*, 51 Wash. 688, 99 Pac. 1027. The respondent in support of its contention has cited *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064. The California statute construed in that case provided that the notice "must be published as often as the judge or court shall direct," etc. The court said that, without the order, there can be no legal period of publication, and no authority for publishing, and that until the judge or court "acts it cannot be known whether the period of publication will exceed the statutory minimum or not." We think that the authority for publishing the notice comes from the statute, and not from the order of the court. It is true that it cannot be known in advance of the order how many publications the court may deem necessary. This fact, however, does not render ineffectual a publication which has run the minimum period required by the statute, and has been approved by the court. The object of the statute is notice, and, as this court has said in construing the factory act, "notice is notice." When the notice has been published the minimum period provided by the statute without an order of the court fixing the number of publications, the court may formally approve its sufficiency or direct a republication for such time as in its discretion it may deem necessary. This burden is, of course, assumed by an executor or administrator who publishes the notice in advance of an order fixing the period of publication.

[3] The court found that the claim was duly presented to the executors on the 3d day of September, 1910, and several times thereafter; the last presentation being on or about the 1st day of October, 1910. This is more a conclusion of law than of fact. The finding is erroneous. There is evidence that the respondent's attorney took the claim to the office designated in the notice on the 3d day of September, 1910, and two or three times thereafter, before the 1st day of October, that he found the office closed, and that he finally left the claim with an employé in the office on the 5th day of October. There is also evidence to the effect that the office was kept open continuously; that one of the executors was in Seattle the greater part of the month of September, 1909; that his headquarters were at the office; that the Pacific Engineering Company, a corporation of which one of the executors was an officer, had its office at the place designated in the notice; and that the secretary of the corporation with whom the claim was finally left made the office his headquarters.

There was no presentation of the claim within one year after the first publication of the notice. It is not pretended that the claim was left at the office designated in the no-

tice within the year. Rem. & Bal. Code, § 1474, provides that, when a claim properly verified has been presented to the executor or administrator, he shall indorse thereon his allowance or rejection with the day and date thereof; and that, if he reject it, he shall notify the claimant forthwith of the rejection. Section 1475 provides that, after a claim has been allowed by the executor or administrator and judge, it shall be filed in court. The mere physical act of going to the place of business of the executors named in the notice, with an intention to present a claim, is not a presentation. Nor does the temporary absence of the executor from the place named in the notice relieve a claimant of the duty to present his claim as a condition precedent to the maintenance of a suit to enforce liability upon it. *Walker v. Cheever*, 39 N. H. 420. Respondent has cited *Roddan v. Doane*, 92 Cal. 555, 28 Pac. 604. In that case the notice to creditors required them to present their claims to the administratrix at the office of E. W. McGraw, California street, San Francisco. The plaintiff went to the office indicated, and, the administratrix not being present, left his claim for her, and took a receipt for it signed by McGraw through his clerk. The court held that "the claim was presented when left at the office." This view does not strengthen the respondent's case.

[4] The testimony shows that the executors promised to pay the notes evidenced by the claim, and that they made small payments upon each of the several notes early in January, 1910. These payments, however, we find were not made from funds belonging to the estate, but from money loaned to the executors by their mother out of money which she had received upon a policy upon the life of her husband, the testator, in which she was named as the beneficiary, and from the funds of the Pacific Engineering Company, the principals upon the note; the testator having indorsed it before delivery. It is argued that the promise of the executors to pay the notes, and the payments to which reference has been made, operated as a waiver of the right to demand a presentation of the claim in accordance with the statute. Rem. & Bal. Code, § 1472, provides: "If a claim be not presented within one year after the first publication of the notice, it shall be barred." Section 1473 provides the manner of verifying claims. Section 1479 provides: "No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator." This section is mandatory. *Ward v. Magaha*, as Ex'r, 129 Pac. 395; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482. In the *Ward Case* we said: "The general rule is that an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased; that he is bound by the

statute, and cannot waive, as against the heirs or devisees, any requirement of the statute. * * * Since those decisions [meaning decisions of this court] the statute must be taken as it reads, and the presentation is a fact essential to the cause of action as much as the instrument sued on." The respondent has cited, among other cases in support of this contention, *Seymour v. Goodwin*, 68 N. J. Eq. 189, 59 Atl. 93. It holds that the provision of the statute requiring the presentation of verified claims was intended primarily for the protection of the executor or administrator, and that statutory provisions for the benefit of private or personal rights, and not affecting public rights or policy, may in general be waived. This is in direct conflict with the *Ward Case*, where we said: "The statute is designed for the protection of estates and to bar a recovery."

[5] The respondent invokes the doctrine of estoppel. The basis of this claim is that the executors are the sole devisees and legatees. There are two reasons why this contention is not sound: (1) The claimant did not reply upon the promise, but sought and failed to present his claim in a legal way; and (2) the executors cannot by any promise of their own estop creditors who have properly presented their claims for allowance and whose rights might be adversely affected.

The judgment is reversed, with directions to dismiss the action.

CROW, C. J., and MOUNT, CHADWICK, and PARKER, JJ., concur.

(23 Idaho 363)

QUIRK v. SUNDERLIN.

(Supreme Court of Idaho. Feb. 11, 1913.)

1. MASTER AND SERVANT (§ 80*)—ACTION FOR SPECIAL COMPENSATION — SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to support the verdict and judgment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

The following two instructions, when taken and considered together, held to correctly state the law applicable in a case where a servant sues for a special and additional compensation over and above the regular wage or salary:

"(a) If you find from the evidence that the plaintiff has performed services for the defendant with defendant's knowledge and consent, and the defendant voluntarily took the benefit thereof, then the law will presume that the plaintiff should be paid by the defendant for those services, unless the contrary is shown by the evidence; and if no special contract is shown, fixing the price, then plaintiff would be entitled to recover what the services are reasonably worth.

"(b) Where an employé, who is working for stipulated wages, performs extra work for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

employer, there is a presumption, in the absence of an express or clearly implied agreement to the contrary, that no extra compensation is to be paid therefor, and that payment for that extra work is included within the regular wages; but this presumption does not extend to extra work performed for persons other than the employer."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

3. MASTER AND SERVANT (§ 80*)—COMPENSATION OF SERVANT—BURDEN OF PROOF.

Where a servant or employé is in the regular employ of the master or employer, at a stated wage or salary, in order to recover for special services or extra work performed during the same period of time, the burden is cast upon the employé to show by a preponderance of the evidence that the work was extra work outside of and beyond the scope of the employment, and that there was either an express or a clearly implied contract and agreement to pay extra for the special work so performed, and that it was not intended that such work should fall within the general employment of the servant, or be compensated for by the regular wage or salary paid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Mary A. Quirk against Pearl I. Sunderlin. From a judgment for plaintiff, defendant appeals. Affirmed.

E. J. Frawley, of Boise, and Chas. A. Sunderlin, of Burley, for appellant. Edwin Snow, of Boise, for respondent.

AILSHIE, C. J. This action was instituted by respondent to collect from the appellant a certain sum for special services rendered in the collection of accounts. The respondent was in the employ of the Boston Grocery, a partnership of which appellant was a member, and was serving the company as stenographer, collector, and bookkeeper; and she alleged that during a certain period of time she did extra service for appellant, for which she was to have extra pay in the matter of collecting accounts. The trial resulted in a verdict and judgment in favor of the plaintiff in the sum of \$200, and an appeal has been prosecuted.

[1] The appellant assigns two errors: First, the insufficiency of the evidence to support the verdict; and, second, the error of the court in giving two instructions. Upon the question of the sufficiency of the evidence, we are forced to the conclusion which we have frequently expressed in other cases, namely, that while it is true that "the evidence is meager and rather indefinite, under the rule that has been adopted and uniformly followed by this court, it is quite clear to us that the evidence made a prima facie case, and was sufficient to go to the jury." *Mineau v. Imperial Dredge Co.*, 19 Idaho, 462, 114 Pac. 24. We are not able to say that there is no substantial evidence whatever to support this verdict, and we can-

not therefore disturb the verdict on the ground of insufficiency of the evidence.

[2] The court gave the following two instructions (a) and (b):

"(a) If you find from the evidence that the plaintiff has performed services for the defendant with defendant's knowledge and consent, and the defendant voluntarily took the benefit thereof, then the law will presume that the plaintiff should be paid by the defendant for those services, unless the contrary is shown by the evidence; and if no special contract is shown, fixing the price, then plaintiff would be entitled to recover what the services are reasonably worth.

"(b) Where an employé, who is working for stipulated wages, performs extra work for the employer, there is a presumption, in the absence of an express or clearly implied agreement to the contrary, that no extra compensation is to be paid therefor, and that payment for that extra work is included within the regular wages; but this presumption does not extend to extra work performed for persons other than the employer."

It is contended by counsel for appellant that, under the peculiar facts of this case, the foregoing instructions were erroneous and misleading. The respondent, the plaintiff in the lower court, was in the regular employ of the Boston Grocery, of which appellant was a member; and it is contended that, where a servant is in the employ of the master, the performance of services for the master, or a request from the master to perform services, or a direction from him as to the character or manner of performance of services, carries with it no implied promise to pay additional salary or wages, or any implication of any special contract other than the regular contract of employment. The position of appellant in this respect is clearly supported by the authorities. *Ross v. Hardin*, 79 N. Y. 84.

[3] Instruction (a) clearly stated the general rule of law with reference to the performance of services by the servant, with the knowledge and consent of the master. This instruction, standing alone, would have been misleading to the jury in this particular case. We think, however, instruction (b) sufficiently explained the exception to the general rule, and gave the jury the correct view of the law applicable in this class of cases. Where a servant is in the employ of the master, at a regular wage or salary, in order to recover for special services or for extra work, the burden should be cast upon the employé to show clearly that the work was extra, and that there was either an express agreement or a clearly implied agreement to pay extra for the special work performed, and that it was not intended to fall within the general employment of the servant, or be compensated for by the regular wage or salary paid. *Cany v. Halleck*, 9 Cal. 198; *Houghton v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Kittleman, 7 Kan. App. 207, 52 Pac. 898; Forster v. Green, 111 Mich. 264, 69 N. W. 647.

The two instructions, taken together, correctly state the law of the case, and there was no error committed by the court in giving them to the jury.

Upon the whole record in the case as presented to us, no error or reason is shown that would justify a reversal of the judgment. Judgment is affirmed, with costs in favor of the respondent.

SULLIVAN and STEWART, JJ., concur.

(23 Idaho, 282.)

JARRETT v. PROSSER et ux.

(Supreme Court of Idaho. Feb. 13, 1913.)

1. EVIDENCE (§ 411*)—PAROL EVIDENCE AFFECTING WRITING—COMPLETENESS OF WRITING.

Where parties have entered into a contract or agreement which has been reduced to writing, in the absence of fraud or mistake, if the writing is complete upon its face and unambiguous, parol evidence is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract; but this rule does not apply where it appears from the evidence that the agreement was a mere informal memorandum, incomplete on its face, and not intended by the parties to exhibit the whole agreement, but merely to define some of its terms. The writing is conclusive as far as it goes; but such parts of the actual agreement as are not embraced within its scope may be established by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 411.*]

2. VENDOR AND PURCHASER (§ 299*)—RIGHTS AND LIABILITIES OF PARTIES—FORFEITURE OF CONTRACT—EVIDENCE.

Evidence examined and held to support the findings.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. § 299.*]

3. VENDOR AND PURCHASER (§ 299*)—RIGHTS AND LIABILITIES OF PARTIES—FORFEITURE OF CONTRACT—FINDINGS AND JUDGMENT.

The findings examined and found to support the judgment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. § 299.*]

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by Ada E. Jarrett against D. D. Prosser and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

McFarland & McFarland, of Cœur d'Alene, for appellants. Black & Wernette, of Cœur d'Alene, for respondent.

STEWART, J. Ada E. Jarrett instituted this suit against D. D. Prosser and Mary Prosser, his wife, in the district court of Kootenai county, this state. The action was brought for the purpose of having a certain

written contract, dated August 16, 1910, made between the respondent and the appellants, declared forfeited.

The action is based upon the following provisions of the contract: "Witnesseth that, if the parties of the second part shall first make the payments and perform the covenants hereafter mentioned on their part to be performed, the said parties of the first part hereby covenant and agree to convey to the said parties of the second part in fee simple, free and clear of all incumbrances whatever by a good and sufficient warranty deed, the following described parcels of land situated in the county of Kootenai, state of Idaho, and known and described as follows: "All that part of lot ten (10), sec. thirty-three (33), twp. forty-nine (49) N., range one (1) W., B. M.; and all that part of lots three and five in section four (4), twp. forty-eight (48) N., range one (1) W., B. M., and lying west of the county road as now surveyed through said lots ten, three and five above mentioned, and consisting of 64 acres, more or less; except and reserving therefrom one acre of land in lot three above mentioned, on which the schoolhouse now stands, said reservation to continue so long as said land is used for school purposes. And said parties of the second part hereby covenant and agree to pay to said parties of the first part therefor the sum of \$3,600 in the manner following: \$700 on the signing and delivering of this contract, and the further sum of \$500 or more on the 16th day of August of each and every year hereafter until the balance of \$2,900 shall have been fully paid, with interest at the rate of 6 per cent. per annum to be paid semi-annually on the balance remaining unpaid. Said parties of the second part further agree to pay all taxes and assessments that may legally be levied or imposed upon said land subsequent to the year 1910, it being hereby agreed that said first party shall pay the taxes on said land for the year 1910. And it is further agreed between the parties hereto that said first party shall, on or before the 1st of December, 1912, at the option of said second parties, give to said second parties a warranty deed of the land herein described, free from all incumbrances, and accept a mortgage from the said second parties on said land for any balance remaining unpaid under this contract. And it is further agreed between the parties hereto that if said second parties shall not desire or call for a deed of said premises with a mortgage back as in the paragraph above specified that said first parties shall procure, on or before the 1st day of December, 1912, a release of a certain mortgage, for \$3,600, covering the premises herein described with other lands of said first parties, so far as the same shall cover the land herein mentioned. And it is further agreed that said second parties shall keep the dwelling

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

house on the land herein described insured in the sum of \$500 in some reliable insurance company, in favor of the first parties, during the life of the contract; and that they will, at all times keep said lands and premises in good repair. And it is further covenanted and agreed between the parties hereto that time is, and shall be, of the essence of this contract; and in case of a default or failure of said parties of the second part to make the payments or any part thereof, or to perform any of the covenants on their part to be performed, this contract shall, at the option of the parties of the first part, be forfeited, and said parties of the first part may re-enter said premises and repossess the same and retain any, and all, payments made on this contract as liquidated damages for the nonperformance of this contract. And it is further agreed between the parties hereto that the covenants and agreements contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties thereto."

The complaint alleges compliance with all the terms of the contract, and noncompliance on the part of the defendants in the failure to pay \$500 on the 16th day of August, 1911, or since that time; that the plaintiff has at all times been able to comply, and has complied, with all the terms of said written contract. The relief asked is the right to re-enter the premises, and that the defendants deliver up the possession of the property, and that plaintiff be declared to have the right to retain all payments made under said contract, according to the terms of the contract, as liquidated damages for the nonperformance of the contract.

The defendants filed an answer and admitted the making of the contract of August 16, 1910, and denied plaintiff's compliance with the terms of the contract, and denied that the defendants had not complied with the terms of the contract, or that they did not pay the sum of \$500, as provided for in the contract, on August 16, 1911, or since that time, and denied that the plaintiff was able to comply, or has complied, with any of the terms of the written contract; and as a further answer, and for affirmative relief, the defendants alleged affirmatively the execution of the contract, and that said contract was recorded on the records of Kootenai county on the 3d day of November, 1910, and that, at the time that plaintiff and her husband entered into said agreement, they were not in a position or able to give to defendants a clear title to the lands and premises, and that there were in full force and effect two certain mortgages against the lands and premises which then remained, and still remain, unpaid and unsatisfied, and that plaintiff and her husband could not convey a good and sufficient title to the premises without first liquidating and satisfying said mortgage; that, at the time of the execution of

said written contract and agreement, the two mortgages remained of record in the office of the county recorder, one mortgage for the sum of \$3,000, and the other for \$600. These two mortgages are set forth in the answer.

It is also alleged in the answer that, at the time of the execution of the contract of August 16, 1910, the defendants paid plaintiff \$700, and since that time have also paid the taxes upon the lands and premises. It is then alleged that on or about the 11th day of September, 1911, the plaintiff and the defendants ascertained that plaintiff was not in possession or able to deliver a warranty deed conveying the premises, on account of the existence of the mortgages; and it was mutually agreed by and between the plaintiff and said defendants that, instead of defendants making the payments to the plaintiff mentioned and specified in the contract, the said defendants liquidate, pay, and procure the satisfaction of said two mortgages, and that plaintiff should sign a memorandum of agreement, and also a warranty deed, conveying said property and premises to the defendants, and that said memorandum of agreement and said warranty deed should be, and the same were, placed in escrow in the Union Trust & Savings Bank of Spokane, Wash.; that said memorandum of agreement, executed and signed by the plaintiff, is in words and figures as follows:

"Spokane, Washington, September 11th. To Union Trust & Savings Bank, Spokane, Washington: You are hereby instructed to deliver to D. D. Prosser, Cœur d'Alene, Idaho, the papers inclosed within this envelope, to wit: Warranty deed, Ada Jarrett to D. D. Prosser, free and clear of all incumbrance upon delivery to this bank of a copy of recorded release of a certain mortgage in the sum of \$3,000, dated 12-28-'08, due 12-1-1918, covering lot 10, sec. 33-49-1, and lots 3 and 5, sec. 4-48-1, and the N. E. ¼ of sec. 4-48-1. W. B. M., recorded book 8, page 379, December 29, 1908, also second mortgage in the sum of \$600. These papers are left with you in escrow, and you are hereby released from any and all liability or claim whatsoever by receiving and delivering said papers.

"[Signed] Mrs. Ada E. Jarrett.

"Witness: [Signed] H. E. Fraser."

The warranty deed was placed in the envelope upon which this escrow agreement was written. This warranty deed was of the property described in the contract of August 16, 1910, and was executed by Mrs. Ada E. Jarrett and her husband.

It is also alleged that, prior to the placing of these two documents in escrow, the plaintiff caused to be paid \$300 of the \$600 mortgage. Then follow allegations that the property was described by mistake as being in Kootenai county, Wash., instead of Kootenai county, Idaho, and that the deed should have been reformed. Allegations then follow that the defendants have in all respects complied

with the escrow agreement and with all agreements entered into between the plaintiff and defendants, and intended to satisfy the two mortgages when they become due and payable, and to take up the warranty deed, and intended to keep the premises insured, as provided for in the agreement, and to perform every matter and thing specified in said memoranda of agreement to be kept and performed.

An answer was filed by plaintiff to the cross-complaint, in which the plaintiff denies that on or about the 11th day of September, 1911, said plaintiff and these defendants discovering and ascertaining that plaintiff was not in possession of or able to deliver to defendants a warranty deed conveying to them said lands and premises on account of or by reason of said mortgages, it was mutually agreed by and between plaintiff and defendants that, instead of defendants making the payments to plaintiff mentioned, the defendants pay and procure the satisfaction of said two mortgages, and that plaintiff should sign a memorandum of agreement, and also a warranty deed, conveying said property to defendants, and that said memorandum of agreement and said warranty deed should be, and the same were, placed in escrow in the Union Trust & Savings Bank; and denies that the memorandum of agreement was as set forth in the cross-complaint; and admits that a warranty deed was left in escrow, as set forth in said cross-complaint; but denies that the defendants are entitled to said deed, or to have the same delivered to them according to the agreement; and alleges the fact to be that on the 11th day of September, 1911, plaintiff agreed with the defendants that, if the defendants could, within three weeks after said date of September 11, 1911, procure or raise the money in the amount sufficient to liquidate and pay and satisfy said two mortgages, plaintiff, in order to have said mortgages immediately satisfied and released, and not be compelled to wait until said mortgages became due to have them satisfied and released, agreed with defendants that plaintiff would place a warranty deed to the lands and premises in escrow; and if the defendants could raise the amount within the time (three weeks after September 11, 1911), as agreed upon, and release and satisfy said two mortgages, and would procure the release of said mortgages, and present said releases and said mortgages to the escrow holder of said deed within three weeks' time after September 11, 1911, that then the escrow holder should deliver to the defendants the warranty deed. The fact is also alleged to be that there was no agreement of any kind that any memorandum of agreement be placed in escrow, and that the only agreement was, as heretofore stated, that, if said defendants paid the two mortgages and filed the releases with the escrow holder, the deed was to be delivered to defendants; and

upon such agreement the deed was prepared and placed in escrow, and the plaintiff signed her name on the envelope of escrow, and it was understood that she was simply directing, by the writing on said envelope, that, in case the defendants released said two mortgages and presented to said escrow holder the said releases within three weeks, then the said escrow holder should deliver said deed to defendants, and, if said releases of mortgages were not so presented, that said deed was to be delivered back to the plaintiff. It was also alleged affirmatively in said answer that plaintiff signed the escrow agreement without examining the same carefully, and overlooked the contents of the agreement as to whether it carried out the agreement made, and did not know at that time that the escrow agreement did not contain that part of the agreement made as to the time of presenting the releases and satisfaction of the mortgages, and did not learn the same until some time thereafter; and alleges affirmatively that it was understood and agreed that, in order to entitle the appellants to a deed, they were to satisfy the mortgages and present to the escrow holder the releases thereof within a period of three weeks after September 11, 1911; that there was no consideration passed between the parties for the making of said escrow agreement. The answer then contains allegations as to the forfeiture of said contract by failure on the part of the defendants to comply with the terms thereof, and the plaintiff's demand for possession of the property, and for the return of the deed.

Upon these issues, the cause was tried to the court, and findings of fact and conclusions of law were made by the trial court, and judgment was rendered for the plaintiff.

The findings of fact, in substance, are that the land described in the complaint was owned by the plaintiff on the 16th day of August, 1910; that on that day the contract sued upon was executed by the plaintiff and the defendants; that, at the time the contract was executed, there was in full force and effect two mortgages against said land which were then unpaid, one of which had been partially paid, and at such time the plaintiff and her husband could have conveyed to the appellants a sufficient title to said premises; that, at the time the contract was made, \$700 was paid to the plaintiff on said contract according to the terms thereof, and, since the contract was made, the defendants have paid the taxes on said lands; that on September 11, 1911, the plaintiff and the defendants mutually agreed that, if the defendants would liquidate, pay, and procure the satisfaction of the two mortgages within a period of about three weeks after September 11, 1911, plaintiff would give the defendants a warranty deed to said property mentioned in the contract, and would sign an escrow memorandum, and also a war-

warranty deed conveying said property and premises to defendants; that said warranty deed should be placed in escrow in the Union Trust & Savings Bank of Spokane, Wash., so that when the defendants within said three weeks, as agreed upon, procured the satisfaction and release of said two mortgages, and delivered said releases to the escrow holder, the Union Trust & Savings Bank of Spokane, then said escrow holder could deliver said warranty deed so placed in escrow to these defendants, in case they had liquidated, paid, and procured the satisfaction of said two mortgages within said three weeks' time from September 11, 1911, as agreed upon; and that, after said agreement was made, plaintiff signed a warranty deed to said property, which deed was placed in escrow in the bank, and the escrow agreement was made.

The court further finds that the defendants did not within the time agreed upon (three weeks after September 11, 1911), or at any time since, up to the time of the trial of the action, comply with or attempt to comply with their said agreement, which was that said defendants would liquidate, pay, and procure the satisfaction and release of the two mortgages, and take up the deed which was placed in escrow; that, prior to the placing of the deed in escrow, the plaintiff and her husband paid \$300 of the \$600 mortgage, according to the provisions of the note, and received a receipt therefor; that the defendants have not in any respect complied with the escrow memorandum and with the agreement which was entered into by the plaintiff and the defendants as to the time in which the defendants should liquidate, pay, and procure the satisfaction of the mortgages; and that the defendants are in default in not complying with said escrow memorandum and with said agreement.

The court further finds that, by the provisions of the notes and mortgages which defendants agreed to have released and satisfied, there was interest due on said notes and mortgages on December 1, 1911, and that defendants have not at any time paid said interest, or caused the same to be paid, up to the time of the trial of the action. The court further finds that the agreement between plaintiff and defendants as to the liquidation, payment, and satisfaction and release within three weeks after September 11, 1911, of the mortgages was a separate and distinct agreement between the parties, and did not nullify or become a substitute for the written agreement between plaintiff and defendants, dated August 16, 1910; that the defendants were in default and failed to comply with the terms of the written agreement dated August 16, 1910, in this, that they failed to comply with that part of the contract which provides that defendants should pay to the plaintiff the sum of \$500 or more on the 16th day of August of each

year following the date of the execution, the first payment to be made August 16, 1911, and that defendants failed to make said payment of \$500 at said time or at any time, and have not paid the same; that time was the essence of the contract, and in the contract it was provided that, in case of default or failure of the parties to make the payments or any part thereof or perform any of the covenants on their part to be performed, the contract, at the option of the parties of the first part, was to be forfeited; that the contract provided that the parties of the first part might re-enter the premises and repossess the same and retain any and all payments made under the contract as liquidated damages for the nonperformance of the contract; that the payment of \$500 was not made on August 16, 1911, as required by the contract.

As conclusions of law, the court found that the agreement made between the plaintiff and the defendants that defendants would, within about three weeks after September 11, 1911, liquidate, pay, and procure the satisfaction and releases of the two mortgages described above in these findings, and deliver said releases or copies thereof to the Union Trust & Savings Bank at Spokane, Wash., and take up a warranty deed which was placed there in escrow by plaintiff, did not supersede or become a substitute for or nullify the written agreement dated August 16, 1910, but was a separate and distinct agreement between the parties; that plaintiff exercised her option to forfeit said written contract dated August 16, 1910; that plaintiff is entitled to have said written contract forfeited according to its terms; that plaintiff is entitled to a decree giving her the right to re-enter said premises and take possession of and repossess the same; that plaintiff is entitled to judgment compelling defendants to deliver up the possession of the premises described in the contract of August 16, 1910, and giving her the right to retain any and all payments made to her on said above-described property by the defendants, according to the terms of the written contract.

Judgment was rendered accordingly. A motion for a new trial was made and overruled. The appeal is from the judgment and from the order denying the motion for a new trial.

It is apparent, as disclosed by the record in this case, that the respondent and appellants entered into a contract on the 16th day of August, 1910, wherein the respondent and her husband agreed to convey to appellants certain real property described in the complaint upon the payment of the sum of \$3,600; the payments to be made as follows: \$700 to be paid upon the signing and delivering of the contract, and the further sum of \$500 on the 16th day of August of each year thereafter, with interest at the

rate of 6 per cent. per annum, to be paid semiannually, on the balance remaining unpaid. The appellants also agreed to pay all taxes subsequent to the year 1910. It was also agreed that on the 1st of December, 1912, at the option of the said parties of the second part, the respondent and her husband would give to appellants a warranty deed to the said land, free from all incumbrances, and accept a mortgage from appellants for any balance remaining unpaid under the contract. It was also further provided in the contract that, if the appellant did not exercise the option as above stated, then the first parties, on or before the 1st day of December, 1912, would procure the release of a certain mortgage covering the premises, the mortgage being for the amount of \$3,600, and that the buildings would be insured for the sum of \$500 in favor of the respondent. It was provided in said contract that, if the appellants failed to make the payments at the time and in the manner therein specified, the contract would be, at the option of the respondent and her husband, forfeited, and the appellants would lose, as liquidated damages, the sums of money paid thereunder. It seems as, though the conditions of the contract as to payments, and the ability of the respondent to make the conveyance of a clear title under the terms of the contract, were not complied with upon the part of either party; and the parties negotiated together, and finally made an additional contract whereby the contract was changed, and it was mutually agreed between them that instead of the appellants making the payments to the respondent, specified in the contract, the appellants would liquidate, pay and procure the satisfaction of the outstanding mortgages, and that the respondent would sign a memorandum agreement and also a warranty deed conveying the premises to the Prossers, and that the deed and agreement should be placed in escrow in the Union Trust & Savings Bank at Spokane, and that the same was, according to agreement, placed in escrow in the bank; and in such agreement it was provided that the warranty deed from Jarrett to Prosser, free and clear from incumbrances, should be delivered to Prosser upon the delivery to the bank "of a copy of a recorded release of a certain mortgage in the sum of \$3,000, dated 12-28-'08, due 12-1-1918 [describing the property], and also a second mortgage in the sum of \$600"; that such papers were left with the bank in escrow, and the bank released from any liability or claim whatsoever by receiving and delivering the papers.

The escrow agreement, under which such papers were deposited, did not include the entire agreement entered into by the parties at the time and as found by the trial court. It omitted the agreement of the parties that such release should be procured within

two or three weeks; and this mistake was overlooked by the respondent when she signed such memorandum. It appears, also, that the appellants did not comply with the agreement thus made; and the satisfaction of the mortgage of \$3,000, mentioned in the escrow agreement, was not secured and deposited with the bank. Because of such fact, the respondent declared a forfeiture of said contract and brought this action for the purpose of foreclosing said contract and having it declared forfeited, and for the restoration of the possession and ownership of said property, and the damages provided for in said contract.

[1] The first and second errors assigned are that the court erred in the admission of certain oral testimony with reference to the escrow agreement dated September 11, 1911, and referred to in the answer and cross-complaint and in the findings of the court. It is the contention of the appellants that this memorandum, being in writing and complete in itself, cannot be contradicted, changed, or enlarged by parol evidence, except on the ground of fraud or mutual mistake, and that the evidence objected to was offered and received for the purpose of changing and enlarging the memorandum of agreement. Respondent, however, contends that such evidence does not tend to change and vary the terms, conditions, and contents of the escrow agreement in any way whatever, but does contend that the escrow agreement is incomplete and did not contain the real agreement entered into by the parties, and that the oral testimony offered and received was a part of the real contract made, and in no way altered the escrow agreement.

It may be conceded, as contended for by appellants, that where parties have entered into a contract or agreement which has been reduced to writing, in the absence of fraud or mistake, if the writing is complete upon its face and unambiguous, parol evidence is not admissible to contradict, vary, alter, add to, or detract from the terms of the instrument. This is a universal rule of law; but this rule does not apply where it appears from the evidence that the agreement was a mere informal memorandum, manifestly incomplete on its face, and not intended by the parties to exhibit the whole agreement, but merely to define some of its terms. The writing is conclusive as far as it goes; but such parts of the actual agreement as are not embraced within its scope may be established by parol, and, where it appears from the writing itself that it is not complete, parol evidence may supply the omission. *Jones on Evidence* (Ed. de Luxe) § 440, p. 533; *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409; *Russell v. Pittsburg N. I. & C. R. Co.*, 17 Pa. Super. Ct. 195; *Walter Pratt & Co. v. Frasier & Co.*, 72 S. C. 368, 51 S. E. 983; *Sivers v. Sivers et al.*, 97 Cal.

518, 32 Pac. 571. It is also argued that the court erred in making his findings.

[2] The escrow agreement dated September 11, 1911, discloses upon its face that the placing of the deed in escrow is only one part of the agreement made by the parties with reference to the appellants' assuming and paying the mortgages and obtaining the release and obtaining the deed therefor; and such agreement omits the time that the appellants were to pay and release the mortgages which covered the property of the respondent, and clear her property which was covered by the mortgages, and release her from the responsibility of keeping up the interest on said mortgages and collecting the payments due on the contract each year from the appellants. This phase or condition of the contract is clearly set forth in the answer and cross-complaint, and the trial court found that such contract was made. From all the facts in this case, it is clear that the same was omitted from the escrow memorandum by mutual mistake; and this mistake was willful on the part of the appellants or the scrivener who wrote the memorandum, and overlooked by the respondent.

The trial court found that the escrow agreement of September 11, 1911, was a part of the agreement between the plaintiff and defendants whereby it was agreed that the defendants would liquidate, pay, and procure the satisfaction and release of the said two mortgages within three weeks after September 11, 1911; and that such agreement was a separate and distinct agreement between the parties, and did not nullify or become a substitute for said written agreement between the plaintiff and the defendants dated August 16, 1910. This finding of the trial court is supported by the evidence that it does not in any way alter or change the original agreement between the parties, but simply changed the agreement of August 16, 1910, in the obligations to be performed by the respective parties in the payment of the mortgages against the land and the delivery of the deed; and, the court having found the defendants were in default and had failed to comply with such agreement, this agreement clearly supports and justifies the findings and judgment of the trial court, when considered with the other findings made by the trial court.

[3] A number of errors are assigned addressed to the separate findings made by the trial court upon the ground that the evidence does not support the findings. Upon an examination of the evidence, we are satisfied that each of the findings made by the trial court is supported by the evidence, and that there was no error in the admission of evidence which supports such findings.

The judgment is affirmed. Costs awarded to the respondent.

SULLIVAN, J., concurs.

(23 Idaho 337)

COLBURN v. WILSON et al. (TALMADGE, Intervener).

(Supreme Court of Idaho. Feb. 6, 1918. Rehearing Denied March 5, 1913.)

1. IRRIGATION CONTRACT—VALIDITY.

Contract in this case examined and held so imperfect, indefinite, and incomplete as to render it impossible for a court to enter a decree for its enforcement or determine its real terms and provisions.

2. WATERS AND WATER COURSES (§ 224*)—"IRRIGATION DISTRICT"—"MUNICIPAL CORPORATION."

An irrigation district is a quasi municipal corporation, organized for the specific purpose of providing ways and means of irrigating lands within the district and maintaining an irrigation system for that purpose.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 315, 316; Dec. Dig. § 224.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3776; vol. 5, pp. 4620-4627; vol. 8, p. 7726.]

3. WATERS AND WATER COURSES (§ 228*)—IRRIGATION DISTRICTS—VALIDITY OF CONTRACTS.

A contract entered into by the board of directors of an irrigation district, giving to a stranger the management and control of the reservoir, dam, and main canal, and taking that management and control out of the district, would be ultra vires and void.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 228.*]

4. IRRIGATION DISTRICTS—CONDEMNATION OF CANAL.

As to whether the right to enlarge a canal belonging to an irrigation district for the purpose of carrying an additional volume of water for power purposes might be condemned by an individual or another district, *quære*.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by F. J. Colburn against R. B. Wilson and others, defendants, and C. L. Talmadge intervenes. From the judgment, the intervenor appeals. Affirmed.

Richards & Haga and McKeen F. Morrow, all of Boise, for appellant. Wood & Driscoll, of Boise, for respondents.

AILSHIE, C. J. The judgment in this case should be affirmed.

[1] In the first place, the contract is so imperfect, indefinite, and incomplete as to render it impossible for a court to enter a decree for its enforcement or to determine its real terms and provisions. It provides on its face that it is to be completed at some future time, and that it is not yet a completed contract.

[2] In the second place, the irrigation district is a quasi municipal corporation organized for the specific purpose of providing ways and means of irrigating lands within the district and maintaining an irrigation system for that purpose. Pioneer Irrigation Dist. v. Walker, 20 Idaho, 605, 119 Pac. 304;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

City of Nampa v. Nampa & Meridian Irr. Dist., 19 Idaho, 779, 115 Pac. 979; Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937.

[3] A contract by the board of directors of such a district, giving to others the management or control of any part of the system, and taking that management and control out of the hands of the district board, would be ultra vires and void. The instrument involved in this case is not a completed contract, and provides upon its face that it is to be completed at some future time. It is signed by the board of directors of the district as parties on the one hand, and appellant as the other party to the contract. By this contract it is proposed to place the management and control of the dam and reservoir and a certain part of the main canal, which supplies the water users of the district, in the hands and under the management of a stranger for his specific use, and to the apparent exclusion of the district, and thereby surrender the authority of the district over its property, which, under the law, it holds as trustee for the water users within the irrigation district. Such a contract would be contrary to the policy of the law creating the municipality, for the reason that it would afford a method of placing the dam and reservoir and distributing works in the hands of adverse or unfriendly interests.

[4] As to whether the right to enlarge a canal belonging to an irrigation district for the purpose of carrying an additional volume of water might be condemned by an individual or another district is a question not involved in this case, and one upon which we express no opinion here.

Owing to the incompleteness of the contract here involved, the facts of the case are not sufficiently before us to enable us to determine whether this case would fall within the rule announced by this court in Portneuf Irrigating Co. v. Budge, 16 Idaho, 116, 100 Pac. 1046, 18 Ann. Cas. 674.

The judgment will be affirmed, and it is so ordered. Costa awarded in favor of respondents.

STEWART, J., concurs.

(23 Idaho 344)

PIONEER IRR. DIST. v. STONE.

(Supreme Court of Idaho. Feb. 10, 1913.)

1. WATERS AND WATER COURSES (§ 228*)—IRRIGATION DISTRICTS—VALIDITY OF CONTRACTS.

Sections 2397 and 2398 of the Rev. Codes authorize the board of directors of an irrigation district to contract with the United States for the construction of necessary works for the supply of water and irrigation of lands within the district, and the provisions of those sections have been complied with in this case, and the

action of the district has been regular and legal.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 228.*]

2. WATERS AND WATER COURSES (§ 228*)—IRRIGATION DISTRICTS—POWERS.

Under the laws of this state, an irrigation district may provide for the drainage and reclamation of lands within the district which have been flooded or water-logged by reason of overflow, percolation, or seepage from its irrigation works, and the accomplishment of such purpose is one of the necessarily implied duties of the district equally as incumbent on the district as the irrigation of its dry and arid lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 228.*]

3. WATERS AND WATER COURSES (§ 238*)—IRRIGATION COMPANY—POWERS.

The Boise-Payette Water Users' Association has the power, under its articles of incorporation and the state statute, to sign and execute a contract with the Secretary of the Interior for supplying water to the district for the irrigation of its lands and the drainage of overflowed lands within the district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 238.*]

4. WATERS AND WATER COURSES (§ 222*)—IRRIGATION—POWERS OF SECRETARY OF INTERIOR.

Under the provisions of the act of June 17, 1902, known as the Reclamation Act (chapter 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1911, p. 862)), and the decision of the Circuit Court of Appeals in Burley v. United States, 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807, and the Act of Congress of February 21, 1911, c. 141, 36 Stat. 925 (U. S. Comp. St. 1911, p. 681), known as the Warren Act, the Secretary of the Interior is authorized and has the power to contract with an irrigation district for supplying water to such district or partially supplying it with water for the irrigation of the lands therein and for the drainage of other lands within such district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by the Pioneer Irrigation District against F. S. Stone for the confirmation of the proceedings of the district taken with reference to a proposed contract with the United States. From a judgment confirming the proceedings, defendant appeals. Affirmed.

Griffiths & Griffiths, of Caldwell, for appellant. B. E. Stoutemyer, of Boise, and Thompson & Buckner, of Caldwell, for respondent.

AILSHIE, C. J. This action was instituted by the Pioneer Irrigation District, under the provisions of section 2401 of the Rev. Codes, for the confirmation of the proceedings of the district after a vote had been taken on a certain proposed contract with the United States and the Boise-Payette Water Users' Association. After a hearing, the court entered a decree confirming the proceedings, and this appeal has been prosecuted.

Three questions are presented: First, that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the contract has not been duly authorized by the qualified electors of the Pioneer Irrigation District and that the board of directors of the Pioneer Irrigation District is not duly authorized to execute the contract; second, that the Boise-Payette Water Users' Association has no authority to sign the proposed contract; and, third, that the Secretary of the Interior has no authority under the acts of Congress to enter into the proposed contract.

[1, 2] 1. In the first place, the contract has been authorized by a vote of the qualified electors of the district in conformity with the statute. The statute (sections 2397 and 2398 of the Rev. Codes) specifically authorizes the proceedings which have been taken in this case and authorizes an irrigation district to enter into such a contract with the United States for the purpose of carrying out the purposes and objects of an irrigation district. Upon the question of whether or not an irrigation district has a right to provide means and expend money for the drainage of overflowed lands within the district, this court, in the case of *Bissett v. Pioneer Irrigation District*, 21 Idaho, 98, 120 Pac. 461, expressed the opinion that such action might be taken. While the views there expressed were not essential to the determination of that case, a further investigation of the question convinces us of the correctness of the impressions the court then had on the subject, and we adopt the views therein expressed as the opinion of the court and hold that an irrigation district possesses the powers necessary to drain its overflowed lands and to protect its landowners from seepage and overflow waters as well as to supply water to the dry and arid lands of the district.

[3] 2. It appears to us that the Boise-Payette Water Users' Association has the power to sign and execute the proposed contract both under its articles of incorporation and the statute dealing with irrigation districts and the landowners and water users therein. The association was acting as trustee for the landowners who were members thereof, and we have not had our attention called to any law or fact which would militate against the action taken by the association.

[4] 3. It would seem to us that the Secretary of the Interior has the power to enter into such a contract under the provisions of the act of June 17, 1902, known as the Reclamation Act (Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. St. Supp. 1911, p. 662]). The United States Circuit Court of Appeals, in *Burley v. United States*, 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807, seems to have entertained the same view and held that the Secretary has power to enter into contracts such as the one under consideration. If, however, there could have been any question or doubt on this subject,

it seems to us that all such doubt should have been dissipated by the provisions of the act of February 21, 1911, c. 141, 36 Stat. 925 (U. S. Comp. St. Supp. 1911, p. 681), known as the Warren Act, which act specifically provides for and authorizes contracts such as the one under consideration. The proceedings seem to have been regular, the statute authorizes the same, and the contract is clearly within the purview of the statutes of the state and the acts of Congress as well.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

(33 Idaho 447)

CITY OF POCATELLO v. MURRAY.

(Supreme Court of Idaho. Feb. 25, 1913.)

1. WATERS AND WATER COURSES (§ 203*)—MUNICIPAL WATER SUPPLY — REGULATION OF RATES—"TAXPAYER."

Section 2839, Rev. Codes, provides that commissioners selected under the provisions of such act are to be taxpayers of such town or city, and "taxpayer" of such town or city, as used in this statute, means one who owns property within the municipality and who pays a tax, or is subject to or liable for a tax.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289-299; Dec. Dig. § 203.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6890, 6891.]

2. WATERS AND WATER COURSES (§ 203*)—MUNICIPAL WATER SUPPLY — REGULATION OF RATES—"TAXPAYER."

Where W. and M. are appointed commissioners under the provisions of section 2839, Rev. Codes, and the question arises as to whether or not such persons are taxpayers, and it is shown that such persons own certain real property jointly, each owning a one-half interest, and it is also shown that such property was assessed in the name of M., and the taxes are paid upon said property by W. and M., each paying one-half of the total amount, *held*, that W. and M. are each "taxpayers" under the statute.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289-299; Dec. Dig. § 203.*]

3. WATERS AND WATER COURSES (§ 203*)—MUNICIPAL WATER SUPPLY — REGULATION OF RATES—COMMISSIONERS.

The fact that commissioners appointed by a person, company, or corporation supplying water to towns and cities under the provisions of section 2839, Rev. Codes, have been, and are, employees of the person, company, or corporation, and that one of such commissioners was the general manager of such person, company, or corporation, and as such manager contested and opposed the fixing of the rate to be charged for the use of water furnished by the person, company, or corporation in previous negotiations between the city and such person, company, or corporation in order to agree upon a rate, does not necessarily disqualify such persons from

acting as commissioners if appointed under the provisions of such section.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289-299; Dec. Dig. § 208.*]

Ailshie, C. J., dissenting.

Application by the City of Pocatello for writ of mandate to James A. Murray, doing business as the Pocatello Water Company. Heard on application by the acting mayor of the City of Pocatello for order to show cause why defendant should not be punished for contempt for failure to obey the writ of mandate issued to him. Dismissed.

P. C. O'Malley and D. Worth Clark, both of Pocatello, for plaintiff. N. M. Rulck, of Boise City, for defendant.

STEWART, J. An application was filed in this court by the appellant praying for the issuance of a writ of mandate directed to the defendant commanding and requesting him to appoint commissioners in conformity with the provisions of section 2839, Rev. Codes, for the purpose of conferring and acting with the commissioners appointed by the plaintiff, and fixing and determining rates to be charged by the defendant for water furnished to plaintiff city and the inhabitants thereof. A demurrer was filed to the complaint and overruled, and an answer to the complaint was filed. The case was heard upon the pleadings. In the opinion in that case, reported in 21 Idaho, 180, 120 Pac. 812, this court ordered that mandate issue to the defendant commanding him to appoint commissioners in accordance with the provisions of section 2839 of the Rev. Codes. The writ of mandate was issued on the 30th day of January, 1912, and served on respondent on the 3d day of February, 1912. A writ of error was taken thereafter from such decision to the Supreme Court of the United States, where said cause was heard, and the judgment of this court affirmed. 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. —. A remittitur from the Supreme Court of the United States in said cause was filed in this court on the 28th day of January, 1913.

There were no other proceedings in this court in the case until the 31st day of January, 1913, at which time an application was made to this court upon the affidavit of J. M. Bistline, acting mayor of the city of Pocatello, wherein this court was asked to make an order directing James A. Murray to show cause why he should not be punished for contempt for his failure and neglect to appoint commissioners as required by the peremptory writ of mandate issued out of this court on the 30th day of January, 1912. Upon such application this court issued an order in accordance with such application, and the service of the same was waived.

After such order was entered, the defendant appeared and filed a motion to set aside

and quash the part of the application demanding a receiver, on two grounds: First, want of jurisdiction of this court; and, second, that the affidavit does not state facts sufficient to authorize the appointment of a receiver. A motion was also filed to strike out certain parts of the affidavit of Bistline filed in support of the application for the order to show cause, on the ground that neither the affidavit of Bistline nor any other paper filed in support of the application for the order to show cause authorizes or justifies the appointment of a receiver. At the same time the defendant filed an answer and denies that he failed to obey the mandate of this court dated January 30, 1912, and alleges that immediately on the decision of the Supreme Court of the United States, on January 24, 1913, and prior to the date upon which the writ of mandate from the Supreme Court of the United States was filed, January 28, 1913, the defendant selected two commissioners in the persons of George Winter and Alex Murray, residents and taxpayers of said city of Pocatello, to act with the commissioners theretofore appointed by the said city of Pocatello to fix and determine the rates to be charged for water furnished by the defendant to said city and the inhabitants thereof, and on the 24th day of January, 1913, served upon Bistline, the mayor, a notice of such appointment and received from the mayor an acknowledgment that such commissioners had been appointed; that thereafter, on the 28th day of January, J. H. Townsend and W. P. Havenor, the commissioners appointed by the city of Pocatello as members of said commission for the purpose of fixing and determining said rates, pursuant to the mandate of this court, served upon George Winter and Alex Murray, commissioners selected by the defendant, the following notice: "To George Winter and Alex Murray: The undersigned heretofore appointed as commissioners by the city of Pocatello, pursuant to the provisions of section 2839 of the Idaho Revised Codes, are now ready to proceed to fix the rates and charges to be charged for water by James A. Murray doing business under the firm name and style of the Pocatello Water Company, pursuant to the resolution of the city council passed upon the 6th day of July, 1911, and served upon you on the 15th day of July, 1911. We therefore demand of you, the commissioners appointed by said James A. Murray, that you immediately meet with us at such place as may be mutually agreeable to enter upon the consideration of the question of fixing such water rates. We suggest that the room in the City Building on the east side will be a suitable place, and that 10:00 o'clock a. m. on Wednesday, January 29, 1913, will be a suitable time to hold such meeting for the purpose of entering upon a consideration of the question of fixing said

*For other cases see same topic and section, NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

rates. In the event of your refusal to comply with this request and immediately enter upon the consideration of said matters, the undersigned will apply to the probate court of this county to appoint a fifth commissioner to act with the undersigned and yourself in fixing such rates, and the undersigned together with such fifth commissioner will enter upon the fixing of such rates. Dated at Pocatello, Idaho, this 28th day of January, 1913. J. H. Townsend, W. P. Havenor."

It is then alleged in said answer that, in pursuance of this notice, Winter and Murray, on the 29th day of January, 1913, proceeded to the place suggested in such notice and there met Townsend and Havenor, and that such commissioners then and there proceeded to effect a temporary organization by the election of W. P. Havenor as chairman and Alex Murray as secretary. A copy of the proceedings of said commissioners is made a part of the answer and is as follows:

"First Meeting. Wednesday, January 29, 1913, East Side Fire Station. Meeting called to order at 11:15 a. m. Present: Mr. Havenor, Mr. Townsend, Mr. Winter, Mr. Murray. Motion regularly made and seconded to appoint Mr. Havenor chairman of the board. Motion carried. Motion regularly made and seconded to appoint Mr. Murray secretary of the board. Motion carried. Mr. Ruick and Mr. O'Malley were present and made a few remarks. Regularly moved and seconded that board adjourn until 2:00 p. m. Motion carried. Meeting adjourned.

"Second Meeting. Wednesday, January 29, 1913, East Side Fire Station. Meeting called to order at 2:30 p. m. Present: Mr. Havenor, Mr. Townsend, Mr. Winter, Mr. Murray. Motion regularly made and seconded to adjourn until February 10. Motion carried. Alex Murray, Secretary."

Accompanying this answer is the affidavit of Winter, wherein he states that he is a taxpayer of such city and county and owns property subject to taxation and which was assessed for the year 1912 in the sum of \$12,500, and that such property is referred to in the affidavit of Alex Murray and is described in said affidavit, and that the affiant has been the owner in fee simple of an undivided one-half interest in said property since the 8th day of June, 1912, and is still such owner and contributed to and paid one-half of the taxes assessed thereon for the year 1912; that during his residence in Pocatello he has always been an owner of property subject to taxation and paid all taxes assessed against the same; that he was selected together with Alex Murray as a commissioner to act with the commissioners appointed by the city; that the city was notified of such fact and acknowledged such appointment; that the four commissioners appointed met and organized as shown by the minutes of the meeting of the board; that he is in no way biased or prejudiced in

the adjustment of the rates and has no feeling antagonistic to the city, but that after consulting with his principal, Murray, and under his advice, he has resisted a readjustment of the rates except in accordance with the provisions of the ordinance of June 6, 1901, of said city, as Murray understood said ordinance; that as one of the commissioners appointed by Murray to fix rates he has held, and now holds, himself in readiness to act promptly and without delay in the adjustment of said rates as a member of the commission appointed for such purpose.

An affidavit was also filed on behalf of the defendant by Alex Murray, in which he says that he is the owner of property in Pocatello subject to taxation and which was taxed therein, and that such property is an undivided one-half interest in the real property situated in said city of Pocatello known as the "Auditorium," which property appears upon the assessment roll of said city and county for the year 1912 in the name of "Monidah Trust," a corporation, and that since the 5th day of June, 1912, affiant has owned in fee simple the title to a one-half interest undivided in said property, and the other one-half interest in said property has even since the 8th day of June, to the knowledge of affiant, been owned in fee simple by George Winter, co-commissioner of affiant, and superintendent of the Pocatello water company, and agent and representative of James A. Murray; that said property was regularly and duly assessed in said city and county by the assessor thereof for the year 1912 at \$25,798, the total tax for said year being \$830.68, one-half of which said tax, \$415.34, was paid to the tax collector of said Bannock county within the time allowed therefor and prior to the same becoming delinquent for the said year 1912; that one-half of said sum so paid was paid by, for, and on behalf of said George Winter; that the affiant was appointed a commissioner, and notice of such selection was served on the mayor of the city, and a receipt of such notice was acknowledged by the mayor, and on the 28th day of January, 1913, affiant received from the commissioners appointed by the city the same notice as is set out in the affidavit of Winter, and in pursuance of such notice he attended the meeting and participated in the proceedings.

At the time of the hearing an affidavit was filed on behalf of the application of Bistline, the mayor, by one L. B. Case, assessor and tax collector of Bannock county from June 6, 1912, up to and since January 13, 1913, in which he states that he knows George Winter, and that the name of George Winter does not appear upon the assessment roll for the year 1912, and that no property situated within the said city was assessed to George Winter upon said assessment roll; neither did George Winter pay any taxes upon any property situated in the city of Pocatello.

On February 6th an affidavit was filed up on behalf of the city by P. C. O'Malley, city attorney of Pocatello, who says that he has read the affidavits of Winter and Murray and has made inquiry as to the present ownership of the property described as the Auditorium building in the city of Pocatello, in which property both Alex Murray and George Winter swore that they own a one-half interest, and on the 6th day of February, 1913, was informed by telephone by E. G. Gallet the recorder of Bannock county, that the property known as the Auditorium of Pocatello stands on the records of Bannock county in the name of Alex Murray, and in the name of Alex Murray alone; that it was transferred from James A. Murray to Alex Murray about the month of June, 1912; that the property is not on the deed record in the name of the Monidah Trust Incorporation; that since the 5th day of June, 1912, Alex Murray has owned in fee simple the entire property known as the Auditorium building in Pocatello according to the deed records of Bannock county; that L. B. Case told the affiant that the property was on the assessment roll in the name of Monidah Trust, but that Alex Murray himself paid the taxes, and that Murray told Case the day he paid the taxes that the property should not be assessed in the name of Monidah Trust; that he owned the property individually; that the Monidah Trust Incorporation was incorporated in May, 1907, the incorporators being James A. Murray, Alex Murray, George Winter, and a man by the name of King, and others; that the records of the Secretary of State show that the life of the Monidah Trust is under suspension since the 1st day of December, 1912.

The foregoing pleadings and the affidavits on behalf of the respective parties constitute the entire record and all the facts upon which this court must determine whether or not the defendant is guilty of contempt for failure to comply with the mandate of this court in the appointment of commissioners under the provisions of section 2839 of the Rev. Codes. This section reads as follows: "All persons, companies, or corporations supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use, business houses, lawns and all domestic purposes so long as their supply permits, without distinction of person, upon demand in writing therefor, under such reasonable rules and regulations as the person, company, or corporation supplying water, may, from time to time, establish, and at such rates as established in the manner hereinafter specified; and must also furnish water to the extent of its means in case of fire, or other great necessity, at reasonable rates established in the manner hereinafter specified. The rates to be charged for water must be determined by commissioners to be selected as follows:

Two by the town or city authorities, or when there are no town or city authorities, then by the board of county commissioners of the county, the two said commissioners so selected to be taxpayers of such town or city; said town or city authorities must, within ten days after the appointment of the two commissioners so selected, give notice in writing to said person, company, or corporation supplying water, of the appointment of such commissioners, and the names of each, and within thirty days thereafter two other commissioners, taxpayers of said town or city, must be selected by the person, company or corporation supplying water, and in case a majority of the four commissioners so selected cannot agree on the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer of such town or city, and if they cannot agree upon a fifth commissioner, then the probate judge of the county, must, within ten days after notice to him by said commissioners, that they are unable to agree upon a fifth commissioner, select a fifth commissioner qualified as aforesaid. The decision of a majority of the commissioners thus selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, for the ensuing three years from the date of such decision, and until new rates are established as herein provided. The decision of such commissioners so selected must be made within ninety days from the date such board of water commissioners is complete: Provided, that any person, company, or corporation supplying water, and failing or refusing within the time above specified to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars per day for every day thereafter and until such commissioners are appointed: Provided, further, that nothing in this section contained shall relieve said town or city authorities from their duty to appoint the commissioners herein specified within a reasonable time after the granting of a franchise to any person, company or corporation to supply water as aforesaid: Provided, further, that said commissioners shall receive a reasonable compensation for their services in establishing such water rates, one-half of said sum to be paid by the town or city, and one-half by such person, company, or corporation supplying water: Provided, further, that said commissioners shall be empowered to incur any other expense that may be necessary to aid them in establishing such water rates, and one-half of such expense shall be paid by the city or town, and the other half by such person, company, or corporation supplying water."

It will be observed from the provisions of this section of the statute that the only qualification fixed by such statute is "taxpayers of such town or city." The affidavit upon which the charge of contempt is based

charges: First, that George Winter was not, on the date of the service of said notice, and has not been for more than one year last past, a taxpayer of the city of Pocatello, Bannock county, Idaho, and for that reason said defendant has made no appointment of commissioners as required by the peremptory writ of mandate dated the 30th day of January, 1912; second, that George Winter for many years, and continuously, has been superintendent and managing agent of Murray, and in charge and control of the water system of the defendant in said city, and has been a party to numerous controversies between the defendant and the city relating to the operation of the water system in said city and the supply of water and water service, and has continuously opposed the city in its efforts to improve conditions with reference to the supply of water and the service and with the readjustment of rates, and is biased against the city to a readjustment of the unreasonable rates and charges; and that he is not a proper person to act upon said commission within the provisions of the section.

In the affidavit charging the failure to comply with the mandate of this court there is no allegation or charge that Alex Murray was not qualified or was in any way prejudiced against the plaintiff. There is, however, a statement in one of the affidavits that Alex Murray is an employé of James A. Murray in connection with his water system in said city, and has been connected with and interested in numerous controversies between the defendant and the city, and for that reason is prejudiced and biased against the city and is not competent to act as commissioner, and therefore his appointment was not in accord with the mandate of this court and with the statute providing for the appointment of commissioners. This latter charge against Murray, however, is not stated in the affidavit charging the contempt, and was not a part of the charge made upon which this court issued the order requiring the defendant to show cause.

It is alleged in the answer of defendant Murray that, as soon as he learned of the decision of the Supreme Court of the United States, he selected two commissioners who were taxpayers of the city of Pocatello, in pursuance to law and the mandate of this court, to act with the commissioners appointed by the city to determine the rates to be charged for water furnished by him to said city and the users of water under said system; that such commissioners were George Winter and Alex Murray; that such commissioners so appointed by him were requested by the commissioners appointed by the city to meet on the 29th of January, 1913, and proceed to organize; that a meeting was had by the two commissioners Winter and Murray, appointed by the defendant, and the two commissioners appointed by the city,

J. H. Townsend and W. P. Havenor; that such commissioners did organize and elect a temporary chairman and secretary, and two separate meetings were held, and by such action on the part of the city the city approved and recognized the appointment by the defendant of the two commissioners Winter and Murray; and that the commissioners appointed by the city acted with them and organized and selected officers to act in such matter, as provided by law.

[2] It is also alleged in the answer, and the facts so alleged are clearly supported by the evidence, that George Winter and Alex Murray were joint owners of property in the city of Pocatello, Bannock county, Idaho, each owning a one-half interest, to the value of \$25,000, and that such property was acquired by deed conveying a fee-simple title executed upon the 8th day of June, 1912, and that such property was regularly and duly assessed in said city and county by the assessor thereof for the year 1912 at \$25,798, the total tax for said year being \$830.68, and that one-half of said tax, \$415.34, was paid to the tax collector of Bannock county within the time allowed therefor and prior to the same becoming delinquent for said year, and that one half of said sum so paid was paid by and for and on behalf of George Winter, and the other half paid by Murray upon the one half interest he owned in said property.

[1] If this be true, Winter and Murray were joint owners of said property, and the title was taken in the name of Murray, and the property was assessed to Murray, and each of the joint owners paid his proportionate share of the taxes assessed and paid upon said property. From these facts it necessarily follows that each of said parties was a "taxpayer" within the meaning of the statute in controversy in this case. "A taxpayer" is one who owns property within the municipality, and who pays a tax or is subject to and liable for a tax. This qualification, however, would not apply to a person who actually owns property and who willfully and purposely covers up his ownership and conceals his title for the purpose of avoiding the payment of taxes.

In the case of *Lasityr v. City of Olympia*, 61 Wash. 651, 112 Pac. 752, the Supreme Court of Washington, in defining "taxpayer" when applied to the qualification of a juror, said: "We are inclined to agree with the respondent that a taxpayer, within the meaning of this statute, is a person owning property in the state, subject to taxation and on which he regularly pays taxes."

The Court of Appeals of Missouri, in the case of *State ex rel. Sutton v. Fasse*, 71 S. W. 745, defines "taxpayer" as "a person owning property in the state subject to taxation, and on which he regularly pays taxes."

The statute now under consideration contains no provision which requires that the

name of the person appointed as commissioner should appear on the tax roll, or that he should be a holder of property in severalty if in fact it is shown that he pays the taxes upon the interest he has in the property, although the title stands in the name of another. This doctrine is fully supported in the case of *Commonwealth ex rel. Underwood v. Shrontz*, 213 Pa. 327, 62 Atl. 910.

Other cases might be cited, and it will generally be found that the courts do not agree as to the exact definition of a taxpayer; but we think the true and correct rule which we have announced above should be applied where it is used in connection with an official in fixing the qualifications to hold office or perform a duty of trust and honor in behalf of a municipality and a public service corporation in fixing rates for the use of water furnished by the public service corporation to the municipality and its inhabitants. The mere statement of the assessor that the name of Murray does not appear on the tax roll, as shown in the affidavits filed by plaintiff in support of the application to punish for contempt, and that he did not pay any taxes in Pocatello or Bannock county during the year 1912 or up to the time of this action, does not overcome the showing made by the defendant in the record in this case.

We conclude, therefore, and hold in this case, that the record clearly shows that George Winter and Alex Murray were taxpayers at the time they were appointed as such by the defendant and continued to be so up to the time this proceeding was commenced.

[3] It is next contended on the part of plaintiff that the two commissioners appointed by the defendant are incompetent by reason of the fact that they are employees of Murray and have been engaged in controversies that have taken place between Murray and the city in which they have taken an interest adverse to the city. The statute also requires the city to appoint commissioners to act on its behalf, and the commissioners appointed by the city must be taxpayers; such commissioners may be users of water, and they might also be prejudiced by reason of the fact that the company has been exacting exorbitant rates and they want a lower rate, and therefore they might likewise be disqualified. In this respect it was argued in the case that one of the commissioners appointed by the city was the city engineer employed by the city, and he might be prejudiced against the corporation, and in fixing rates might favor the city. So the Legislature fixed no qualification as to whether the person appointed commissioner should in any way be interested in the controversy, and no doubt made no such provision because it would be one which perhaps would exclude every property owner within the city limits and would force the parties to

go outside the municipality to secure commissioners to act, and for that reason they left the question open to be determined after the board had fixed the rates by proper proceeding.

There can be no question but that the action of the board in fixing rates might be questioned in a proper proceeding, where it appears that such board by fraud or through unfair means fixed rates which were unreasonable and exorbitant, and as a result of such acts a greater charge was determined than would have been made if the board had been fair and honest and not prompted to act by reason of bias or prejudice or feeling against any of the parties to the action.

In this case the four commissioners appointed by the respective parties seem to be in perfect harmony, and there is nothing in their proceedings which would indicate in any way favoritism or partiality to either party. If in their joint actions they cannot agree, the statute provides that they must select a fifth commissioner who shall also be a taxpayer of such town or city, and, if the commissioners cannot agree upon a fifth commissioner, then the probate judge of the county must, within 10 days after the notice to him that they are unable to agree upon a fifth commissioner, select a fifth commissioner qualified as provided by law.

If Winter and Murray are unfair and will not agree to a reasonable rate, the probate judge after notice is required to appoint a fifth commissioner, and there is no showing in this case but that the probate judge would appoint a commissioner who would be fair and have the qualifications fixed by the statute and do what was right in fixing the rates to be charged by the defendant for the use of water within said city. No injustice can occur under this process, and the city or the users of water can in no way be injured or suffer from the appointment of Winter and Murray.

It appearing then that both the city and the defendant have appointed commissioners who are qualified under the statute, and that such commissioners have met and organized for the purpose of fixing the rates, the statute requires such board to meet and proceed in accordance with law, and, if such commissioners are unable to agree, then the fifth commissioner should be selected as provided by the statute, and a majority of the commissioners thus selected must fix and determine the rates for the ensuing three years from the date of such decision and until new rates are established as herein provided. It will thus be seen that, even if Winter and Murray show by their actions as such commissioners that they are prejudiced against the city or favor the defendant in fixing such rates, their action cannot control or determine the rates, for the controlling power lies in the hands of the two commissioners appointed by the city and the fifth commis-

sloner, appointed by agreement, or by the probate judge, and the city cannot suffer from the appointment of Winter and Murray as commissioners.

The motion filed to strike out certain parts of the affidavit is covered by the opinion upon the merits and needs no further consideration. The motion filed to set aside and quash the part of the application demanding a receiver becomes immaterial, under the views of this court, and requires no further consideration.

Under these views the defendant is not guilty of contempt. The facts do not justify the punishment of the defendant for contempt, but show that he has fully and completely obeyed and followed the mandate of this court in the appointment of commissioners, and that such commissioners were appointed in accordance with the provisions of section 2839, Rev. Codes.

This action therefore is dismissed, and the defendant is awarded costs.

SULLIVAN, J., concurs.

AILSHIE, C. J. (dissenting). It is manifestly the real purpose of this proceeding to have the court determine whether the two commissioners appointed by the water company are qualified and competent to act. It should be remembered that James A. Murray is the Pocatello Water Company and that he has not had himself incorporated. Murry does not live in Idaho, and service of process cannot be had on him personally. When he wants to act personally in Idaho, he does so through an agent or attorney, and it is an admitted fact in this case that he did not make these appointments himself, but that they were made by his superintendent and manager, Winter. In other words, Winter, as superintendent and manager of the water company, appointed himself and another employé of the company as commissioners to fix the rates to be charged by the water company to water users from that same company. If these same people are already charging an exorbitant and unreasonable rate to the consumers and there is a demand for a commission to fix reasonable rates, how can any one suppose these same men on a commission are going to help matters any or give a more reasonable rate? The very fact that the statute authorizes the appointment to be made by the parties interested implies that they should not act themselves or appoint themselves on the commission. The term "commissioner" itself, as used in the law, signifies a person who is charged with a public or private trust to be executed for others than himself. *State v. Morris Canal & B. Co.*, 14 N. J. Law, 411; 8 Cyc. 335. Does any one suppose for a moment that the people of the city of Pocatello can have rates fairly established by a water commission on which body the two principal officers and employés of the water company

are serving as commissioners? I have not the least idea that the Legislature ever meant or intended that any such thing should happen under this statute. I cannot yield my consent to such a construction of the statute. If Mr. Murray, doing business as the Pocatello Water Company, wants to be fair and square with the water users of the city of Pocatello in the matter of fixing water rates, he will appoint two fair-minded, disinterested men to act and co-operate with a like number appointed by the city and have honest and fair rates established. It does not matter what rates may be fixed by a commission on which two of his principal employés are members; it will never satisfy the people for this very reason.

There is another reason why these men should not be allowed to serve on this commission, and that is, *they are not taxpayers*. The statute says they must be "taxpayers of such town or city." A "taxpayer" is one who pays taxes. We may hunt up all the legal definitions possible and get all the learning that has been displayed in defining the term, and we will never arrive at the point where we can fairly and rightfully say that a man is a taxpayer who has never been assessed and paid taxes. It is established beyond doubt by the affidavits of the officers of Bannock county that Winter was not assessed for the year 1912 in the city of Pocatello and that he paid no taxes whatever to the county. If he owned property, or rather had the equitable title to property, that stood on the record of Bannock county in the name of some one else, and the person in whose name the property stood paid the taxes, and Winter thereafter paid the holder of the legal title, he was merely paying a debt and not a tax. It is well established that a tax is merely a lien upon the property and is not a debt against the individual. In order for him to be a taxpayer, he must pay taxes in the regular way, rather than pay his debt to an individual. A man cannot cover up his property by having the legal title carried on the records in the name of a corporation or another person, and thereby avoid the responsibilities and liabilities attaching under the law to a freeholder and taxpayer in those cases wherein he wishes to be relieved of such duties and obligations, and, on the other hand, come in and introduce proofs extraneous to the record for the purposes of showing that in fact he is a freeholder and taxpayer when to do so will prove to his advantage. In other words, the law expects, and justice should demand, that he do business on the level, and that what would be legal and fair when the demands are coming his way is no greater or more favorable than when the demands are against him. So far as the records of Bannock county are concerned, they show that Winter was neither a property owner nor a taxpayer within the city of Pocatello for the year 1912. It is

likewise shown that Alex Murray did not own the legal title to the Auditorium property prior to the 5th of June, 1912, and that prior to that time no assessment had been made against him. The Monidah Trust Company, which he claims was holding the record title to this property while he was the equitable and true owner of the property, appears to be one of James A. Murray's corporations, organized by Murray and his employees in the Pocatello Water Company, and the Auditorium property appears to have been held in the name of the Monidah Trust Company until the transfer in June, 1912, was made to Alex Murray.

Now it seems to me that another important fact has been lost sight of in the discussion of this case, namely, the time or date when the duty devolved on Murray to appoint these commissioners. The city of Pocatello appointed its commissioners in 1911, and it was then the duty of Murray to make his appointment. He refused to do so and refused to obey the provisions of the statute. The city commenced its action to compel him to make the appointment. He still declined, and the case was heard, and on the 30th of January, 1912, this court issued its writ of mandate requiring him to make the appointment. It was then his clear legal duty to make the appointment. He still declined and refused to comply with the order of the court until he could carry the matter to the Supreme Court of the United States, and it was not until after the remittitur came from the Supreme Court of the United States that he made any effort whatever or pretense at complying with the statute of this state. While he did not make the appointments until 1913, the appointees should be such as were qualified at the time the duty devolved upon him, namely, in the year 1911. In other words, as I understand the law, it is the duty of both the city and Murray to appoint commissioners who are not only qualified at the time of the appointment, but who were qualified at the time the duty devolved upon them under the law to make the appointment. If any other rule is to prevail, it will leave it in the hands of designing, skillful, and rapacious individuals and corporations to defer the discharge of a duty devolving upon them by statute, such as this, until such time as they can qualify some special agent or per-

son for the position they want filled, instead of making the appointment or performing the act at the time the law devolves the duty upon them.

These appointments should have been made and rates established more than a year ago. If the contention of the city and the people of Pocatello be correct, then the rates are too high, and, when a just and reasonable rate is established by a commission, it will be lower than that now being charged by the water company. The question arises at once: If a fair commission should fix a rate lower than that which has been charged during the time Murray has been contesting this matter in the courts, would not the city and the water users be entitled to recover the overcharge which the company has collected during the time it has been holding this matter up and preventing the establishment of rates? If the overcharge cannot be collected from this company, then there would clearly be a premium placed on the company for resisting the operation of the law and the orders of the court. This overcharge may be found to run into the thousands of dollars and to far more than pay the expense of the litigation. If a rate fixed by this commission would attach and relate back to the time that the company should have appointed its commissioners if it had followed the law, then I fail to see how one who was not then qualified to act on the commission could act on the commission under these circumstances and conditions at this late date.

This case shows a flagrant disregard of the statutes of the state and the rights of the people of Pocatello by this water company. After delaying the matter for nearly a year and a half, its agent finally appoints the company's employees to serve on a commission to fix water rates, and the record clearly shows that one of these employees, the superintendent and general manager, has been in constant conflict with the water users and the people of Pocatello.

There is no question whatever in my mind but that the action taken by Murray, or rather by his superintendent Winter, utterly fails to comply with the statutes of the state and is a clear evasion and violation of the same. It ought not to be sanctioned by any court. I therefore dissent from the views expressed by my Associates.

(64 Or. 491)

SPAULDING et al. v. McNARY et al.
(Supreme Court of Oregon. March 4, 1913.)

1. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER—STATE EXERCISE.

The power of a state, by proper legislation, to protect the health, promote the morals, and prevent the introduction of any infected articles of trade that would necessarily injure property or affect persons is a matter of self-preservation, the exercise of which is not limited by any clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

2. COMMERCE (§ 67*)—INTERSTATE COMMERCE—REGULATION—SALE OF CARRIAGES.

The sale of carriages within the state by soliciting agents going through the country is not so inherently harmful as to entitle the state to regulate the same in the exercise of police power, where the sales constitute interstate commerce, though the conduct of the agents may not be governed by the strictest rules of probity in business.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 111; Dec. Dig. § 67.*]

3. COMMERCE (§ 40*)—INTERSTATE COMMERCE—WHAT CONSTITUTES.

Plaintiff, a carriage manufacturer in Iowa, sold the same through Oregon by means of agents who traveled through the country taking orders for carriages, which were sent to plaintiff's place of business in Iowa, where another agent would ascertain the financial responsibility of the proposed buyer, and, if found to be good, plaintiff would ship the vehicle to Oregon, when it would be delivered by another agent, thereby transferring title to the buyer. Held that, under such system, the carriages were in fact sold in Iowa, and the sales constituted interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

4. INJUNCTION (§ 85*)—VOID STATUTE—ENFORCEMENT.

Injunction will lie to prevent officers from enforcing a void statute, the enforcement of which will affect a party's property rights.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

5. COMMERCE (§ 68*)—INTERSTATE COMMERCE—STATE STATUTES—LICENSES—"PEDDLERS."

L. O. L. § 4961, defining "peddlers" to include every person who, for himself or as agent of another, goes from place to place or from house to house selling, or offering to sell, for future delivery, by sample or catalogue, at retail to individual purchasers who are not dealers in the article sold, any goods or wares or merchandise, and section 4963, imposing a license tax thereon, in so far as it purported to include agents for nonresidents selling goods in interstate commerce, amounted to a tax on such commerce, and was therefore void.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 107-109; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by H. W. Spaulding and others against John H. McNary and others. From a judgment of dismissal, plaintiffs appeal. Reversed and rendered.

This is a suit by H. W. Spaulding, F. E. Spaulding, and E. H. Spaulding, partners, as the Spaulding Manufacturing Company,

against John H. McNary, as district attorney of the third judicial district of Oregon, and certain of his deputies, and B. F. Mulkey as district attorney of the first prosecuting attorney district of this state, to enjoin the maintenance of criminal proceedings against the plaintiffs' agents for alleged violations of a statute. The complaint, stripped of a vast amount of wholly immaterial matters, charges in substance that at all times stated therein the plaintiffs were and are citizens and residents of Iowa, and engaged at Grinnell in that state in manufacturing vehicles which are sold by their agents in various sections of the Union, including the several counties of Oregon, in which latter places the privilege of conducting such business has become and is a valuable property right, the exercise of which results in lucrative profits; that in negotiating such sales one of plaintiffs' agents, driving a pair of horses hitched to a wagon, canvasses a part of this state, and if he finds a purchaser, a written order is taken for a specified style of carriage, to be furnished in 30 days, or as soon as transportation will permit, and thereupon another agent at Grinnell, Iowa, ships into Oregon the required vehicle, upon the delivery of which, by another of plaintiffs' agents, the sale is completed; that in transacting such business in the manner indicated the plaintiffs' agents have been and are threatened by the defendants with the prosecution of criminal actions for alleged violations of sections 4961-4967, L. O. L., which enactment is void as to plaintiffs, in that it violates certain clauses of the federal Constitution and of the organic act of Oregon; that such proceedings will result in irreparable loss and damage to the plaintiffs in the distribution of their traffic in Oregon, for the redress of which injuries they have no plain, adequate, or speedy remedy at law. A demurrer to the complaint was sustained on the ground that it did not state facts sufficient to warrant equitable intervention, and, the plaintiffs declining further to plead, the suit was dismissed, and they appeal.

A. C. Lyon, of Grinnell, Iowa, and Ralph R. Duniway, of Portland, for appellants. W. C. Winslow, of Salem (John H. McNary, of Salem, R. L. Conner, of McMinnville, J. E. Sibley, of Dallas, and B. F. Mulkey, of Medford, on the brief), for respondents.

MOORE, J. (after stating the facts as above). It is maintained inter alia that, since it is admitted that the plaintiffs were and are citizens and residents of another state and engaged therein in business, and as a branch thereof consists in selling by agents their manufactured products in Oregon, the license fee prescribed by the statute referred to is a tax, undertaken to be imposed in contravention of the third clause of section 8 of article 1 of the Constitution

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
; For opinion on petition for rehearing, see 120 Pac. 1122.

of the United States, to regulate commerce among the several states, and the enactment under consideration is therefore void as to plaintiffs and invades their property right, and, such being the case, an error was committed in sustaining the demurrer, and in not granting the equitable relief sought.

The statute in question, as far as deemed involved herein, defines the word "peddler" according to the ordinary meaning of the term, except that an agent of another is included within the class. 15 Am. & Eng. Ency. Law (2d Ed.) 291. The enactment further declares:

"Every person who, for himself or as agent of another, goes from place to place or from house to house, selling or offering to sell for future delivery, by sample or catalog, at retail, to individual purchasers who are not dealers in the articles sold, any goods, or wares or merchandise." L. O. L. § 4961.

"Any peddler who shall, without having first obtained a license so to do in the manner in this act provided, peddle any goods or wares or merchandise in any county of this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished," etc. Id. § 4962.

"Every peddler, whether principal or agent, shall before commencing business in any county of the state, make application in writing under oath, to the county treasurer for the county in which he proposes to make sales for a county license. * * * He shall also at the same time make a special deposit of money with the county treasurer aforesaid, equal to the amount of license fee which he shall pay to the county treasurer, which license fee shall be as follows: (1) Peddler on foot, \$25. (2) Peddler with one horse and a wagon, \$100. (3) Peddler with two horses and wagon \$150. (4) Peddler with any other conveyance, \$300." Id. § 4963.

The second definition of the word "peddler" as hereinbefore quoted is criticised by plaintiffs' counsel as not applicable to a commercial traveler who, like the agents of their clients, go from place to place exhibiting samples or cuts of manufactured goods, wares, or merchandise, for which orders are taken. We do not think it necessary to enter into a discussion of the question, since we believe the business conducted by plaintiffs' agents comes within the designation of interstate commerce. It has been intimated by some courts of last resort that a "peddler" is a person who, in going from house to house with goods for sale, resorts to disreputable methods in seeking admission to homes in order to defraud customers, and for other nefarious purposes, and that, such being the case, it is proper for a state in the exercise of its police power to place such restrictions upon that business, though it may be interstate commerce, as will protect the public from imposition.

[1, 2] The power of a state by proper legis-

lation to protect the health, to promote the morals, and to prevent the introduction of any infected articles of trade that would necessarily injure property or affect persons is a matter of self-preservation, and such fights are not intended to be invaded under any clause of the federal Constitution, for an injury to the welfare of the state is a detriment to the nation. If one or more persons engaged in any particular branch of business has recourse to dishonorable methods in order to make a sale of his goods, and for that reason all business of that class must be suspended under an exercise of the police power of a state, the result would necessarily be the interruption of all legitimate traffic; for it is safe to predict that in every branch of lawful commerce it will be found that some dishonest persons are engaged. It must be conceded that the sale of some kinds of goods and the transaction of some classes of business are in themselves, regardless of the persons connected therewith, so inherently harmful as to violate every sense of propriety and modesty, and in such cases the state rightfully may and necessarily ought immediately to put a stop to the flagitious traffic. Within the category thus condemned the sale of carriages cannot be included, and though there may be found one or more agents soliciting sales of buggies whose lives and conduct are not governed by the strictest rules of probity, the business in which they are engaged is not essentially unlawful, and therefore not subject to an exercise of the police power.

[3] So far as disclosed by the complaint herein, the material averments of which are admitted by the demurrer, it appears that when a written order for the purchase of a carriage is secured, the requisition is sent to Grinnell, Iowa, where, if the plaintiff's agent who has charge of this branch of the business finds the proposed buyer is financially responsible, he ships into Oregon the desired vehicle, which is delivered by another agent, thereby transferring the property and the title to the purchaser. By this manner of conducting the plaintiffs' business the goods, wares, and merchandise are in fact sold in Grinnell, Iowa, and do not, when shipped into this state for delivery become a part of the general mass of property in Oregon, so as to exempt such vehicles from the provision of the federal Constitution, to which reference has been made.

[4] The rule is well established that if the threatened enforcement by prosecuting officers of a void statute will affect the property rights of a party, injunction will lie to prevent the menace from being carried into effect; and that the conduct of such officers, in the case indicated, are their personal acts in which the state is not involved. *Dunn v. University of Oregon*, 9 Or. 357; *Salem Mills Co. v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; *Sandys v. Williams*, 46 Or. 327,

80 Pac. 642; *Hall v. Dunn*, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; *Portland Fish Co. v. Benson*, 56 Or. 147, 108 Pac. 122; *Kellaher v. City of Portland*, 57 Or. 575, 110 Pac. 492, 112 Pac. 1076; *Spaulding v. Evenson* (C. C.) 149 Fed. 913; *Id.*, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904.

[5] The remaining inquiry is whether or not the exacting of a license fee, as a condition precedent to the right to solicit orders that were to be filled by shipping goods from another state into this, amounts to a tax upon interstate commerce, and for that reason is void as to the plaintiffs.

In the case of *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, Sabine Robbins, a citizen and resident of Ohio, was engaged in the taxing district of Shelby county, Tenn., in soliciting trade by the use of samples for the firm of Rose, Robbins & Co., doing business in, and all the members thereof being citizens and residents of, Cincinnati, Ohio. A statute of Tennessee required that all persons not having a regular licensed house in the taxing district, who offered for sale or sold goods, wares, or merchandise therein by sample, should be required to pay \$10 per week or \$25 per month, and no license should be issued for a longer period than three months. While soliciting trade for such firm and exhibiting samples for the purpose of effecting sales, and without having paid the license, Robbins was arrested, tried, convicted, and fined, and the judgment was affirmed by the Supreme Court of the state of Tennessee, which held that the statute relating to such license was constitutional and valid. A writ of error was thereupon taken to the Supreme Court of the United States which, in reversing the judgment, held that interstate commerce could not be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. In that case, however, Mr. Chief Justice Waite, Mr. Justice Field, and Mr. Justice Gray dissented.

In *Le Loup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, it was unanimously determined that, where a telegraph company which was doing business of transmitting messages between different states, and had accepted and was acting under the telegraph law passed by Congress July 24, 1866, no state within which the company saw fit to establish an office could enforce upon it a license tax, or require it to take out a license for the transaction of such business.

In *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368, it was ruled that a state law, exacting a license tax to enable a person within the state to solicit orders and make sales there for a person residing within another state, was repugnant to the clause

of the Constitution of the United States giving Congress power to regulate commerce among the several states, and that such statute was void.

The rule thus announced has been followed by an unbroken line of decisions by the United States Supreme Court, and by most of the state courts of last resort, as well as by the federal courts. In *re Kinyon*, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699. See, however, the very interesting notes to the case of *People v. Wemple*, 27 Am. St. Rep. 542.

In *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A. (N. S.) 297, several agents of the plaintiffs herein were convicted of violating the provisions of a statute of Utah similar to our law with respect to licensing solicitors, and in reversing the judgment it was held that the enactment contravened the commerce clause of the federal Constitution.

So, too, in *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401, in passing upon the validity of a similar statute of Colorado, it was ruled that Congress possessed the sole power to regulate commerce between the several states, and hence interstate commerce should not be taxed by a state.

We consider, therefore, that the statute under consideration in as far as it relates to the plaintiffs, is an attempt to exact a tax on interstate commerce, and for that reason the enactment is void as to them.

As the facts involved appear to have been admitted, the decree should be reversed and one entered here granting the relief prayed for in the complaint, and it is so ordered.

(65 Or. 1)

PORTER v. O'DONOVAN et al.

(Supreme Court of Oregon. Feb. 25, 1913.)

1. DEEDS (§ 211*)—FRAUD—EVIDENCE.

Evidence held to justify a finding that a deed was procured by fraud.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

2. PRINCIPAL AND AGENT (§ 158*)—FRAUD—EFFECT.

Where a grantee obtained the benefit of a deed procured by his agent's fraud practiced on the grantor, he was chargeable with the fraud whether he knew or participated in it or not, and the deed must be set aside as against him.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 589-598; Dec. Dig. § 158.*]

3. FRAUD (§ 58*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Fraud need not be shown by direct evidence, but may be established by circumstantial evidence and by inferences like any other fact.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. DEEDS (§ 70*)—VALIDITY—FRAUD—EFFECT.

Where a grantee obtaining a conveyance through his fraud practiced on the grantor was induced by the fraud of a third person, who knew of the grantor's rights, to convey the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property to another chargeable with knowledge of the facts, the latter conveyance was tainted with fraud as against the original grantor, who could recover the premises so far as the same had not been passed to an innocent purchaser.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 185-182; Dec. Dig. § 70.*]

5. CANCELLATION OF INSTRUMENTS (§ 55*)—JURISDICTION OF SUBJECT-MATTER — SUIT TO SET ASIDE DEED.

The court, in a suit to set aside conveyances of described real estate situated in the state on the ground of fraud, has no jurisdiction to order a party to the suit to convey to another party real estate in a sister state not in issue.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 130, 168; Dec. Dig. § 55.*]

6. CANCELLATION OF INSTRUMENTS (§ 55*)—CANCELLATION OF DEED—RELIEF.

Where a conveyance was set aside on the ground of fraud practiced on the grantor except as to a tract conveyed by the fraudulent grantee to an innocent purchaser, the court must compel the grantee to account for the value of the tract sold and compel the grantor to account for the partial payments made by the grantee.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 130, 168; Dec. Dig. § 55.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by L. L. Porter against C. O'Donovan and others, in which defendant named filed a cross-complaint against the codefendants. From a decree for plaintiff on his complaint and for defendant named on his cross-complaint, the codefendants appeal. Modified and affirmed.

O'Donovan was the owner of the southwest quarter, the west half of the southeast quarter, the southwest quarter of the northeast quarter, and the south half of the southeast quarter of the northeast quarter of section 10, in township 39 south, range 19 east of the Willamette meridian, containing 300 acres of land, situate in Lake county, Or.; lot 10, in block 2, Collinge addition to Portland; and the northeast quarter of the southwest quarter of the D. L. C. of John Stephenson, claim No. 59, in township 3 south, range 4 east of the Willamette meridian, in Clackamas county, Or., containing 20 acres. The plaintiff, Porter, was the owner of tracts 3, 4 and 15 in the town of Pinehurst in the county of Clackamas, and lots 5, 6, 7, and 8 in block 6, Peck's addition to East Portland. On the 2d day of October, 1909, the defendant O'Donovan conveyed to plaintiff the above-described 300 acres of land in Lake county, in exchange for plaintiff's tracts and lots above described; and, as an inducement to plaintiff to make such exchange, O'Donovan represented to plaintiff that said 300 acres was arid, but that it was susceptible of being irrigated at a cost of \$25 per acre, from a certain ditch then being constructed by the Oregon Valley Land Company, which representations, plaintiff alleges, were false, and fraudulently made; that

after said exchange plaintiff obtained information that but 12 acres of said 300 were under said ditch, and demanded of O'Donovan that he rescind the trade and reconvey to plaintiff the lands so conveyed to him by plaintiff, on the ground of the fraudulent representations made to him by O'Donovan. About the time plaintiff was so demanding of O'Donovan such a reconveyance, namely, on about March 21, 1910, with the exception of lots 5 and 6, of said block 6, which he had previously conveyed away, O'Donovan conveyed to one M. McCarthy all of said property received by him from plaintiff, without consideration, the deed for which was not delivered, but was placed on record by O'Donovan. He thereafter attempted to procure a reconveyance of said lands to himself by a fictitious M. McCarthy, and on March 31, 1910, with the above-mentioned exception, conveyed the property so received by him from plaintiff, together with the 20 acres in Clackamas county, and lot 10 of block 2, Collinge addition, previously owned by him, to Katherine M. Dwyer.

On April 2, 1910, plaintiff commenced this suit against all the defendants, alleging that all of said conveyances were fraudulent and void, and asking that defendants be required to reconvey to him said property so conveyed by him to O'Donovan, or to pay the value of the portions thereof conveyed by them to innocent purchasers. Defendant Katherine M. Dwyer separately answered to the complaint, denying any information or knowledge sufficient to form a belief as to its truth, and therefore denied the same, and alleged affirmatively that she purchased the property from O'Donovan in good faith, without any knowledge of any fraud of O'Donovan, for full value, namely, \$5,000. Defendant E. P. McCarthy, who is not related to the M. McCarthy above named, by answer denies the allegations of the complaint. Defendant O'Donovan files his answer to the complaint and a cross-complaint against his codefendants, charging that his codefendants conspired to cheat and defraud him out of all his property, and alleges at length their efforts to frighten him by reporting to him that the plaintiff was seeking to prosecute him for false representations made by him to plaintiff, and in procuring the pretended deed from M. McCarthy, and to attach all his property; that, acting under the fear of arrest and attachment of his property, and at the dictation of his codefendants, and to save his property to himself, he conveyed it to Katherine M. Dwyer, for the consideration of \$5,000, of which sum only \$350 was paid; that Katherine M. Dwyer gave him two notes, one for \$1,500 and the other for \$1,750, when in fact he thought he was getting notes for \$4,500, and \$500 in cash; that thereupon a ticket was purchased for him by McCarthy, and he was placed on the Southern Pacific train for San Francisco, at 12

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

o'clock at night, and instructed to use an assumed name, John J. Collins, and to go to T. Cavanaugh, a friend and former partner of E. P. McCarthy, where he stayed for some time; that in attempting to collect the \$1,500 note, through Cavanaugh, he received only \$1,000. The other note has not been paid. During his stay in San Francisco, McCarthy wrote him many letters containing "scare news" of the sheriff being after him. Katherine M. Dwyer, by her answer to the cross-complaint, denies its allegations. McCarthy and A. J. Dwyer separately answer the cross-complaint by general denials. The circuit court heard the evidence, and made findings sustaining plaintiff's contention against O'Donovan, and in favor of O'Donovan against his codefendants, and on August 4, 1911, rendered a decree canceling the deeds of O'Donovan to Katherine M. Dwyer, except as to lot 10, of block 2, Collinge addition to Portland, which Katherine M. Dwyer had conveyed to an innocent purchaser, and gave judgment in favor of O'Donovan against his codefendants for the sum of \$875, the price received by them therefor. A. J. and Katherine M. Dwyer appealed from said decree. Defendant McCarthy also appealed. Katherine M. Dwyer is the wife of A. J. Dwyer and sister of E. P. McCarthy, and until about the last of February, 1910, E. P. McCarthy and A. J. Dwyer were partners under the firm name of the McCarthy Company, and they were still occupying the same office rooms.

J. W. Westbrook, of Portland (John F. Logan, I. N. Smith, and Westbrook & Westbrook, all of Portland, on the brief), for appellants Dwyer. Christopherson & Matthews, of Portland, for appellant McCarthy. O. W. Fulton, of Portland, for respondent Porter. J. F. Sedgwick, of Portland, for respondent O'Donovan.

EAKIN, J. (after stating the facts as above). [1] It appears that O'Donovan is a man of weak mind and easily influenced; that he has been in this country only five or six years, and is a longshoresman by occupation. He was in fear of some legal proceedings being brought against him by the plaintiff, Porter, and confided to one German and to defendant E. P. McCarthy the story of his troubles with Porter, his fear of litigation, and the condition of the title to his property, which he had conveyed to M. McCarthy. They immediately began to work on his fears and to take advantage of his confidence, and induced him to have a deed made by a person whose name they pretended was M. McCarthy, conveying to him the property standing on the record in the name of M. McCarthy. They represented to him that Porter would sue him, attach his property, and prosecute him criminally on account of the warranty in his deed to Porter, and because of the forged deed in the name

of M. McCarthy; that a warrant of arrest had already been issued for him; and that the sheriff was looking for him to arrest him. On account of his fear of these proceedings, they induced him to put the property out of his name and leave the state. By reason of said influence he did execute deeds for the Porter property as well as for his other property to Katherine M. Dwyer, for the alleged consideration of \$5,000, and before the delivery of the deeds or the payment of the price McCarthy sent Green and Moreland, who seemed to be acting on behalf of McCarthy, and O'Donovan to look at the property. When O'Donovan was returning to the city, McCarthy met him at the Golf Links, and told him that the sheriff was after him, and to wait there until the crowd had gone away. Then they went to Fulton and remained until dark, after which they went to the Lenox Hotel, and stayed in a room until 10 o'clock, when McCarthy went to the depot and secured a ticket for San Francisco in the name of John J. Collins, and told O'Donovan that he should go by that name. At midnight McCarthy put him on the train and directed him to go to T. Cavanaugh, in San Francisco, a friend and former partner of McCarthy, and delivered to him \$350 and the two notes hereinbefore mentioned. These circumstances are set forth in the cross-complaint at great length, and the evidence upon these matters is very voluminous. When O'Donovan attempted to collect the \$1,500 note, he paid \$100 to Cavanaugh to go to Portland to see about his affairs, and to collect the note, which Cavanaugh induced O'Donovan to indorse to him to avoid attachment by Porter. When Cavanaugh returned from Portland, he told O'Donovan that the sheriff was in McCarthy's office twice while he was there. Cavanaugh collected the \$1,500 note, paid \$100 to his attorney, and, retaining \$400 himself, turned over to O'Donovan \$1,000. In September, 1910, McCarthy went to San Francisco to see O'Donovan, and he and Cavanaugh told O'Donovan that, if he did not give up the \$1,750 note, they would throw up the case and tell the sheriff about him; and thereby compelled him to surrender up the note, which they still retain.

It needs no argument to show that the whole transaction is a rank fraud. Cavanaugh evidently was aiding McCarthy to keep O'Donovan in fear and prevent him from returning to Oregon and to get his property away from him. However, the defense of Katherine M. Dwyer is that she is an innocent purchaser for value, without any knowledge of or participation in the fraud of McCarthy. She took no part in making the purchase of the property and did not see or talk with O'Donovan until the time she signed the notes; and A. J. Dwyer says that he bought the property with his wife's money. At the time of the pur-

chase there seems to have been little or no talk of the terms of the sale. They had been arranged beforehand. A. J. Dwyer was the agent of his wife, Katherine, in the part he took in the purchase, and McCarthy was the person who made the terms of the sale and consummated it. Dwyer testifies that he and O'Donovan had but little talk; that O'Donovan came to his desk and offered him the property for \$5,000. It does not appear that O'Donovan ever told him what property it was, or where, but McCarthy informed A. J. Dwyer on the evening of March 30th that the O'Donovan property would be a good purchase. Dwyer had McCarthy get an option on the property, by the terms of which O'Donovan agreed to sell and convey the property to "The McCarthy Company," if taken before April 2, 1910, for \$5,000 cash net to him. The next day Dwyer and his wife met McCarthy and O'Donovan at Dwyer's office, at which time there seems to have been no talk as to the terms of the sale, but Mrs. Dwyer signed the two notes, the payment of which was unsecured. A. J. Dwyer produced \$500 in money, and the money and notes were delivered to McCarthy, who was directed to complete the transaction, and McCarthy went off with O'Donovan to make out the deeds. Dwyer admits that it was rather a strange transaction. He denied having any talk with O'Donovan about the property, but, when asked if he was acquainted with the value of the property, he said that in a general way he was; that from general inquiries made at the time, etc., he thought the property a good purchase at that price. He also admits that the only thing he knew about the Shamrock Investment Company was that a corporation was to be formed by McCarthy, and that O'Donovan was going to put his property into the company. Dwyer testifies that he left the completion of the transaction to McCarthy. The fact of the former business relations between A. J. Dwyer and McCarthy, and Mrs. Dwyer being McCarthy's sister, the fact that A. J. Dwyer and McCarthy occupied the same office together, and that McCarthy still used the firm name of the McCarthy Company, together with the other circumstances, tended to show that A. J. Dwyer was in touch with the whole transaction, and to corroborate O'Donovan in his testimony to that effect. When McCarthy found out that Porter had located O'Donovan, he became sufficiently interested to take a trip to California to see O'Donovan in order to guard the interests of the Dwyers, and he was again acting for the Dwyers when he brought back the \$1,750 note. Dwyer says McCarthy took it upon himself to get the note back, with the promise from O'Donovan that O'Donovan would reimburse Dwyer for anything that he would be out in this suit. The proof tends strongly to bring home to A. J. Dwyer knowledge of the facts that were in the knowledge of Mc-

Carthy, as McCarthy was the actual agent of A. J. Dwyer and his wife in the purchase, and his acts in connection therewith were their acts. The evidence shows that O'Donovan did not sell the property to Katherine M. Dwyer for \$3,750. He did not agree to take notes, but was to have \$5,000 in cash, and he did not consent to the sale; that was forced upon him, and their minds did not meet on the attempted purchase. Even the \$500 which Dwyer admits was to be paid to O'Donovan was not so paid, and delivery of it to Dwyer's agent, McCarthy, was not payment to O'Donovan.

[2] The option was obtained only by fraud and by keeping O'Donovan in fear. This was done by Dwyer's agent, and Dwyer is chargeable with it, whether or not he knew of or participated in it. Dwyer cannot be allowed to benefit by so rank a transaction, known to and accomplished by his agent.

[3] Contention is made in the brief of defendant that there can be no presumption of fraud, but it is said in *Williamson v. North Pac. Lum. Co.*, 42 Or. 160, 70 Pac. 390: "Fraud is a question of fact, but need not be shown by positive evidence, as this can seldom be done. It is generally proved by circumstantial evidence, and may be established by inference like any other disputed fact." In the case of *Phipps v. Willis*, 53 Or. 195, 96 Pac. 868 (18 Ann. Cas. 119), it is said: "Nor is direct and positive proof essential to the establishment of fraud. It is always permissible to prove it by any circumstances from which it may follow as a legitimate inference; this class of evidence in many instances being the only proof available." See, also, *Kabat v. Moore*, 48 Or. 198, 85 Pac. 509.

[4] All that was done by McCarthy was with knowledge of plaintiff's rights. O'Donovan's relations with the plaintiff were the foundation of McCarthy's power over O'Donovan, and his knowledge thereof affects the purchase by Dwyer and his wife, and taints it with the fraud as to plaintiff also.

[5] So much of the decree of the circuit court as required O'Donovan to convey to Katherine M. Dwyer the flats in California, and which relates to matters that were not in issue, was beyond the jurisdiction of that court, and the decree will be modified in relation thereto. The identity of the flats is not disclosed, nor is it shown what amount of money was invested in them, nor whether they are subject to deferred payments or to forfeiture for nonpayment.

[6] The conveyances by O'Donovan to Katherine M. Dwyer should be set aside, except as to lot 10, block 2, Collinge addition to Portland, because they were obtained through fraud and fear; but, as Katherine M. Dwyer has sold said lot 10 of block 2 to an innocent purchaser, the title thereto will not be disturbed. The defendants, the Dwyers, will be required to reconvey to O'Donovan tracts 3,

4, and 15 in the town of Pinehurst, Clackamas county, Or., lots 7 and 8, in block 6, Peck's addition to East Portland, and the northeast quarter of the southwest quarter of the D. L. C. of John Stephenson, in township 3 south, range 4 east of the Willamette meridian; that the defendants A. J. Dwyer, Katherine M. Dwyer, and E. P. McCarthy account to O'Donovan for the \$875 received by them for said lot 10, block 2; that O'Donovan repay to Katherine M. Dwyer the \$350 received by him from McCarthy on account of Katherine M. Dwyer, and the \$1,000 received by him on the \$1,500 note, less the said \$875, namely, \$475, with interest thereon from October 1, 1910, and until the same be repaid it shall be decreed to be a lien on the northeast quarter of the southwest quarter of the D. L. C. of John Stephenson, in Clackamas county.

The decree of the circuit court as to the rights of plaintiff and O'Donovan between themselves, having been made upon stipulation, is affirmed.

(65 Or. 239)

DANIELS et al. v. MORRIS et al.

(Supreme Court of Oregon. March 4, 1913.)

1. SALES (§ 417*)—ACTIONS FOR BREACH—SUFFICIENCY OF EVIDENCE.

In an action for breach of a contract to grow and sell to plaintiff 20,000 pounds of prime hops, evidence held to show that 20,000 pounds of defendant's crop of hops were prime.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.*]

2. SALES (§ 177*)—BREACH—REFUSAL TO ACCEPT.

Under a contract to grow and sell 20,000 pounds of prime hops, which provided that the purchaser should have preference both as to quantity and quality over all other contracts made as to such growth of hops by the seller with any other purchaser, where 20,000 pounds of the seller's crop were prime, and the purchaser on an inspection of a part thereof declined them without objecting to any particular bales and without giving the seller an opportunity to supply others in place thereof, the contract was broken by the purchaser.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 445-450; Dec. Dig. § 177.*]

3. SALES (§ 71*)—CONTRACT—CONSTRUCTION.

Under a contract for the sale of hops, each bale to contain "from 180 to 210 pounds of hops (5 pounds tare per bale to be allowed)," bales weighing with the bale cloth 215 pounds were within the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189-196; Dec. Dig. § 71.*]

4. SALES (§ 176*)—BREACH—REFUSAL TO ACCEPT.

A recovery by the seller under a contract for the sale of hops in bales to contain from 180 to 210 pounds was not defeated by an excess of weight in a few bales, where the refusal to accept was not placed on that ground.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

5. SALES (§ 418*)—BREACH—MEASURE OF DAMAGES.

Under a contract to grow and sell hops providing that the purchaser should make certain

advances to the seller, and that if the purchaser should fail to accept and pay for the hops the seller should be entitled to receive as liquidated damages the difference between the contract price and the market value on a specified date, the purchaser by a refusal to accept did not forfeit the advances, and the seller was only entitled to offset his liquidated damages ascertained as provided in the contract against such advances.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Appeal from Circuit Court, Yamhill County; Percy R. Kelly, Judge.

Action by C. F. Daniels and another, partners as Daniels & Bishop, against M. L. Morris and another. Judgment for plaintiffs, and defendants appeal. Modified.

W. T. Slater and M. E. Pogue, both of Salem, for appellants. McCain & Vinton, of McMinnville, for respondents.

EAKIN, J. On April 1, 1910, C. F. Daniels and the defendants entered into a contract by which the defendants agreed to grow and sell to plaintiff Daniels 20,000 pounds of prime hops, and Daniels agreed to purchase the same at \$.16 per pound; the contract in so far as involved here being as follows: "That said seller * * * does hereby agree to sell and deliver to the buyers * * * twenty thousand (20,000) pounds of hops. * * * And to deliver the said hops in said year at the McMinnville depot * * * at such time between the 1st and 31st days of October of said year as the buyers may direct. Each bale of said hops to contain from 180 to 210 pounds of hops (five pounds tare per bale to be allowed), and are to be put in new bale cloth. The said hops shall be of prime quality of even color, well and cleanly picked, and not broken. And the seller further agrees that this contract shall have preference, both as to quantity and quality, over all other contracts made as to said growth of hops by the seller with any other purchaser. The buyers agree to advance to the seller for cultivation purposes \$400.00, upon the signing of these presents, and for picking purposes, on or about the first day of September of said year to enable the seller to harvest said crop of hops, and to prepare the same for market in the manner in which the seller agrees to harvest and prepare the same, the sum of 5 cents per pound at their office. * * * And upon the delivery and acceptance of said hops the buyers will pay in current funds of the United States or their equivalent 9 cents, the balance due on said hops at 16 cents per pound, that being the agreed price for said hops, and all money advanced for the purposes aforesaid, with — per cent interest to be deducted from the purchase price of said hops. * * * It is further agreed that if the seller should sell said hops, or any part thereof, in violation of the terms of this agreement to any other person or per-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

sons or refuse to deliver the same to the buyers, as herein agreed, or otherwise fail to perform the terms and conditions of this contract, to be kept and performed by him, the buyers not being in default, in the terms and conditions to be by them kept and performed, the buyers shall be entitled to receive, in addition to all advances made and interest thereon; * * * and should the buyers fall on their part to accept and pay for the hops herein agreed to be sold, the seller not being in default in the terms and conditions to be by him kept and performed, the seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned at McMinnville, Yamhill county, Oregon, on the 31st day of October, 1910."

Daniels thereafter assigned the contract to Daniels & Bishop, these plaintiffs. Defendants raised about 31,000 pounds of hops, and cured and baled them, amounting to 155 bales in all. Plaintiffs advanced to defendants under the terms of the contract \$1,576.32. On October 8th defendant had delivered in the warehouse at the depot, in McMinnville, 95 bales of hops, containing about 20,000 pounds, and that on that day defendants tendered to plaintiffs the said 95 bales, which plaintiffs examined, and pronounced the hops damp and not properly dried. When plaintiffs first declined to receive the hops, and said that they were slack dried, defendant took 21 bales thereof back to the dryer, and redried them, which resulted, to some extent, in breaking up the hops. The Morrisses testified that when they opened up the bales they were found to be well dried, and further admit that about 5 bales of the last picking were out of color, and not prime hops. Witnesses who identified the classification made by them show that the objectionable hops were mostly those redried, because badly broken up, and the 5 bales of the last picking, which were not of good color. At that time plaintiffs gave defendants notice that they would not accept the hops and demanded the repayment of the advances made. Before October 20th, defendants delivered 21 additional bales at the warehouse, and on the 22d, that many more, making 137 bales in all; and the balance of the crop, namely, 18 bales, was deposited in the warehouse on the 27th of October. The hops were reinspected by plaintiffs on October 20th, and again refused by them. Prior to October the price of hops had gone down to 14 cents or less, so that at the time the hops were tendered, on October 8th, plaintiffs were anxious to be relieved from taking the hops. They made little objection to the hops except that they were slack dried. They did not discard any particular bales, that defendants might have them tested or replace them with good ones,

but in general terms said they would not accept the hops; and they bring several other witnesses who corroborate them in their statement that many of the hops were slack dried, although some of these witnesses did not corroborate them altogether.

[1] W. C. Miller, a witness for plaintiffs, took four samples from the hops, one of which represented a prime hop, two of them were medium, and one a cull, and says that the drying was all right in the medium hops; that they were well dried; and that the cull hop evidently had been redried, anyhow it was dried too much. Weldner, a witness for plaintiffs, first had four samples furnished him by the Morrisises. Afterwards he drew 10 or 12 samples himself, and he classed some of them as good prime, and except the 21 bales redried, and one other, as prime, or better than prime. He offered to buy them, but plaintiffs told him they had a lien on them, so he declined them on that account. Frank Johnson, a member of the firm of J. W. Seavey Hop Company, of Portland, was a witness called by plaintiffs, and says that he was sent samples of the hops by the defendants, and that on October 20th he wrote a letter grading the hops, classifying samples 7-87, 121, and 124 (referring to the numbers of the bales from which samples were taken) as prime, and four samples as less than prime. Later he examined the hops himself, and graded 90 bales as prime, and 43 others as containing no slack hops. He purchased the hops, and sold 27,000 pounds of them on sample as prime. The redried hops were in bales numbered from 135 to and including 155. Evans, a witness for plaintiffs, says he took five samples, one representing the 21-bale lot (redried), one representing the 5 bales of the late picking, and three representing 129 bales, the balance of the crop, and sent them to Mischler, at Aurora. From samples sent him by Morris, witness classed three of the samples, one as representing prime hops, one broken as though redried, and the other very slack. The samples exhibited by Morris were evidently drawn from the same classes as those taken by himself, namely, from the 21 bales of redried hops, from the 5 bales of the last picking, and from the 129 bales, the balance of the crop. Therefore the sample he pronounced prime undoubtedly represented the 129 bales. In speaking of the samples he drew he says that judging by the lot he would not pronounce them prime. One of the samples he drew represented prime hops; of the other two, one was very much broken up, as though redried, the other very slack. Mischler, referring to the same samples, says the one representing the 21 bales of redried hops, of course, was broken considerably; that the five bales were a little slack; and that, of the three samples representing the 129 bales, one was prime, and the other two dried enough, but off color.

The contract calls for hops of prime quality, even color, cleanly picked, and not broken. Plaintiff Daniels and other witnesses called by plaintiffs, in describing or defining hops of prime quality, say it is a hop that is cured properly, picked cleanly, dried enough so as to keep, and not overdried. They describe choice hops in practically the same terms, and, in distinguishing between prime hops and choice, they were not able to name any differential feature; but we understand from their efforts to describe them that choice hops are hops a little cleaner picked, a little better dried, without being too much dried, and of a little better color than prime hops. In other words, it depends upon the opinion of the person judging, rather than on any accurately definable conditions. If hops are fairly well dried, fairly cleanly picked, and of good color, one expert can consistently pronounce them prime while another may pronounce them less than prime; and so also as to choice hops. Opinions differ. If a buyer is under contract to buy prime hops and wishes to avoid his contract, it is not difficult to claim the hops as less than prime and to get his friends to agree with him. If he wants the hops, he will accept them if they are approximately prime, without objection. So there is no exact line of demarcation between medium and prime hops that can be accurately defined or drawn. The outcome of these hop contracts between the hop buyers and farmers, as to either the buyer or the farmer, is almost a pure chance. There is an absence of all the means of calculating the results. The demand and price for hops are subject to sudden and extreme fluctuation without apparent reason; and, when a person makes such a contract, he cannot expect the courts to show him leniency because of its hardships when the price is adverse to him. Both parties take the chance, and should abide by the result.

If defendants' hops did not fill the contract, he has no remedy, but, if they did, plaintiff must meet the terms of the contract; and the only question is: Did the hops meet the terms of the contract? The principal ground of plaintiffs' objection made at the time of the inspection of the hops was that they were not properly dried. There were four expert witnesses besides Miller and the defendants themselves, who testify that most of the hops were properly dried. Evans' testimony is practically to the same effect, at least so far as the drying is concerned. Stout and Fletcher, witnesses for the plaintiffs, saw only samples shown them by Daniels, and there is no indication from which bales the samples were taken, nor that they were representative of the 129 bales, or any part thereof. Dorcas' examination was superficial and casual. It was not shown from what bales samples classed by Miller were taken, or that they were representative of the lot. The only fault Weidner finds was

that they were of mixed color and the hops broken. His samples, therefore, must have been from the redried hops, or from the last picking.

[2] We are convinced from the preponderance of the evidence that 20,000 pounds of the hops were prime. The contract provides that the plaintiff shall have preference both as to the quantity and quality over all other contracts made as to said growth of hops by the seller with any other purchaser. Thus, if there were in the 31,000 pounds of hops harvested by defendants 20,000 pounds that were prime, plaintiffs were to have the right to select them from the whole crop. The conduct of plaintiffs would not indicate a desire to select 20,000 pounds therefrom if that many were prime, but on an inspection of a part thereof declined them without objecting to any special bales, and without giving defendants an opportunity to supply others in place of the defective ones.

[3, 4] Objection is now made that some of the bales weighed more than 210 pounds each. The contract provides: "Each bale of said hops to contain from 180 to 210 pounds of hops (5 pounds tare per bale to be allowed)." Therefore the weight of the bale with the bale cloth may be 215 pounds, and be within the contract. We may infer that the 95 bales delivered prior to October 8th were delivered in the order of their numbers, and therefore numbered from 1 to 95, as that was apparently the order in which they were baled and weighed; and of those so numbered there were but 9 that weighed over 215 pounds gross, and none exceeded 220 pounds. Daniels in his testimony says that it was claimed by Mr. Morris that there were 20,000 pounds in the 95 bales, and that that would make an average of more than 240 pounds to the bale. This is error on the part of the witness. 20,000 pounds in 95 bales would average just 210.5 pounds to the bale. Neither was this objection made when the hops were rejected, and the excess of weight in a few of the bales is immaterial in this case.

[5] It is contended by the defendant that the plaintiffs' refusal to take the hops was an abandonment of the contract, and therefore a forfeiture of the advances made; but the damages for breach of the contract by plaintiffs is fixed by the contract, namely: "The seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops as herein specified, and the market value * * * on the 31st day of October, 1910." This, we think, is intended to cover all forfeitures and damages, and that defendants must account for the advances received by them and offset the same against the damages in the contract provided for. It is difficult to determine what the market value of prime hops was on October 31st, as there

were not many sales in that month. Some of the buyers testified that the market price on the 31st was 14 cents; but no sales were made or offers of that price so there is no indication that defendants could have realized 14 cents. We think the preponderance of the evidence establishes the price on October 31st at 13 cents, and we so find, making the defendants' loss \$600, which deducted from the \$1,576.32, plus the interest, leaves \$1,001.91, for which amount, with interest from the 31st day of October at 7 per cent. per annum, plaintiff is entitled to judgment and decree of foreclosure.

The decree of the circuit court will be modified accordingly.

(64 Or. 325)

TAZWELL v. DAVIS.

(Supreme Court of Oregon. March 4, 1913.)

1. ELECTIONS (§ 269*)—CONTEST—STATUTORY PROVISIONS.

The powers and mode of procedure of the court in an election contest must be ascertained from the statute authorizing the proceeding; the determination of an election contest being a judicial function only so far as authorized by statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.*]

2. ELECTIONS (§ 278*)—CONTEST—STATUTORY PROVISIONS.

L. O. L. § 3422, provides that the county clerk, immediately after making an abstract of votes in his county, shall make a copy thereof and transmit it to the Secretary of State, who, in the presence of the Governor, shall, within 30 days after the election, and sooner if all the returns be received, canvass the votes, and that the Governor shall grant a certificate of election to the person elected and issue a proclamation declaring his election. Section 3524 provides that actions to contest the right of any person declared elected must be commenced within 40 days after the return day of the election, unless based on an illegal payment of money or other valuable thing. *Held*, that a contest commenced prior to the canvass by the Secretary of State, and before the certificate of election had been granted to either candidate, was premature.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 258-262; Dec. Dig. § 278.*]

3. ELECTIONS (§ 270*)—CONTEST—STATUTORY PROVISIONS.

L. O. L. § 3426 et seq., authorizes proceedings to contest an election to any county, district, or precinct office. Section 3529, which was part of the Corrupt Practices Act of 1909 (Laws 1909, p. 33, § 45), provides that any elector of the state, or of any political or municipal division thereof, may contest the right of any person to any nomination or office for which he has the right to vote, on the ground of deliberate, serious, and material violation of any of the provisions of that act, or of any other provisions of the law relating to nominations or elections, when the person whose right is contested was not eligible to such office, or on account of illegal votes, or an erroneous or fraudulent count or canvass thereof. *Held*, that an elector may contest the election of a person to the office of circuit judge under section 3529, although that office is neither a county, district, nor precinct office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 247; Dec. Dig. § 270.*]

4. ELECTIONS (§ 285*)—CONTEST—PLEADING—PETITION.

A petition in an election contest, alleging that the board of canvassers of an election returned that contestee received 10,793 votes for an office, and the contestant 10,665, that the clerks and judges of 191 precincts named made a false and erroneous count, that contestant was informed and believed that 250 or more votes were counted for the contestee more than were voted for him, and that they failed to count a large number cast in favor of contestant, and that contestant was informed and believed that 10,543 votes, and no more, were cast for the contestee, and 10,915 or more for the contestant, but not pointing out in which of the precincts named the errors occurred, by what judges or clerks they were made, or whether they were intentional, and, while alleging that the count was fraudulent, not setting forth any facts constituting fraud, was insufficient, because indefinite and failing to state any traversable facts.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.*]

5. ELECTIONS (§ 285*)—CONTEST—PLEADING—PETITION.

A petition in an election contest, alleging that illegal, spurious, and void ballots were cast, which were erroneously and illegally counted, in that there were various illegal marks of identification and erasures made upon the ballots by the voters, so that they could be readily identified, but not alleging in what particular precincts they were cast, the character of the marks, or whether they were accidental or intentional, or how many ballots contained illegal marks, and how many erasures, was insufficient; the allegation that the marks were illegal being a mere conclusion.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.*]

6. ELECTIONS (§ 194*)—VOTING BY BALLOT—MARKING BALLOTS.

Under L. O. L. § 3412, prohibiting electors from placing on their ballots any distinguishing mark whereby they may be identified, a mark which the elector has a legal right to place on the ballot, and which is necessary to indicate his choice, does not vitiate the ballot, although it might distinguish it from others and afford a means of identifying the voter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

7. ELECTIONS (§ 285*)—CONTESTS—PLEADING—PETITION.

Under L. O. L. § 3463, providing that, where an elector has not registered in the precinct in which he applies to vote, he shall be considered as challenged, and required to subscribe and swear to the blank A, prescribed by section 3449, and to procure six freeholders to take the oath therein provided that they are acquainted with the elector and believe the statements made in his oath are true, that for this purpose judges of election may administer oaths, and that in cities having a population of 5,000 or more the elector and the freeholders must take the oath before the judges of election in the precinct and at the time the elector offers to vote, a petition in an election contest, alleging that in 19 precincts named votes were illegally and erroneously counted, for the reason that the electors were not registered, and made no oath before any judge of the election as to their qualifications, but not giving a list of the number of illegal votes, or the names of the voters, or alleging that they lacked the constitutional qualifications, that the oath was not administered by clerks of the election acting as notaries public, or that the precincts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

named were within a city of 5,000 or more, was insufficient.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.*]

8. ELECTIONS (§ 227*)—CONDUCT OF ELECTIONS—IRREGULARITIES—EFFECT.

Qualified electors, whose ballots have been received and counted, should not be disfranchised because judges of election, by reason of an error in judgment, have not followed the correct procedure, where the real purpose of the law has been attained, and only qualified voters have voted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 197-200; Dec. Dig. § 227.*]

9. ELECTIONS (§ 285*)—CONTEST—PLEADING—PETITION.

Specifications of mere irregularities not affecting the result of the election, in a petition in an election contest, should be stricken out on motion.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.*]

10. ELECTIONS (§ 291*)—CONTEST—BURDEN OF PROOF.

When an elector is permitted to deposit his ballot, the presumption is in favor of the legality of the vote; and the burden is on the attacking party to show lack of qualification or a forfeiture of the voter's right.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.*]

11. ELECTIONS (§ 291*)—CONTEST—BURDEN OF PROOF.

Where an election is contested on the ground of illegal voting, the contestant has the burden of proving, not only that illegal votes were cast in sufficient number to change the result, but by whom and for whom they were cast.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.*]

12. ELECTIONS (§ 305*)—CONTEST—REVIEW.

The Corrupt Practices Act of 1909 (Laws 1909, p. 15; L. O. L. § 3486 et seq.), being full and complete in itself, and neither authorizing appeals in contests thereunder, nor referring to former provisions for appeals in election contests, no appeal in a contest under that act is authorized.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.*]

13. ELECTIONS (§ 305*)—CONTEST—REVIEW—"CIVIL CASE."

A contested election proceeding is not a "civil case," within statutes authorizing appeals from judgments in civil cases.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1183-1193; vol. 8, p. 7603.]

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Election contest by George Tazwell against George N. Davis. From an order dismissing the petition and quashing the proceeding, the contestant appeals. Proceeding dismissed.

This is a special proceeding to contest the right of defendant to the office of circuit judge of department No. 4 of the circuit court of the state of Oregon for the Fourth judicial district, comprising Multnomah county. The trial court sustained a motion to quash the proceeding, and dismissed the petition. The contestant appeals. The elec-

tion was held on the 5th day of November, 1912, at which George Tazwell, contestant, and George N. Davis, contestee, were candidates for the office of circuit judge. On the 21st day of that month contestant filed a petition for a recount of the ballots, and a notice of contest, naming the date for the hearing of the contest as December 6, 1912. The petition and notice were amended on November 30, 1912. Contestee moved to quash, for the reason that the court had no jurisdiction to try the proceeding.

Henry St. Rayner, of Portland (Bradley A. Ewers, of Portland, on the brief), for appellant. A. E. Clark, of Portland, for respondent.

BEAN, J. (after stating the facts as above). [1] In the absence of any statutory proceeding, the only remedy in the nature of a contest known to the common law is quo warranto, or, in modern times, an action in the nature of quo warranto. The determination of an election contest is a judicial function only so far as authorized by the statute. The court exercising the jurisdiction does not proceed according to the course of the common law, but must resort to the statute alone to ascertain its powers and mode of procedure. 15 Cyc. 394; Bradburn v. Wasco County, 55 Or. 539, 541, 106 Pac. 1018; Marsden v. Harlocker, 48 Or. 90, 85 Pac. 328, 120 Am. St. Rep. 786; Linegar v. Rittenhouse, 94 Ill. 208, 213.

The questions for consideration raised by the motion to quash are: (1) Has the court jurisdiction of the subject-matter of a contest of election of the office of circuit judge? (2) Does the petition state facts sufficient to constitute a cause of contest of the office in question, and invest the court with jurisdiction of the subject-matter?

[2] We will notice some of the provisions of the election laws of this state. Section 3422, L. O. L., provides that the county clerk, immediately after making the abstract of votes given in his county, shall make a copy of each of said abstracts, and transmit it to the Secretary of State, and it shall be the duty of the Secretary of State, in the presence of the Governor, to proceed within 30 days after the election, and sooner if all the returns be received, to canvass the votes given for different officers, including judges of the circuit court and district attorneys; and the Governor shall grant a certificate of election to the person having the highest number of votes, and shall also issue a proclamation declaring the election of such person. Official canvass of the returns of the election of November 5, 1912, was made in conformance with the above section November 29, 1912.

Section 3524, L. O. L., directs that any action to contest the right of any person declared elected to an office, unless a different

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—26

time be stated, must be commenced within 40 days after the return day of the election, unless the ground of such an action is for the illegal payment of money or other valuable thing. It is held that the return day mentioned in this section is the day on which the canvass begins, or after the official declaration of the result. 15 Cyc. 400; *Carlson v. Burt*, 111 Cal. 129, 43 Pac. 583; *Carbis v. Dale*, 23 Utah, 463, 65 Pac. 204; *Broadbuss v. Mason*, 95 Ky. 421, 25 S. W. 1060.

Until the vote has been canvassed and the certificate has been issued by the proper officer, no cause can arise for a contested election, because until that time it cannot be known who is officially declared elected. *Barnes v. Gottschalk*, 3 Mo. App. 111. An election contest is a statutory proceeding to obtain a recanvass of the votes cast at an election, as the result of which some person has been declared elected; and, where the court finds that no one has been declared elected, it has no jurisdiction of the contest, and cannot declare the contestant elected. 15 Cyc. 408; *Austin v. Dick*, 100 Cal. 199, 34 Pac. 655. This contest in the case at bar, having been initiated November 21, 1912, prior to the time of the official canvass of the votes by the Secretary of State, and before a certificate of election had been granted to either candidate, was premature. Evidently, as the Fourth judicial district comprises but one county, the contestant refers in his petition to the returns made by the county clerk. We will pass this point, however, and will examine some of the other questions presented, on account of the importance of the matter involved.

[3] The petition follows the form prescribed in section 3537, L. O. L. It is maintained by contestant that the proceeding is authorized by chapter 3, p. 15, of the Laws of 1909, popularly known as the Corrupt Practices Act, being section 3486 et seq., L. O. L.

Section 3529, L. O. L., is as follows: "Any elector of the state, or of any political or municipal division thereof, may contest the right of any person to any nomination or office for which such elector has the right to vote, for any of the following causes: 1. On the ground of deliberate, serious and material violation of any of the provisions of this act, or of any other provisions of the law relating to nominations or elections. 2. When the person whose right was contested was not, at the time of the election, eligible to such office. 3. On account of illegal votes, or an erroneous or fraudulent count or canvass of votes."

Section 3525 directs that an action or proceeding to annul and set aside the election of any person declared elected to an office must be made or filed in the circuit court of the county in which the certificate of his nomination as a candidate for the office to which he is declared nominated or elected is filed, or in which the incumbent resides.

Section 3531 enacts that, when the reception of illegal votes is alleged as a cause of contest, it shall be sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose nomination or election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony shall be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial. This provision shall not prevent the contestant from offering evidence of illegal votes not included in such statement, if he did not know, and by reasonable diligence was unable to learn, of such additional illegal votes, and by whom they were given, before delivering such written list.

Section 3532 provides, among other things, that any petition contesting the right of any person to a nomination or election shall set forth the name of every person whose nomination is contested, and the grounds of the contest, and shall not thereafter be amended, except by leave of the court; that on the filing of any such petition the clerk shall immediately notify the judge of the court, and issue a citation to the persons whose nomination or office is contested, citing them to appear and answer, not less than three nor more than seven days after the date of filing the petition; and that the contest shall take precedence over all other business. This section was not followed as to the issuance of a citation, but instead thereof a notice of contest was served. Inasmuch as contestees appeared, we do not deem this variation material.

The act of 1909 is general in its scope, particularly section 3529, L. O. L., and we think authorizes any elector of the state, or of any political division thereof, to contest the right of any person to any office for which such elector has the right to vote, including the office of circuit judge. Prior to this the act of 1854 (Rev. St. 1854-55, pp. 76, 78, §§ 41-46), being sections 3428 et seq., L. O. L., only made provisions for the contest of an election to any county, district, or precinct office, clearly pertaining to an office of the county, or to some subdivision thereof, and not to the office of circuit judge. The original petition was challenged by a motion, upon the ground, *inter alia*, that the petition did not state facts sufficient to constitute a cause of contest.

Section 3531, L. O. L., in substance, provides for amending such a petition by permitting the contestant to deliver to the opposite party, at least three days before the trial, a written list of the illegal votes, and by whom given, which he intends to prove

on such trial. Instead of following this method, the contestant, by leave of court, filed an amended petition, and by his brief and argument contends that this petition is sufficient. Therefore we do not consider that the question of amendment is before this court. The amended petition appears to have been drawn with care, and states the case as favorably to the contestant as the facts would warrant.

[4] With this understanding we will consider the facts stated in the petition. The petition contains three counts. After the formal allegations as to the election, the candidacy of the parties, and the qualifications of contestant for the office, stating that he is a qualified elector of the district, the petition alleges, in substance, that the board of canvassers of election returned that contestee, George N. Davis, received 10,793 votes for the office, and that contestant, George Tazwell, received 10,665 votes; that the respective clerks and judges of precincts numbered 1 to 182, inclusive, including precincts with half numbers, making a total of 191, made a false and erroneous count of the votes cast in such precincts, as the contestant is informed and believes, and therefore alleges that a large number of votes, to wit, 250 or more, were counted for contestee, George N. Davis, more than were voted for him by the electors of such precincts; that the judges and clerks of election failed to count a large number of votes, to wit, 250 or more, that were cast by the electors in favor of contestant, George Tazwell; that contestant is informed and believes that in truth 10,548 votes were cast for George N. Davis, and no more, and 10,815 or more votes for contestant George Tazwell. It is not pointed out in which of the 191 precincts the contestant believes that the errors occurred. The petition was properly verified by the contestant to the effect that he believed it to be true; therefore the statement of contestant purports that he is informed and believes that an error occurred in the count. It is not claimed in the petition that any intentional error was made; nor is it shown what judges or what clerks made the error. While it is said that the count was fraudulent, no facts constituting a fraud are set forth.

McCrary, in his work on Elections (4th Ed.) § 435, says: "An application for a recount of the ballots cast at an election will not be granted, unless some specific mistake or fraud be pointed out in the particular box to be examined. Such recount will not be ordered upon a general allegation of errors in the count of all, and giving particulars as to none, of the boxes. These rulings were made in case of applications to the court to order a recount of ballots. * * * But before ordering it the court held that there must be charges of mistake or fraud sufficiently precise to induce the court to entertain the com-

plaint, and that a general allegation of errors believed to exist was not enough to authorize the perilous experiment of testing the election return by the result of a recount."

The first cause of contest is nothing more than an application for a recount. A careful examination of the same does not disclose that errors favorable to the contestant are any more likely to be found than errors in favor of the contestee. It is a mere application for a second chance on a recount of the votes in 191 precincts.

In counting the votes and making return thereof by the various judges and clerks of election, it is presumed that every official duty has been performed. In order for a recount or re-examination of their proceedings in the matter, issuable facts should be set forth in the petition indicating some specific mistake or fraudulent conduct, in order that the court may determine whether or not the same is sufficient. We think that the rule referred to in McCrary on Elections is a salutary one, and that it has usually been taken as a guide in cases of this nature. The first cause of contest states no traversable fact as to the grounds of contest, but states conclusions.

In the case of Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, this court, in discussing the allegations contained in the 14 counts of the complaint, at pages 575, 576, of 17 Or., at pages 877, 878, of 21 Pac. (11 Am. St. Rep. 857), of the opinion, said: "From the facts as set forth, it is manifest that they are not even reasonably or otherwise specific and certain, and that no one could be prepared to meet charges preferred in such a general way, or, if any irregularity or illegality in fact did lie concealed behind them, to avoid being taken by surprise. The wording of the notice indicates, as was asserted at the argument, that the plaintiff did not know of a single error or illegal vote cast, but stated the facts broadly and generally, because he was unable to point out or to be reasonably specific and certain as to any count in his notice, or as to any irregularity or illegality of whatever kind, upon which to rely, or other fact to sustain his claim. * * * While it is the duty of courts to disregard mere technical rules or defects, and to liberally construe the law that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which he has been declared to be elected, by a tribunal chosen by the people, ought to have some well-defined 'cause,' and to be able to state it with sufficient certainty as to notify or inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry."

The Supreme Court of Indiana, in the case

of *Borders v. Williams*, 155 Ind. 36, 57 N. E. 527, in regard to the allegations contained in the appellant's petition, at page 39 of 155 Ind., at page 528 of 57 N. E., said: "It is but tantamount to a general averment that the judgment of the county board of canvassers, pronounced upon the returns from the precincts, that the contestee had received the highest number of votes, was erroneous, which would be a mere conclusion, and present no question of fact; and, when pleaded, as in this case, as an independent ground of contest, we must regard it as insufficient and surplusage."

[5] The second and third causes of contest are subject to much the same objections as the first. In the second cause of contest it is alleged, in effect, that there were divers illegal, spurious, and void ballots cast at the election in the precincts numbered in the first cause of contest, to wit, 200 or more, the exact number of which contestant is unable to state; and that they were erroneously and illegally counted for the contestee by the judges and clerks of election, in that there were various and divers illegal marks of identification and erasures made upon the ballots by the voters, so that the ballots could be readily identified. It is not alleged in what precincts the alleged illegal votes were cast, and the petition does not indicate in what manner any of the ballots were marked. This allegation may be true, yet the only identifying mark on any of the ballots may have been the name of a candidate voted for properly written thereon, or accidental blots. The allegation is a conclusion of law and, like the first cause of contest, contains no traversable fact. It is not indicated how many ballots contained the alleged illegal marks, or how many contained the erasures. It is at most an application for a re-examination of the ballots in 191 precincts, in order, perchance, to find a fraction over one ballot to the precinct with some distinguishing mark thereon. It is not shown by the petition whether or not the marks were accidental or intentional. The petition is evidently based upon the supposition that the marks and erasures which usually occur upon ballots are to be found upon those in the several precincts. True it is alleged that the marks were illegal. This is but a legal conclusion. The pleading does not directly or indirectly indicate the character of a single mark, or where, or by whom, a single alleged illegal ballot was cast. It is attempted to embrace within the allegations of the petition all manner of marks and erasures, without specifying any particular kind, and without indicating who cast such ballots.

[6] Section 3412, L. O. L., being a part of the Australian ballot law adopted in this state, prohibits any elector from allowing his ballot to be seen by any person, with an apparent intention of letting it be known

how he is about to vote, and from mutilating his ballot, or placing thereon any distinguishing mark whereby the same may be identified. It provides a penalty of not less than \$50, nor more than \$200, for a violation thereof. Any mark which the elector has a legal right to place upon his ballot, and which is necessary to indicate his choice, should not vitiate the ballot as bearing a distinguishing mark, although it might be possible thereby to distinguish such ballot from others, affording a means of identifying the voter. *Van Winkle v. Crabtree*, 34 Or. 462, 55 Pac. 831, 56 Pac. 74.

It is stated in 15 Cyc. 359 that "ballots should not be rejected on account of slight irregularity in the manner of marking, unless it is clear that the elector intended it as a mark of identification. Consequently ballots containing blots or marks which were apparently made accidentally or carelessly and not deliberately should not be rejected as containing distinguishing marks; and the same is true of accidental ink blots on the back of a ballot. Marks on ballots, a reason for which is or may be suggested, consistent with honesty and good faith, will rarely be allowed to invalidate them, unless it appears that they were in fact used for corrupt purposes; but marks, for the existence of which no such reason can be suggested, will, if unexplained, generally be presumed to be for corrupt purposes."

[7] For a third, separate, and further cause of contest it is alleged, in substance, that in 19 precincts, the numbers of which are given, the respective judges and clerks of the election erroneously counted 1,358 votes for the office for contestee, giving the number in each precinct; that such votes were illegally and erroneously counted, for the reason that the electors casting such ballots were not registered, and made no oath before any judge of the election of the respective precinct as to their qualifications to vote; that therefore the votes were illegal and void, and the result was thereby changed. No list of the number of illegal votes, nor of the names of the persons by whom cast, was contained in the petition or furnished the contestee at any time. What we have said in regard to the first cause of contest applies equally to the third. It will be observed that the illegality of the ballots mentioned is based upon the allegation that the electors, not being registered, did not take the required oath, as prescribed in blank A, § 3449, L. O. L., before one of the judges of election. There is no intimation in the petition but that each of the electors casting these ballots was qualified to vote.

The qualification of electors was prescribed by article 2, § 2, of the Constitution of Oregon, as it existed prior to the amendment of November 5, 1912, which extended the right of suffrage to women. That organic law then provided that, in all elections not

otherwise provided for by this Constitution, every male citizen of the United States of the age of 21 years and upwards, who had resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of 21 years and upwards, who had resided in the United States one year and in this state during the six months immediately preceding such election, and had declared his intention to become a citizen of the United States one year preceding such election, should be entitled to vote at all elections authorized by law. It is not stated in the pleading that the electors casting these ballots lacked any of these prescribed qualifications.

In order to prevent intimidation, fraud, bribery, and other corrupt practices at elections, and to prescribe a general rule for determining the right of persons to vote, sections 3447 et seq., L. O. L., provide for the registration of voters.

Section 3463, L. O. L., requires that, if it appears that the elector has not registered in the precinct in which he applies to vote, he shall be considered challenged, and shall be required to subscribe and swear to blank A, prescribed by section 3449, filled out according to the facts, and to procure six freeholders of the county to take and subscribe to the second oath as specified in blank A. For this purpose judges of election are authorized to administer oaths. It is further provided that, in carrying out the provisions of this section, in cities having a population of 5,000 or more, as shown by the last preceding federal census, the elector offering to vote, and all the freeholders subscribing to the affidavits herein required, shall take such oath before, and the same shall be administered only by, the judges of election, or either of them, in the precinct and at the time the elector offers to vote, and such affidavits shall not be received, if taken or made at any other time or place, or before any other officer than one of such judges of election. This provision is mandatory, and requires the election officers to strictly comply therewith.

[8] For aught that appears, the prescribed oath may have been administered by clerks of the election, acting as notaries public. The main purpose of the law is to prevent persons who are not qualified electors from exercising the right of suffrage. It is not the purpose of the law that a large number of qualified electors who have cast their ballots, which have been received and counted by the election judges, should be disfranchised on account of the judges of election not following the correct procedure by reason of an error in judgment, when the real purpose of the law has been attained, and only qualified electors have been allowed to cast their ballots. *Lehibach v. Haynes*, 54 N. J. Law, 77, 23 Atl. 422.

[9] Specifications of mere irregularities not

affecting the result of the election should be stricken out on motion. 15 Cyc. 406. It is not alleged in the third cause of contest whether or not these 19 precincts are within or without the city of Portland. We are asked to look at another separate part of the petition to aid this cause of contest, and to take judicial knowledge of the fact that these precincts are within a city having a population of 5,000 or more. In a city of 4,000 inhabitants, or in Multnomah county outside of the cities, the method apparently pursued would have been perfectly proper.

The judges of election are not required to have the qualifications of lawyers; and no stricter rule should be applied to their conduct relating to the mode of procedure, when they have obtained the correct result, than should be applied to the pleadings prepared by the learned counsel in this election contest.

[10, 11] When an elector is permitted to deposit his ballot, the presumption is in favor of the legality of the vote; and the burden is on the attacking party to show a lack of qualification in the elector, or a forfeiture of his right. *Clark v. Robinson*, 88 Ill. 498; *Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312. Where an election is contested on the ground of illegal voting, the contestant has the burden, not only of proving that illegal votes were cast in sufficient number to change the result, but he must also show by whom and for whom they were cast. 15 Cyc. 416; *Lippincott v. Felton*, 61 N. J. Law, 291, 39 Atl. 646. In order to lay the foundation for making such proof, facts should be alleged in the petition in conformity with the statute. The contest in the case at bar was prematurely commenced. The petition does not conform with the requirements of the statute referred to, nor state facts sufficient to confer jurisdiction. It does not appear that any request or offer to further amend the proceedings was made. The time for hearing the cause as provided in section 3532, L. O. L., had expired at the time the motion to quash the proceedings was allowed. There was no error in granting such motion.

[12, 13] It is also contended by counsel for contestee that there is no right of appeal from the decision of the circuit court in a contest brought under the provisions of the act of 1909. The right of appeal from the decisions of inferior courts in election cases does not exist, unless it has been conferred by some constitutional or statutory provision. *City of Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28. Statutes authorizing appeals to be taken from judgments rendered in civil cases do not apply to contested election proceedings under the statute, as they are not civil cases. 15 Cyc. 435; *French v. Lighty*, 9 Ind. 475; *Stearns v. Village of Wyoming*, 53 Ohio St. 352, 41 N. E. 578; *Simon v. Portland*, 9 Or. 437; *Rogers v. Johns*, 42 Tex.

339. This proposition is not controverted by counsel for contestant, but it is claimed that the right of appeal exists by virtue of section 3429, L. O. L.

The Corrupt Practices Act of 1909 appears to be full and complete in itself, and covers numerous questions relating to elections and nominations. It makes no reference to the former act of which section 3429 is a part, and makes no provisions for an appeal in cases of this kind. We do not deem it absolutely necessary to decide this question, as the result in this case would be the same, except as to the form; but we call attention to the same in order that the statute may be remedied by amendment. We think the point made by contestee in this respect is well taken. It is unnecessary to pass upon the other questions raised in this case.

The proceeding should therefore be dismissed; and it is so ordered.

(64 Or. 476)

MERRIAM v. HAMILTON.

(Supreme Court of Oregon. March 4, 1913.)

1. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE — COMPLAINT — REQUISITES — "DISEASE"—"PAIN."

A complaint, in an action by a married woman for malpractice, which alleges that she employed defendant as her physician to treat her for a backache, that he mistakenly diagnosed her case as one of pregnancy, that he negligently failed to examine her to ascertain that she was not in such condition, and failed to ascertain her true condition, and that by reason thereof she was rendered sick and injured in her health and rendered weak and nervous, states no cause of action for failing to show that her real condition was one of disease which by the exercise of ordinary skill defendant should have discovered; "disease" being defined as an alteration in the state of the body, or of some of its organs, interrupting or disturbing the performance of the vital functions, or a particular instance or case of this, and the word "pain" being defined as a disagreeable feeling usually in its intenser degrees resulting from, or accompanying, deranged or otherwise abnormal action of the physical powers.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2100, 2101; vol. 8, p. 7639; vol. 6, p. 5158.]

2. PLEADING (§ 8*)—CONCLUSIONS OR FACTS.

While it is sufficient to charge in general terms that an injury was negligently inflicted, the acts done must be stated, and it must appear from the facts averred, and not from mere conclusion, that the negligence caused or contributed to the injury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—EVIDENCE—SUFFICIENCY.

In an action for malpractice, evidence held not to show that the physician's treatment caused the physical condition complained of.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

4. NEGLIGENCE (§ 121*)—LIABILITY.

Where there are two possible causes of an injury, for one of which defendant is not responsible, plaintiff to recover must show that the jury was wholly or partly the result of the cause for which defendant was liable, and, if the evidence leaves it as probable that the injury was the result of one cause as much as the other, he cannot recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Elizabeth Merriam against W. B. Hamilton. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to allow nonsuit.

The plaintiff, a married woman, avers in substance that about February 6, 1909, she employed the defendant as her physician to treat her for a backache, and that he entered upon such service, but did not use due care in treating her for that malady, in that he diagnosed her case as one of pregnancy, and that he contended for his diagnosis until November 8, 1909. She then alleges: "That during all of said times the plaintiff was not pregnant with a child, and that said fact and the true condition of the plaintiff was well known to the defendant, and with reasonable diligence, care, and skill in treating and examining the plaintiff the same should and would have been known to the defendant, but the defendant carelessly and negligently and without due and proper care and skill as a physician, during all of said times failed, neglected, and refused to treat and examine the plaintiff so as to ascertain that the plaintiff was not in said condition, and failed to ascertain plaintiff's true condition. That by reason of the said careless, negligent, and unskillful treatment of the plaintiff by the defendant, and by reason of the careless, negligent, and unskillful neglect of the said defendant to ascertain the true condition of the plaintiff, the plaintiff has been and is rendered sick, and has been and is thereby injured in her health and constitution and rendered weak and nervous, and has and does now, because thereof, suffer great mental and physical pain and anguish and humiliation, and the said plaintiff has been and is thereby injured and damaged in the sum of \$5,000." What is termed as a second cause of action is couched in terms identical with the first, except the added statement of special damages for money expended for medicines, nurse hire, and infant's wardrobe, all of which might have been included in the first cause of action. Without stating for what he was consulted, the defendant admitted that he was a physician and surgeon employed as such to treat the plaintiff, and that he had treated her between the dates mentioned in the complaint, but otherwise he entirely traversed that pleading. There was a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

verdict and judgment for the plaintiff, and the defendant appeals.

H. H. Riddell and G. W. Stapleton, both of Portland (J. F. Logan and Covert & Stapleton, all of Portland, on the brief), for appellant. H. M. Kimball and E. R. Ringo, both of Portland (J. A. Jeffrey, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] In the consideration of the allegations quoted it is of no importance whether the plaintiff was pregnant or not, for either condition is normal for a married woman who has not passed her sexual climacteric, and neither one of them is a disease or malady. Although the complaint says the defendant failed to ascertain the plaintiff's true condition, yet no intimation is given about what that true condition was. To charge a defendant with a tort in a case of this kind, it should appear for one thing that the plaintiff's real condition was one of disease which by the exercise of the ordinary skill of his profession the defendant should have discovered, for "they that are well have no need of a physician." In other words, if the plaintiff was in a condition of health, no cause of action would arise upon the mere expression of opinion or diagnosis that she was in one or the other condition of pregnancy or nonpregnancy. In this the complaint was amenable to the objection that it fails to state a cause of action. True enough, the plaintiff says she had a backache, but pain is not a disease; it is only the symptom of some disorder of the body which in turn may not amount to disease or trauma. Webster defines "disease" as "an alteration in the state of the body or of some of its organs interrupting or disturbing the performance of the vital functions or a particular instance or case of this; any departure from the state of health presenting marked symptoms." It is said in the Standard Dictionary that pain is "a disagreeable feeling usually in its intenser degrees resulting from or accompanying deranged, overstrained or otherwise abnormal action of the physical powers and serving as a warning of danger and a spur to effort." *Mutual Life Ins. Co. v. Simpson* (Tex.) 28 S. W. 837.

[2] The plaintiff, indeed, says that she has been rendered weak and nervous and injured in her health and constitution by reason of the alleged careless, negligent, and unskillful treatment of her by the defendant. If sound health and steady nerves were absolute conditions of every human being, it would be sufficient in so many words to charge that a departure from these conditions was due to the negligence of the attending physician, within the meaning of *Gederson v. O. R. & N. Co.*, 38 Or. 343, 62 Pac. 637, 62 Pac. 763, teaching the doctrine that it is sufficient to charge in general terms that an injury was inflicted negligently.

But a continuous condition of perfect health in every or any individual does not accord with human experience, and it does not necessarily follow that the ills of which the plaintiff complains were attributable to the treatment given her by the physician merely because they occurred during his attendance. "It is well settled that negligence may be charged in general terms—that is, what was done being stated, it is sufficient to say that it was negligently done without stating the particular omission which rendered the act negligent—but it must appear from the facts averred that the negligence caused or contributed to the injury." *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29. In other words, the disorders mentioned in the complaint are such as may and often do happen to any person in the absence of medical treatment and if the plaintiff would charge these to the defendant she must show by an appropriate averment of facts, not conclusions, that those ills were really attributable to him and would not have happened but for his lack of skill.

[3] If we turn to an analysis of the testimony, the situation is not made better for the plaintiff. It does not establish any causal connection between defendant's treatment of her and her alleged state of health. Out of her own mouth come statements of symptoms which all the witnesses agree are common signs of pregnancy. She avows that she desired to give birth to a child and that the defendant advised her to remain quiet and take no risk of bringing on a miscarriage. She menstruated at intervals during the time she was under the defendant's care. He gave her some remedies to regulate her stomach and bowels, but the principal treatment was to advise quiet and freedom from excitement. In effect they were precautionary measures designed to prevent premature parturition. She states in answer to questions: "I was feeling just normal, kind of good for nothing. You didn't suffer any pain? No, if I had suffered any pain there would have been some excitement." When by lapse of time it was established that pregnancy did not exist, she consulted other physicians, who diagnosed her case as one of tumor and advised an immediate abdominal operation. Not satisfied with this, she consulted still another physician, who told her there was no tumor or pregnancy and advised her to eat coarse food, put on a straight front corset, and get rid of some of the fat on her abdomen, and the ultimate event proved the accuracy of this last diagnosis. The evidence thus discloses that her true condition was one of health and that no injury could have resulted because of the diagnosis of her case as one of pregnancy, as that is a normal condition and not one of disease. So far as the diagnosis is concerned, no injury could be attributable to it. The bodily states of which she complains could as well be attributed to the tumor diagnosis as that of pregnancy.

[4] In this connection the court erred in denying the defendant's request to instruct the jury that: "Where there are two or more possible causes of an injury for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as much as the other, the plaintiff cannot recover."

Other errors are noted, but we deem it unnecessary to consider them. The motion for nonsuit at the close of plaintiff's case should have been sustained, and likewise the motion for a directed verdict in favor of the defendant at the close of the evidence should have been allowed.

The judgment of the circuit court is reversed, and the cause remanded, with directions to allow the motion for nonsuit.

(65 Or. 20)

KITCHIN v. OREGON NURSERY CO., Limited.

(Supreme Court of Oregon. March 4, 1913.)

1. APPEAL AND ERROR (§ 882*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where, in an action by a buyer of nursery stock for damages caused by receiving defective stock, the seller placed in evidence statements of shipments of stock made out on billheads bearing the heading after his name "Growers of reliable nursery stock," the objection to the admission in evidence of letters written by him to the buyer because they contained, printed on the letter head, the same phrase, was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8591-3610; Dec. Dig. § 882.*]

2. SALES (§ 416*)—CONTRACTS—BREACH OF CONTRACT—EVIDENCE—ADMISSIBILITY.

A buyer of nursery stock, who sues for damages caused by the delivery to him of defective stock, may show that prior to the purchase a newspaper advertisement of the seller containing a representation of the quality of the stock came to his attention and that it induced him to buy the stock.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

3. SALES (§ 416*)—CONTRACTS—BREACH—EVIDENCE—ADMISSIBILITY.

Where, in an action by a buyer of nursery stock for damages caused by the delivery of defective stock, the defense was that the stock died for want of proper soil, cultivation, and care, evidence of the character and condition of the soil was not objectionable because reference was made therein to other stock thriving in similar soil.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

4. TRIAL (§ 110*)—CONDUCT OF COUNSEL—OBJECTIONS—NECESSITY.

It is not error to allow counsel of a party to state in the hearing of the jury the matters sought to be deduced by the answer of a witness to a question to which an objection was sustained, unless the adverse party objected to

the making of the statement in the presence of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 271; Dec. Dig. § 110.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the verdict contained no special damages except an item specially alleged and properly allowed if plaintiff could recover, and an item of \$1 mentioned as personal damages, meaning special damages, the error, if any, in an instruction on special damages, was not prejudicial, especially as plaintiff conceded that the special damages of \$1 should be eliminated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

6. EVIDENCE (§ 493*)—OPINION EVIDENCE—NONEXPERT WITNESSES.

Questions involving the effect and quality of the cultivation of the soil in which trees purchased as nursery stock are planted may be established by nonexpert witnesses as a matter of common observation, from the appearance of facts, and expert witnesses are not necessary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2275-2282; Dec. Dig. § 493.*]

7. SALES (§ 417*)—WARRANTY—EVIDENCE—SUFFICIENCY.

Where, in an action for breach of contract of sale of nursery stock, the buyer alleged and proved that trees, delivered and planted, died, and it appeared that the number of dead trees in some of the orchards was arrived at by estimates, by an actual count of dead trees in sections of 10 trees through a large part of the orchard, and by computing the number of dead trees in the balance in the same proportion, there was sufficient evidence to enable the jury to ascertain the damages with reasonable certainty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.*]

8. SALES (§ 273*)—CONTRACTS—IMPLIED WARRANTY.

One engaged in producing and placing on the market fruit trees for fruit raising impliedly warrants that the trees sold are sound, healthy, and vigorous.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.*]

Appeal from Circuit Court, Washington County; J. U. Campbell, Judge.

Action by A. L. Kitchen against the Oregon Nursery Company, Limited. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Plaintiff alleges that in the year 1910 he was engaged in the business of buying and selling, taking orders for, and supplying, fruit trees to the public for planting orchards; that between the 1st day of February and the 19th day of April, 1910, he purchased from the defendant young fruit trees of the total value of \$1,257.59, which were shipped to plaintiff at Roseburg, Or.; that said trees were defective and imperfect, in that they were immature by reason of late cultivation and growth in the fall, and were not suitable for planting in the spring; and that, although seasonably planted, by reason of said defects, a large part of them died, namely, about 80 per cent. thereof, whereby plaintiff was damaged in the sum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on petition for rehearing, see 130 Pac. 1133.

of \$78.88, freight and express charges paid for shipment, and the sum of \$1,000 for the loss of the trees. Plaintiff admits that he is indebted to the defendant in the sum of \$157.59, and that said sum should be credited against said damages. The defendant by its answer admits the sale of the trees, but denies that defendant is liable to plaintiff for any defects in the trees, or that he sold them upon any warranty; denies that the trees were defective, imperfect, immature, or unfit for planting; and alleges that the trees were in good, healthy condition, and packed in proper shape, when shipped. The case was tried before a jury, which rendered a verdict in favor of the plaintiff for the sum of \$901.28, and for personal damages \$1, from which it authorized a deduction of the \$157.59; and defendant appeals from the judgment rendered thereon.

Bagley & Hare, of Hillsboro, for appellant.
E. B. Tongue, of Hillsboro, and B. L. Eddy, of Roseburg, for respondent.

EAKIN, J. (after stating the facts as above). There are a great many assignments of error, but all may be included under a few points.

[1] Objections were made to the introduction in evidence of several letters, written by the defendant to the plaintiff, for the reason that they contained printed on the letter head, following the name of the defendant the words, "Growers of reliable nursery stock," but the objections are rendered immaterial for the reason that defendant placed in evidence several statements of shipments of trees made out upon billheads bearing the same heading, and including the statement objected to.

[2] Plaintiff offered in evidence a newspaper advertisement published over defendant's name, the admission of which was excepted to by the defendant. Plaintiff testified that the advertisement came to his attention before he purchased the trees, and that it influenced him to buy from the defendant. The advertisement is in the nature of a representation of the matters stated therein to those who might thereafter deal with the company, and tends to establish an implied warranty to subsequent purchasers of the truth of such representation, and was competent evidence for that purpose. See *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714, 19 S. E. 846.

[3] Testimony as to the character and condition of the soil was not objectionable because reference is made therein to other trees thriving in similar soil; part of the defense being that the trees died for want of proper soil, cultivation, and care.

[4] Error is assigned to the ruling of the court in permitting counsel for plaintiff to state, within the hearing of the jury, the matters sought to be deduced by the answer of the witness to a question to which an

objection was sustained. If it appeared that such a statement might be prejudicial, defendant should have objected to the statement being made within the hearing of the jury, and, no doubt, the court would have required the statement to have been made in writing rather than orally; but, in the absence of such objection being timely made, no error was committed.

[5] Exceptions are also taken to the instruction of the court as to special damages; but the verdict contains no special damages, except the item of freight, which is specially alleged, and properly allowed if plaintiff is entitled to recover, and an item of \$1, mentioned as "personal damages." We understand the term "personal damages" to mean special damages; but, as the amount allowed in the verdict was only nominal, the instruction could not be prejudicial error; and, as the plaintiff in his brief concedes that the special damages may be stricken out, that will be the order.

[6] Witnesses testified as to the effect and quality of the cultivation of the soil in which the trees were planted, and it is contended by defendant that this was expert opinion by nonexpert witnesses. We do not deem the matter sought to be established by this evidence as a matter requiring scientific knowledge or special skill or learning, but rather a matter of common observation from the appearance of facts. It is said in *Graham v. Pennsylvania Co.*, 139 Pa. 158, 21 Atl. 152, 12 L. R. A. 295, and quoted with approval in *National Bank v. Fire Association*, 33 Or. 181, 53 Pac. 11: "That the opinions of witnesses are in some cases admissible as evidence, even when not coming properly under the head of expert testimony, has long been established in practice." In the case of *National Bank v. Fire Association*, supra, Mr. Justice Wolverton says: "There are several reasons assigned which characterize its (nonexpert testimony) competency, among which may be enumerated its necessity as being the only method of proving certain facts essential to the due and proper administration of justice; that it is not a mere opinion, but a conclusion of fact to which the judgment and common knowledge of the observer has led him in regard to the subject-matter; and that certain facts are of such a nature that whatever a witness may affirm touching them he asserts largely as an opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished, making it, in effect, a compound question of fact and opinion." See, also, *Farmers' Bank v. Woodell*, 38 Or. 298, 61 Pac. 838. The admission of the evidence could not have been prejudicial, and was not error.

It is further contended that the price at which the trees were sold by plaintiff was not competent, but the evidence relating thereto was excluded, and the court in the

instructions told the jury that the purchase price of the trees at Orenco should be the basis upon which to compute the damages.

[7] Again, it is objected that damages cannot be predicated upon estimates. The number of dead trees in some of the orchards was arrived at by estimates, namely, actual count of dead trees in sections of ten trees through a large part of the orchard; the number of dead trees in the balance of the orchard being computed in the same proportion. In many of the orchards it was determined by actual count, and the evidence was sufficient to enable the jury to ascertain the damages with reasonable certainty. *Hoskins v. Scott*, 52 Or. 276, 96 Pac. 1114.

[8] The principal contention of plaintiff is as to the liability of defendant upon its implied warranty that the articles sold shall be suitable for the purposes to which they are to be applied. This rule is well recognized by this court. *Gold Ridge Mining Co. v. Tallmadge*, 44 Or. 34, 74 Pac. 325, 102 Am. St. Rep. 602; *Lenz v. Blake*, 44 Or. 573, 76 Pac. 357; *Mine Supply Co. v. Columbia Mining Co.*, 48 Or. 395, 86 Pac. 790. However, in this case it is not necessary to apply the rule because the plaintiff is not only contending that the trees were not suitable for the use to which they were to be applied, but that the trees were not sound. Defendant admits that it is bound by an implied warranty to that extent, namely, that the trees were sound and healthy, and the testimony strongly tended to establish the fact that the trees were not sound, but were unhealthy trees having an inherent defect which caused them to die; and the jury passed upon the question of the inherent defect, as well as the cause of the death of the trees. Defendant contends that it was not liable upon a warranty that the trees would grow, but only that they were live trees of the variety ordered. Defendant as a nursery company was producing and putting upon the market young fruit trees for fruit raising; and nursery fruit stock cannot be considered with reference to any other purpose. Hence there is an implied warranty that the trees are sound, healthy, and vigorous. Defendant states in its brief that "when a known and described article is purchased, and the plaintiff purchased what he got and got what he purchased; there is no implied warranty that it is reasonably fit for the use intended by the purchaser." But plaintiff's contention is that he did not get what he purchased, namely, sound, healthy, and vigorous trees.

There are other errors assigned relating to the admissibility of the evidence and instructions to the jury, but we deem them unimportant.

After careful consideration of the law applicable to the questions here involved, and a review of the evidence, we find no prejudicial error.

The case was fairly presented to the jury, and, eliminating the \$1 special damages, the judgment is affirmed.

(47 Mont. 64)

LOWERY et al. v. COLE et al.

(Supreme Court of Montana. Feb. 21, 1913.)

1. APPEAL AND ERROR (§ 954*)—DISCRETIONARY RULING—PRELIMINARY INJUNCTION.

The trial court's exercise of discretion in granting a preliminary injunction could not be disturbed on appeal, where there was no manifest abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

2. INJUNCTION (§ 144*)—PRELIMINARY INJUNCTION—NOTICE.

Under the express provisions of Rev. Codes, § 6645, a preliminary injunction may be granted in exigent cases upon the complaint alone before the defendant has answered, where the court believes that irreparable injury will result from the delay required for giving notice.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

3. INJUNCTION (§ 161*)—PRELIMINARY INJUNCTION—CONTINUANCE AFTER ANSWER—DISCRETION.

Whether a preliminary injunction shall be continued after the defendant answers is a matter within the discretion of the trial court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 347; Dec. Dig. § 161.*]

4. SPECIFIC PERFORMANCE (§ 108*)—PRELIMINARY INJUNCTION—DISCRETION—COMPLAINT.

The granting of a preliminary injunction in a suit for specific performance to restrain a foreclosure sale about to be held pursuant to a breach of the contract sought to be enforced was not an abuse of discretion, though the complaint failed to allege that the defendants were insolvent.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

5. SPECIFIC PERFORMANCE (§ 114*)—COMPLAINT—SUFFICIENCY—TENDER.

Where the bill in an action for specific performance of a contract for the sale of land alleged that plaintiff was willing and ready to comply with the contract, and that in compliance therewith he had tendered a deed which had been refused, it was not demurrable because it failed to allege a deposit of the deed with the clerk of court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.*]

6. SPECIFIC PERFORMANCE (§ 114*)—COMPLAINT—SUFFICIENCY.

The complaint in an action for specific performance of a contract for the sale of land need not allege special circumstances showing that plaintiff has no adequate remedy at law; the allegation of a breach of the contract being sufficient to raise the presumption that pecuniary compensation will not afford adequate relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.*]

7. SPECIFIC PERFORMANCE (§ 108*)—PRESERVATION OF STATUS QUO—INJUNCTION.

Where the court has jurisdiction of an action for the specific performance of a con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tract for the sale of land, it may use all the instrumentalities at its disposal to preserve the status quo until the controversy can be determined on the merits, and hence the court had power to enjoin a foreclosure sale of the property covered by the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by Andrew Lowery and another against Mary Cole and another. From an order refusing to dissolve an injunction, defendants appeal. Affirmed.

O'Hara, Edwards & Madeen, of Hamilton, for appellants. J. D. Taylor and L. O. Johnson, both of Hamilton, for respondents.

BRANTLY, C. J. Appeal from an order refusing to dissolve an injunction. On January 20, 1912, the plaintiffs were indebted to the defendant Mary Cole in the sum of \$949.44, evidenced by a judgment recovered in the district court of Ravalli county on September 2, 1911. They were also indebted to one Louise J. Hageman. A portion of this indebtedness, the exact amount being not then definitely determined, was secured by a mortgage upon lots 15 and 16, in block 21, in Hamilton, Ravalli county. The plaintiffs, desiring to effect satisfaction of the judgment and also to procure a discharge of so much of their indebtedness to Hageman as was secured by the mortgage, entered into a contract in writing with the defendant Cole, under the terms of which they agreed to convey to her the said lots by warranty deed at a price to be fixed by three arbitrators, one chosen by each of the parties to the contract, and the third by these two. The defendant Cole agreed on her part to accept the conveyance at the price so to be fixed, and in consideration therefor (1) to pay so much of the Hageman indebtedness as was secured by the mortgage; (2) to apply the remainder to the satisfaction of the judgment; and (3) to pay the balance, if any then remaining, to the plaintiffs. The arbitrators were selected and fixed the price of the lots at \$1,750. The amount of the Hageman incumbrance was then definitely ascertained to be \$778. In addition to these facts, the complaint alleges that the plaintiffs thereupon executed a warranty deed to defendant Cole; that they tendered it to her and demanded that she pay the mortgage indebtedness due Hageman; that she refused to accept the deed or to pay the said indebtedness and has ever since refused to do so; that the plaintiffs have ever since been ready to deliver the said lots to this defendant according to the terms of the contract; that on the — day of —, 1912, this defendant caused an execution to be issued upon the judgment and to be placed in the hands of the defendant George See, the sheriff of

Ravalli county; that, under and by virtue of it, he had seized certain personal property of plaintiffs, consisting of live stock, hay, grain, farming implements, household goods, etc.; that he has advertised it for sale to satisfy the judgment; and that, unless he is restrained from so doing, he will proceed to complete the sale and satisfy the judgment. It is further alleged by way of conclusion that the plaintiffs are without a plain, speedy, or adequate remedy at law, and will suffer irreparable injury if the sale is carried to completion. The prayer is for a decree requiring the defendant Cole to perform the contract according to its terms, and for an injunction to restrain the sale pending the action. Attached as an exhibit is a copy of the contract. The allegations are upon positive knowledge. The complaint was filed on November 8th. The court issued the injunction as prayed, but without notice; the sale being advertised for that day. On December 6th the defendants moved the court to vacate the order granting the injunction on the grounds that the facts stated do not warrant the granting of the writ, and that, in any event, they do not exhibit such an emergency as justified the granting of it without notice. The motion was supported by an affidavit by the defendant See, and by an answer by both defendants. The affidavit does not controvert any of the facts alleged in the complaint. The answer admits all of the allegations therein made, except that it denies a tender of the deed by the plaintiffs. It alleges in this connection that the defendant Cole, at the time the value of the lots was fixed by the arbitrators, was, and ever since has been, ready and willing to accept the deed from plaintiffs and to carry out the terms of the contract, but that the plaintiffs refused, and ever since have refused, to deliver it or the possession of the lots.

[1] It is a settled rule in this jurisdiction that the granting or refusing to grant a preliminary injunction in a particular case rests in the discretion of the district court, and that this court will not interfere with the exercise of that discretion unless there has been a manifest abuse of it. *Bennett Bros. v. Congdon*, 20 Mont. 208, 50 Pac. 556; *Boyd v. Desrozier*, 20 Mont. 449, 52 Pac. 53; *Forrester et al. v. Boston & Mont., etc., Co.*, 21 Mont. 555, 55 Pac. 229, 353.

[2, 3] In exigent cases, before the defendant has answered, the writ may be granted without notice either upon the complaint alone or upon affidavits, if in the opinion of the court irreparable injury will result from the delay required for giving notice. *Rev. Codes*, §§ 6644, 6645. So it is discretionary with the court as to whether the injunction shall be continued after the defendant has answered.

[4, 5] The contention of counsel is that

since it is not alleged that the defendants are insolvent, and it is apparent that an action at law for damages for a violation of the contract would adequately compensate the plaintiffs, the court abused its discretion both in granting the writ, and in refusing to sustain the motion to set it aside. There is no merit in the contention from either point of view. The complaint is verified upon knowledge. This meets the requirement of the statute. Section 6644, *supra*. We do not think that it can be questioned that the plaintiffs are entitled to a specific performance of the contract, if the facts as stated are established by the evidence. The complaint is not a model of pleading, but it sets forth clearly the stipulations of the contract, the definite ascertainment of the purchase price in accordance therewith, and a tender of such a conveyance as the plaintiffs bound themselves to make. But for the single issue as to the tender of the deed, upon the admissions in the answer it is apparent that defendant Cole is without defense. It is true the deed is not tendered with the complaint; yet, since the plaintiffs have submitted themselves to the jurisdiction of the court, they may be required to prepare and deposit the deed in court at any time before the decree granting them relief. By demanding the relief sought, coupled with the allegation of the offer to perform, they exhibit their willingness to meet all the obligations to be performed on their part. Hence the complaint is not open to objection because the plaintiffs do not allege a deposit of the deed with the clerk. As was said by the Supreme Court of Appeals of West Virginia, in *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. 9: "Whatever may be the rule as to dependent covenants in courts of law, it is well settled, in cases of this character in courts of equity, that it will not make the bill demurrable merely because the plaintiff fails to tender with his bill for specific performance a sufficient or any deed for the land." There is some diversity in the decisions on the subject, but, where it appears that an offer to perform has been made and refused, it is sufficient if the plaintiff alleges that he is willing and stands ready to comply with the contract on his part. *Bruce v. Tilson*, 25 N. Y. 194.

[6] In this character of action it is not necessary for plaintiff to allege special circumstances showing that he has no adequate

remedy at law. The allegation of a breach of such a contract is itself sufficient to raise the presumption that pecuniary compensation will not afford adequate relief. *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Christiansen v. Aldrich*, 30 Mont. 451, 76 Pac. 1007; Rev. Codes, § 8099. In other words, when it appears that the defendant has refused to comply with his contract, the presumption attaches that the plaintiff has suffered detriment which is irreparable in an action for damages and is *prima facie* entitled to invoke the aid of equity to obtain adequate relief, viz., the performance of the contract.

[7] The court may grant or withhold relief, according to the circumstances as they are made to appear by the evidence (*Christiansen v. Aldrich*, *supra*); but, having assumed jurisdiction of the action, it will, as in any other action, make use of all the instrumentalities at its disposal to preserve the status quo until the controversy can be determined on the merits. *Taylor et al. v. Florida East Coast Ry. Co.*, 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472; 2 High on Injunctions (4th Ed.) 1120. The question here is not, as counsel seem to think, whether a case is stated for an injunction to restrain the collection of a judgment which should be deemed satisfied, but whether, pending the action, the court should restrain conduct on the part of the defendants which, but for the restraint, would result in a condition which would render the final decree in favor of plaintiffs ineffective. If the plaintiffs are entitled to any relief, they are entitled to have the judgment satisfied in conformity with the terms of the contract. This they cannot have if the sale is allowed to proceed and satisfaction is had by that means; for, under the changed conditions which would be found to exist at the termination of the action, the rights of the parties, as affected by the seizure and sale of the property, would be left wholly unadjusted.

The injunction was properly issued in the first instance, and the action of the court in denying the motion was correct. The order is affirmed.

Affirmed.

HOLLOWAY, C. J., and SANNER, J., concur.

(47 Mont. 70)

BRANDT et al. v. McINTOSH et al.

(Supreme Court of Montana. Feb. 21, 1913.)

1. PLEADING (§ 8*)—CONCLUSIONS—ENJOINING ISSUE OF SHERIFF'S DEED.

In an action to enjoin the issue of a sheriff's deed on execution sale of a mine under a judgment for services, a complaint alleging only that defendant's claim for services was fraudulent and was approved by other defendants solely to obtain possession of the mine, and that the entire suit was a conspiracy, is insufficient to authorize an injunction, the allegations being mere conclusions, and not sufficient under Rev. Codes, § 6532, requiring the complaint to contain a statement of the facts constituting a cause of action to support an injunction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

2. CORPORATIONS (§ 211*)—ACTIONS BY STOCKHOLDERS—COMPLAINT—SUFFICIENCY.

Where stockholders of a corporation seek an injunction to prevent the sale of corporate property, a complaint which does not show that they are minority stockholders is insufficient to afford them relief, as under Rev. Codes, §§ 3835, 3838, they may control the election of directors and remove objectionable ones if they have a majority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. § 211.*]

3. CORPORATIONS (§ 206*)—ACTIONS BY STOCKHOLDERS—DEMAND.

Minority stockholders are not entitled to sue to prevent the sale of corporate property under an invalid judgment, where they have made a demand only upon the president and secretary, and it does not appear that relief has been sought by appeal to the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. § 206.*]

4. CORPORATIONS (§ 211*)—ACTIONS BY STOCKHOLDERS—PETITION—SUFFICIENCY.

A complaint by stockholders to enjoin issue of a deed on execution sale of corporate property under a judgment is insufficient, where, though alleging that the officers have failed to redeem, it fails to allege that the officers who refused to redeem from the sale had any means of obtaining funds to redeem.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. § 211.*]

5. PLEADING (§ 8*)—CONCLUSIONS—ENJOINING ISSUE OF SHERIFF'S DEED.

A complaint by stockholders to enjoin the issue of a sheriff's deed to corporate property on the ground of fraud in the judgment under which the sale was made, which alleges that the control and operation of the mine has been in the hands of a board of directors who have managed it for their own personal advantage, and that they might obtain control of the property to the loss of the stockholders, is insufficient for want of a statement of the facts on which the charge is based.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Henry E. Brandt and others against Robert G. McIntosh and others and Curtis Huller and another. From a judgment for plaintiffs, the last-named defendants appeal. Reversed.

Elmer E. Hershey, of Missoula, for appellants. MacChesney, Becker & Bradley, of Chicago, Ill., and Woody & Woody and A. J. Violette, all of Missoula, for respondents.

HOLLOWAY J. This is an appeal from an order granting an injunction. The complaint alleges that in June, 1911, Curtis Huller commenced an action in the district court of Missoula county against the Amador Copper & Gold Mining & Milling Company, Limited, a corporation, to recover \$5,822.44, alleged to be due him for work and labor performed for the corporation; that due service of summons was made; that on July 8, 1911, the default of the defendant corporation was entered, judgment recovered by default for the full amount demanded, and execution issued and placed in the hands of the sheriff of Missoula county for service. It is then alleged that in the proceedings leading up to the sheriff's sale, and in the sale itself, such irregularities occurred, and these are pointed out, that a sheriff's deed ought not to issue to the purchaser of the property at such sale. After a hearing the district court ordered an injunction to issue restraining the defendant sheriff from issuing the deed, and this appeal followed.

But for certain statements contained in the brief of respondents we would be uncertain as to the theory upon which plaintiffs proceeded, but we have the repeated assurance that the purpose of this suit is twofold: (1) To set aside the Huller judgment; and (2) to have vacated the pretended sheriff's sale. As ancillary relief and for the purpose of maintaining the status quo, an injunction was demanded restraining the sheriff from executing or delivering a sheriff's deed pending a final determination of the cause.

[1] 1. The only allegations to be found in the complaint which reflect in the least upon the character of Huller's claim or his judgment are these: "That the claim of the said Curtis Huller is a pretense and a fraudulent claim, approved by the said Robert G. McIntosh and the said George F. Stoney, together with other parties unknown to your orators, for the sole purpose of obtaining possession of the Amador mine and the other property mentioned in the said sheriff's sale for themselves in fraud of your orators' rights," etc. And, again: "Your orators further allege that the entire suit brought in this court by Curtis Huller is a mere scheme and conspiracy on the part of the said Curtis Huller, Robert G. McIntosh, and George F. Stoney and others unknown to your orators to obtain possession of the said premises described in the said sheriff's return in fraud of the rights of your orators," etc. It will be observed at once that in neither of these excerpts is there a single fact stated. Each consists of a bald conclusion. Under our Code, the complaint must contain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a statement of the facts constituting the cause of action. Rev. Codes, § 6532. There is not any contention that Huller did not render services to the corporation of the value of the amount claimed, or that such services were not necessary; indeed, there is not a suggestion of any fact which tends in the remotest degree to impeach the integrity of the judgment. The employment of such extravagant terms as "fraud," "conspiracy," and other words of like malign import, unaccompanied by a statement of facts upon which the charges of wrongdoing rest, is a useless waste of words. 20 Ency. Pl. & Pr. 786. The complaint fails altogether to state facts sufficient to constitute a cause of action for setting aside the Huller judgment.

[2] 2. Assuming that sufficient facts are stated to warrant the action of the trial court in granting an injunction pendente lite if the corporation whose property is alleged to be in jeopardy was plaintiff, we still have for consideration the question: Does the complaint state a cause of action for an injunction in favor of these plaintiffs? The suit is brought by seven named stockholders of the Amador Copper & Gold Mining & Milling Company, Limited, for themselves and for 500 other stockholders in that company similarly situated. The purpose of having the sheriff's sale set aside is to protect property owned by the corporation, and not to subserve any private, personal interests of plaintiffs, as distinguished from the rights common to all other stockholders of the company. An action of this character is one brought in behalf of the corporation itself. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 78 Pac. 194, 104 Am. St. Rep. 703. It is elementary that, before stockholders can go into a court, they must first exhaust their remedy within the corporation itself. If they hold a majority of the stock, they may control the election of the directors (Rev. Codes, § 3835), or, if they control two-thirds of the stock, they may remove an objectionable director (section 3838). Because of the power and authority thus lodged in the stockholders, courts of equity refuse to listen to their complaints, unless it appear that the situation of the parties is such that they cannot secure relief from the corporate authorities.

[3] In the first place, this complaint does not even disclose that these named plaintiffs and those for whose benefit the suit was brought are minority stockholders. We are not informed what amount of the stock these plaintiffs own or control, or what the authorized or issued stock of the corporation is. Therefore the plaintiffs do not show their inability to secure relief within the corporation itself, and for this reason fail to state a cause of action. But, even if they are minority stockholders, they still fail to state a cause of action. It is an elementary

rule of law that, before minority stockholders can be heard to prosecute a suit founded on a right of action existing in the corporation itself, they must allege that a demand has been made upon the board of directors or other governing body of the corporation for relief from the grievances of which they complain or for action in conformity with their desires, and that such demand has been met by a refusal, or, in lieu of such demand and refusal, they must show such a state of facts as discloses that the demand, if made, would have been entirely unavailing. The complaint fails to disclose any demand whatever upon the board of directors to prosecute this suit or prevent the threatened injury to the corporation's property. It is alleged, however, "that your orators have requested the said officers and directors to redeem said property from said liens and judgment and especially from the pretended sale to Curtis Huller, but that the said officers and directors have made no attempt to redeem said property and have refused and still refuse to do so," but this reference is only to the defendants McIntosh and Stoney, president and secretary, respectively, of the defendant corporation, and each a director thereof. We are not informed of the number of directors constituting the board, and it is therefore impossible to say that the acts of the president and secretary are such that relief could not be had from the board itself, and certainly neglect or misconduct on the part of those two officers is not sufficient to relieve the plaintiffs from the necessity of applying to the board of directors for a redress of their grievances or for action in conformity to their wishes. The authorities in support of these propositions are so numerous that reference to the texts where they are cited will suffice. 10 Cyc. 967; 28 Am. & Eng. Ency. of Law (2d Ed.) 976; 20 Ency. Pl. & Pr. 778; 2 Cook on Stock & Stockholders (3d Ed.) § 701.

[4] While it is alleged that the officers have refused to redeem the corporation's property from the pretended sale under the Huller judgment, the complaint fails to allege that the officers or directors have any funds, or the means of obtaining funds, with which to effect such redemption.

[5] The complaint contains the following paragraph: "That since the year 1907 the operation and control of said mine has been in the hands of a board of directors, most of whom were residents of the state of Idaho, and the property has been managed and controlled since that time by said board of directors for their own personal advantage and gain, and in such a manner that the directors or some of them may finally acquire the property herein described, to the great loss and detriment of your orators, and the stockholders represented by them." Assuming, without deciding, that the words "said

mine" refer to all the real property sold at the sheriff's sale, the paragraph quoted is distinguished by the adroitness with which the pleader approaches facts, which might reflect adversely upon the conduct of the board of directors, without stating them. It will not do to say that the directors managed the property for their own personal gain. The facts must be stated upon which such a charge can rest.

Because the complaint does not state any cause of action in favor of these plaintiffs, the trial court erred in directing an injunction to issue and the order is accordingly reversed.

Reversed.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 59)

HULSE v. NORTHERN PAC. RY. CO. et al.
(Supreme Court of Montana. Feb. 20, 1913.)

1. NEW TRIAL (§ 33*)—GROUNDS—ERRORS OF LAW.

Where the trial court committed errors of law of a substantial character, a motion for new trial is properly granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 48; Dec. Dig. § 33.*]

2. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS—NARRATION OF INJURY.

In an action by a trespasser on a train who was run over, declarations that a brakeman pushed him under the train are self-serving, and are inadmissible in chief where merely narrative of a past occurrence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

3. EVIDENCE (§ 155*) — CONVERSATIONS—ADMISSIBILITY.

In an action by a trespasser on a train who was run over, where a number of witnesses testified for the defense that in a conversation immediately after the accident he stated that one of his companions pushed him under the car, and he fell, and did not state that the brakeman pushed him off, testimony in rebuttal by other witnesses that at that time he did state that he was shoved under the train by a brakeman is admissible in view of Rev. Codes, § 7871, providing that, when part of a conversation is given in evidence, the whole on the same subject may be inquired into by the other party, and was improperly excluded as a self-serving declaration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-453, 2148; Dec. Dig. § 155.*]

4. APPEAL AND ERROR (§ 978*)—DISCRETION OF LOWER COURT—GRANT OF NEW TRIAL.

Where the trial court erroneously excluded certain evidence, and subsequently granted a new trial on that ground, the latter ruling will not be disturbed on appeal, even though the excluded evidence does not seem to the reviewing court to be of much importance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by A. J. Hulse against the Northern Pacific Railway Company and another. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

Gunn and Rasch, of Helena, for appellants. Wellington D. Rankin, of Helena, for respondent.

SANNER, J. On March 21, 1911, the respondent, A. J. Hulse, with others, was riding on one of appellant company's freight trains en route from Missoula to Helena without paying fare. When the train had reached a point about half a mile west of Helena, he was in some manner cast beneath its wheels and run over, sustaining the injury which is the basis of this action. The issue of fact was whether he had been pushed off by the brakeman while the train was in motion. The case was tried to the district court sitting with a jury, and the verdict was for the appellant. On motion of respondent the verdict was set aside and a new trial awarded; hence this appeal.

[1] The motion for new trial was submitted to the district court upon the ground of errors of law occurring at the trial. If it appear that any such errors of a substantial character were committed, the order must be affirmed. *Monson v. La Franc Copper Co.*, 43 Mont. 65, 114 Pac. 778; *Harrington v. Butte, etc., Ry. Co.*, 36 Mont. 478, 93 Pac. 640; *Gillies v. Clarke Fork Coal Co.*, 32 Mont. 320, 80 Pac. 370; *State v. Schnepel*, 23 Mont. 524, 59 Pac. 927.

The exceptions noted in the record challenge the propriety of the rulings below in two respects: (1) The exclusion from respondent's case in chief of certain declarations by him, to the effect that the brakeman had pushed him off; and (2) the exclusion of substantially the same evidence in rebuttal.

[2] 1. The declarations were self-serving, and the theory on which it was sought to have them admitted in chief is that they were part of the res gestæ. To this we cannot assent. Without elaboration, it will suffice to say that the declarations in question were merely statements or narratives of a past transaction and within the rule against hearsay. *State v. De Hart*, 38 Mont. 211, 99 Pac. 438; *Polindexter & Orr L. St. Co. v. Oregon Short Line Ry. Co.*, 33 Mont. 338, 83 Pac. 886; *State v. Tighe*, 27 Mont. 337, 71 Pac. 3; *State v. Pugh*, 16 Mont. 343, 40 Pac. 861. The order granting a new trial cannot be sustained for error in this regard.

[3] 2. In rebuttal it was sought to prove by the witnesses Matheny, Grotz, and Ward that respondent said a brakeman had pushed him off. As to Matheny, the evidence was properly refused, since the declaration to be

elicited from him was fixed at a time and place for which there was no foundation in the appellant's case. As to Grotz and Ward, the condition is different. For the appellant the witnesses Porter, Gardiner, and Wilson had testified to the effect that, after respondent had been taken to the baggage room, some conversation occurred in which the respondent stated in effect that, as the train was coming into town and as he was getting out of the car, some one of his companions in the car pushed him and he fell. On cross-examination Porter further testified that the respondent did not say a brakeman pushed him off; and Gardiner and Wilson testified that the respondent did not say who pushed him. We are satisfied that there was but one conversation in the baggage room. The testimony of Grotz and Ward, therefore, was admissible as part of that conversation (Rev. Codes, § 7871; 1 Ency. of Evidence, p. 385), and as a contradictory version of it. Fidelity & Casual-

ty Co. v. Dorrough, 107 Fed. 339, 48 C. C. A. 364; Carver v. United States, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602; O'Keefe v. Eighth Ave. R. Co., 33 App. Div. 324, 53 N. Y. Supp. 940; St. Louis, etc., Co. v. Frazier (Tex. Civ. App.) 87 S. W. 400. The way for it having been opened in appellant's case, its admissibility in rebuttal was not affected by the fact that the declaration was self-serving.

[4] The trial court was in better position to appreciate the value of this testimony than we are. In view of what appears in the record, it does not seem to have been of very much importance; but its exclusion was error, and we cannot say that the trial court was guilty of a graver error in the effort to correct it.

The order appealed from is affirmed.
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

(184 Cal. 659)

BORGWARDT et al. v. MCKITTRICK OIL CO. (L. A. 2,997.)(Supreme Court of California. Feb. 11, 1913.
Rehearing Denied March 13, 1913.)**1. MINES AND MINERALS (§ 14*)—LOCATION—VALIDITY.**

Where persons locating mining claims formed a corporation, each owning stock in proportion to their claims, the location is not invalid, as in the case where persons merely lend their names to a corporation, in which they have no interest, to enable it to acquire a greater area of mining ground than is allowed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.*]

2. MINES AND MINERALS (§ 38*)—LOCATION—ABANDONMENT.

In an action involving the right to mining land, evidence held not to establish a voluntary abandonment by defendant of its location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

3. MINES AND MINERALS (§ 23*)—ANNUAL ASSESSMENT WORK—NECESSITY.

Until an actual discovery of mineral is made upon a claim, the location is not perfected, and annual assessment work is not necessary.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.*]

4. MINES AND MINERALS (§ 26*)—LOCATION—EFFECT.

Upon the locating of a claim and posting of notice, the locator, while acquiring no vested right as against Congress until the inchoate location is perfected by discovery, has a right, as against third persons, to be protected against all forms of entries, so long as he remains in possession and with due diligence prosecutes his work of discovery; but, where he abandons his work toward discovery, the claim may be relocated, and the subsequent locators, if they remain in possession and diligently prosecute the work of discovery, which does not mean the pursuit of capital for the work, but the actual prosecution of the work, they may perfect title good as against the original locator.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 61-63; Dec. Dig. § 26.*]

5. MINES AND MINERALS (§ 36*)—LOCATION OF CLAIM—WORK OF DISCOVERY.

Where a claim upon which there had been no discovery was relocated by plaintiffs, their placing men in a cabin, with directions to watch the land, together with the mere figuring as to the charge for drilling oil wells, is not such a diligent prosecution of the work of discovery as to perfect the relocation as against the original locator.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 36.*]

6. MINES AND MINERALS (§ 23*)—LOCATION—WORK OF DISCOVERY.

A locator of a mining claim is protected in his possession only while he may be fairly held to be actually engaged in such work as reasonably may be discovery work, and will not be protected on the theory that he is entitled to a reasonable time to begin work, where actual operations were not begun for several months after location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.*]

7. MINES AND MINERALS (§ 26*)—LOCATION—RELOCATION.

Where defendant did not abandon its original location, but merely failed to diligently prosecute the work of discovery, a relocation by plaintiffs, who also failed to prosecute the work of discovery until after re-entry and commencement of discovery work by defendants, will not bar defendant of its rights under the original location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 61-63; Dec. Dig. § 26.*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George W. Borgwardt and others against the McKittrick Oil Company. From a judgment for plaintiffs, defendant appeals. Reversed.

J. W. Laird and F. E. Borton, both of Bakersfield, for appellant. George E. Whitaker, of Bakersfield, and Charles G. Lamberson and Lamberson & Lamberson, all of Visalia, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment given in an action commenced June 1, 1908, to quiet plaintiffs' title to the N. E. ¼ of section 12, township 30 south, range 21 east, Mt. Diablo base and meridian, containing 160 acres, which is valuable for petroleum oil. Plaintiffs claim under an attempted United States placer mining location, initiated by the posting by them of notice of location on the ground on May 26, 1908, while defendant claims under two locations initiated on September 19, 1899, one including the N. ½ of said N. E. ¼, with lots 1 and 2 in the N. W. ¼ of the same section, and the other including the S. ½ of said N. E. ¼, with lots 3, 4, 5, and 6 in the S. E. ¼ of the same section.

The findings of the trial court, which are in full accord with the allegations of the complaint of plaintiffs, are to the following effect: Plaintiffs, who were then citizens of the United States over the age of 21 years, on May 26, 1908, filed a mineral location covering said quarter section under and pursuant to the provisions of chapter 6, title 32, Revised Statutes of the United States, by posting a notice in due form thereon, where it was easily discernible, and performing the other acts essential to the initiation of a location. All said land was at said time a part of the public domain of the United States, and was unappropriated, open, vacant, and unoccupied land, subject to location and entry by citizens of the United States. Immediately following the making of such location, they entered upon the occupancy and possession thereof, and continued in the exclusive possession thereof up to May 29, 1908, engaged in the development of the same for the oils, gypsum, and other minerals contained therein. During the night of May 29, 1908, while plaintiffs were in such possession, the defendant, without their consent, entered in and upon the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

surface lines of said claim, announcing its intention to drill for mineral oils contained therein, and have ever since proceeded, and are now proceeding, "to put into effect the said announcement and the preliminary work of drilling for said mineral oils." The court further found that, at the time of plaintiffs' location, the land was not held by the defendant under or by virtue of any mineral location whatever, and the defendant was not the owner of, or entitled to the possession of or in the occupancy or possession of, said land or any part thereof, or actively or in good faith engaged in the work of prosecuting the development of said land or any part thereof for oil. It further found that any attempted location which defendant had made upon said land had, prior to May 26, 1908, become forfeited by reason of the failure of defendant or its predecessors in interest to do or perform the assessment work required by law to be performed upon said land during the year 1907, and that defendant was not thereafter, or on August 18, 1908, in the possession or occupancy of the land under any mineral location whatever. It further found that plaintiffs, within a reasonable time after their location, commenced in good faith the work of developing the land for the mineral oil contained therein, and prosecuted the same with reasonable diligence until the discovery of oil in a well drilled by the lessees of plaintiffs.

Judgment was given that, subject only to the paramount title of the United States, the plaintiffs are the sole owners of said land, and enjoining defendant from asserting any claim thereto. As we have said, this is an appeal by defendant from such judgment. It is claimed that the findings are in certain material respects without support from the evidence.

Except in regard to the matter of assessment work for the year 1907, there is practically no conflict in the evidence. Substantially such evidence is as follows: As we have said, defendant claims under two locations initiated on September 19, 1899, one including the N. $\frac{1}{2}$ of said N. E. $\frac{1}{4}$, with lots 1 and 2 in the N. W. $\frac{1}{4}$ of the same section, and the other including the S. $\frac{1}{2}$ of said N. E. $\frac{1}{4}$, with lots 3, 4, 5, and 6 in the S. E. $\frac{1}{4}$ of the same section. Notices of location were posted on September 19, 1899, on these two claims on behalf of the requisite number of persons, who at such time intended to work through the agency of a corporation, in which they were to hold the stock in equal shares, and who subsequently, on December 2, 1899, conveyed their respective interests to defendant corporation. The work of development was immediately proceeded with on lot 5 in the S. E. $\frac{1}{4}$ of the section, with the result that a well was drilled to the depth of about 1,100 feet. At a depth of some 775 feet, 26 feet of rich oil sands were discovered,

capable of producing, it is claimed, 40 barrels of oil per day. No oil was in fact produced; defendant endeavoring to pass through and reach a greater production at a lower depth. Finally an immense flow of artesian water was struck, which effectually prevented further operations in that well. This was in the latter part of 1899 or the early part of 1900. It may be conceded that from such time until May 28, 1908, there was no such continuous work as would warrant a conclusion that defendant was continuously and diligently prosecuting any discovery work on either location, and that it was not doing so on May 26, 1908. It claims that a sufficient discovery was shown on the southerly location by what we have already stated, which perfected that location, obviated the necessity of any further work, except the \$100 assessment work required annually on a claim after discovery and before patent, and dispensed with the necessity of further actual possession, all of which results do follow an actual discovery. Defendant owned other claims, adjoining or cornering on these locations, on some of which it was prosecuting work. In April, 1908, defendant's board of directors voted to order the timbers for a rig to drill a well on the northerly location. At this time, Mr. Davis, who located the alleged claim, as agent of plaintiffs, was the foreman of defendant, as well as a stockholder and director therein. Early in May he severed his relations with defendant. On May 23, 1908, defendant commenced the overhauling and repair of a water pipe line to be used in drilling on said northerly location. On May 26, 1908, Davis went upon the N. E. $\frac{1}{4}$ of section 12 to locate the same for plaintiffs. At that time no one was in actual physical possession of any part thereof. There was an old cabin on the northerly $\frac{1}{2}$ of said N. E. $\frac{1}{4}$, and another old cabin on the S. E. $\frac{1}{4}$ of said section, some little distance outside of the lines of the land attempted to be located by him, but within the lines of defendant's southerly location. Both of these cabins had been erected by defendant. Davis posted his notice of location, and looked at the boundaries already marked on the ground. On May 27, 1908, he departed for Bakersfield, leaving a man named Garner in the cabin on the S. E. $\frac{1}{4}$ of the section, with directions to get two or three other men to watch the claim and stay on the ground. During the evening of May 28, 1908, defendant brought to the N. $\frac{1}{2}$ of said N. E. $\frac{1}{4}$ in wagons certain timber for the construction of a rig to bore a well, and deposited the same thereon, following this with rig lumber on the next day. Davis returned to the land on May 29th, with a surveyor to run the lines, and found the timber that had already been left there by defendant, and also found a man occupying the cabin thereon, who had been left in possession by defendant. On May 30th or 31st he returned again, staying overnight, and

sleeping in the cabin on the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ with the man who occupied the same for defendant. He returned to Bakersfield the next day, and on June 1, 1908, this action was commenced. The only actual possession on the part of plaintiffs up to this time was such as can be held to have existed by reason of the occupancy by Garner, and three men whom he employed, of the cabin on the S. E. $\frac{1}{4}$ of the section, and the fact that such men were there to watch the claim, and walked over the ground occasionally. The only alleged prosecution of any discovery work on the part of plaintiffs up to this time was that Mr. Davis, some 10 days before May 26, 1908, had been negotiating with certain parties as to the amount that they would charge to place a drilling rig on this land, or as he put it, "figuring" with them as to what they would charge. This resulted in nothing in the way of any arrangement; and it was as late as the middle of July, 1908, before any arrangement was made with anybody to procure a drilling rig. From the time that defendant commenced to move timber upon the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ on May 28, 1908, it was never out of actual possession thereof, and continued to diligently prosecute discovery work, ultimately, some time in the fall of 1908, finishing a well capable of producing oil in paying quantities. Some time subsequent to the commencement of the action, and in the early part of June, 1908, while defendant was enjoying actual possession of the land, engaged in prosecuting discovery work, Davis constructed a small cabin thereon, which was thereafter occupied by plaintiffs' agents. About the middle of July, plaintiffs commenced to place timber for a boring rig upon the land. They completed a rig there about July 22d or 23d, "spudded in" on August 31st, and thenceforth prosecuted their discovery work with diligence, finally, some time after defendant's discovery, finishing a well.

[1] We see no reason to doubt the validity of the locations of defendant's predecessors, made in the year 1899. The 16 locators located the claims solely for their own individual benefit, and not as mere agents for the benefit of some other person or of some corporation in which they had no interest. The defendant corporation, to which it was proposed to transfer the claims, was to be one in which they were to be the sole stockholders, each to own one-sixteenth of the stock. As said in appellant's brief: "This is no case of dummy locators, lending their names to any person or any corporation for the purpose of permitting it to acquire lands. This is a case of 16 men locating, in apparent good faith, lands within the limit of the amount allowed to them, and adopting a corporate management as an appropriate means of regulating and handling their joint interests, and each retaining, through the agency of the corporation, the exact interest

in the land which he acquired under his location." The authorities cited by respondents in this regard, have no application to such a situation, but refer to cases where a location is made by so-called "dummy locators," persons who simply loan their names as locators and act simply as the agents or employes of some person or corporation to whom they are to transfer their interest. Our own case of *Mitchell v. Cline*, 84 Cal. 400, 24 Pac. 164, cited by respondents, is one of such cases. There, as said by the court, three of the locators of one claim and five of another were "sham locators," not pretending to have any interest in the claim. "They merely permitted their names to be used as locators to enable their friends to obtain possession of and patent for more mineral land than they were entitled to by law; and they executed conveyances to such friends without any valuable or lawful consideration therefor." This was held to be contrary to the policy and object of the United States law limiting the quantity of placer mineral land, which may be located by one person. In *Cook v. Klonos*, 164 Fed. 529, 90 C. C. A. 403, the question, as stated by the court, was "whether an individual can, by the use of the names of his friends, relatives, or employes, as dummies, locate, for his own benefit, a greater area of mining ground than that allowed by law." No reason is advanced or can be conceived why such a practice, as was adopted in the case at bar, can be held to be violative of any statute, rule, or policy relating to the disposition of mineral lands, and we know of no ruling to the effect that it is forbidden. See, in this connection, *Lindley on Mines*, § 226.

[2, 3] There was never, prior to the latter part of the year 1908, any discovery of oil or other mineral by defendant on the northerly location, sufficient to perfect the location. We do not think that the evidence was of such a nature as to establish any voluntary abandonment of this location by defendant; and we do not understand that the conclusion of the lower court was in any way based on the theory of an abandonment of the claim. Its express finding on the subject is not one of abandonment, but that any attempted location which defendant had made became forfeited by reason of the failure of defendant or its predecessors in interest to do or perform the assessment work required by law to be performed upon said land during the year 1907. Until a sufficient actual discovery of mineral is made on such a claim, a location is not perfected, and no question of the doing of annual assessment work is involved. It is only after such discovery, when actual possession is no longer necessary to protect the location against subsequent locators, that annual assessment work is essential to prevent a forfeiture.

[4] The rights of the person or persons endeavoring to locate an oil claim, after the posting of notice, etc., are well settled by the

decisions. Until the inchoate location is perfected by discovery, the locator has no vested right which Congress is obliged to recognize. But where his location is made in good faith, he has the right, as against third persons, which is transferable, "to be protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession," so long as he "remains in possession and with due diligence prosecutes his work toward a discovery." *Miller v. Chrisman*, 140 Cal. 440, 447, 73 Pac. 1084, 98 Am. St. Rep. 63; *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023. As long as such a condition continues, no one, without his consent, can make the actual entry of the land essential to legally initiate a new location. But actual possession of the land, coupled with continued diligent prosecution of discovery work, are essential to his protection. "What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery." *McLemore v. Express Oil Co.*, 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147. "Where the alleged locator has not made a discovery, and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying." *New England, etc., Oil Co. v. Congdon*, 152 Cal. 211, 214, 92 Pac. 180, 181. The case of *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, does not hold otherwise. The location there involved was one perfected by discovery, or rather one where discovery preceded the posting of notice of location; and, as we have said, actual possession is not essential after the location has been perfected by discovery. The requirement of diligent prosecution of the work was described in *McLemore v. Express Oil Co.*, supra, as follows: "This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view." It is only one so actually possessed and so engaged in the diligent prosecution of the work of discovery who is thus protected, by reason of his attempted location, against an entry by another.

As we have intimated, in view of what we have said, the situation was not such on May 26, 1908, that defendant could complain of an entry then made by another in good faith on the land embraced in its northerly location. Apparently it was not then in actual possession of any part thereof, or engaged in the diligent prosecution of discovery work

thereon. Accordingly, plaintiffs were then entitled to locate the same as an oil claim. They were entitled to go into actual possession thereof, post their notice of location, and continue in actual possession as long as they were diligently prosecuting discovery work thereon for the purpose of perfecting their location by discovery, protected against any re-entry on the part of defendant. But, as we have seen, their mere entry into possession and posting of a notice of location, without continuance of actual possession and continued diligent prosecution of discovery work, would not avail them. These things would serve only to protect them in their actual possession while they were engaged in diligently prosecuting discovery work.

As we have seen, the trial court found in favor of plaintiffs upon the matter of actual possession and diligent prosecution of discovery work at the time defendant re-entered the land, and commenced its own discovery work thereon. This was one of the allegations of paragraph 5 of the complaint, all the allegations of which were found to be true by the trial court. The finding is a material one, as is apparent from what we have said.

[5] As to the matter of possession, it appears, without conflict, that there was absolutely no one in actual occupancy of any part of the land embraced in plaintiffs' attempted location from the time of the posting of plaintiffs' notice to the time of defendant's re-entry, or, indeed, until some time during the following month, when Davis constructed a cabin thereon. The utmost effect of plaintiffs' evidence, in this behalf, was that men had been placed in a cabin on an adjoining tract of land, with directions simply to watch this land and walk over it once or twice a day. Whatever may be said as to this as being capable of sustaining a finding of actual possession, it is clear that the evidence is not sufficient to support the finding substantially to the effect that plaintiffs were engaged in the prosecution of discovery work at any time prior to the entry by defendant and the commencement of its own discovery work, or, indeed, to support a conclusion that they were so engaged at any time prior to the middle of July, long after the commencement of this action. Clearly, the mere "figuring" with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator, which is the utmost plaintiffs' evidence tends to show was done, cannot be held to constitute a diligent prosecution of the work of discovery any more than the pursuit of capital to prosecute such work can be held to constitute such diligent prosecution. See *McLemore v. Express Oil Co.*, supra. Under the rule established by the decisions, the locator is protected in his possession only when engaged in the diligent prosecution of actual

work for a discovery, and the commencement and continuance of such work are as essential, when he complains of interference with his possession, as is the posting of his notice of location. We do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor. We have no such situation presented by the evidence here, and need not determine exactly what will constitute the diligent prosecution of discovery work. Here we have nothing more than an indefinite "figuring" with other persons as to what they will charge for doing the work, if employed to do so, which by no stretch can be held to constitute a part of the actual prosecution of the work of discovery.

[6] It is urged that an attempting locator is protected in his possession without commencing such work, provided he does not allow an "unreasonable time" to lapse without making such a commencement; and this appears to have been the theory of the learned judge of the trial court, as evidenced by one of his findings, where it is declared that plaintiffs, "within a reasonable time thereafter, commenced in good faith the work of developing the said land," etc. Such commencement, as we have seen, was long after defendant's re-entry, and long after the commencement of this action. The rule declared by the decisions does not so provide. The attempting locator's possession is protected only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work.

It would seem to follow that, as to defendant's northerly location, plaintiffs were not protected in their alleged possession at the time of defendant's re-entry on May 28, 1908, by reason of the posting of their notice of location. As we have said, it cannot be fairly held that plaintiffs had then commenced any work which by any stretch can be called discovery work. Until they had made such a commencement, the claim was as freely open to defendant, under its location of September, 1899, as it would have been had no notice of location been posted by plaintiff. Learned counsel for plaintiffs are in error in claiming that the location of defendant's predecessors had been forfeited. Such would have been the situation if a discovery had been made on the claim and the location thus perfected, and there had been a subsequent failure to do the annual assessment work expressly made necessary by statute to avoid a forfeiture, coupled with a subsequent valid location by an adverse claimant. Defendant's northerly location had never been perfected by discovery.

[7] In the absence of a voluntary abandonment of all claims thereunder, it had the

right to enter into possession of the land and do discovery work thereon at any time that it could do so without transgressing any right obtained by another. The alleged occupancy of plaintiffs was not of such a nature as to destroy or affect this right of defendant; and defendant, in going again into possession and commencing discovery work on the land, did not violate any right of plaintiffs.

In view of what we have said, it is apparent that the judgment must be reversed. A material finding, essential to plaintiffs' right to prevail as to the land embraced in defendant's northerly location, is not sufficiently supported by the evidence.

We have not considered what the effect on plaintiffs' claim as to the southerly $\frac{1}{2}$ of said N. E. $\frac{1}{4}$ will be, if they finally fail to substantiate their claim as to the northerly half thereof; and, as that question has not been argued, we shall not attempt to determine it here. As we understand the record, all of plaintiffs' development work has been done on the northerly $\frac{1}{2}$ of said N. E. $\frac{1}{4}$.

It is proper to say, for the purpose of a new trial, that we see no good reason for doubting that the evidence was such as to support a conclusion that there was a sufficient discovery by defendant, in 1899 or 1900, to perfect its location in so far as its southerly claim is concerned. Such would appear from the findings of the trial court to have been the view of the learned trial judge. The material question, then, in regard to the validity of such location at the time of plaintiffs' entry, would appear to be whether defendant, subsequent to such discovery, had failed to do the necessary annual assessment work required by the United States statutes. There is no other matter suggested in the briefs that appears to require discussion in this opinion.

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.

(164 Cal. 677)

WIDENMANN v. WENIGER, County Treasurer. (Sac. 1,843.)

(Supreme Court of California. Feb. 11, 1913.)

1. PARTITION (§ 111*)—SALE OF LAND—PROCEEDS—NATURE OF ACTION TO RECOVER.

Upon a sale of land for partition, one of the owners assigned his interest in the purchase money to plaintiff, who notified the referee, who made the sale of the assignment, but the referee paid the money to the clerk of the court without any authority, and the clerk subsequently transferred the fund to defendant, the county treasurer. *Held*, that the referee was not the custodian of earmarked money belonging to the owners, the precise amount due being still to be determined, and consequently the owner had only a chose in action for debt due from the referee, and an action by the as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

signee for the proceeds is not an action in the nature of replevin.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401-418; Dec. Dig. § 111.*]

2. EXECUTION (§ 264*)—SALES—TITLE OF PURCHASER.

Under Code Civ. Proc. § 699, providing that, when personal property not capable of manual delivery is bought on execution, the certificate of the officer making the sale conveys to the purchaser all the rights of the debtor, an execution purchaser of the interest of the owner in the fund held by the county treasurer obtains no better title than if he had bought the claim privately, getting the same title that he would have received had he bought from the owner without notice of his assignment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.*]

3. EXECUTION (§ 264*)—EXECUTION PURCHASER AS ASSIGNEE—EFFECT OF PRIOR ASSIGNMENT.

As the execution purchaser takes only the right of a successive assignee without notice, the rule that, as between successive assignees, he has preference who first gives notice to the debtor, even though he be a subsequent assignee, provided that at the time of taking he had no notice of the prior assignment, prevails.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.*]

4. EXECUTION (§ 264*)—RIGHTS OF ASSIGNEES—NOTICE.

The transfer by a referee to the clerk of the court and by him to the treasurer did not divest the rights of the first assignee who had notified the referee of the assignment, and consequently a payment by the treasurer to the execution purchaser will not bar the first assignee's right of action against him, particularly as he gave notice of his claim before payment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.*]

5. PARTITION (§ 111*)—SALE—DISTRIBUTION OF PROCEEDS—NECESSITY OF NOTICE.

Where, upon sale of land for partition, the court confirmed the sale and directed distribution, the action not being continued for the disposition of money as provided for by Code Civ. Proc. § 774, the proceeds did not remain in custodia legis, and an assignee of the interest of one of the owners cannot be deprived of his rights by a proceeding begun without notice; it being in effect a new action.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 216-225; Dec. Dig. § 111.*]

6. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

In an action involving the rights of assignees in a chose in action, where the title of the one to whom defendant paid the fund was inferior to that of plaintiff, the exclusion of evidence of that assignee's title was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

7. ASSIGNMENTS (§ 122*)—DEMAND BY ASSIGNEE—NECESSITY.

A demand upon a debtor by an assignee of a chose in action is unnecessary, where the debtor, after the filing of the complaint, paid the debt to another.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 210; Dec. Dig. § 122.*]

In Bank. Appeal from Superior Court, Solano County; Henry O. Gesford, Judge.

Action by Henry J. Widenmann against George Weniger, as treasurer of the county

of Solano. From a judgment for plaintiff, defendant appeals. Affirmed.

T. T. O. Gregory, Gaillard Stoney, and Oroville C. Pratt, Jr., all of San Francisco, for appellant. Theodore A. Bell, of San Francisco, for respondent.

SHAW, J. The defendant appeals from an order denying his motion for a new trial.

The plaintiff sued to recover the sum of \$4,875 alleged to belong to the plaintiff, but which the defendant has in his possession and refuses to pay over to the plaintiff. The facts are as follows: In a suit in partition, entitled Catherine Magee et al. v. James Magee et al., pending in the superior court of Solano county, a sale of the land was ordered, and R. J. R. Aden and two others were appointed as referees to make the sale. The sale was conducted by Aden, who on April 23, 1908, sold the land to Henry Widenmann, the plaintiff, for \$10,500, and received from him the purchase money. Widenmann bought the property at the instance of James Magee, who advanced to him \$1,500 for that purpose, and it was the understanding between them that after the purchase from the referee was consummated Widenmann would resell the property to Magee. On May 1, 1908, Widenmann agreed to sell the land to Magee for \$10,500 and to convey the same as soon as the partition sale was confirmed. Magee owned one-half of the money realized on the partition sale, less the costs. On May 2, 1908, Magee, in writing, duly assigned to Widenmann all his interest in the partition money; the understanding between them being that the same when received was to be a part payment on the price of the sale of the land by Widenmann to Magee. The partition money was then in the hands of Aden as referee, and Widenmann immediately gave notice in writing to said referees, including Aden, of his said assignment from Magee.

The referees afterwards reported the partition sale to the court, and on August 6, 1908, the court made a decree confirming said sale, declaring the share of James Magee in the money to be \$4,875, and directing the said referees to distribute and deliver said sum to Magee. It does not appear that the referees mentioned the assignment in their report, or that it is referred to in the decree. The Code provides that the referees shall make the distribution of funds in such cases when ordered by the court. Code Civ. Proc. § 773. Aden did not deliver the money to Magee or to Widenmann. He did deliver it to G. G. Halliday, the clerk of the court, but without any order or authority to do so. No order had been or ever was made for such money to be deposited in court or with the clerk. The money was handed to the clerk by Aden on or about August 13th, and it was trans-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ferred by the clerk to Weniger, the defendant, on or about August 13, 1908. This also was without any order of court or other authority.

Certain evidence was offered and apparently rejected, from which it appears that on April 27, 1908, in another action in said court, Catherine Magee and others recovered judgment against James Magee for \$4,877.82; that on August 18, 1908, an execution was issued on this judgment by the sheriff of said county, who on August 20, 1908, by virtue thereof, levied on the supposed interest of James Magee in the money then in the hands of Weniger, by serving on Weniger a notice of garnishment thereof; that Weniger answered to the effect that, as county treasurer, he was indebted to Magee in the sum of \$4,875; and that the sheriff thereupon advertised and sold the interest of Magee to T. T. C. Gregory, said sale being made on August 26, 1908. These documents further showed that Weniger refused to pay the money to Gregory; that thereupon, on August 28, 1908, Gregory filed a petition to the superior court in the partition suit, asking for an order directing Weniger, as treasurer, to pay to him said money; that the court thereon issued an order to show cause against Weniger, returnable August 31, 1908; that the matter was continued by consent until September 21, 1908; that Weniger and Gregory then appeared, the matter was heard, and the court thereupon made an order directing Weniger to pay the money to Gregory, which he accordingly did.

No notice of this proceeding was given to Widenmann or to Magee, and neither one of them appeared at the hearing. The minutes recited that Magee was "present in open court" on August 31st, when one of the continuances was had, but it is not otherwise shown that he appeared at the proceeding or had knowledge thereof. The present action was begun on September 19, 1908. On September 17, 1908, Weniger was informed of the assignment to Widenmann, and was cautioned not to pay the money to any other person. It does not appear that he had any previous notice of the assignment. The summons and complaint in the action had been served on Weniger prior to the hearing of Gregory's petition on September 21st. Whether or not the court, at that hearing, was advised of the assignment, the notice to Weniger, or the pendency of the present action, does not appear. There is no evidence that Gregory had any notice of the assignment at the time of the execution sale on August 28th to him.

The plaintiff claims that he obtained a perfect right to the payment of the money by reason of the assignment from Magee to him and the notice thereof given by him to Aden, who was then the debtor, that this right was not affected or divested by the subsequent transfer of the fund, first to the clerk

and then to Weniger, nor by the execution sale to Gregory, or the subsequent order of the court. The defendant claims that by the purchase at the execution sale, without notice of the assignment, Gregory acquired a title superior to that of Widenmann, and that, whether this was so or not, the order of the court directing payment to Gregory is binding and conclusive on Widenmann and all other interested parties.

[1] It is contended that this action is in the nature of an action of replevin to recover specific moneys in the hands of the defendant. But this is not the case. The money was not identified, nor was its amount ascertained at the time of the transfer. Aden was not the mere bailee of a specific fund or the custodian of earmarked money belonging to Magee. He was the custodian of funds held by him for the use of Magee and others, according to their interests, to be paid when the precise amounts due should be determined. The only appropriate action which Magee, or his agents, could maintain against Aden, or his successor, for the recovery of the money when due, would have been either an action of debt or for money had and received to the use of the plaintiff in the action. The claim assigned was therefore a pure chose in action. These propositions are settled by the following decisions: *Walling v. Miller*, 15 Cal. 38; *Wendt v. Ross*, 33 Cal. 650; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331.

[2] The title acquired by Gregory under his purchase at the execution sale was no better or worse than the title he would have obtained if he had bought the claim privately from Magee without notice of the prior assignment. The execution sale gave him no additional rights, and of itself it transferred to him only the title of Magee as it existed at the time of the levy. Code Civ. Proc. § 699. If, by reason of his ignorance of the prior assignment, he thereby took a title superior to that of Widenmann, this favorable situation comes from the fact that he was an innocent purchaser for value, and not from the fact that he bought at execution sale. There is no distinction in this respect between an execution sale and an ordinary sale. *Mitchell v. Hockett*, 25 Cal. 544, 85 Am. Dec. 151; *Harris v. Harris*, 64 Cal. 108, 28 Pac. 63; *Southard v. McBrown*, 63 Cal. 546. The case of *West Coast, etc., Co. v. Wulff*, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171, and similar cases, relating to the rights of second assignees of corporation stock, are cited by respondent on this point. They do not apply to the case. They rest entirely upon the provision of section 324 of the Civil Code, declaring that a transfer of such stock is invalid, except as to the parties thereto, unless it is entered on the books of the corporation. They depend upon the Code provision, and not upon the principle of the common law. Gregory

and Widenmann, therefore, with relation to each other, stand in the positions, respectively, of successive assignees in good faith for value of the same chose in action from the original purchaser. The question presented is which has the paramount title under the facts shown.

[3] The effect of such successive assignments and the rights of the successive assignees without notice, with respect to each other, were considered and decided in *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26. There is some conflict of authority on the subject, but this court approved and followed the English rule stated as follows: "As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment." "In the case of a chose in action you must do everything toward having possession that the subject admits. You must do that which is tantamount to possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession and under the absolute control of another person."

It is suggested that the decision in *Curtin v. Kowalsky*, 145 Cal. 431, 78 Pac. 962, is contrary to the *Graham Case*. This notion finds no support in the *Curtin Case*. The rules governing the rights of successive assignees of the same chose in action were not involved in that case. *Curtin* was the first assignee, the second assignee was not a party to the action, and there was nothing to show that he had given a prior notice, nor was there any question in the case which made such notice material. The opinion expressly declares that "the rights of the second assignee are not involved and cannot be adjudged." We are at a loss to understand why the two cases are supposed to be in conflict. They discuss different rules, the parties stood in different relations, the facts are not the same, and there is nothing in the opinion in the latter case that is inconsistent with the language of the former.

The result of the rule thus stated is that Widenmann's title to the demand was perfect at the time the execution was levied, and Magee then had no interest therein. Widenmann had obtained the assignment for a valuable consideration and had given notice thereof to Aden, the debtor, thus doing all that he could do toward taking possession. Gregory purchased Magee's title

only, and, Magee having none, Gregory obtained none, unless some other fact in the case gives him the superior right.

[4] The transfer of the fund to Weniger did not operate to change the rights and priorities of the respective claimants. The possession by Aden of the fund, a part of which belonged to Widenmann, made him, to that extent, the debtor of Widenmann. The transfer of this fund to Weniger carried with it the burden of the obligation attending its possession, the obligation to pay it over to the owner. He was, in effect, a volunteer. He accepted the money with knowledge of its source and character and of the duty of its possessor to pay it over to the persons entitled. The transfer to him made no change in the person entitled, nor in the rights of that person.

We can perceive no good reason for holding that Widenmann was required to give a new notice to Weniger of his assignment, in order to preserve his prior right to the obligation thus assumed by Weniger, as against a possible subsequent assignee of Magee. It does not appear that Widenmann was informed of the transfer of the fund to Weniger until after the purchase by Gregory at the execution sale. He was informed of the transfer by Aden to Halliday, but he was also informed by Halliday at the same time that he, Halliday, knew of the assignment from Aden to Widenmann. Consequently no notice was necessary to hold Halliday liable, even if we concede that a new notice should have been given upon information of the transfer of the fund. So far as the question of laches or estoppel in favor of Weniger, arising from failure to notify Weniger, is concerned, Widenmann is completely exonerated by the fact that he gave such notice and presented his claim before Weniger paid the money to Gregory, and before the hearing upon which the court directed that payment, and, so far as appears, immediately after he learned of the transfer to Weniger.

The conclusion from these considerations is that Widenmann's title to the chose in action—that is, to the claim against Weniger—was superior to that acquired by Gregory at the execution sale.

[5] The order of the court, made upon the petition of Gregory, was clearly insufficient to protect Weniger against the claims of Widenmann. The court had already made its final order in the partition suit, confirming the sale and directing the distribution of the proceeds by the referees (Code Civ. Proc. §§ 773, 785), no money had been paid into court, and the action was not continued thereafter for the disposition of any such money as provided in section 774 of the Code of Civil Procedure. The order had become final in that court. Nothing remained to be done by the court, except to settle the account of the referees after they had made the payments as previously directed. The money was not even in *custodia legis* so as to be exempt

from execution. *Dunsmoor v. Furstenfeldt*, supra; *Estate of Nerac*, 35 Cal. 397, 95 Am. Dec. 111. The proceeding by Gregory had no place in or legal connection with the partition suit. Giving it the most favorable effect in his behalf, it was in the nature of an independent proceeding to determine the title to the fund, although entitled in the partition suit. Weniger was made a party to it, and notice was given to him. But Widenmann was not made a party. He was given no notice, and he did not appear. And, although Weniger then knew of Widenmann's claim and of his rights under the prior assignment, he did not ask that the latter be made a party, or that he be given notice, but, to the contrary, submitted to and obeyed an order made by the court in the absence of Widenmann and destructive of his rights. In order to place himself in a position to rely upon any order made in that proceeding, Weniger should have himself notified Widenmann of the proceeding and he should have asked the court to make Widenmann a party thereto and have him brought in by notice to defend his rights. Falling in this the order cannot avail Weniger as a protection.

[§, 7] It follows from the foregoing that, if the court had admitted the evidence which it rejected touching Gregory's acquisition of the title to the chose in action, it would not have established a title superior to that of plaintiff, and the refusal to admit the proffered evidence was without injury. Nor, under the circumstances here indicated, was a demand upon appellant necessary before the commencement of the action. It is manifest that the demand would have been refused, since, treating the complaint itself as a demand, and remembering that the complaint was served before payment over by the appellant of the fund, appellant still refused to recognize the assignee's rights. *Parrott v. Byers*, 40 Cal. 622.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(164 Cal. 663)

COFFMAN v. BUSHARD. (L. A. 3,006.)
(Supreme Court of California. Feb. 11, 1913.)

1. APPEAL AND ERROR (§ 161*)—RIGHT OF REVIEW—SATISFACTION IN PART.

Where the decree in an action to rescind an executed contract for the exchange of property, on the ground of defendant's fraud and misrepresentations, restored to each of the parties the property formerly owned by him, decreed that plaintiff pay to defendant an amount laid out by him upon the property conveyed by plaintiff, authorized defendant to retain the income from such property and struck out plaintiff's cost bill, plaintiff's acceptance of defendant's deed of his property did not estop him from prosecuting his appeal from the other parts of the decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 979-983; Dec. Dig. § 161.*]

2. EXCHANGE OF PROPERTY (§ 8*)—RESCISSI-
ON—RIGHTS OF PARTIES.

Where the findings in an action to rescind an executed exchange of property showed that plaintiff had been defrauded and that he received no rent from the property conveyed to him, and was obliged to expend money in procuring the title and in payment of taxes, a decree allowing defendant to retain the income of the property conveyed to him and reimbursement for his outlay thereon should be modified by requiring defendant to account for and pay over such income to plaintiff.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

3. EXCHANGE OF PROPERTY (§ 8*)—JUDG-
MENT—ALLOWANCE IN VIOLATION OF TERMS
OF JUDGMENT.

Where a decree in an action to rescind an executed exchange of property required plaintiff to pay the amount expended by defendant for repairs on property conveyed by plaintiff, and for interest on the mortgage on such property, provided such amount was determined by agreement of the parties on proofs presented to the court within 10 days, and no agreement as to the amount was made, or any proof presented to the court, the court's arbitrary allowance of the amount expended by defendant should be stricken from the judgment, with direction to fix the amount after taking evidence thereon.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

4. COSTS (§ 16*)—PREVAILING PARTY—"AC-
TION INVOLVING THE TITLE TO REAL ES-
TATE."

Under Code Civ. Proc. § 1022, subds. 1, 5, allowing costs as of course to the plaintiff prevailing in an action for the recovery of real property, or involving the title or possession of real estate, an action in equity to rescind an executed exchange of property, the real and declared purpose of which was to recover property out of which plaintiff had been defrauded, involved title to real estate, so that plaintiff prevailing was entitled to costs as a matter of right.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 26, 30-35; Dec. Dig. § 16.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 144.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by R. E. Coffman against L. W. Bushard. Decree for plaintiff, and plaintiff appeals. Superior court ordered to correct its decree.

F. C. Spencer, of Anaheim, for appellant. H. V. Wessel, of Anaheim, Roger C. Dutton, of Los Angeles, and Montgomery & Tarver, of Santa Ana, for respondent.

HENSHAW, J. Plaintiff and defendant had by deeds effected an exchange of properties, plaintiff conveying to defendant a house and lot at Riverside, Cal., in exchange for a house and lot at Goldfield, Nev., owned by defendant. This action was brought to rescind the sale upon the ground of fraud and deceit. The court found in accordance with the allegations of the complaint and decreed a rescission of the contract and a restoration to each of the parties of the property formerly owned by him. One of the frauds

and misrepresentations was to the effect that the Goldfield property was rented for \$42 a month. The court found that it was not rented, was not in a condition to be rented, that plaintiff had received no income of any kind from it, and had paid the taxes thereon, the amount so paid not being declared. It found that defendant had received \$352 rents from the Riverside property. It further found that defendant had made outlays on account of the Riverside property for repairs, taxes, and interest upon a mortgage. It decreed, as has been said, a restoration to each of the parties of the property formerly owned by him, decreed payment by plaintiff to defendant of \$225 laid out by defendant upon the Riverside property, and authorized the defendant to retain \$352, the amount of the income derived by him from the Riverside property. And finally it struck out plaintiff's cost bill, refusing to allow him costs.

[1] From these three several portions of the judgment plaintiff appeals. His appeal is met by a motion to dismiss. The facts upon which this motion is based are that, in accordance with the decree, defendant tendered the deed to the Riverside property, which plaintiff accepted, and plaintiff, in turn, made a like tender of his deed of the Nevada property. Upon this respondent insists that plaintiff has accepted the benefits of the judgment, and, upon familiar principles, has waived his right to complain of it and so to appeal from it. *San Bernardino v. Riverside*, 135 Cal. 618, 67 Pac. 1047. But plaintiff has appealed only from certain portions of the judgment. Defendant has taken no appeal. There is thus no controversy whatsoever over the decree ordering a re-exchange and transfer of the properties. In accepting this portion of the judgment plaintiff takes only that which indisputably he is entitled to receive. His appeal is from minor portions of the judgment, in no way depending upon the transfer of the property decreed by the court. He insists that in certain minor particulars the decree does not do equity. His acceptance of his property under the indicated circumstances, the taking of that which indisputably is his, does not estop him from prosecuting his appeal and asserting his rights to other allowances which the court refused to grant. *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 869; *San Bernardino Co. v. Los Angeles Co.*, 135 Cal. 618, 67 Pac. 1047; *Walnut Irrigation Dist. v. Burke*, 158 Cal. 165, 110 Pac. 517; 2 Cyc. 653. The motion to dismiss is therefore denied.

[2] 1. The findings disclose that plaintiff was defrauded, that he received no income from the Goldfield property, which was unrented and unrentable, and was obliged to expend some money in perfecting the title and in the payment of taxes. As against this, the de-

creed permits the defendant actually to profit by his own fraud. He is reimbursed for all his outlay upon the Riverside property, and is allowed to retain \$352, the income derived from it. This is clearly inequitable. When defendant is reimbursed for his outlay, he has received all that in good conscience he is entitled to receive. The decree should be modified in this respect, and defendant should be compelled to account for and pay over to plaintiff the \$352, rents of plaintiff's property.

[3] 2. The judgment decreed that plaintiff should pay the defendant "the amount expended by defendant for repairs of said real property at Riverside, Cal., and for interest on the mortgage on said property, provided said amounts are determined by agreement of the said parties or proofs to be presented to this court, within ten days from date hereof." The bill of exceptions shows that no agreement as to the amount so expended was entered into by the parties, and that no proof of the amount was presented to the court. Notwithstanding this, the court, upon motion of defendant's attorney, arbitrarily fixed the amount expended by defendant upon the Riverside property in the sum of \$225. It is insisted, and we think correctly, that an allowance so made without proof was in violation of the express terms of the judgment. The appeal upon this proposition is, therefore, well taken, and it is ordered that this item of \$225 be stricken from the judgment, and that the trial court be directed to fix the amount, after the taking of evidence upon the question.

[4] 3. The court refused plaintiff his costs, evidently under the belief that the action was one embraced in the provisions of section 1025, Code of Civil Procedure. *Gray v. Dougherty*, 25 Cal. 266; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158. While the action was based upon fraud and deceit, its real and declared purpose was the recovery of real property out of which plaintiff alleged he had been defrauded. That the action involved the title of real estate may not for a moment be doubted. The case, then, notwithstanding that it was an action in equity, comes clearly within the purview of section 1022 of the Code of Civil Procedure, and plaintiff was entitled to his costs as matter of right. Code Civ. Proc., § 1022, subds. 1, 5; *Hart v. Carnall-Hopkins Co.*, 103 Cal. 142, 37 Pac. 196; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Gibson v. Ham-mang*, 145 Cal. 454, 78 Pac. 953.

It is therefore ordered that upon the findings made by the court it correct its decree in the indicated particulars.

We concur: MELVIN, J.; LORIGAN, J.

(164 Cal. 688)

WINSLOW v. GLENDALE LIGHT & POWER CO. (L. A. 2,844.)

(Supreme Court of California. Feb. 13, 1913.)

1. EVIDENCE (§ 99*)—COMPETENCY—MATTERS IN ISSUE—OWNERSHIP.

In many instances, as where agency or ownership of property is not in issue, it is permissible, for the purpose of curtailing inquiry, for questions to be asked and answered which, were issue joined thereon, would be incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 123, 137-143; Dec. Dig. § 99.*]

2. EVIDENCE (§ 472*)—CONCLUSION—OWNERSHIP—EMPLOYMENT.

Where ownership or employment is itself in question, the statement of a witness that he owns certain property, or that he was working for such a person, amounts to allowing him to state a conclusion upon a matter in controversy; and in such cases the testimony must be limited to a statement of the person by whom the witness was employed, and the nature and surrounding circumstances of his employment, from which, with the other evidence, the conclusion, as to who was in fact his employer may be drawn.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

3. MASTER AND SERVANT (§ 316*)—LIABILITY TO THIRD PERSONS—EVIDENCE OF INDEPENDENT CONTRACT.

The circumstance that upon occasions witness was paid by his employer with the check of a company for whom the employer worked, taken with evidence that such company paid by check, and that the check was not drawn to his employer's order, is without bearing on the question whether his employer was an employé of the other company, or himself an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

4. EVIDENCE (§ 574*)—CONCLUSIONS OF WITNESS—WEIGHT.

In an action against a light and power company for personal injuries, defended on the ground that the accident occurred through the negligence of an independent contractor, the conclusion of a witness, improperly admitted as competent, that he was employed by defendant, when in fact he was employed and paid by the contractor and knew nothing of any arrangement of his employer with defendant, and thought that his employer was merely defendant's foreman, as against uncontroverted evidence that his employer was an independent contractor, raised no conflict in the evidence as to the relations of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Mary M. Winslow against the Glendale Light & Power Company. From a judgment of the Court of Appeals affirming a judgment for plaintiff, defendant appeals. Reversed.

Tanner, Taft & Odell, of Los Angeles, for appellant. Drew Pruitt, W. O. Morton, and M. A. Fleming, all of Los Angeles, for respondent.

HENSHAW, J. This action was brought to recover damages for personal injuries sus-

tained by plaintiff. She was 76 years of age at the time she received the injuries complained of, and these injuries were occasioned by her tripping over a wire stretched across the sidewalk. This wire was admittedly a wire of the defendant, the Glendale Light & Power Company. That company's principal defense to the action was that, having been ordered by the city to remove certain poles and wires, it employed an independent contractor to do the work; that the work was done wholly under the management and control of this independent contractor; and that it was through the negligence of his employes and not the employes of the defendant light and power company, that the accident occurred. Reference may here be made to a former appeal taken in this case and reported in 12 Cal. App. 530, 107 Pac. 1020. By the decision upon the first appeal, the judgment was reversed. A second trial followed, resulting in a judgment in favor of the plaintiff. From that judgment and the order denying defendant's motion for a new trial, an appeal was taken, resulting in an affirmance of the judgment and order by the Court of Appeals. Upon the first trial, one of the men at work removing the poles and wires was permitted to testify, over the objection of the defendant, that he was "working for the Glendale Light & Power Company." Upon the appeal reported in 12 Cal. App., it was held that the objection was not well taken, and that the question was permissible and its answer admissible. Upon the second appeal, the Court of Appeals, seemingly feeling itself bound under the doctrine of the law of the case, held that the same questions asked upon the second trial were permissible, and decided, further, that the answers to these questions presented evidence sufficient to raise a conflict upon the principal question in the case, namely, whether the work was being done by the defendant or by an independent contractor, for whose conduct defendant was not legally responsible. It was for the further consideration of this proposition that a hearing before this court was ordered.

[1] But, lest by our silence it may be thought that this court approves the determination as to the permissibility of the question discussed in the opinion in 12 Cal. App., it is proper to say that in many instances—as where the agency or the ownership of property is not in issue—it is permissible, for the purpose of curtailing the inquiry, to permit questions to be asked and answered, which questions and answers would be to the last degree improper, were issue joined upon the question of agency or ownership. Instances come readily to mind, and, indeed, in the courts are of daily or even of hourly occurrence. If the ownership of a piece of land is not in issue, it is not objectionable to ask the witness who owns that land. If the agency or employment is not in question,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes.

it is equally permissible to ask the witness whose agent he was, or for whom he was working. It is but a time-saving method of presenting the truth upon a matter not controverted.

[2] Very different, indeed, must be and is the rule where the ownership or the agency is itself in dispute. For a man, under such circumstances, to be permitted to say that he owns the property is to permit him to state a conclusion which must be drawn from all the facts by court or jury. To permit, where the question of employment is itself in controversy, a witness to testify that he was working for this person is to allow in evidence the incompetent conclusion of the witness upon a matter of vital controversy. In such a case the rule limits the testimony of the witness to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment. From these, with such other evidence as the case presents, must the conclusion be drawn as to who in fact was the responsible employer.

So much we think it proper to say in pointing out the true rule. But the matter here in controversy will be considered under the doctrine of the law of the case, as that law was laid down, though mistakenly, in the opinion in 12 Cal. App., above cited. So treating it, the ruling amounts to this, but to this only: That it was competent for the witness to answer the question, and he did answer it by saying that he was working for the Glendale Light & Power Company. Nothing, however, in the decision of the Court of Appeals goes to the weight of this testimony; and a review of the evidence in the case satisfies us that this testimony is without weight, and is so wholly unsubstantial as not to raise a controversy over the fact. The evidence introduced on behalf of the defendant is clear, conclusive, and undenied, and establishes that Seaman was employed as an independent contractor to do the work, and did undertake its performance under his contract. The defendant had no control, and exercised no control, over the employes of Seaman; and two of those employes, who were actually engaged in the work, were Harvey and Allen. Neither Harvey nor Allen was ever in the employ of the defendant company. Such was the uncontroverted evidence of the defendant; and it remains to be considered whether the testimony of the witness Harvey is sufficient to raise a conflict. Harvey was asked the question, "By whom were you employed, and for whom were you working on February 27, 1907?" (the date of the accident) and made answer, "For the Glendale Light & Power Company." Again, testifying that he was at the scene of the accident, he concludes his answer by saying, "I was on duty." He is immediately asked the question, "On duty for whom?" and replies, "The Glendale Light & Power Company." The facts elicit-

ed from the witness upon cross-examination show that these declarations were but the conclusion of the witness, and demonstrate that the conclusion is without basis in truth. Confronted with his testimony given upon the former trial, and with his statements therein contained to the effect that he was employed by Mr. Seaman, he discredits his former testimony, saying, as to some of his answers, that he did not remember; as to others that, when he said he was employed by Mr. Seaman, "I might have said he was the foreman who hired me." Asked further if he did not reply, upon being asked for whom he was working, that he was working for Seaman, he answered, "Well, I said he was my employer." Passing over his testimony upon the first trial, and coming to the testimony on the second trial, he was asked the direct question, "What person employed you?" and he replied, "Mr. Seaman." He testifies that nobody beside Mr. Seaman told him to do any work on the job; that no officer of the Glendale Light & Power Company ever ordered him to go on the work. He had no knowledge whatsoever of the contract Mr. Seaman had with the light and power company, and finally he answers, "Yes," to the question, "When you say you were working for the Glendale Light & Power Company, it was because you were working on their lines, was it not, and because Mr. Seaman there was evidently doing the work for them?" It is shown that Mr. Seaman had a shop in town, his own tools, wagon, and employes, and paid his own workmen, of whom the witness was one; that Harvey was engaged upon other work and jobs besides this one, and was always paid by Mr. Seaman.

[3] The circumstance that upon one or another occasion he was paid by Mr. Seaman with the check of the defendant company is without significance. It is in direct and undisputed evidence that the check was not drawn to his (Harvey's) order, and that the defendant company paid Seaman by checks. *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 577, 93 Pac. 377.

The witness Harvey was not only permitted to testify that he was employed by the Glendale Light & Power Company, but he was allowed even greater latitude, and was permitted to testify that his fellow workman, Allen, was also working for the Glendale Light & Power Company at the time of the accident. But as, under cross-examination, he answers that his testimony as to Allen's employment is based upon the same knowledge and facts which he had related concerning his own employment, no amplification of this matter becomes necessary.

[4] What, then, results from this evidence? Nothing more than that the conclusion of the witness, which he has been allowed improperly to express, is shown to rest upon no basis of fact, the facts being that the witness was employed by Seaman and by no

body else, was paid by Seaman and by nobody else, worked under the direction of Seaman and nobody else, knew nothing of any arrangement which Seaman might or might not have with the Glendale Light & Power Company for the doing of the work; but because the work was Glendale Light & Power Company work, the witness believed that Seaman was the foreman, and believed that the work was being done under the direction of the Glendale Light & Power Company, and believed that the Glendale Light & Power Company was his employer. No conflict is raised by evidence such as this.

All of the evidence establishes that Seaman was an independent contractor; and the judgment and order are therefore reversed.

We concur: MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.

(164 Cal. 676)

CRANE v. FERRIER BROCK DEVELOPMENT CO. (S. F. 6,095.)

(Supreme Court of California. Feb. 13, 1913.)

1. VENDOR AND PURCHASER (§ 35*)—RESCISION—FRAUD.

Where a vendor fraudulently induces a purchaser to make a contract by representing that he has good title when he has no title, vendee, on discovering the false representations, may sue to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 45-51; Dec. Dig. § 35.*]

2. VENDOR AND PURCHASER (§ 334*)—REMEDIES OF PURCHASER—RECOVERY OF PRICE PAID.

Defendant corporation represented to plaintiffs that it owned in fee a certain lot, and offered to sell it to plaintiffs for \$1,500, \$500 in cash and the balance in installments, when defendant did not own the lot and knew that it did not, but plaintiffs believed the representation to be true, and, acting thereon, purchased the lot on such terms, but afterwards discovered that defendant did not own the same, and demanded the return of the purchase money paid. Held, that plaintiffs were entitled to a return of the purchase money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

3. VENDOR AND PURCHASER (§ 341*)—RECOVERY OF PRICE PAID—PLEADING—POSSESSION BY PURCHASER.

In the absence of an implication in the contract that the purchaser, under an executory contract, is to have possession of the land in question, he is not entitled to possession, so that, in an action by such purchaser to recover the price paid upon rescinding for fraud, the complaint need not allege that he offered to restore possession; there being no presumption that he had been put into possession, and it being for defendant to allege and prove that the purchaser was in possession when he demanded the return of the purchase money, if defendant desires to rely on failure to restore possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

4. VENDOR AND PURCHASER (§ 341*)—RESCISION—ACTION FOR PURCHASE MONEY.

The complaint, in an action to rescind a contract of sale of land and recover the price, need not refer to or describe stock accepted by the vendor as the equivalent of money in payment of the price, and is not materially uncertain for not doing so.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

5. VENDOR AND PURCHASER (§ 341*)—RESCISION—RETURN OF PURCHASE PRICE—RETURN IN MONEY.

Where a vendor accepted shares of stock as the equivalent of cash, the vendee, upon rescinding for fraud, was entitled to recover the amount of money for which the stock was accepted.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

Department 1. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Arthur Crane against the Ferrier Brock Development Company. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur Crane, of San Francisco, in pro. per. James M. Koford, of Berkeley, for respondent.

SHAW, J. The court below sustained a demurrer to plaintiff's fourth amended complaint, and thereupon gave judgment for the defendant, from which plaintiff appeals.

The complaint contains many unnecessary allegations, and these seem to have produced some confusion in the arguments. The following is a statement of the material facts alleged: On May 23, 1910, the defendant, a corporation, represented to plaintiff that it was seised in fee of a certain lot in a subdivision of land in Alameda county, known as "Cragmont," and thereupon offered to sell the same to plaintiff for the price of \$1,500, of which \$500 was to be paid in cash, and the balance in monthly installments of \$15 each; that in fact the defendant had no interest whatever in the lot; that the defendant, knowing that said representation was not true, made it to induce the plaintiff to enter into a contract to buy the lot from the defendant, on the terms above stated, and to make the cash payment thereon; that plaintiff believed said representation to be true, and, because of that belief, on the day above named executed the contract referred to, and paid to the defendant \$500 on the price thereof; that he would not have done so but for the belief aforesaid; that on July 15, 1910, plaintiff paid a monthly installment of \$15 on the price; that thereafter he discovered that said representation was false, and demanded the return of the money paid, which was refused. The contract, as alleged, provided that upon payment of the last monthly installment, which would become due on December 23, 1915,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

the defendant should execute to plaintiff a grant deed for said lot. It was further stated that \$480 of the \$500 cash payment aforesaid was paid by delivering to defendant 1,650 shares in a corporation of the par value of \$1 each, which the defendant accepted as cash. The prayer of the complaint was for a judgment that the contract be rescinded, that the defendant return to plaintiff the said \$515 so paid upon the price, or the personal property delivered as aforesaid to the defendant, and for general relief.

[1] Where the vendor fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever in the land, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon. There are numerous cases establishing this proposition. *Alvarez v. Brannan*, 7 Cal. 504, 68 Am. Dec. 274; *Wright v. Carillo*, 22 Cal. 604; *Easton v. Montgomery*, 90 Cal. 316, 27 Pac. 280, 25 Am. St. Rep. 123; *Morris v. Courtney*, 120 Cal. 65, 52 Pac. 129; *Muller v. Palmer*, 144 Cal. 312, 77 Pac. 954; 39 Cyc. 1264, 1417.

[2] The facts above stated bring the case within this rule. The complaint states a good cause of action to rescind the contract on the ground that it was procured by fraud, and for the return of the purchase money paid thereon. It does not appear that the plaintiff had received anything whatever in performance of the contract and consequently there was nothing for him to restore to the defendant.

[3] The objection was made that the complaint does not aver an offer by the plaintiff to restore possession. There is no presumption of law that the vendee, in an executory agreement for the purchase of land, has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto. *Gaven v. Hagen*, 15 Cal. 211; *Stratton v. Land Co.*, 86 Cal. 364, 24 Pac. 1065; *Gates v. McLean*, 70 Cal. 49, 11 Pac. 489; 39 Cyc. 1620. There is nothing in the contract or in the allegations of the complaint to indicate that the plaintiff ever had possession, or that the contract gave him the right thereto, or that he had taken possession, or that he now has possession. If the defendant desires to rely on the failure to make an offer to restore possession, it is incumbent upon it, therefore, to allege and prove, by way of defense, that the plaintiff was in possession at the time he demanded the return of the purchase money or at the time the action was begun.

The defendant relies on *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, and other cases of similar effect. These are cases where the contract was made in good faith and the vendee, upon discovering that the vendor had

subsequently parted with the title, brought an action to recover the part of the purchase money which had been paid, without having himself offered to perform the contract by paying, or offering to pay, the balance due upon the price. They rest upon the principle that one who is himself in default cannot rescind the contract, unless he has first offered to perform himself, and has unsuccessfully demanded for performance by the vendor, thereby putting the vendor in default. In the case we have cited, in arguing this question, the court said: "One may sell land which he does not own, but yet be able, when the time for performance arrives, to furnish a good title. In the meantime, the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." This is a true statement of the law, as applicable to a suit to rescind the contract, or to recover the money paid thereon after a rescission upon the ground that the vendor has himself broken the contract. It has no application to a suit for the rescission of a contract upon the ground that the vendor, having no title to the land, falsely represented to the vendee that he had the title thereto, and thereupon and thereby induced the vendee to purchase.

[4] The demurrer contains many specifications wherein it is claimed that the complaint was uncertain. Among other things, it specifies that it is uncertain because it does not give the name of the corporation, the shares of which were taken by the defendant as cash upon the payment of the first installment. Inasmuch as the shares were accepted as the equivalent of money, we do not think that it was necessary to mention them at all in the complaint, or to describe them more particularly. The uncertainty was not upon a material point.

[5] The fact that the shares were taken as cash was also sufficient to give the plaintiff the right to demand the return of \$500 in money. The other specifications of uncertainty relate to immaterial allegations in the complaint, and it is not necessary to discuss them. The demurrer to the complaint should have been overruled.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(164 Cal. 683)

MARCUCCI et al. v. VOWINCKEL
(S. F. 5,789.)

(Supreme Court of California. Feb. 14, 1913.)

1. APPEAL AND ERROR (§ 757*)—BRIEFS—MATTERS TO BE INCLUDED.

Under Code Civ. Proc. § 953c, providing that in cases where a transcript of the testimony, etc., is prepared in lieu of a bill of ex-

ceptions as permitted in preceding sections, the parties must print in their briefs or in a supplement appended thereto such portions of the record as they desire to call to the court's attention, on an appeal by plaintiff in an action against a physician and surgeon for negligence and want of skill, where appellant's brief did not contain any evidence showing want of care or skill, nor refer to the part of the record where it might be found, and the question was not argued, it would be assumed that there was no such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 787.*]

2. TRIAL (§ 26*)—ABSENCE OF WITNESS.

On a trial, plaintiff about 8:30 asked a continuance until the following morning to procure the attendance of additional witnesses. It was not shown that any subpoena had been issued or served on them; that they had promised to attend; that, if examined, they would testify to any material fact; that they knew anything about the facts or what plaintiff expected to prove by them; and their names or where they resided were not stated. The court offered to delay proceedings half an hour, but plaintiff's counsel claimed that, because of the witnesses' office hours, their presence could not be procured on that day. *Held*, that the denial of a continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 42; Dec. Dig. § 26.*]

3. CONTINUANCE (§ 7*)—DISCRETION OF COURT.

The granting or refusing of a continuance is usually a matter largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.*]

4. APPEAL AND ERROR (§ 966*)—REVIEW—DISCRETIONARY MATTERS—CONTINUANCES.

To justify reversal of a judgment because of the denial of a continuance, an abuse of discretion must be shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

5. APPEAL AND ERROR (§ 417*)—NOTICE OF APPEAL—SUFFICIENCY.

A notice to the clerk of the court under Code Civ. Proc. § 963a, providing that, in lieu of preparing a bill of exceptions, a party may file a notice with the clerk stating that he desires or intends to appeal or has appealed, and requesting that a transcript of the testimony, etc., be made up and prepared, is not a notice of appeal, and, if given in the form there prescribed without other appropriate words, is insufficient as a notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Maria S. Marcucci and husband against F. W. Vowinckel. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Wal J. Tuska, of San Francisco, for appellants. Chickering & Gregory and Stanley Moore, all of San Francisco, for respondent.

SHAW, J. At the conclusion of plaintiffs' evidence, the court below, on motion of defendant, granted a nonsuit, on the ground that the evidence did not tend to show neg-

ligence or unskillfulness on the part of the defendant. From the judgment of dismissal thereupon given, the plaintiffs appeal.

[1] The plaintiffs seek to recover damages from defendant for injuries sustained by the plaintiff, Maria, wife of plaintiff, Antonio, from the alleged negligence and want of skill of defendant, as a physician and surgeon, in advising her that a surgical operation upon her was necessary and in the performance of said operation. The transcript on appeal consists of a copy of the judgment roll and a reporter's transcript of the evidence and proceedings at the trial, neatly typewritten, prepared, and certified, as provided by sections 953a and 953c of the Code of Civil Procedure. Counsel for the appellant does not print in his brief, or at all, any part of the testimony or evidence on the subject of want of care and skill on the part of the defendant, as he is required to do by section 953c, aforesaid, where he desires to call the attention of the court to the evidence. Nor does he in his brief point out or refer to such evidence on the part of the record where it may be found. He does not argue the question at all. We will therefore assume, for the purposes of this review, that there was no evidence of such want of care or skill.

[2] The only point worthy of mention presented in the brief is the claim that the court below improperly refused to continue the trial from the afternoon of the last day thereof until the following morning, to give the plaintiffs an opportunity to procure the attendance of three additional witnesses to testify on behalf of the plaintiffs. The record does not show at what time in the afternoon this refusal occurred. Plaintiffs' counsel say it was at half past 8 o'clock. There was no showing of any diligence whatever made in support of the application for the continuance. No affidavit was made, or proposed to be made. It was not shown that any subpoena had been issued or served on the proposed witnesses, or that they had promised to attend then, or at any other time, or that they would, if examined, testify to any material fact, or that they knew anything about the facts of the case, or what counsel expected to prove by them. Their names were not even stated. The court offered to delay the proceedings half an hour to enable plaintiffs to procure their attendance, but their counsel stated that the office hours of the witnesses were such that he could not procure their presence on that day, but he did not state where they resided, whether in San Francisco, or elsewhere.

[3, 4] Continuance should not be granted without good cause. The granting or refusing thereof is usually a matter largely within the discretion of the trial court. An abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. It cannot justly be claimed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that good cause was here shown for a continuance. We cannot say that the lower court abused its discretion.

The other rulings complained of relate to the admission or exclusion of evidence. The trial was before the court, without a jury. None of the rulings operated to prevent the plaintiff from introducing any substantial evidence of the want of care or skill complained of, and all of them were upon trivial matters. They could not have affected the substantial rights of the plaintiffs. We do not think it necessary to discuss them. The failure to prove want of care or skill would justify the nonsuit even if these rulings had been favorable to plaintiffs.

[5] The transcript of the record does not contain any notice of appeal. There is a notice to the clerk requesting the preparation of a transcript on appeal, being the notice provided for by section 953a, aforesaid. Because of the frequent misunderstanding of the effect of this section, we repeat that it does not provide for a notice of appeal and that a notice given under it, in the form there prescribed and without other appropriate words, is not a good notice of appeal. *Smith v. Jaccard*, 128 Pac. 1026; *Boling v. Altan*, 162 Cal. 298, 122 Pac. 461; *Lent v. Cal. F. G. Ass'n*, 161 Cal. 719, 121 Pac. 1002. Counsel for respondent do not raise the objection, and we therefore assume that a proper notice of appeal was filed, and that its insertion in the record was waived.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

(164 Cal. 680)

HAYT v. BENTEL. (L. A. 3,291.)

(Supreme Court of California. Feb. 13, 1913.)

1. VENDOR AND PURCHASER (§ 335*)—ACTION BY PURCHASER—DEFENSE.

That the purchaser was in default in payments under the contract was no defense to her action, brought after rescission of the contract for defect in title, to recover the purchase money paid, where a payment was made and accepted after the expiration of the contract time for making all payments.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. § 335.*]

2. VENDOR AND PURCHASER (§ 335*)—ACTION BY DEFAULTING PURCHASER—EFFECT OF BELATED TENDER.

A purchaser who, without excuse, fails to make payments of installments as they fall due cannot, by a belated tender, put the seller in default, and thus establish a right to recover back sums paid under the sale contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. § 335.*]

3. PARTIES (§ 76*)—DEFECT—OBJECTIONS—SUFFICIENCY—WAIVER.

An objection that the plaintiff is not an unmarried woman, and hence should be joined by her husband, as required by Code Civ. Proc. § 370, being in effect a plea of defect of parties plaintiff, is waived when not specially set up

by demurrer or answer; and a mere denial of the allegation in the complaint that plaintiff is an unmarried woman is not a plea of defect of necessary parties.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 117-121; Dec. Dig. § 76.*]

4. VENDOR AND PURCHASER (§ 341*)—COMPUTATION FROM DATE DUE.

In a purchaser's action for money paid under a sale contract rescinded because of defect of title, the plaintiff was entitled to interest only from the date of rescission and demand for repayment, even though the defendant had been guilty of fraud.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

5. VENDOR AND PURCHASER (§ 117*)—RESCISSI—OFFER TO RESTORE POSSESSION—NECESSITY.

A purchaser's notice of rescission was not ineffectual for want of an offer to restore possession, where it did not appear that she ever took possession, though the contract provided that she should do so.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 209; Dec. Dig. § 117.*]

6. PLEADING (§ 310*)—SUFFICIENCY—RECITALS IN CONTRACT.

Recitals in a contract incorporated in the complaint will not supply the want of essential averments in the pleading.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. § 310.*]

7. PLEADING (§ 310*)—INSTRUCTION—RECITALS IN CONTRACT.

In a purchaser's action to recover the purchase money paid, the mere annexing to a complaint of a contract providing that the purchaser shall have possession is not equivalent to an averment in the complaint that possession was in fact transferred.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. § 310.*]

In Bank. Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by Mrs. S. M. Hayt against George R. Bentel. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

For opinion of District Court of Appeal reversing judgment of superior court, see 126 Pac. 370.

H. C. Millsap and Millsap & Sparks, all of Los Angeles, for appellant. Smith, Miller & Phelps, of Los Angeles, for respondent.

SLOSS, J. On June 29, 1905, the parties entered into a written contract for the purchase by plaintiff from defendant of a lot in the city of Ocean Park, county of Los Angeles. The purchase price was \$825, of which \$275 was to be paid on the signing of the agreement, \$275 on or before the 29th day of June, 1906, and \$275 on or before the 29th day of June, 1907, deferred payments to bear interest at the rate of 7 per cent. per annum, payable semiannually. Time was made of the essence. By the contract, a copy of which is annexed to the complaint, the purchaser was to have immediate possession of the premises, and was to pay all taxes and assessments levied against the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property. It was provided that, in case of default on the part of the plaintiff, defendant at his option might declare the whole sum due or might cancel the contract, re-enter and take possession of the premises, and retain all moneys paid by plaintiff as rent for use and occupation. Upon payment of all sums due from plaintiff, defendant agreed to execute and deliver to plaintiff a good and sufficient bargain and sale deed together with a certificate of title showing a title, free and clear of incumbrances, to be vested in plaintiff.

The complaint alleges that plaintiff made the following payments:

On June 29, 1905.....	\$275 00
July 16, 1906, as principal.....	275 00
July 16, 1906, interest on deferred payments.....	38 50
October 29, 1908, on principal....	50 00
October 29, 1908, interest on deferred payments to December 29, 1908.....	48 15
Total.....	\$686 65

It is alleged that on October 29, 1908, plaintiff paid and defendant accepted \$50 on the third installment, together with interest upon all deferred payments to and including December 29, 1908; that it was then understood and agreed between the parties that as soon as the deed was executed and delivered to plaintiff she would pay the balance due. Plaintiff has ever since, as she alleges, been ready and willing to pay such balance. On October 15, 1909, plaintiff tendered defendant such balance, and demanded a deed and certificate of title, but defendant refused to execute such deed, and informed plaintiff that he could not deliver a conveyance or certificate, inasmuch as the title to the property was incumbered and defective, and had been so at all times since the execution of the contract. A subsequent tender and demand in writing are set forth, together with refusal by defendant, followed by a notice of rescission from plaintiff to defendant, with a demand for repayment of all sums paid under the contract. The complaint alleges, further, that at the time of the execution of the contract the property was not free from incumbrances, but the title was then, and has ever since been clouded; that these facts had at all times been known to defendant, but not known by plaintiff until October 15, 1909; and that all moneys obtained by defendant from plaintiff had been taken and received in fraud of plaintiff's rights.

The prayer of the complaint was that the contract be rescinded, and that plaintiff recover the moneys paid by her under the contract, with interest.

The answer denied a number of the foregoing allegations. The findings were in favor of all the averments of the complaint. Judgment was given in favor of plaintiff for \$691.30, being the sum of the various amounts

paid by her under the contract for principal, interest, and taxes, together with interest from the date of each payment.

The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

[1] There is no merit in the appellant's claim that on the facts alleged and found the plaintiff is not entitled to any relief, because she had been in default in making payments under the contract. In this regard reliance is placed upon *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[2] In the opinion in that case the status of a defaulting purchaser under a contract for the sale of real estate is fully discussed, and the rule declared that such a purchaser, who has, without excuse, failed to make payment of installments as they fell due, cannot, by a belated tender, put the seller in default, and thus establish a right to recover the sum paid under the contract. But this undoubtedly sound doctrine does not apply to a case where the vendor has waived the delay in making payments. Such waiver is alleged and found here. On October 29, 1908, the plaintiff was in default. On that date she paid to the defendant, and the latter accepted, the sum of \$98.15, being \$50 on account of principal, and \$48.15 for interest to December 29, 1908. The time for the payment of all installments had then elapsed; indeed, the final payment was already, under the terms of the contract, past due. These facts bring the case precisely within the principle declared in *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. There the court declared the rule to be that where the vendor, under an agreement like the one before us, permits the entire contract price to become due, without exercising his option to declare a forfeiture, "the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the vendee in default. The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment." The same case lays down the doctrine that, where the provision making time of the essence has once been waived, mere delay by the vendee, short of the statutory period of limitation, in making a tender will not constitute laches in the absence of a showing that the delay has prejudiced the vendor. In *Boone v. Templeman* the vendee was permitted to maintain a suit for specific performance. If delay in tendering payment did not deprive him of the right to this relief, the delay of the plaintiff in this case could not affect her right to rescind the contract for inability on the part of the vendor to make a good title. The waiver of the right to insist upon prompt payment is es-

tablished by the acceptance of a part of the final installment long after it was due. The allegation and finding that the parties then agreed that plaintiff would pay the balance upon delivery of the deed is immaterial. It is of no importance, therefore, to consider the point made by appellant that the evidence does not sustain this finding. The alleged agreement provided for no more than would, as we have seen, be implied in law from the waiver of the delay in payment. The views expressed render it unnecessary, also, to pass upon the respondent's claim that the party first in default was the defendant, who made the contract with knowledge that he could not give a good title.

[3] The complaint alleged, and the answer denies, that plaintiff is an unmarried woman. There is a finding in favor of the averment of the complaint. The appellant assails the finding as unsupported. The point made is that, if plaintiff was a married woman, her husband should have been joined with her. Code Civ. Proc. § 370. But this objection, if otherwise well founded, should have been specially set up by answer. It amounted to a plea of defect of parties plaintiff, which, if not taken by demurrer (where appearing on the face of the complaint), or by answer, is deemed waived. Code Civ. Proc. § 434; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Work v. Campbell, 123 Pac. 943. A mere denial that plaintiff is an unmarried woman does not constitute a plea of defect of necessary parties plaintiff.

[4] It is argued that the court erred in allowing plaintiff interest on the sums paid by her from the dates of the respective payments. We think this position is well taken. In the absence of an agreement to pay interest, the law "only awards interest upon money from the time it becomes due." City of Los Angeles v. City Bank, 100 Cal. 22, 34 Pac. 510; Civ. Code, § 1917. Plaintiff's suit was not based upon any provision of the contract. It was an action for money had and received, in which the right was based upon a want or failure of consideration. Thomas v. Pac. Beach Company, 115 Cal. 136, 46 Pac. 899. Until rescission, or a demand for repayment, nothing was due, and interest was not allowable. Hellman v. Merz, 112 Cal. 661, 44 Pac. 1079. No different conclusion would follow if, as urged by respondent, the action be viewed as one based on fraud. Even in that aspect no money was due plaintiff until she exercised her right to demand the return of the sums paid.

[5] The point is made that since, under the contract, the plaintiff was entitled to possession of the premises, her notice of rescission was ineffectual for want of an offer to restore such possession. But there is no allegation, in either the complaint or the answer, that plaintiff ever did receive or take possession of the lot. The contract is annexed to the complaint and made a part thereof. But all that is averred is that the

parties made an agreement for possession, not that possession was in fact delivered.

[6] Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. Mayor, etc., of L. A. v. Signoret, 50 Cal. 293; Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; Estate of Cook, 137 Cal. 191, 69 Pac. 968. The rule is well illustrated by the case of Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481, 49 Pac. 578. There an action was brought upon a promissory note. The complaint alleged the making of the note, setting forth a copy thereof, demand, and nonpayment. The note contained the following clause: "This note secured by a mortgage of even date herewith." The defendant contended that the recital showed that the note was secured by mortgage, and that plaintiff's only remedy being to sue for foreclosure (Code Civ. Proc. § 726), an action on the note alone could not be maintained. But the court declined to give such effect to the recital, saying: "There is * * * no averment in the complaint that the note was secured by a mortgage, and the recital to that effect in the note cannot, as matter of pleading, be treated as the equivalent of such averment. It is only by inference or argument from this recital that it can be assumed that a mortgage was ever executed, and the rule is as much in force under the Code as at common law that argumentative pleading is not permissible." [7] For like, if not stronger, reasons, the mere annexing to the complaint of a contract providing that the purchaser shall have possession cannot be treated as equivalent to an averment that possession was in fact transferred. To give such effect to the language of the complaint would be, in effect, a holding that the mere pleading in *hac verba* of a contract constituted an allegation that all of its terms had been performed. There is, therefore, nothing on the record to show in whom the possession of the lot was during the life of the contract or at the time of the judgment. We will not presume, for the purpose of overthrowing the judgment, that such possession was in plaintiff. If the defendant had desired to protect his rights in this regard, he should have made them appear by pleading or otherwise before the proceedings in the trial court were concluded.

We have not thought it necessary to consider whether plaintiff's rights accrued by reason of her notice of rescission. Even if the contract had not been rescinded before the commencement of the action, the complaint prayed that it be rescinded by the judgment of the court. This was a proper form of relief. Civ. Code, § 3406.

There are no other points requiring notice.

The cause is remanded, with direction to the trial court to modify the judgment by deducting from the amount recovered all sums shown by the findings to have been

allowed as interest for any period prior to the 4th day of February, 1910, the date of the demand for repayment. As so modified the judgment shall stand affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(21 Cal. App. 1)

BARBER ASPHALT PAVING CO. v. CRIST
et al. (Civ. 1,014.)

(District Court of Appeal, Third District, California. Jan. 3, 1913.)

1. MUNICIPAL CORPORATIONS (§ 293*)—STREET PAVING RESOLUTION—CONSTRUCTION—DESCRIPTION.

A street paving resolution, declaring an intention to pave an entire street as in the resolution specifically described, "excepting from said work the paving" of a certain crossing, "which crossing shall be repaved," was not open to the objection that it did not specify with what material such crossing should be repaved, but reasonably construed, meant that the crossing should be repaved so as to make it conform to the specific description given for the paving.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

2. MUNICIPAL CORPORATIONS (§ 293*)—STREET PAVING RESOLUTION—SUFFICIENCY OF DESCRIPTION.

Street paving proceedings being in invitum, the resolution of intention must describe, with reasonable clearness, the work to be done, otherwise the contractor cannot recover, whatever his good faith or expenditures may have been.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

3. MUNICIPAL CORPORATIONS (§ 293*)—STREET PAVING RESOLUTION—SUFFICIENCY OF DESCRIPTION—"BASALT BLOCK."

A street paving resolution declaring the intention of the city council to order the construction of basalt block gutters of a certain width, upon a concrete foundation of a certain thickness, was not objectionable for failure to fix the thickness of the gutters; the term "basalt block" implying and being understood by reasonably intelligent men to mean blocks of sufficient size for the purpose intended.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

4. MUNICIPAL CORPORATIONS (§ 565*) — IMPROVEMENTS — ASSESSMENTS — JOINDER — TRANSACTION—FORECLOSURE OF LIEN.

Under the Vrooman Act (St. 1885, p. 157) § 12, providing that a contractor may sue the owner of the lots assessed for an improvement, a street paving contractor properly joined in one action against the owners in common of several lots, assessed for paving a single resolution of intention, his causes of action to foreclose his lien on all the lots.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1274; Dec. Dig. § 565.*]

5. PLEADING (§ 216*)—DEMURRER TO COMPLAINT—WAIVER—SCOPE.

Where the only grounds stated for demurrer were insufficiency of facts and that causes of action were improperly joined, the objection

that the causes of action were not separately stated was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Barber Asphalt Paving Company against Julius A. Crist and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Cooper, Gray & Cooper, of San Francisco, for appellant. Johnson & Shaw, of Oakland, for respondents.

CHIPMAN, P. J. This is an action to foreclose a lien claimed for street work done in the city of Oakland by appellant under the so-called Vrooman Act. A demurrer was interposed to the amended complaint on two grounds: First, for insufficiency of facts; and, second, that several causes of action have been improperly united in this: That causes of action to foreclose liens against 12 separate and distinct parcels of land have been improperly united. The demurrer was sustained, and judgment passed for defendants. Plaintiff appeals from this judgment.

In paragraph 5 of the amended complaint, it is alleged that on September 4, 1906, the city council of the city of Oakland "duly made and passed a resolution (No. 31,323) declaring its intention to order the work and improvement mentioned in paragraph 6 of this amended complaint to be done at said city, and determining and declaring that said work and improvement was of more than local or ordinary public benefit, and would affect and benefit the lands and district hereinafter described," and that the costs of said work "should be assessed upon said lands and district, which district is * * * described as follows:" (Description follows.) It is also alleged that said resolution of intention and the superintendent's notice of the passage thereof were published as by the said resolution provided.

In paragraph 6 it is alleged that on December 20, 1906, the city council "duly made and passed its resolution No. 31,755, ordering the following street work to be done according to the specifications adopted by said council on October 22, 1906, to wit: That East Fourteenth street in said city, from the western line of Twenty-First avenue to the eastern boundary line of the city of Oakland, be graded, curbed with granite with a backing of concrete, and paved with asphalt in a layer two inches thick on a binder course one inch thick of asphalt and broken stone, and a concrete foundation six inches thick; also that basalt block gutters, four feet wide, upon a concrete foundation six inches thick, be constructed thereon as follows, to wit: On the southern side from the center line of Twenty-Second avenue to the

center line, produced, of Twenty-Fourth avenue, as said Twenty-Fourth avenue exists south of East Fourteenth street, and on the northern side from the center line of Twenty-Second avenue to the center line, produced, of Twenty-Fourth avenue, as said Twenty-Fourth avenue exists north of said East Fourteenth street; also that the existing culverts in the crossing of Twenty-Third avenue be removed; excepting, however, from the above-described work, such portions as are required by law to be kept in order or repair by any person or company having railway tracks thereon; also excepting from said work the curbing on the southern side of East Fourteenth street from the western line of Twenty-Third avenue to a point 75 feet easterly from the eastern line of said Twenty-Third avenue; and also excepting the curbing on the northern side of said East Fourteenth street from the eastern line of Twenty-Third avenue to a point 117 feet westerly from the western line of said Twenty-Third avenue; also excepting from said work the grading, paving, and guttering of the southern half of said East Fourteenth street from the eastern line of Twenty-Third avenue to a line parallel with and distant 75 feet easterly from said eastern line of Twenty-Third avenue; also excepting from said work the paving of the crossing of Twenty-Third avenue, which crossing shall be repaved; and also excepting the grading of the sidewalks from the western line of Twenty-First avenue to the eastern boundary line of the city of Oakland."

It will be observed that the plaintiff, in paragraph 5 of its complaint, does not set out in full the resolution of intention. Certain of its provisions are given, and, among others, that it declared the intention of the council to be "to order the work and improvement mentioned in paragraph 6 of this amended complaint to be done." We think the complaint must be treated as if it alleged, in express terms, that the resolution of intention declared the work to be done as it is described in paragraph 6; and the question as to the sufficiency of the description of the work is thus distinctly raised. It is therefore contended by respondents that "the resolution of intention did not name or describe the materials with which the crossing of Twenty-Third avenue should be repaved, and did not state the depth or thickness of the basalt rock gutters."

The street to be improved was East Fourteenth street from the westerly line of Twenty-Fourth avenue to the easterly boundary line of the city. Between these points was the crossing of Twenty-Third avenue.

[1] After describing the entire length of East Fourteenth street, which was to be graded and paved, and as in the resolution specifically described, we find, among other exceptions, the following: "Also excepting from said work the paving of the crossing

of Twenty-Third avenue, which crossing shall be repaved." Respondents' contention is that "the council intended by this language that the crossing of East Fourteenth street should not be paved in the same manner as the remainder of the street, but that the same should be paved with some other material not specified." Appellant's contention is that it is fairly inferable, from the provisions of the resolution, that the Twenty-Third avenue crossing, being a part of East Fourteenth street, was to be repaved with the same material as that used elsewhere on East Fourteenth street. This was the construction put upon the resolution by the contractor and by the city authorities, and all subsequent steps taken, as appears from the complaint, conformed thereto. The specifications for the work, prepared by the city engineer, the contract for its execution, the completion of the work, its acceptance by the superintendent of streets, the payment by the city of its proportion of the cost of the work, all show that this particular crossing was to be repaved, and was repaved, the same as other parts of East Fourteenth street.

[2] It is well settled that, the proceedings being in invitum, the resolution of intention must describe, with reasonable clearness, the work to be done, otherwise the contractor cannot recover, whatever his good faith may have been in doing the work, or however much money he may have spent. Speaking of the rule laid down in *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33, the Supreme Court said in *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924: "*Bolton v. Gilleran* has been seized upon by property owners and used in every possible way to defeat the just recovery of the contractor, until, finally, this court felt impelled to voice its protests against these efforts in *Haughawout v. Raymond*, 148 Cal. 311, 312, 83 Pac. 53, where it said: "Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor, by a resort to the extreme technicalities of the law, can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which,

after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery."

It will be noticed that certain exceptions were made of work to be done on the curbing from certain points on Twenty-Third avenue, and also certain paving and guttering for which no substitute was provided (i. e., that at these points no work was to be done), and then follows the exception in question, to wit: "Also excepting from said work the paving of the crossing of Twenty-Third avenue, which crossing shall be repaved"—and this is followed by another exception of grading, which was work taken out of the contract.

It is entirely clear that this crossing was to be repaved, and the resolution specifically directed how East Fourteenth street was to be paved. It seems to us reasonable to hold that, wherever any part of that street was to be paved or repaved, it was meant that the work was to conform to the specific description given for the paving. This street was to be improved for the entire length described and as specified; and the improvement in mind was an entire piece of work. It seems to us that a property owner observing by the resolution that this street was to be paved, and this crossing repaved, or, what would be the same, paved, he would reasonably conclude that the specifications as to paving the street would govern.

[3] Respondents say in their brief: "It further appears from the resolution that the council declared its intention to order the construction of basalt block gutters, four feet wide, upon a concrete foundation six inches thick; that the council carefully defined the thickness or depth of the concrete foundation and the width of the gutters, but failed entirely to fix the depth or thickness of the gutters." It is argued that the depth or thickness of the gutters is as important to be stated as to fix the width, "because the cost may depend upon the depth as much as upon the width." But the depth is fixed if the size of the basalt blocks was understood, for they were to be laid upon a concrete foundation six inches thick, and the depth would be six inches plus the basalt blocks. Webster defines basalt to be "a dark hard species of marble." Also: "It is a very tough and heavy rock, and is one of the best materials for macadamizing roads." The description was "basalt blocks," not small broken pieces or fragments of basalt, such as are used in macadamizing streets. The terms "basalt blocks" imply, and would be understood by reasonably intelligent men to mean, blocks of sufficient size for the purposes intended. If the resolution had specified brick instead of basalt blocks, it would be unreasonable to say that the contractor could not recover because the size of the brick was not given. *Harney v. Heller*, 47 Cal. 15, 17. Had the

resolution used the terms "cobblestones," a material frequently used for gutters, it would be unreasonable to hold the proceedings invalid because the size of the cobblestones was not given. Yet cobble, as used, varies in size somewhat. Appellant cites *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96, and *Dowling v. Hibernia Savings & L. Socy.*, 143 Cal. 425, 77 Pac. 141. In the first of these cases the description read that a certain street be graded, and that "redwood curbs and rock gutterways be laid thereon, and that the roadway and sidewalks thereof be macadamized." The terms "rock gutterways" are not more definite than the terms "basalt blocks." In that case the principal ground for a reversal was that "the improvements were not properly or sufficiently described in the resolution of intention." The judgment was affirmed. It is hardly conceivable that both court and counsel failed to consider the sufficiency or insufficiency of the description of the material used in the gutterways. In *Schwiesau v. Mahon*, 128 Cal. 114, 116, 60 Pac. 683, 684, it was said that, by using the description, "rock gutterways be constructed in the street, notice was given of the work and the materials to be used."

In the *Dowling* Case the resolution read: "That granite curbs be laid on Henry street. * * * and that the roadway thereof be paved with bituminous rock." It is true that the objection discussed in the opinion did not touch upon the description of the material, and the question of its sufficiency seems not to have been raised. But it is not likely that the point escaped the notice of counsel for appellant, who doubtless considered it untenable and did not raise it. The judgment was affirmed. We are unwilling to declare the proceedings invalid because of the objection now being considered, and thus deprive the contractor of what is justly his due.

[4] Finally, it is claimed that the several causes of action set up in the complaint did not arise out of the "same transaction." It is contended that each assessment upon the several lots of land constituted a separate and distinct "transaction" within the meaning of subdivision 8 of section 427 of the Code of Civil Procedure, citing *Himmelmann v. Spanagel*, 39 Cal. 392. While it was not necessary to the decision in that case, it was nevertheless held that "the assessment is the 'transaction' within the meaning of section 47 of the Practice Act (St. 1851, p. 57), out of which the cause of action must arise, which the defendants are authorized to set up as a counterclaim"; that "the owners of property adjacent to a street are not, in any sense, parties to the contract, for the improvement of a street, entered into with the superintendent of streets." The counterclaim in that case was for piling dirt on plaintiff's lot while doing the work on the street. The court said: "It

is apparent that the alleged demand did not arise out of the assessment, nor, indeed, out of the proceedings upon which it is based, and therefore are (1s) not available as a counterclaim. The acts occasioning the damages complained of were naked trespasses, and would not be held to arise out of the contract considered as the 'transaction' upon, or in respect to, which the action was brought."

The causes of action which may be joined are defined in section 427 of the Code of Civil Procedure: " * * * (8) Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated. * * * "

The complaint alleged "that defendants, Julius A. Crist, Frederick G. Crist, and Clara E. Crist, were on the 16th day of October, 1907 [the date of the assessment, diagram, warrant, and certificate of the city engineer], and still are, the owners in common of that certain parcel of land situated in said assessment district and particularly described as follows:" (Then follows a description of a parcel of land which it is alleged "embraced those certain lots shown on said diagram and numbered thereon and on said assessment numbers." Then follow also the numbers of all the lots fronting on East Fourteenth street and affected by the assessment.)

Section 12 of the Vrooman Act (Stats. 1885, p. 157) provides that "the contractor or his assignee may sue, in his own name, the owner of the land, lots or portions of lots assessed. * * * "

Appellant contends, with much force, that under subdivision 8, section 427, of the Code of Civil Procedure, "the 'transaction' out of which the cause of action arises is the whole proceeding, commencing with the passage of the resolution of intention and ending with the recording of the assessment, warrant, diagram, and the contractor's return," and this because the assessment is of no effect unless the steps prescribed by the statute have been taken. We do not find it necessary to determine the point. In *McCaleb v. Dreyfus*, 156 Cal. 204, 210, 103 Pac. 924, 927, it is said: "Defendant was the owner of all the lots against which the liens were sought to be enforced in a single action. While the method of procedure is admissible under section 12 of the Vrooman Act, yet a single attorney's fee only can be recovered in such an action. *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027." No difference is perceivable where the action is brought against a single owner of all the lots, and where it is

brought against three owners in common of all the lots, which is the case here.

[8] The causes of action are not separately stated, but the demurrer was not on this ground. Code Civ. Proc. §§ 430, 431.

The judgment is reversed with directions to overrule the demurrer.

We concur: HART, J.; BURNETT, J.

(17 N. M. 433)

VORENBERG v. BOSSERMAN.

(Supreme Court of New Mexico. Jan. 14, 1913.
Rehearing Denied March 8, 1913.)

(Syllabus by the Court.)

1. ACKNOWLEDGMENT (§ 29*)—CERTIFICATE—FORM.

An acknowledgment in the following form, "This mortgage was acknowledged before me by —, this — day of —, A. D. 19—," held not to be a substantial compliance with the statutory requirements, and to be invalid.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 151-159; Dec. Dig. § 29.*]

2. CHATTEL MORTGAGES (§ 150*)—RECORD—NECESSITY FOR ACKNOWLEDGMENT.

A chattel mortgage, not properly acknowledged, is not entitled to record, and furnishes no constructive notice.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246-252; Dec. Dig. § 150.*]

3. CHATTEL MORTGAGES (§ 61*)—RECORD—EFFECT AS BETWEEN PARTIES.

An acknowledgment is not necessary to the validity of a chattel mortgage between the parties.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 118-124; Dec. Dig. § 61.*]

4. CHATTEL MORTGAGES (§ 118*)—CONSTRUCTION—PROPERTY COVERED.

The words, "also the wool clipped from said ewes," held sufficient to cover wool afterwards clipped from same.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 203, 204; Dec. Dig. § 118.*]

5. CHATTEL MORTGAGES (§ 152*)—RECORD—NECESSITY AS AGAINST ATTACHING CREDITORS.

Sections 2361, 2362, C. L. 1897, require the recording of a chattel mortgage, as against a subsequent attaching creditor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 254, 266; Dec. Dig. § 152.*]

Appeal from District Court, Mora County; D. J. Leahy, Judge.

Attachment by Simon Vorenberg, trading as the Vorenberg Mercantile Company, of wool as the property of O. S. and O. G. Keyser, partners as Keyser Bros., and Elijah Bosserman intervenes, claiming the property under a chattel mortgage. From a judgment for the intervener, the plaintiff appeals. Reversed and remanded, with instructions.

W. J. Lucas, of East Las Vegas, and S. A. Foutz, of Wagon Mound, for appellant. W. R. Holly, of Springer, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PARKER, J. Appellants levied an attachment on a quantity of wool owned by O. S. and O. G. Keysor, partners as Keysor Bros. Appellee intervened, setting up a chattel mortgage upon certain property described therein as follows: "(1,500) Fifteen hundred head of improved New Mexico 3 year old ewes, together with increase, and branded 'O' on right hip. Also wool clip from above ewes. The above ewes are now located on Keysor Bros. ranch, 11 miles southeast of Wagon Mound, Mora county, New Mexico, together with all increase and offspring of said live stock." The wool levied upon was wool clipped from the sheep mentioned in the mortgage after its execution and before the attachment. The mortgage was acknowledged in the following form: "State of Colorado, County of Denver—ss: This mortgage was acknowledged before me by O. G. Keysor this 11th day of April, A. D. 1911. Bernard O. Bub, Notary Public."

The appellants had no actual notice of the mortgage, although the same was regularly recorded. Appellants demurred to the intervening petition as follows: "That the said petition of intervention does not state facts sufficient to constitute a cause of action for the following reasons, to wit: (a) That the instrument upon which said petition of intervention is based and alleged therein to be a chattel mortgage, and which is referred to therein, and a copy attached thereto as Exhibit A thereof, is not acknowledged as required by the laws of the territory, now state, of New Mexico, and the acknowledgment thereof and thereon fails to fulfill the requirements of the laws of the territory, now state of New Mexico. (b) That, because of the defective acknowledgment aforesaid, the said instrument, alleged in said petition of intervention, was not entitled to be placed of record in the office of the probate clerk of Mora county, New Mexico, and the recordation thereof did not constitute any notice to the plaintiff herein, and the lien of plaintiff's attachment is superior to such alleged chattel mortgage, even though the same should be valid, which validity is hereby denied. (c) That the same alleged instrument, which is Exhibit A attached to the petition of the intervener, even if not for other reasons invalid, is void as to the property attached by the plaintiff herein for the reasons that the property covered and included in said alleged chattel mortgage is not described with sufficient certainty." The court overruled the demurrer, and the appellants elected to stand on the same. They afterwards stipulated, among other things, some of the facts stated above. The defendants in the case defaulted.

The court awarded judgment in favor of intervener, and directed the money realized from the sale of the wool (sold by stipulation of the parties) to be paid over to him. Appellants appeal from this judgment.

[1] 1. It is first argued by appellants that

the mortgage is not properly acknowledged. The requirement of acknowledgment is to be found in section 2361, Compiled Laws of 1897, in the following language: "That hereafter all chattel mortgages, or other instruments of writing, having the effect of a mortgage or a lien upon personal property, shall be acknowledged by the owner or mortgagor and recorded in the same manner as conveyances affecting real estate. * * *

This section was afterwards amended by section 1 of chapter 14 of the Laws of 1907, but in a particular not affecting the consideration of this case. The original requirements as to the contents of the certificates of acknowledgment, in conveyances of real estate, are to be found in section 3949 of the Compiled Laws of 1897, being a part of an act passed in 1862 and carried through the compilations of 1865 and 1884, and being in the following language: "The certificate of acknowledgment shall express the fact of the acknowledgment being made, and also that the person making the same was personally known to at least one of the judges of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the writing or a party to it, or that it was proved to be such person by the testimony of at least two reliable witnesses." Since that time, forms of acknowledgment have been provided by statute and declared to be sufficient in cases of all written instruments, except commercial paper. See sections 3945 and 3947, C. L. 1897. The form prescribed in section 3945 is as follows: "On this — day of —, before me personally appeared —, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed."

It can hardly be contended, it seems to us, that the acknowledgment of the mortgage in question is a substantial compliance with the requirements of either section 3945 or 3949. Counsel cite, in support of the sufficiency of the acknowledgment, *Wilson v. Quigley*, 107 Mo. 98, 17 S. W. 891, in which case is cited *Hughes v. Sloan*, 102 Mo. 77, 14 S. W. 660. In both of those cases the omission to state that the person acknowledging the instrument was known to the officer was held not to vitiate the acknowledgment. But in those cases the certificate contained a recital which showed that the party acknowledging the instrument was known to the officer. But in this case there is no recital that the mortgagor acknowledged that he executed the instrument, or that the person who appeared before the notary was the person described in, and who executed, the instrument. The recital is simply that the instrument was acknowledged by O. G. Keysor. This will not do. This is not a substantial compliance with the statute.

[2] 2. It is next urged by appellant that

the mortgage, not being acknowledged, was not entitled to record, and consequently gave no constructive notice. The proposition is evidently sound. Section 18 of chapter 62 of the Laws of 1901 expressly provides that an instrument, not duly acknowledged, shall not be entitled to be filed and placed of record, nor considered of record, though so entered. Under this statute, the instrument was not entitled to record, and, under the prevailing doctrine, gave no constructive notice.

[3] 3. It is further urged that the absence of a valid acknowledgment rendered the instrument void. The argument is clearly unsound. The general doctrine is that, in the absence of statute expressly so providing, an acknowledgment is no part of an instrument, and is not necessary to its validity. 1 Cyc. 513; *Kitchen v. Schuster*, 14 N. M. 164, 176, 89 Pac. 261. The argument is based upon the language of section 2361 of the Compiled Laws of 1897, where the imperative form "shall" is used. But nothing is contained in the act declaring the instrument to be void in case it is not acknowledged. It is to be further noted that a later statute (section 17 of chapter 62 of the Laws of 1901) provides that an acknowledgment shall not be necessary to the execution of any instrument, unless expressly so provided by statute. Section 2361 cannot be held to expressly provide any such consequences of failure to acknowledge an instrument.

[4] 4. The description of the property in the mortgage is questioned for uncertainty. Appellee urges that the word "increase" is sufficiently broad to cover wool clipped from sheep, and cites *Alferitz v. Ingalls* (C. C.) 83 Fed. 964. The weight of authority seems, however, to be to the contrary. *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Stringyellow v. Sorrells*, 82 Tex. 277, 18 S. W. 689; *Libert v. Unfried*, 47 Wash. 186, 91 Pac. 776.

But we are not called upon to decide, nor do we, whether the word "increase," in a chattel mortgage, includes the annual clip of wool from sheep. The language used in this mortgage precludes the giving of such effect to the word. If the word "increase" is to include the wool, then the words, "also the wool clipped from said ewes," become superfluous and should be disregarded. This cannot be done. Under the familiar general rule of construction, every word used by the parties to a contract must be given its full and fair meaning and operation. In this case, therefore, it is apparent that the parties intended to and did measure their respective rights as to the wool by the words, "also the wool clipped from said ewes."

5. Do those words sufficiently identify the property? It is argued that the description is uncertain, because it is not stated whether the wool has been, or is to be, clipped. This argument is palpably unsound. If any person were called upon to state a descrip-

tion of wool already clipped from sheep, he would necessarily describe it as a certain amount of wool located at a certain place. Wool, after it has been clipped from sheep, bears no further relation to the sheep in ordinary commercial transactions. The words here used necessarily refer to wool to be clipped from the sheep; and we assume that counsel for appellant would have no criticism of such description. We are not unmindful, in this connection, of the rule relied upon by appellants that a chattel mortgage must clearly, by its terms, include after-acquired property, or it will not be covered. *Jones on Chattel Mortgage* (5th Ed.) § 173a. But the property in this case is not strictly after-acquired property, as usually spoken of in the books; the property having a potential existence at the time of the execution of the mortgage. The language used in the description clearly indicates and describes the sheep from which the wool was clipped, and clearly indicates an intention to subject the wool to the mortgage, and is therefore sufficient.

[5] 6. We have, then, a case of a contest between an attaching creditor with no actual notice, and a mortgagee with a mortgage valid between the parties, but unacknowledged, and, although recorded, improperly so, and furnishing no constructive notice.

To support the judgment, appellee relies upon three cases decided by the territorial court; but it will be seen that in neither of them was the question now before the court decided. In *Ilfeld v. De Baca*, 13 N. M. 32, 79 Pac. 723, the question was as to the effect of the failure to record a deed of real estate; and the court there held, under section 3953, C. L. 1897, which does not include creditors, that that section was intended for the protection of subsequent purchasers and mortgagees only. In *Kitchen v. Schuster*, 14 N. M. 164, 89 Pac. 261, the controversy was between a mortgagee, with an unacknowledged and unrecorded mortgage, and a subsequent purchaser of the chattels covered by the mortgage. But the question was as to whether the purchaser had actual notice of the mortgage; the court holding that, if he had, the mortgage would prevail. In *Bank v. Haverkamp*, 16 N. M. 497, 121 Pac. 31, there was a controversy between the mortgagee and an alleged fraudulent transferee of some of the mortgaged property, and also the trustee in bankruptcy of the mortgagor's estate. The mortgage had been withheld from record for a long time, and the question was whether this fact rendered the mortgage fraudulent in law, and the court held that it did not. No specific liens by attachment or otherwise had been obtained by the creditors. There is some language in this case which might justify the inference that creditors are in no instance included within the protection of the recording acts; but, as seen, no such question was be-

fore the court. The exact question in this case has never been decided in this jurisdiction.

We assume that the profession would unqualifiedly say that in this jurisdiction a chattel mortgage must be recorded in order to retain its priority over a subsequent attaching or execution creditor. But there is no specific statutory provision to that effect, and such a conclusion can be reached only by construction. The only statute touching upon the question is section 2362 of the Compiled Laws of 1897, which is as follows: "Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers, or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and if said mortgage is to secure the payment of money, the amount yet due and unpaid; such affidavit shall be attached to, and filed with the instrument or copy on file to which it relates." This is an old section, being section 4 of chapter 36 of the Laws of 1875-76, and has been retained ever since that time. The act of 1876 provided for the filing of the original mortgage, which was to be retained by the recorder, and also provided that either an actual and continued change of possession of the chattels mortgaged, or the filing forthwith of the original mortgage with the recorder, must be had, or such mortgage should be void as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith. In 1880 the Legislature specifically repealed three of the sections of the act of 1876, but allowed the section above quoted to remain. It substituted, for the filing of the original document with the recorder, a provision for acknowledgment and recording of the same; and the act now appears as section 2361 of the Compiled Laws of 1897, chapter 73, Laws of 1889. In this act the Legislature omitted to provide that, in case of failure to record the instrument, it should be void as to the creditors of the mortgagors. Since that time the law has remained unchanged, except for a minor amendment, which has been heretofore referred to.

It will be observed that section 2362, above quoted, does not provide that the mortgage shall be void as against the creditors of the mortgagor, unless recorded, but provides that, in case of the failure to file a renewal affidavit within the stated time, it shall become void as to the creditors. It is apparent that the Legislature has assumed that the law, during all these years, has required the recording of chattel mortgages in order to pre-

serve their priority as against creditors. Otherwise an absurd situation would be presented. If the statute does not require the recording of a chattel mortgage as against creditors, then for one year after its execution it would be valid, but at the end of the year it would become invalid, not because it had not been recorded, but because an affidavit of renewal had not been filed. If the mortgage had not been filed for record, then there would be no record of a mortgage, concerning which the affidavit of renewal should be filed, and the whole section would thereby become nugatory. The act of 1880 is not a comprehensive act covering the whole subject of chattel mortgages, but merely is intended to change the form of record notice to the world of chattel mortgages. We therefore hold that section 2363 is sufficient regarding the recording of a chattel mortgage as against the creditors of the mortgagor.

For the reasons stated, the judgment of the district court will be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

(47 Mont. 1)

MELVILLE et al. v. BUTTE-BALAKLAVA COPPER CO.

(Supreme Court of Montana. Feb. 10, 1913.)

1. DEATH (§ 23*)—ACTION FOR CAUSING—RIGHT OF WIDOW AND CHILDREN.

As regards the question whether, under Rev. Codes, § 6486, as to action for wrongful death, the widow and children have a cause of action for wrongful death of the husband and father, even if he, because of his contributory negligence or assumption of risk, would have had no cause of action had he survived the injury, sections 3692, 3741, declaring that the husband must support his wife, and the parent entitled to custody of a child must support him, are not pertinent; they merely enjoining duties on living parents, and not conferring vested rights on the wife and children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 23.*]

2. MASTER AND SERVANT (§§ 204, 228*)—INJURY TO SERVANT—"LEGAL NEGLIGENCE"—DEFENSES.

While employing one in a mine more than eight hours a day, in violation of Rev. Codes, §§ 1739, 1740, is legal negligence, the master, in an action by the servant, bottomed on such negligence, for injury, is not precluded from showing as a defense assumption of risk or contributory negligence of the servant in also violating the statute, or in reckless conduct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.*]

For other definitions, see Words and Phrases, vol. 5, p. 4066.]

3. DEATH (§ 15*)—RIGHT OF ACTION—"WRONGFUL ACT OR NEGLIGENCE OF ANOTHER."

The words "wrongful act or neglect of another" in Rev. Codes, § 6486, declaring, where death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for dam-

ages against the person causing the death, in view of prior legislation, imply actionable wrong or negligence towards deceased, and not towards the surviving wife and children; so that the heirs cannot recover if deceased could not have recovered for his injury had he lived.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 17; Dec. Dig. § 15.*]

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Action by Thomas Melville and others against the Butte-Balaklava Copper Company. Judgment for defendant; plaintiffs appeal. Affirmed.

Maury, Templeman & Davies, of Butte, for appellants. Kremer, Sanders & Kremer, of Butte, for respondent.

BRANTLY, C. J. The purpose of this action is to recover damages for the death of Michael Melville, which is alleged to have been caused by the wrongful act of the defendant. The plaintiffs are the widow and minor children of the deceased, and sue as his heirs.

The facts showing how the accident occurred may be briefly stated as follows: On the evening of December 6, 1909, the deceased was in the employ of the defendant as shift boss and pumpman. He had gone on shift at about 7 o'clock in the morning, and had worked continuously from that time until he was injured. He and four other men constituted the shift. They were engaged in excavating a third compartment to the defendant's mining shaft. The work had begun at the 500-foot level, and had progressed upward to the 200-foot level. The two compartments already constructed were used, respectively, for pumping and hoisting purposes. During the work the men stood upon a bulkhead, which extended over the three compartments of the shaft. Owing to the presence of the men there, the cage could not be lowered entirely to the level of the bulkhead. Therefore, in order to remove the debris resulting from the excavation, the men shoveled it into buckets, which were raised, one at a time, to the surface by means of a hook attached to the underside of the deck of the cage. When a bucket was ready to be raised, it was hooked to the cage; then, at a signal by the bell to the engineer at the surface, the cage was raised about five feet, or far enough to clear the bucket from the bulkhead. It was then stopped long enough to enable the men to steady the bucket, so that it would not swing back and forth and bump into the timbers on the way up. Upon the giving of a second signal, it was raised to the surface. When the change shift went on at 3 o'clock in the afternoon, it was found that the air hose line had been broken by blasts set off by the morning shift. The air line came down from the surface by way of the pump compartment, and through the other compart-

ment into the excavation. The deceased, having charge of this shift also, undertook to repair the hose. The point at which the break in it had occurred was some 15 feet above the level of the bulkhead. The deceased went up on the cage to this point, and stepped off upon the timbers separating the pump compartment from the hoist compartment. There being ample room for the cage to pass and repass him, he ordered the men below to send the cage up. Upon its return trip another bucket was attached to it, and the signal given to raise it. As usual, it was stopped for a moment to steady the bucket. By that time the deceased had completed the repairs, and, desiring for some reason to go to the surface, without giving notice to any one of his intention to do so, he attempted to step upon the cage as it passed the position where he was standing. He missed his footing, was caught between the cage and the timbers, and so badly injured that he died within a few days thereafter.

The wrongful act for which recovery is sought is alleged in the complaint substantially as follows: That the deceased was working underground in defendant's mine in the capacity of shift boss and pumpman; that on December 6, 1909, the defendant wrongfully and intentionally required him to remain at work continuously for a period of more than eight hours; that after he had been engaged for more than eight hours he was "dealt by and in and from said required employment grievous bodily injuries, from which he died thereafter on the 12th day of December, 1909;" and that there was not, at the time of the injury, any emergency by which life or property was in imminent danger. The answer denies generally the allegations of the complaint. It alleges that the injury of the deceased was due solely to his own negligence in attempting to step upon the cage while it was in motion, and that in so doing he assumed the risk, knowing the danger thereof. The reply joins issue upon these allegations.

It will be observed that the complaint does not allege that the deceased was in such a condition of mental and physical exhaustion, induced by overwork, that he was unable to give proper attention to his surroundings, and that this was the efficient cause of his injury. Though the evidence does not show definitely whether the deceased had continued work after the lapse of eight hours at the instance of defendant's superintendent, or whether he did it voluntarily to accommodate the shift boss who should have relieved him, it is conceded, for the purposes of this case, that he continued at work, with the knowledge of the superintendent, under a standing order made by him that each shift boss should continue at work until he was actually relieved by his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

successor. At the close of the evidence the court granted a nonsuit and rendered judgment for the defendant. The appeal is from the judgment. Did the court err in granting the nonsuit?

[1] The plaintiffs are entitled to recover, if at all, under section 6486 of the Revised Codes, which declares: "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The theory of counsel for plaintiffs is that the provisions of the Codes which declare that "the husband must support himself and wife out of his property or by his labor," etc. (Rev. Codes, § 3692), and that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances," etc. (Id. § 3741), and similar provisions, confer vested rights upon the wife and children to support by the father; and that in every case where they have been deprived of this support by the death of the father, caused by the wrongful act or neglect of another, they have a cause of action against such other person, without regard to whether the father, if death had not ensued, could have maintained an action in his own behalf. It is argued, therefore, that, since the deceased was injured while at work at the request of the defendant, in violation of the provisions of sections 1739 and 1740 of the Revised Codes, though the death was caused wholly by the negligence of the deceased himself, the defendant is to be deemed guilty of his death by wrongful act, within the meaning of the statute.

Sections 3692 and 3741, supra, are not pertinent to the present inquiry. They may be dismissed from consideration, with the remark that, so far as they go, they declare the mutual obligations of the husband and wife with reference to the support of the family and the education of the children. They enjoin duties upon the living parents, and do not purport to confer vested rights upon the wife and children, within the meaning of the expression "vested rights" as it is ordinarily used.

[2] Section 1739, supra, declares that eight hours shall constitute a day's work upon public works and in certain industries, including operations in underground mines. Section 1740 declares a violation of any of its provisions to be a misdemeanor, punishable by fine or imprisonment, or both. In *State v. Livingston Concrete, etc., Co.*, 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204, these provisions were examined by this court. It was held that the inhibition contained in

the latter includes both employer and employé, and renders both subject to the penalty whenever the former causes the employé to work and the latter works for a period longer than eight hours. We shall not undertake to question the contention of counsel that the continuance of work beyond the statutory period is to be deemed a proximate cause of Michael Melville's death. It is the general rule that, where a statute makes a requirement, or prohibits a thing, for the benefit of a person or class of persons, one injured by reason of a violation of it is entitled to maintain an action against him by whose disobedience he has suffered injury; and this is true whether the statute is penal in its character or not. *Wharton on Negligence*, § 443; *Bishop on Noncontract Law*, § 132; 1 *Thompson's Commentaries on the Law of Negligence*, §§ 10, 210; *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 83, 49 Am. St. Rep. 935; *Pauley v. Steam Gauge Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; *Pelin v. New York C. Ry. Co.*, 102 App. Div. 71, 92 N. Y. Supp. 468; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325. A violation of the statute is negligence per se, or, properly speaking, legal negligence. *Osterholm v. Boston & Mont. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226.

But the rule thus broadly stated does not preclude the defendant from showing that the negligence of the plaintiff was a proximate cause of the injury, or that he assumed the risk, and hence is not entitled to recover. The purpose of such statutes being to protect the employé or the public, they do not abrogate these defenses, unless they expressly so declare. Their effect is to render a failure to comply with their requirements negligence per se, or legal negligence, and not to excuse negligence in other persons. 4 *Thompson's Com. on the Law of Negligence*, §§ 210, 4622; *Bishop on Noncontract Law*, § 140; *Osterholm v. Boston & Montana C. C. & S. Min. Co.*, supra.

If a violation of the statute by the employer is negligence, it is equally so on the part of the employé; and if the disobedience, on the one hand, is a proximate cause of the injury, so the dereliction, on the other hand, must be regarded as a contributing proximate cause; for the disobedience is concurrent, and the injury is the result of the concurrent causes which operated to the same end. In such a case the employé cannot recover, because, in alleging the injury, he must, of necessity, allege his own fault. It is the general rule that an action never lies when the plaintiff must base his claim, in whole or in part, on the violation of a criminal or penal law of the state. *Lloyd v. North Carolina R. R. Co.*, 151 N. C. 536, 66 S. E. 604; *Nottage v. Sawmill Phoenix (C. C.)* 183 Fed. 979; *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Louisville, etc., Ry. Co.*

v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 521, 9 Am. St. Rep. 883; Little v. Southern Ry. Co., 120 Ga. 347, 47 S. E. 953, 56 L. R. A. 509, 102 Am. St. Rep. 104; Voshefskey v. Hillside Co., 21 App. Div. 168, 47 N. Y. Supp. 386; Thompson, Com. on the Law of Negligence, §§ 10, 204, 249. This rule finds expression in section 6192 of the Revised Codes, as follows: "Between those who are equally in the right, or equally in the wrong, the law does not interpose." If, therefore, Michael Melville had survived, he could not have maintained an action, for the obvious reason that the evidence discloses, in the first place, that his injury was due to his own reckless conduct, and, in the second place, if this were not so, for the reason that he would have to rely on the violation of the statute by the defendant and thus show that he was in pari delicto with the defendant, and hence base his claim upon his own criminal conduct.

[3] Counsel insist, however, that the statute, supra, creates a cause of action in favor of the wife and children because of the wrong done to them; and that, since the defendant's violation of the penal statute was a proximate cause of the death of the husband and father, the death was caused by its wrongful act, within the meaning of the statute, without regard to the negligence of which the deceased was himself guilty. In other words, the defenses of contributory negligence, assumption of risk, etc., which would have been available against the deceased if he had brought the action, are not available to the defendant in this action. This contention presents the real question in the case, viz.: Do the words of the statute "wrongful act or neglect of another" imply actionable wrong or negligence toward the deceased, or toward the surviving wife and children? It is thus made necessary to examine and construe the statute in the light of its history and the expression of opinion by the courts generally as to the purpose of such enactments.

At the common law one who was injured by the wrongful act of another had his action for the wrong. If he died before his action was brought, his right of action died with him. If he had brought his action, but died before judgment, the action abated. So, also, it was the rule that for the death of one person, caused by the wrongful act of another, there was not any remedy by civil action. *Dillon v. Great Northern Ry. Co.*, 38 Mont. 435, 100 Pac. 960. To avoid this condition the English Parliament enacted what is commonly known as Lord Campbell's Act (9 & 10 Vict. 93). This statute created a new right of action in favor of the kindred of the deceased for the damage sustained by them through the death of the deceased. In 1872 the Legislature of the territory of Montana enacted a statute containing two sections, the first of which was substantially the first section of Lord Campbell's Act. The

second was a modification of the second section of that act, in that it limited the amount of recovery and also the time within which the action might be brought. This act was as follows:

"Section 1. Whenever the death of a person shall be caused by (a) wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation or company which would have been liable if death had not ensued, shall be liable for an action for damages, notwithstanding the death of the person injured and although the death shall have been under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by, and in the name of, the personal representatives of such deceased persons, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages, not exceeding twenty thousand dollars, as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next kin of such deceased person: Provided, that every such action shall be commenced within three years after the death of such person." *Codified Statutes 1871-72, c. 61.*

The statute was thereafter retained in the various compilations and revisions of the laws of the territory and state until the Revision of 1895, from which it was omitted. *Rev. Statutes 1879, 5th Div., §§ 491, 492; Compiled Statutes 1887, 5th Div., §§ 981, 982.* In 1877 the territorial Legislature enacted a complete Code of Civil Procedure. Section 14 of that Code is identical with section 5486 of the Revised Codes, supra. This provision was doubtless copied from the Code of Civil Procedure of California, as amended by the act of March 24, 1874. *California Code Civ. Proc. § 377.* However this may be, it has ever since been retained as a part of our Code of Civil Procedure. *Rev. Statutes 1879, 1st Div., § 14; Compiled Statutes 1887, 1st Div., § 14; Code Civ. Proc. 1895, § 579; Rev. Codes, § 6486.* The purpose had in view by the Legislature is apparent. It was to provide the procedure by which the right of action created by the first section might be enforced, and to substitute it in the place of the second section of the older act. The older act was not repealed, but was allowed to stand undisturbed, except so far as the later act, by implication, modified and became a substitute for the second section of it. The modification wrought by it was to

except minors from its operation, to omit the limitation as to the amount of recovery and as to the time within which the action must be brought, and to authorize the heirs, as well as the personal representative, to maintain the action; whereas under the old statute it could be maintained by the personal representative only. It is thus apparent that the cause of action contemplated by the enactment of 1877 was the same as that created by the older act; for the retention of both provisions in all subsequent compilations and revisions of the laws, up to the adoption of the Codes of 1895, the one in the Code of Civil Procedure and the other among the general laws, required both to be construed together as establishing the law on the subject, and compels the conclusion that the later act, though its terms are appropriate to confer a right, was not intended to confer a different right from that created by the older. The meaning of the expression "wrongful act or neglect of another" thus became established and clearly limited to those cases only wherein the death is wrongful as against the deceased, and to preclude recovery when death was due to the decedent's own fault. And though the Legislature omitted from the Codes of 1895 the general provision creating the right, and retained only the provision as now incorporated in the portion of the Code devoted to the subject of Civil Procedure, it evidently did so, not with the intention of creating a new right of action, but upon the theory that the provision as it now stands would effectually preserve the right as then declared by the omitted provision. This conclusion becomes necessary when we observe that the Code of Civil Procedure of 1895 declared: "The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." Section 3454, Code Civ. Proc. 1895. The same provision is found in the present Code. Rev. Codes, § 8062.

While this court has never expressly determined the question at bar, it has in many cases recognized the rule that recovery can be had only in a case in which the deceased was himself without fault. Some of the decisions of this court were made prior to the adoption of the Codes of 1895. Many more of them have been made since that time. We cite the following: *Johnson v. Boston & Mont. Min. Co.*, 16 Mont. 164, 40 Pac. 298; *Thompson v. Montana C. Ry. Co.*, 17 Mont. 426, 43 Pac. 496; *Dillon v. Great Northern Ry. Co.*, supra; *Meehan v. Great Northern Ry. Co.*, 43 Mont. 72, 114 Pac. 781; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 109 Pac. 706, 137 Am. St. Rep. 738; *Poor v. Madison R. P. Co.*, 41 Mont. 336, 108 Pac. 645; *O'Brien v. Cerra-Rock Island M. Co.*, 40 Mont. 212, 105 Pac. 724;

Neary v. Northern Pac. Ry. Co., 37 Mont. 461, 97 Pac. 944, 19 L. R. A. (N. S.) 446; *Riley v. Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948; *Mulville v. Pacific M. L. Ins. Co.*, 19 Mont. 95, 47 Pac. 650; *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.

The interpretation thus given the statute by the Legislature, and impliedly by these decisions of this court, has become so firmly established as the rule of decision in this jurisdiction that we do not feel justified in departing from it. To sustain the plaintiffs' contention would be to adopt an interpretation which the Legislature never intended that the statute should have and thus destroy defenses of which defendant cannot be deprived, except by act of the Legislature. If a change should be wrought, it is the office of that body to make it, and not of this court.

Similar statutes have been enacted in many of the states of the Union, and have been under consideration by the courts. We shall not enter into an examination of the numerous decisions interpreting them. The following more or less directly support our conclusion: *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *McDonald v. Eagle & Phoenix Co.*, 68 Ga. 839; *Casey, Adm'r. v. L. & N. Ry. Co.*, 84 Ky. 79; *Jones v. Manufacturing, etc., Co.*, 92 Me. 565, 43 Atl. 512, 69 Am. St. Rep. 535; *L. Ry. Co. v. Raymond's Adm'r.*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176; *Hill v. Pennsylvania Ry. Co.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754; *State v. Manchester Ry. Co.*, 52 N. H. 528; *Clarke's Adm'r. v. L. & N. Ry. Co.*, 101 Ky. 34, 39 S. W. 840, 36 L. R. A. 123; *Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104; *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734. See, also, 1 *Shearman & Redfield on the Law of Negligence*, § 65; *Thompson's Com. on the Law of Negligence*, § 7071.

Counsel for the plaintiffs cite and rely with confidence on the case of *Northern Pac. Ry. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196. This was an action for wrongful death under the statute of Idaho identical with section 6486, supra. The trial court instructed the jury as follows: "You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general." The Circuit Court of Appeals, by affirming the judgment in favor of plaintiffs, approved the above instruction, thus holding, in effect, that the right to recover was granted by the statute and existed without reference to what right the deceased would have had, had he survived the injuries and had himself brought an action. In reversing the judg-

ment, the Supreme Court of the United States (192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513) said: "The two terms, therefore, wrongful act and neglect, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation, one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages."

The judgment is affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 18)

HELENA LIGHT & RY. CO. v. CITY OF HELENA.

(Supreme Court of Montana. Feb. 13, 1913.)

1. STREET RAILROADS (§ 19*)—FRANCHISE—RESERVED POWER—SUBSEQUENT RESTRICTIONS.

Where a franchise for a city railway reserved to the city the right, by resolution or order of the city council, to adopt such other or further regulations, rules, or restrictions with reference to or for the management of street railroads within the city as the council might from time to time deem proper, and provided that all grants should be held subject to the right so reserved, such reservation did not enlarge the city's power to enact suitable police regulations to control the construction and operation of railways upon the streets of the city, but was limited to the enactment of such reasonable police regulations with reference to the conduct and operation of the road as the city might impose on any other person in the same position, and therefore did not include the right to impose on the company the duty to light its railroad tracks within the corporate limits without cost to the city.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 49-54; Dec. Dig. § 19.*]

2. MUNICIPAL CORPORATIONS (§§ 589, 591, 593*)—POLICE POWER—EXERCISE.

The source of the police power of a municipality is the state, and its extent must be ascertained from the law creating the municipality and from the laws bearing on the same subject. Its exercise being a governmental function, the power cannot be surrendered, alienated, or abridged by contract, nor can it be delegated, even with the consent of the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1308, 1310, 1319, 1321, 1322; Dec. Dig. §§ 589, 591, 593.*]

3. MUNICIPAL CORPORATIONS (§ 593*) — POLICE POWER—PRIVATE CONTRACT.

Since the state is the source of the police power of a municipality, such power cannot be

enlarged or extended by contract or agreement with a private citizen or subject.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1315; Dec. Dig. § 593.*]

4. MUNICIPAL CORPORATIONS (§ 57*)—POWERS—CHARTER.

A municipality has only such powers as are expressly conferred by the law creating it and such as are necessarily implied and are indispensable in order to accomplish the purpose of its creation, so that, where there is a fair and reasonable doubt as to the existence of the particular power, it must be resolved against the municipality and the power denied; it being assumed that the state has granted in clear and unmistakable terms all that it intended to grant at all.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

5. STREET RAILROADS (§ 76*)—REGULATION—STATUTES—CONSTRUCTION—POWER OF CITY—"RAILROAD."

Rev. Codes, § 3259, subsec. 12, provides that a city council shall have power to require the lighting of any "railroad" track or route within the city, the cars of which are propelled by steam or otherwise, and fix the number, style, and size of lamp posts, burners, lamps, and all other fixtures and apparatus necessary for such lighting and the location of lamp posts, and require the construction of crossings on the line of any railroad track or route within the city, the cars of which are propelled by steam or otherwise, where the track intersects or crosses any street, alley, or public highway, and determine and fix the kind of crossing and the grades, etc. *Held*, that the word "railroad," as used in such act, did not include street railroads, and that the act did not confer on the city the power to pass an ordinance requiring a street railroad company to light its tracks within the limits of the corporation without cost to the city.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 156; Dec. Dig. § 76.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Submission of controversy between the Helena Light & Railway Company and the City of Helena. Decree for defendant, and plaintiff appeals. Reversed and remanded.

Wm. Wallace, Jr., John G. Brown, and T. B. Weir, all of Helena, for appellant. H. S. Hepner and Edward Horsky, both of Helena, for respondent.

BRANTLY, C. J. This cause was submitted to the district court upon an agreed statement of facts under the provisions of section 7254, Revised Codes, to have determined the question: "Has the city of Helena the right and power to require the plaintiff, the Helena Light & Railway Company, to light its railway tracks within the corporate limits of said city without cost or expense to the city, and particularly at street intersections?" The court upheld the contention of the city that it has the power and rendered judgment in its favor. The plaintiff has appealed.

The plaintiff is operating its railway under what is referred to in the briefs of counsel

as the "Brill Franchise." It also supplies to itself and to the city and its inhabitants electricity for light and power purposes under a second franchise granted to it by the city. The ordinance granting the railway franchise contains this provision: "Section 2. Rights Granted, Subject to What.—The right and privilege hereby granted is subject, except as herein otherwise provided, to the terms, restrictions and provisions contained in Article III, entitled 'Street Railroads,' on pages 323 to 331, inclusive, of the Revised Ordinances of 1897." Section 19 of said article 3, which was in force when the Brill franchise was granted, is as follows: "The city of Helena reserves the right, by resolution or order of the city council, to adopt such other or further regulations, rules or restrictions, with reference to, or for the management of, street railroads, or companies or corporations conducting street railroads within the city of Helena, as the council may from time to time deem proper; and all grants for street railroads shall be construed, taken and held to be subject to the right in this section reserved, whether so expressed in the grant or not." Section 3259 of the Revised Codes declares: "The city or town council has power: * * * (12) To require the lighting of any railroad track or route within a city or town, the cars of which are propelled by steam or otherwise, and fix and determine the number, style and size of the lamp posts, burners, lamps, and all other fixtures and apparatus necessary for such lighting, and the points of location of the lamp posts, and to require the construction of crossings on the line of any railroad track or route within the city or town, the cars of which are propelled by steam or otherwise where the said track intersects or crosses any street, alley or public highway, or runs along the same, and to fix and determine the size and kind of such crossings and the grades thereof, and in case the owner of such railroad fails to comply with such requirements, the council may cause the same to be done, and it may assess the expense thereof against such owner, and the same constitutes a lien on any property belonging to such owner within such city or town, and may be collected as other taxes." The ordinance imposing upon the plaintiff the requirement in question is not incorporated in the agreed statement of facts. What its specific requirements are as to the number of lights required, their character, position, etc., does not appear. This is not important, however, since the question presented is not whether the particular requirements of the ordinance are reasonable, but whether either under the reservation in the general ordinance, which must be read into the Brill franchise, or under the provision of the statute, the council may exact the requirement it has undertaken to make.

[1] 1. As to the reservation clause in the ordinance, it is contended that, though the

plaintiff by accepting the franchise entered into a contract with the city whereby it bound itself to observe any condition imposed upon it by the city, it did not thereby bind itself to submit to an exaction made of it, which, but for the reservation, it would be wholly beyond the power of the city to make. It is also argued that the general reservation does not impose upon the plaintiff any other duty than to submit to any reasonable regulation enacted by the city. We do not think the reservation enlarges in any degree the power of the city to enact suitable police regulations to control the construction and operation of railways upon its streets. Upon examination of it we find that it prescribes with great particularity the method to be pursued in constructing them, the character of materials to be used, the grade upon which they shall be laid (on a level with the surface of the street), the portion of the street they shall occupy, the maximum rate of speed at which the cars shall be moved, the points at which the cars must be stopped to receive and discharge passengers, and the duty of the corporation or other person owning the railroad to make the necessary repairs to the tracks and to keep the portion of the street occupied by them planked or paved, as the necessities of the case from time to time require. It imposes the duty of keeping the cars clean and in good repair. It prohibits the carrying of freight. It defines the relative rights of the city and the owners of the railways, when it becomes necessary to make repairs upon the streets. It reserves the right in the city to require the use by one owner of a single track in common with the owner of another railway at points where the width of the street does not permit the laying of two tracks. It contains many other provisions guarding the comfort, convenience, and safety of the public while traveling on the cars or upon the streets, and declares any violation, by omission or commission, of any of the provisions contained in it a misdemeanor, subjecting the offender to the penalty of a fine. If the owner of a railway fails to comply with any of its requirements, its franchise may be forfeited. In short, the ordinance is nothing more nor less than a series of police regulations designed to control the operation of the railway, and thus afford reasonable protection to the public in the use of the streets.

[2] The source of the police power of a municipality is the state. The extent of it must be ascertained from the law creating the municipality, and from the laws of the state bearing upon the same subject. The power cannot be surrendered, alienated, or abridged by contract, nor can it be delegated even with the consent of the Legislature. Its exercise is a governmental function. Without it neither the state nor the municipality could protect the public welfare. *Northern Pac. Ry. Co. v. Minnesota*, 206 U. S. 533, 28

Sup. Ct. 341, 52 L. Ed. 630; Dillon on Municipal Corporations, § 1269; McQuillin on Municipal Corporations, § 890.

[3] By parity of reasoning, since the state is the source of this power, it is obvious that it cannot be enlarged or extended by contract or agreement with a private citizen or subject. To assert the contrary is to assert the proposition that a private citizen may by agreement clothe the municipality with a power which the state alone could grant. Therefore the general expression "such other and further regulations, rules or restrictions," etc., found in the ordinance, must, we think, be taken to refer to, and include only, regulations of the same character as these prescribed in the preceding sections, viz., police regulations. A familiar rule of statutory interpretation is that, where general words follow particular and specific words, the former must be held to mean things of the same kind. Sutherland on Statutory Construction, § 268. It is true that the particular provisions found in the ordinance preceding the section containing the reservation embody separate and distinct regulations applicable to the subjects with which they deal, yet they all fall under the head of "police regulations," and the principle embodied in the rule, it would seem, should be applied as well to the ordinance as to a statute in which the enumeration of specific things followed by general words is all embodied in a single section. To broaden the meaning of the expression so far as to make it include regulations pertaining to subjects wholly beyond the purview of its police power would be to hold that the city may exact of the plaintiff submission to any sort of burden or imposition which the council might deem it expedient to impose, including, for instance, a requirement that the plaintiff, besides lighting its tracks upon the streets upon which they lie, shall also pave and keep in repair throughout their entire length those portions of the same streets. It cannot be questioned that such a requirement would not be within the lawful exercise of the police power. It would simply be an imposition upon the plaintiff of a duty which rests exclusively upon the municipality itself. In accepting the franchise from the city the plaintiff impliedly agreed to become subject to any reasonable police regulation which was in force at the time, as well as to any that might thereafter be enacted. It did not require an express agreement on this subject to enable the city to exact compliance of the plaintiff. Dillon on Municipal Corporations, § 1269. That the city might by an express agreement incorporated in the grant have exacted plaintiff's consent to submit to any imposition which it chose to impose upon it we do not doubt. The plaintiff was not obliged to accept the franchise. It took it with whatever burden was attached to it. We do not think, how-

ever, that, in the absence of a specific agreement to that effect, the city has the right to impose upon it any burden other than such as it might impose upon any other person in the same position.

[4] 2. This brings us to the real question at issue; that is to say: Does the provision of the statute, supra, vest in the city the power to make the requirement in question? The rule is established in this jurisdiction that a municipality has only such powers as are expressly conferred by the law creating it, and such as are necessarily implied and are indispensable in order to accomplish the purpose of its creation; and, when there is a fair and reasonable doubt as to the existence of the particular power, it must be resolved against the municipality and the power denied. *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 106 Pac. 695, 20 Ann. Cas. 239; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249. The reason of the rule is that the state has granted in clear and unmistakable terms all that it intended to grant at all. *Id.*

[5] The provisions of the statute are not explicit. It is argued that the terms in which it is couched are broad enough to include any road constructed of rails. Whether it was intended by the Legislature to put street railroads in the same class with commercial railroads and make them subject to the same regulations by the municipality is left in doubt. To ascertain its intention, reference must be had to the context in which the provision is found, other provisions pertaining to the same subject, the occasion and necessity calling for the enactment of it, and the remedy had in view. Section 3259 is an enumeration of the powers of a city council. It confers the power to pass all by-laws, ordinances, and resolutions not repugnant to the federal or state Constitution or the title relating to the government of cities, which may be necessary to carry out the provisions of the title. Subdivision 1. By specific provisions embodied in 81 other subdivisions it grants many of the powers included in subdivision 1, besides others not clearly included. Some of them are cumulative in character, but most of them deal with specific subjects. Subdivisions 11, 12, 13, and 66 relate exclusively to railroads. Subdivision 11 grants the power "to regulate and control the laying of railroad tracks, and prohibits the use of engines and locomotives propelled by steam or otherwise, or to regulate the speed thereof when used." Subdivision 12 is quoted above. By subdivision 13 is granted the power "to license and authorize the construction and operation of street railroads and requires them to conform to the grade of the street as the same are or may be established." Subdivision 66 confers the power to grant to street or other railroads rights of way through the streets or property of the city, to regulate the running

and management of the cars, to compel repairs upon a street occupied by a railroad by the owner thereof, to regulate the speed of engines, and to require flagmen at crossings. This last subdivision in terms applies to both commercial and street railroads. We do not attach any significance to the use of the term "railroad" in these subdivisions. Similar provisions were first enacted by the territorial Legislature in 1887. Comp. Stat. 1887, div. 5, § 325, subdivs. 14 (11), 15 (12), 16 (13). They have been amended from time to time since, but not in any particular indicating an intention to change or extend their application. Laws 1893, p. 113, subdivs. 14 (11), 15 (12), 16 (13); Pol. Code 1895, § 4800, subdivs. 11, 12, 13; Laws 1897, subdivs. 11, 12, 13. As originally enacted, subdivisions 11 and 12 applied only to railroads propelled by steam locomotives. As they now stand, they include railroads upon which any kind of motive power is used, as is indicated by the expression "or otherwise," now found in subdivisions 11 and 12, but not in the act of 1887. The terms "railroad" and "railway" were used in the original enactment as synonymous. So they were used in the act of 1893. They have been used indiscriminately in the same sense in much of the legislation on the subject of railroads and railroad corporations as is pointed out in *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, 32 Mont. 298, 80 Pac. 252. In the popular sense they are synonymous. As was said by the Supreme Court of California in *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622: "We recognize that the word 'railroad' or 'railway,' as used in a law, is broad enough to include street railroads, and that many cases have arisen where the courts have held that the word does in its signification include such corporations; but, when all has been said, each case has been determined upon its own facts, having in view the circumstances of the case, the context, the presumed intention of the lawmakers, and the general policy of the particular state in regard to the matter, and therefore, while a large number of cases may be cited in which the courts have held that the statutes under consideration dealing with 'railroads' embraced in their provisions street railroads, an equal number could be instanced in which the courts have, under the facts of the case, narrowed and limited the application of the statute, and held that street railroads were not included. It would be difficult, if not impossible, to formulate any rule to govern the determination. In this state the difficulty is much relieved by the distinction which our Codes make between railroad corporations proper and street railroad corporations."

Much of our legislation on the subject of railroads and railroad corporations has no application to street railroads. This is made apparent by the discussion of the provisions

which were construed in *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, supra, and, while the question now before us was not involved in that case, what is said on this subject and especially touching the provision now under consideration should be given weight in arriving at its meaning. It will be observed that the term "railroad" is employed in subdivisions 11 and 12 without qualification. Immediately afterward, in subdivision 13, the distinguishing prefix "street" is used. This same distinction is made in subdivision 66. It is found in sections relating to the assessment of railroads. Rev. Codes, §§ 2528, 2529. Again, in section 3808, enumerating the purposes for which corporations may be formed, the same distinction is observed. Yet again it is found in the recent act of the Legislature providing for the establishment of lighting districts in the business portions of cities and towns. Laws 1911, p. 167. The frequent use of this prefix indicates the intention of the Legislature to maintain the distinction, and suggests that in construing enactments touching railroads they should not be held to apply to street railroads unless the intention that they shall so apply is apparent. The character of their construction, the mode of their operation, the comparatively limited sphere of their activities, distinguish them from the railroads of commerce. Their tracks must conform throughout to the grade of the streets. Their cars are comparatively small and light, and therefore are easily subject to control. Their cars are moved one at a time, or in trains consisting of a single car and a trailer. They are easily operated by one or two men. They are also lighted, and their approach or presence is easily observable. Their rate of speed is low. The danger to operators and the public is, for these reasons, comparatively small. Generally, they may convey passengers only. The operation of commercial railroads requires the use of massive locomotives. They convey passengers as well as freight, often making use of composite trains. Their trains are made up of many heavy cars which, with the massive locomotives drawing them, render them difficult to control. They extend for long distances. Freight trains cannot be lighted. The movements of all trains must be controlled by signals. Many men are required to operate them. The danger to the operators and the public is proportionately large. Hence the greater necessity for precautions to protect against danger of accident, and to serve the convenience of the public. These and many other matters which might be mentioned serve to emphasize the distinctive difference in the two kinds of railroads and furnish support to the view that by the employment, in the statute, of the term "railroad" or "railway," without qualification, the Legislature does not intend to include street railroads, unless the intention to do so is ap-

parent from the general legislation on the subject, or such intention is apparent from the provisions of the particular statute. 33 Cyc. 34; 36 Cyc. 1348, 1349.

We refer to a few cases which justify the foregoing statement. In Minnesota it is held that a statute declaring that railroad corporations shall be liable for damages sustained by an agent or servant of the corporation through the negligence of any other agent or servant is not applicable to street railroad corporations. *Funk, Adm'r, v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608. The Supreme Court of Oregon in *Thompson-Houston El. Co. v. Simon*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86, determined that a statute authorizing railroad corporations to acquire rights of way by condemnation does not include street railroad corporations. A like conclusion was reached by Judge Taft in *Byrne, Adm'r, v. Kansas City, Ft. Scott & M. R. Co.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693, as to the meaning of a section of the Code of Tennessee providing that every engine or train shall be brought to a full stop before crossing an intersecting railroad. It was held that the statute has no application to the crossing by a steam commercial railroad of a horse car track. In *San Francisco & S. M. El. Ry. Co. v. Scott, Collector, etc.*, 142 Cal. 222, 75 Pac. 575, the court had under consideration the provision of the Constitution of California, providing that the franchise, roadway, roadbed, etc., of all railroads operating in more than one county shall be assessed by the state board of equalization at their actual cash value, and that the same shall be apportioned to the counties, cities and counties, and cities, towns, townships, and districts in which such roads are located, in proportion to the number of miles of railway laid in such counties, cities, etc. The conclusion was reached that the provision has no application to a street railroad, though it is operated in more than one county. A provision of the Revised Codes (section 4295) declares that a judgment against a railroad corporation for injury to a person or property, for material furnished or work or labor done upon any property of a railroad corporation, shall be a lien within the county where it is recovered on the property of such corporation, and prior and superior to the lien of any mortgage or trust deed provided for in the chapter of the Code of which it is a part. The application of this provision was considered by this court in *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, supra. The term "railroad" as used therein was held not to include street railroads. The same provision was examined and the same conclusion reached as to its application in *Massachusetts Trust Co. v. Hamilton*, 88 Fed. 588, 33 C. C. A. 46, and *Central Trust Co. v. Warren*, 121 Fed. 323, 58 C. C. A. 289.

Many other cases could be cited, but these are sufficient for illustrative purposes.

When we come to analyze the provision of the statute itself, we find that one of the requirements authorized by it manifestly can have no reference to street railroads, viz.: "The construction of crossings on the line of the track or route within the city or town * * * where the said track intersects or crosses any street, alley or public highway, or runs along the same, and to fix and determine the size and kind of such crossings and the grades thereof." As already stated, street railroads must of necessity be, and they are, laid on the grade of the street. Crossings, therefore, are entirely unnecessary; indeed, they would obstruct rather than add to the safety and convenience of travel along the streets either by foot passengers or vehicles. Should it be held that the provision for lighting applies, but that the provision for crossings does not? We think not. Taking the subdivision as a whole, it confers in appropriate terms the power to prescribe two police regulations, both of which apply to commercial railroads entering or passing through a city or town, whereas one of them could not have any application to street railroads. When we come to examine subdivision 13, we find that it deals exclusively with street railroads, and that, taken in connection with the general provision contained in subdivision 1, it confers all the powers necessary for the policing of street railroads. We therefore conclude that the provision in question was not intended to apply to street railroads at all. Hence the ordinance is void.

Counsel for the city insist that the ordinance making the requirement of plaintiff to light its tracks is authorized by the general provision found in subdivision 1. Let it be conceded that a city has the implied power to require a commercial railroad to light the streets on which its tracks lie, let it be conceded, also, that it has the implied power to require a street railroad to light its tracks at crossings which may be regarded as dangerous, or even at other points along the tracks exclusively for the convenience of the passengers; nevertheless we do not think that an ordinance under which the city may require the railroad to light the entire length of certain streets, without reference to special conditions rendering their lighting necessary, can be sustained under any view of its police power. The city cannot, under the guise of the exercise of this power, impose upon the railway company the duty which necessarily rests upon itself. *City of Shelbyville v. Cleveland, C. & St. L. Ry. Co.*, 146 Ind. 66, 44 N. E. 929.

The fact that the ordinance applies especially to street intersections does not render it free from objection. Under it the plaintiff is made subject to fine and forfeiture of its charter, if it fails or refuses to install

lights at any point or points designated, whether these be at street intersections or not. Nor do we think that the situation is affected by the fact that the plaintiff has a franchise under which it is furnishing electricity to the defendant and its inhabitants. So far as we can gather from the record, the two franchises have no relation to each other.

The judgment is reversed and the cause is remanded to the district court, with directions to enter judgment for plaintiff.

Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 38)

MURPHY v. NETT.

(Supreme Court of Montana. Feb. 13, 1913.)

1. APPEAL AND ERROR (§ 14*)—ORDERS APPEALABLE—ORDER DENYING NEW TRIAL—APPEAL FROM JUDGMENT—EFFECT.

A dismissal, on respondent's motion, of an appeal from the judgment will not prevent a subsequent appeal from the order denying a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.*]

2. WILLS (§ 400*)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where the allegations of the complaint as to testamentary capacity sufficiently sustained the judgment for plaintiff on that ground, whether the complaint sufficiently alleged undue influence was immaterial; the judgment not being based on that ground.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873; Dec. Dig. § 400.*]

3. WILLS (§ 155*)—"UNDUE INFLUENCE."

In view of Rev. Codes, § 4981, defining "undue influence," in connection with contracts, to consist of the use by one in whom confidence is reposed by another, or who holds apparent authority over such other, of such confidence or authority to obtain an unfair advantage over the other, or in taking an unfair advantage of any weakness of his mind, "undue influence," such as will invalidate a will, is such influence as imposes a restraint on the will of testator, who, but for such restraint, would be free and responsible, so as to make his testamentary act not the result of his own volition, but the will of another.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

4. WILLS (§ 159*)—UNDUE INFLUENCE—THEORY OF DOCTRINE.

The theory upon which the doctrine of undue influence is based is that testator is induced to execute an instrument apparently his will, but in fact expressing testamentary dispositions which he would not have voluntarily made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 387; Dec. Dig. § 159.*]

5. WILLS (§ 155*)—UNDUE INFLUENCE—NATURE.

Undue influence which will invalidate a will must have been directed toward the particular testamentary act, near enough thereto in point of time to be operative.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

6. WILLS (§ 282*)—UNDUE INFLUENCE—PLEADING.

The details by which alleged undue influence was exercised need not be alleged if ultimate facts are alleged from which the legal conclusion of undue influence fairly follows.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

7. WILLS (§ 282*)—PROBATE—ALLEGATIONS—UNDUE INFLUENCE—SUFFICIENCY.

The statement in probate proceedings alleged that long before the will was made, and at that time, decedent was so afflicted with disease of the body and mind as to be in constant need of attention from others, and became so weakened that he was easily influenced by those caring for him; that during such time defendant, his sister, acted as the custodian of his property, was almost constantly with him, and that he was constantly in charge of physicians employed by defendant; that by reason "of all these things" defendant had, when the will was made, acquired a controlling influence over decedent's mind, and dictated to him what he should do in matters pertaining to his property; that, taking a grossly unfair advantage of his necessities and distress of body and mind "defendant did, many times before the will was made, demand and importune him that he leave all his property by will to her, to the exclusion of his mother, the contestant herein;" and that by reason of such demands defendant so prevailed upon decedent in his weakened condition "that he did, against his will and wish, in form execute the said purported will," but that such will was not his free act, and he would not have made it, had he been free from defendant's undue influence. Held, that the statement sufficiently alleged undue influence to admit evidence thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

8. WILLS (§ 156*)—UNDUE INFLUENCE.

Whether undue influence was exercised upon testator is not to be determined by the effect the supposed influence would have had upon one ordinarily strong and intelligent, but its effect upon testator under the particular circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 382; Dec. Dig. § 156.*]

9. WILLS (§ 164*)—UNDUE INFLUENCE—EVIDENCE.

Evidence that, before testator's will was made, leaving practically all of his property to his sister, his mother had made a will leaving all of her property to testator, and had also transferred her real and personal property to him, was admissible, in a will contest, on the reasonableness of testator's will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

10. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If evidence was admissible on any theory, it is immaterial whether or not the court erred in refusing to strike the pleading alleging such facts, as such refusal could not have been prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

11. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE—UNREASONABLENESS.

While the injustice or unreasonableness of a will will not alone render it invalid, it is a circumstance bearing upon undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

12. WILLS (§ 164*)—UNDUE INFLUENCE—EVIDENCE.

In a will contest in which the only issue was undue influence, evidence by contestant as to her manner of living was improper.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

13. TRIAL (§ 91*)—MOTION TO STRIKE EVIDENCE—PRIOR OBJECTION.

Where a party permits evidence to be admitted without objection to the question and answer, he cannot complain of refusal of his motion to strike such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244, 252; Dec. Dig. § 91.*]

14. EVIDENCE (§ 226*)—WILL CONTEST—ADMISSIONS—JOINT INTEREST.

In a will contest the rule of Rev. Codes, § 7887, that evidence may be given of a declaration or admission of a party as evidence against him, is modified by the rule that, where there are several legatees having a common or several, but not joint, interest, in the will, the declarations of one of them as to undue influence are not admissible to affect its validity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815-821; Dec. Dig. § 226.*]

15. EVIDENCE (§ 226*)—WILL CONTEST—ADMISSIONS.

Where the real persons in interest in a will contest were the sole substantial devisee, who offered it for probate, and contestant, the sole heir at law, an admission by the devisee would be admissible in evidence against her, though others were given nominal sums of one dollar by the will.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815-821; Dec. Dig. § 226.*]

16. WILLS (§ 400*)—HARMLESS ERROR—INSTRUCTION.

Any error in a will contest, in limiting the jury's consideration of alleged admissions by contestee, the sole devisee, to the question of undue influence, was to contestant's advantage, so that she could not complain thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873; Dec. Dig. § 400.*]

17. EVIDENCE (§ 510*)—EXPERT OPINION—TESTAMENTARY CAPACITY—LUCID INTERVALS.

Where, in a will contest involving undue influence, the parties were at issue as to whether decedent had a lucid interval when the will was made, and both had offered evidence to support their respective contentions, evidence was admissible by sanity experts that, in their opinion, testator could not have had a lucid interval when the will was made, not being objectionable as going to the very question for the jury's consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2314; Dec. Dig. § 510.*]

18. WILLS (§ 21*)—MENTAL CAPACITY—CONTEST.

While contractual capacity implies, *prima facie*, capacity to make a will, the presence or absence of one does not conclusively establish the presence or absence of another; so that an instruction in a will contest that a less degree of mind is required to execute a will than is required to execute a contract was properly refused.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 48, 49; Dec. Dig. § 21.*]

19. WILLS (§ 400*)—FINDINGS—CONCLUSIVE-NESS—CONFLICTING EVIDENCE.

Where there was ample evidence to sustain the admission of a will to probate, as against objections of undue influence and incapacity, and substantial evidence against its

admission, a judgment admitting it will not be disturbed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873; Dec. Dig. § 400.*]

Appeal from District Court, Lewis and Clark County; Lew L. Callaway, Judge.

Will contest by Mary Murphy against Anna E. Nett. From an order denying a motion for new trial after judgment for plaintiff, defendant appeals. Affirmed.

See, also, 45 Mont. 607, 126 Pac. 252.

H. G. & S. H. McIntire and John B. Clayberg, all of Helena, for appellant. Galen & Mettler, of Helena, for respondent.

SANNER, J. Edward J. Murphy died on November 27, 1909, leaving an estate worth approximately \$30,000, and one heir at law, his mother, Mary Murphy, the respondent on this appeal. His other near relatives are a full sister, Anna E. Nett, the appellant here, and two brothers and three sisters of the half blood. An instrument purporting to be his last will and testament, executed December 12, 1908, was offered by the appellant for probate, and its right to be received and regarded as his last will and testament is contested by the respondent, upon the grounds that at the time of its execution the testator lacked testamentary capacity, and was acting under undue influence of the appellant. By the terms of this will one dollar was given to each of the half brothers and sisters, and the balance of his property was left to appellant, on condition that she should, out of the property, support and care for the respondent during the remainder of respondent's life.

This is the second appeal in this matter. On the former appeal (see *In re Murphy's Estate*, 43 Mont. 353, 116 Pac. 1004, Ann. Cas. 1912C, 380) the judgment in favor of respondent was reversed, and the cause remanded for a new trial on account of certain errors in the instructions. The case was retried, and the jury found for the respondent upon the issue of testamentary capacity. This appeal is from an order denying appellant's motion for a new trial.

[1] 1. The respondent suggests that this appeal ought not to be considered, because an appeal was taken from the judgment herein and dismissed on motion of respondent, and because the appellant has, by failure to discuss it, abandoned specification No. 3, which claims error in the overruling of the motion for new trial. Concerning the appeal from the judgment, the argument is that by its dismissal the judgment was affirmed and became final, and cannot now be undermined by a reversal of the order overruling the motion for new trial. In *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 477, 120 Pac. 809, we considered some of the difficulties incident to our present appellate procedure; and it is a necessary consequence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

from what is there said that, where separate appeals, permissible under the statute, are taken in the same case, the fate of one is not necessarily involved in the fate of the other. Nor is there any merit in the supposed abandonment of specification No. 3. While we do not find in appellant's brief any discussion of specification No. 3 *eo nomine*, the entire brief reads like an argument devoted to the theme that the motion for a new trial should have been sustained.

[2] 2. It is contended that the allegations of undue influence, as set forth in the amended statement of contest, were insufficient, and that the trial court erred in not eliminating this subject from the case. Doubt may be entertained as to whether this matter was ever properly raised in the district court; but, assuming it to be properly before this court, it presents two aspects: As affecting the integrity of the judgment, and as furnishing a basis for the introduction of evidence. As regards the integrity of the judgment, the question is purely academic, because there was no finding of undue influence. There were sufficient allegations in the amended statement of testamentary incapacity, and upon that only was there any finding by the jury. Since this finding is the sole support of the judgment, it cannot matter to the judgment what may be the deficiency in the allegations relating to undue influence. In *re* Murphy's Estate, *supra*. Vigorous language is employed, however, to convince us that, if the subject of undue influence had been eliminated from the pleadings, no testimony could have been received upon it; and that, inasmuch as a great part of the record consists of such testimony, clearly creative of prejudice in the ordinary mind, its effect in producing the finding upon the other issue must be manifest, and this court should send the case back for a new trial. There is enough merit in this to warrant a determination of the question raised.

[3-6] "Undue influence," as applied to cases of wills, has been variously defined. In the former appeal of this case it was stated to be such as "imposes a restraint on the will of the testator, who, but for the restraint, would be free and responsible, so that his testamentary act is not the result of his own volition, but the will of another;" and this, in connection with our statute (Rev. Codes, § 4981), is sufficient for all practical purposes. The theory underlying the doctrine of undue influence is that the testator is induced, by the means employed, to execute an instrument in form and appearance his will, but in reality expressing testamentary dispositions which he would not have voluntarily made. 40 Cyc. 1146; Page on Wills, § 126, p. 145. To defeat a will, the undue influence must have been directed toward the particular testamentary act and at the time thereof, or so near thereto as to be

operative. 40 Cyc. 1145; Page on Wills, § 130, p. 151. As such influence is seldom exercised openly, it cannot be expected that a pleading should specify with particularity the entire details of the manner in which it was used. If ultimate facts are alleged from which the legal conclusion of undue influence fairly follows, it is sufficient to support proof. *Estate of Gharkey*, 57 Cal. 279; *Sheppard's Estate*, 149 Cal. 219, 85 Pac. 312.

[7] Now, as constituting undue influence, the amended statement at bar alleges that when the will was made, the decedent was, and for a long time prior thereto had been, so afflicted with disease of the body and mind that he was unable to properly take care of himself, and was in constant need of the care and attention of some other person, and became so weakened in mind and body and reasoning faculties that he was easily influenced by those under whose care and into whose custody he came; that during all such time appellant acted as guardian and custodian of his person and property, was almost constantly with him, and he was entirely dependent on her for the care and attention of which he stood in need; that as a patient he was constantly in charge of physicians and nurses selected and employed by her; that by reason of all these things she acquired and had, at the time the will was made, a great and controlling influence over his mind and will, and was able to and did direct and dictate to him what he should do in matters pertaining to his property; that, "taking a grossly oppressive and unfair advantage of his necessities and distress of mind and body," she did, many times before the will was made, "demand and importune of him that he leave all his property by will to her, to the exclusion of all his other relatives, and particularly to the exclusion of his mother, the contestant herein"; that by reason of such demands and importunities she did so prevail upon and influence him in his then weakened condition of mind and body at the time the will was made that he did, against his will and wish, "in form execute the said purported will," but said will was not his free or voluntary act, and, had he been free from the said undue influence of appellant, he would not have made the will in question.

[8] "Demands and importunities," it is said, are all that is here alleged, and as demands and importunities may be entirely proper, they cannot alone support the charge of undue influence. We think that counsel unduly restrict the effect of respondent's allegations by ignoring the circumstances. In a case involving undue influence the question is not what effect the supposed influence would have had upon an ordinarily strong and intelligent person, but its effect upon the person on whom it was exerted, taking into consideration the time, the place, and all the surrounding circumstances. Page on

Wills, § 126, p. 146; *Mooney v. Olsen*, 22 Kan. 69; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Griffith v. Diffenderffer*, 50 Md. 480; *Shailer v. Bumstead*, 99 Mass. 121; *Rollwagen v. Rollwagen*, 63 N. Y. 519. To say that demands and importunities can in no case amount to undue influence, unless coupled with fraud, threats, or misrepresentation, is to misapprehend the purport of our statute and to beg the question. Whether they do or do not depends upon what they are, how persistently and under what circumstances they are employed, and whether the mind of the testator is so infirm as to be overpowered by them. It is here charged that the demands and importunities in question were of a certain peculiar character were plied by a person standing in a certain special and controlling relation to the testator, at a certain period of time when, by reason of mental weakness, he was unable to resist, and that they caused him to do what he did not want to do, and would not have done if left alone. While we do not acclaim the pleading before us as a model, we think that, under such circumstances as are detailed, it is quite possible for demands and importunities to amount to undue influence, without actual fraud, menace, or misrepresentation (*Hacken v. Newborn*, style 427; *Hall v. Hall*, L. R. 1 Prob. Div. 481; *Wingrove v. Wingrove*, L. R. 11 Prob. Div. 81; *Roman Catholic Episcopal Corporation v. O'Connor*, 14 Ontario L. R. 666; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 South. 516; *Barlow v. Waters* [Ky.] 28 S. W. 785; *Gordon v. Burris*, 141 Mo. 602, 48 S. W. 642; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Lehman v. Lindenmeyer*, 48 Colo. 312, 109 Pac. 956); and therefore the pleading was sufficient as a basis for the introduction of evidence upon this subject.

[9-11] 3. Complaint is made of the denial of appellant's motion to strike paragraphs 6 and 7 from the amended statement, and of the admission in evidence of the facts that in 1901 respondent made a will leaving all of her property to the decedent, and that in 1906 she made a transfer by deed and bills of sale of all her real and personal property to him. If these facts were admissible in evidence on any theory, then we need not inquire whether error occurred in the refusal to strike the allegation of them from the pleading, because it could have had no prejudicial effect. As to the facts themselves, while they may appear remote and the deduction from them far-fetched, it cannot be said, as a matter of law, that they were not admissible on any theory. Indeed, appellant's counsel, on page 79 of their brief, seem to concede that such evidence might be competent if it were made to appear that, in pursuance of a purpose to secure all this property through undue influence upon the decedent, she had induced the respondent to make the will and transfer; and this is pre-

cisely what the pleading attempts to say. But independently of that the evidence was admissible. While the injustice or unreasonableness of a will is never alone sufficient to cause its rejection, it is always a circumstance bearing upon testamentary capacity and upon undue influence. In *re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711; *Sim v. Russell*, 90 Iowa, 656, 57 N. W. 601. That his mother had willed and later had transferred to the decedent all her property, and that he knew these things before his will was made, were facts illustrating the reasonableness of his will, his realization of the extent and character of his property, and his ability to appreciate the special claims she had thereby created upon him. *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Floore v. Green* (Ky.) 83 S. W. 133; *Lehman v. Lindenmeyer*, supra; *Ruffino's Estate*, 116 Cal. 304, 48 Pac. 127; *Gunn's Appeal*, 63 Conn. 254, 27 Atl. 1113; *Glover v. Hayden*, 4 Cush. (Mass.) 580.

[12, 13] 4. Upon the trial a motion by appellant to strike certain testimony given by Mrs. Murphy touching her manner of living was denied. The court could very well have stricken this testimony, for it was manifestly improper and could serve no legal purpose. But error cannot be claimed because the evidence was evoked in response to five separate interrogatories, none of which were objected to. This court has repeatedly held that a party may not sit by in silence while objectionable questions are being asked and answered, and then complain because the record is not cleared on his motion to strike. *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775.

[14] 5. Over the objection of appellant "that one legatee or beneficiary of the will is not competent to make admissions affecting the validity of the will, so far as the sanity or insanity of the testator is concerned," certain statements, claimed to have been made by her, were admitted as declarations against interest. It is not necessary to state them in detail, because we think they were all admissible as against the objection made. It is elementary that upon a trial evidence may be given of the act, declaration, or admission of a party as evidence against such party. *Rev. Codes, § 7887*. Doubtless, in will contests this rule is to be considered as modified by another: That, where there are two or more legatees or beneficiaries under the will having a common or several, but not joint, interest in its provisions, the declarations of one of them as to testamentary capacity or undue influence are inadmissible to affect its validity, because the will cannot be defeated as to such legatee without being defeated as to all. *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1115; *Shailer v. Bumstead*, supra; *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 379; *Campbell v. Campbell*, 138 Ill.

612, 28 N. E. 1081; In re Snowball's Estate, 157 Cal. 301, 107 Pac. 803; In re Myer's Will, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26; In re Dolbeer's Estate, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207. But this case affords no occasion to apply the modification, because there is no one to be adversely affected by avoiding the will, save appellant herself.

[15, 16] As to the brothers and sisters who are mere nominal legatees, recipients of a sum established by custom as a polite mode of disinheritance, it is a case where the law does not care for trifles. The real parties in interest are two, the appellant and the respondent; one, the sole substantial devisee under the will, offering it for probate; the other, sole heir at law, resisting probate. Under such circumstances the declarations or admissions of the devisee, if otherwise competent, ought to be, and are, admissible. *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 48; In re Myer's Will, supra; *Stull v. Stull*, 1 Neb. (Unof.) 389, 96 N. W. 201; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 470; *Wallis v. Lohring*, 134 Ind. 447, 34 N. E. 231; *Perret v. Perret*, 184 Pa. 181, 39 Atl. 83. By instruction 21 the court sought to limit the jury, in their consideration of these declarations, to the question of undue influence; if there was any error in this, appellant cannot complain, as it was to her advantage.

[17] 6. Two physicians, called in rebuttal as insanity experts, were permitted to testify that, in their opinion, the testator could not have had a lucid interval when the will was made. Counsel for appellant say that this was the same as permitting the doctors to decide the very question before the jury, whether the testator was capable of making a will, and approved authority is cited to show that the province of the jury may not be thus invaded. We assent to the rule invoked, but not to its application. The decedent was shown to have been insane before December 1, 1908, and after Christmas of that year. He died the following year of dementia, which is the terminal stage of insanity in many of its forms, and a controversy had developed as to the nature of this insanity. It was the contention of the appellant that on December 12, 1908, the decedent was sane, was enjoying a lucid interval, and this, supported by formidable evidence, was consistent with the nature of his disease as asserted by her medical witnesses. For the opposition it was sturdily maintained that the disease was paresis, a general, progressive, permanent, incurable condition admitting no such thing as a lucid interval; if this were true, then the questions asked were but another way of emphasizing the respondent's contention as to the nature of the disease, and of inquiring whether the testator was of sound mind when the will was made.

So considered, the question was within the scope of expert testimony.

[18] 7. Error is assigned upon the refusal of certain instructions and the giving of certain others. Appellant's offered instruction No. 5 was properly refused. It charged the rule to be that a less degree of mind is required to execute a will than a contract, etc., and many decisions are cited to show that this is good law, and should have been given to the jury. Respondent's counsel, on the other hand, present authorities which hold that the capacity to make a valid will or to make a contract is precisely the same, and that was the ground of their objection to the instruction. With all due respect to these learned decisions, we think that in such matters comparisons are odious, and, for purposes of instructing the jury, wholly unnecessary. To make a will or contract implies more than merely signing it, and it contravenes human experience to say that the conception, ordering, and comprehension of a will dispensing, with care and precision, extensive property, involving, it may be, charities and trusts of various kinds, requires less capacity than the purchase of a bar of soap; or that the same intellectual capacity is required for the simple holograph, "I leave all my property to my wife," and for the elaboration of a complex trade agreement designed to accomplish far-reaching results. The conclusion of common sense is that it takes more mind to make some wills than to make some contracts, and vice versa; and there is excellent authority for the rule that, while contractual capacity implies *prima facie* the capacity to make a will, yet neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other. Page on Wills, § 96; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; *Segur's Will*, 71 Vt. 224, 44 Atl. 342; *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941.

Appellant's offered instruction No. 7 was substantially covered by the given instructions Nos. 6 and 8. The court's instruction No. 7 is attacked as assuming the testator's insanity, and as imposing upon the appellant a greater burden than properly belonged to her. Upon first reading this seems to be the case; but carefully read, and taken in connection with the other instructions, we do not think that No. 7 could have been so misleading or fruitful of prejudice to the appellant as to require a reversal of this case.

8. An exception appears to the ruling admitting certain testimony of the witness Taylor. This testimony was given on redirect examination, and he was entitled, after the plight in which the cross-examination had put him, to explain himself as best he could.

[19] 9. Upon the former appeal this court

entered into a somewhat extended discussion of the evidence presented to show testamentary incapacity, with the result that, while it was characterized as "not as satisfactory as it might be," it was still held sufficient. There is nothing in the present record to require a change in either the characterization or the conclusion. There was ample evidence to sustain the will, and there was substantial evidence against it. Under such circumstances we may not substitute our judgment for that of the judge and jury who tried the issue and had the advantage of personal observation of the witnesses. In *re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; In *re Murphy's Estate*, supra; In *re Wilson's Estate*, supra. So, also, as regards the submission to the jury of the issue of undue influence. Taken at its utmost inferential value, the evidence on this subject was sufficient to warrant the action of the court.

There is no reversible error in the record, and the order appealed from is affirmed.

Affirmed.

BRANTLY, C. J. and HOLLOWAY, J.,
concur.

(23 Idaho 413)

McMAHON v. COOPER.

(Supreme Court of Idaho. Feb. 18, 1913.)

1. EXECUTION (§ 161*)—TEMPORARY INJUNCTION—SUFFICIENCY OF COMPLAINT.

Where the complaint alleges, in an action to recover personal property, that the plaintiff is the owner and entitled to the possession of the property, and the defendant denies the allegations of the complaint, and the defendant claims the right to possession under a levy of execution, in an action against a stranger to the present action, the complaint states a cause of action; and, upon such complaint, the plaintiff is entitled to a temporary injunction restraining the sale pending the trial of the case upon the merits.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 467-471; Dec. Dig. § 161.*]

2. PROPERTY (§ 9*)—OWNERSHIP—EVIDENCE.

Where the right of ownership and the possession of personal property is in issue, it is proper to admit evidence tending to show that the plaintiff purchased the property in dispute, and the location of the property, and the possession of such property, and the continued possession, and the right to the possession of the same.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—DEMURRER—TIME FOR RULING.

The action of the trial court in refusing to pass upon the demurrer, before the time the injunction was issued, became immaterial for the reason that the injunction was thereafter dissolved, and no appeal was taken from the action of the trial court in dissolving said injunction, and the complaint was sufficient to entitle the plaintiff to maintain the cause of action alleged in the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

4. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.

Where there is substantial evidence supporting the verdict and judgment rendered thereon, the verdict and judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3954; Dec. Dig. § 1005.*]

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by James B. McMahon against W. W. Cooper. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Ed. Smith, of Idaho Falls, for appellant. Clark & Budge, of Pocatello, for respondent.

STEWART, J. This action was instituted in the district court by plaintiff against the defendant to enjoin the sale of certain personal property. The complaint alleges ownership and the right to possession of the property, and that the defendant, by virtue of an execution issued out of the probate court of Bingham county, wherein Claude Ferguson was plaintiff and one W. H. Mulligan defendant, levied upon said personal property to satisfy said execution, and threatens to sell said personal property, and will sell it, unless restrained. The defendant in his answer denies the ownership of plaintiff, and denies that defendant levied upon said property without right or without due and lawful authority.

Upon the issues thus presented by the pleadings, the cause was tried and submitted to a jury; and under the instructions the sole question was submitted to the jury, Was the plaintiff the owner and entitled to the possession of the property at the time the defendant levied the execution and took possession of said property? The jury found for the plaintiff, and judgment was rendered accordingly. A motion for a new trial was made in said cause and overruled, and this appeal is from the order overruling the motion for a new trial.

The record in this case shows that the motion for a new trial was upon all the statutory grounds, and was based upon affidavits, the statement of the case, and the records and files in the action. In the notice of motion, specifications of errors in law and evidence are set forth. There are 14 specific errors of law assigned: "(1) The court erred in granting and issuing the injunction upon the plaintiff's complaint, without notice to the defendant. (2) The court erred in refusing to hear and determine defendant's demurrer to the complaint of plaintiff at the time the injunction was dissolved, as requested to do by the defendant's attorney. (3) In making the order shortening the statutory time for defendant to appear and show cause why the so-called restraining order should not be made. (4) In making the so-called restraining order. (5) In setting the cause

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for trial before the defendant's demurrer was disposed of. (6) In overruling the defendant's demurrer after the jury was called to try the case. (7) In overruling the demurrer of the defendant to plaintiff's complaint. (8) In permitting any evidence of the plaintiff's purchase, possession, or continued possession of the attached property sued for herein. (9) In permitting any evidence of such possession after the 17th day of February, 1911. (10) In proceeding to trial of the cause by a jury, without first disposing of the injunction, or so-called restraining order. (11) In denying the defendant's motion for a nonsuit at the close of plaintiff's evidence. (12) In failing to read the two forms of verdict, on delivering them to the jury. (13) In permitting the jury to determine mixed questions of law and fact. (14) In rendering and entering judgment upon a complaint which failed to state a cause of action for an injunction." Then follow the specifications of error in which it is claimed the evidence is insufficient to justify the verdict and the judgment of the court.

We will first consider the specifications of error of law occurring during the trial. Many of them are in the main technical, and in no way affect the right of either party, and have no bearing upon the real issue presented in the pleadings.

[1] The action was brought for the purpose of securing an injunction restraining the sheriff from selling property belonging to the plaintiff and levied upon by the sheriff under an execution issued in a cause wherein a judgment had been rendered against one W. H. Mulligan; and, under that execution, the sheriff was threatening to sell the property claimed in this action to belong to this plaintiff. The complaint alleged that the plaintiff was the owner and entitled to the possession of the property in controversy. The defendant, the sheriff, denied the plaintiff's ownership, and alleged the right to possession under the levy of execution. The right of possession was the issue made by the pleadings; and it was the only question submitted to the jury, and the only question determined by them. The complaint stated a cause of action.

From the showing made in this case, the plaintiff was entitled to a temporary injunction restraining the sheriff from selling the property pending the trial of the case upon the merits. The property was seized as the property of another; and the plaintiff certainly had a right to ask for a restraining order to prevent the sale of his property upon an execution against another party. *Kindall v. Lincoln Hardware & Implement Co.*, 8 Idaho, 664, 70 Pac. 1056; *Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974.

[2] The trial court did not err in admitting evidence showing the plaintiff's purchase of said property, and the location of the property, and the taking possession of such property, and the continued possession of the same, and his right to the possession, as alleged in the complaint. It is assigned as error that the trial court erred in granting a temporary injunction in said cause upon the complaint. This error is immaterial, for the court dissolved said injunction within a few days after it was granted, and no injury resulted, so far as the record is concerned, to the defendant.

[3] The trial court did not commit such an error as would justify this court in reversing this case, in his action in refusing to pass upon the demurrer before the time the injunction was issued, for the reason that the injunction was thereafter dissolved, and no appeal was taken from the action of the trial court in dissolving said injunction, and the complaint was sufficient to entitle the plaintiff to maintain the cause of action alleged in the complaint. Neither did the court err in denying the motion for a nonsuit at the close of the plaintiff's case. The evidence, upon the close of the plaintiff's case, made a prima facie case, and a motion for a nonsuit should have been denied. The other assignments of error occurring at the trial we do not deem of such a character as to require any discussion.

[4] The next error presented upon this appeal is that the evidence is insufficient to justify the verdict and the judgment of the trial court. The argument is that the evidence in this case does not show a sale made by Mulligan to the plaintiff, or that there was an immediate delivery of the property alleged to be sold, and the continuous possession of said property thereafter. Upon this question, after a careful examination of the evidence, it is apparent that the evidence is somewhat conflicting as to the sale, and also as to the immediate delivery and the continued possession of the property thereafter under the bill of sale dated February 2, 1911, given by W. H. Mulligan, from whom the plaintiff purchased said property; but the jury has found upon this question, and there is substantial evidence supporting the verdict and the judgment rendered thereon. *Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507; *Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722.

In such a case, this court will not disturb the judgment. The verdict is supported by the evidence, and the verdict supports the judgment.

The judgment is affirmed. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

(28 Idaho 536)

STATE v. SAYER.

(Supreme Court of Idaho. March 11, 1913.)

CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW OF EVIDENCE.

Transcript of the evidence examined in this case, and *held* that there is no evidence upon which to rest a verdict and judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from District Court, Bingham County; J. M. Stevens, Judge.

John Sayer was convicted of crime, and appeals. Judgment reversed, and defendant discharged.

Claude W. Gibson, of Boise, for appellant. J. H. Peterson, Atty. Gen., J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., and J. E. Good, Co. Atty., of Blackfoot, for the State.

AILSHIE, C. J. In this case it is insisted by counsel for the appellant that there is absolutely no evidence whatever establishing the guilt of the appellant, and that the jury had before them no evidence upon which to rest a verdict. At the oral argument, the Assistant Attorney General stated that he had been unable to find any evidence in the record which justified a verdict and judgment of conviction. The Attorney General's office has furnished us with a digest of all the evidence in the case, and cited us to everything that could be considered as a circumstance or suspicion against the defendant. After examining this, as well as the transcript of the evidence, we are still left to wonder upon what grounds the jury returned a verdict of guilty. There is certainly no evidence justifying it in this record. In the meanwhile, it appears that defendant has served well-nigh a year in the penitentiary.

The judgment is reversed, and the defendant will be discharged.

SULLIVAN and STEWART, JJ., concur.

(28 Idaho 418)

GUNN v. PERSEVERANCE MIN. & MILL. CO.

(Supreme Court of Idaho. Feb. 19, 1913.)

1. WORK AND LABOR (§ 28*)—EVIDENCE.

Evidence *held* sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 17, 55; Dec. Dig. § 28.*]

2. ACCOUNT STATED (§ 19*)—EVIDENCE.

Held, that the evidence does not show an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.*]

3. INSTRUCTIONS.

Held, that the court did not err in giving instructions.

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by James Gunn against the Perseverance Mining & Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wyman & Wyman, of Boise, for appellant. A. L. Fletcher, of Richfield, and Johnson & Haddock, of Shoshone, for respondent.

SULLIVAN, J. This action was brought to recover from the defendant, the Perseverance Mining & Milling Company, the sum of \$1,770, with interest thereon and an attorney's fee of \$200, for services alleged to have been rendered by the plaintiff for the defendant corporation. The appellant corporation answered, denying many of the allegations of the complaint, and averred as a further defense that there was an accounting between the plaintiff and defendant, and there was found to be due to the defendant a balance of \$500, and that said settlement was evidenced by the following writing: "Flint, Idaho, March 11, 1911. On final settlement of all accounts to date between James Gunn and the Perseverance Mining & Milling Co. It is hereto understood and agreed that the full amount due James Gunn from the Perseverance Mining & Milling Company is five hundred dollars (\$500.00). James Gunn. Witness: H. H. Bonnell." The appellant tendered on the trial said sum of \$500. The cause was tried by the court with a jury, and the jury rendered a verdict of \$1,125, with interest thereon, in favor of the plaintiff, and judgment was entered on said verdict. The appeal is from the judgment.

The appellant assigns several errors, which are to the effect that the court erred in entering judgment; that the verdict is against law; that the jury disregarded certain instructions given by the court; that the court erred in giving certain instructions; that the evidence shows that there was an account stated; that the amount due plaintiff from the defendant was the sum of \$500, and no more.

The alleged settlement represented by said writing above quoted was the principal defense made by the appellant. The appellant sought to show that at the termination of the employment of plaintiff, Bonnell, the president and general manager of the appellant company, had an accounting and went over the items of debits and credits, and ascertained a balance and agreed upon the specific sum of \$500 due the plaintiff, and that such settlement was conclusive. The respondent's theory was and is that there was at no time any accounting nor any consideration or settlement of mutual accounts, that no balance was ascertained or agreed upon, and that the instrument relied upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was simply an offer on the part of the plaintiff to accept \$500 in settlement of a claim which the jury found was \$1,125, and that such offer to accept less than the amount due was without consideration, and the same, never having been paid or accepted, was not binding upon the plaintiff. Bonnell testified that when the settlement was made, and said writing signed, they did not go into any detail, "sort of jumped at it—lumped it off." The evidence clearly shows that they did not figure over any accounts at all when said alleged settlement was made, but that respondent was disgusted, and agreed to whatever Bonnell suggested. There was a sharp conflict in the evidence on practically every proposition involved—in the employment, the performance of services, the value thereof, the alleged settlement—and in all of those controverted questions the jury found in favor of the plaintiff. In said writing there is no promise on the part of the appellant to pay the \$500 mentioned therein.

[1, 2] On a review of all of the evidence, we are satisfied there is substantial evidence to support the verdict of the jury. It is clear from all of the evidence that there was no account stated between the parties. The instructions sufficiently cover the case.

We find no reversible error in the record. The judgment is therefore affirmed. Costs awarded in favor of respondent.

AILSHIE, C. J., and STEWART, J., concur.

(23 Idaho 397)

BENGOCHEA v. ELMORE COUNTY.

(Supreme Court of Idaho. Feb. 15, 1913.)

1. TAXATION (§ 535*) — REFUNDING PAYMENT—STATUTORY PROVISIONS.

Under the provisions of section 1791, Rev. Codes, county commissioners have the power to refund to a taxpayer any money to which he may be entitled by reason of taxes having been paid twice on the same property, or on account of double assessments or erroneous assessment through clerical errors, or where, in the judgment of the commissioners, the assessment upon the property "was so grossly overestimated that the same was a mistake."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991-995, 1012, 1015; Dec. Dig. § 535.*]

2. TAXATION (§ 535*)—REFUNDING PAYMENT—STATUTORY PROVISIONS.

The clause, "so grossly overestimated that the same was a mistake," contained in section 1791, Rev. Codes, does not have reference to an assessment made in good faith, with full knowledge on the part of the assessor of the extent, description, situation, and probable or generally estimated value of the property, and where the assessment was made in the regular way in due course of official duty.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991-995, 1012, 1015; Dec. Dig. § 535.*]

3. TAXATION (§ 535*)—REFUNDING PAYMENT—STATUTORY PROVISIONS.

The clause "so grossly overestimated that the same was a mistake," contained in section 1791, Rev. Codes, with reference to the refunding of tax money, was intended to authorize granting relief, where the valuation has been placed upon property, as the same appears upon the assessment roll, so excessive and disproportionate to the generally estimated value of the property as to suggest in itself that some error or mistake has been made in the assessment, and may cover a case where the assessor was mistaken as to the location or distribution of the property, its extent, or bounds, or was misinformed as to the value of that or similar property, or had no knowledge whatever as to the probable value of the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991-995, 1012, 1015; Dec. Dig. § 535.*]

Appeal from District Court, Elmore County; Edward A. Walters, Judge.

Application by Joe Bengoechea to the Board of Commissioners of Elmore County to have certain tax money refunded. Application granted, and the county appeals to the District Court. From a judgment for the claimant, the county appeals. Reversed and remanded, with directions.

W. L. Harvey, Pros. Atty., of Mountain Home, for appellant. Daniel McLaughlin, of Mountain Home, for respondent.

AILSHIE, C. J. On the 9th of January, 1912, the respondent herein presented a petition and claim to the board of county commissioners of Elmore county, setting forth that the Bengoechea Hotel at Mountain Home had been grossly overvalued, and asked for a refund of \$400 of taxes which he had paid under protest. The same day the board of commissioners examined the matter and made an order directing that respondent be refunded the sum of \$155 on account of this claim. The county, acting through the county attorney, thereafter prosecuted an appeal to the district court. The case was tried in the district court, and the order of the board of commissioners was modified and affirmed. The county thereupon appealed to this court.

[1] Respondent filed his claim with the board of commissioners, and the board assumed to act thereon under the authority of section 1791 of the Rev. Codes. The portion of the section particularly applicable to this case reads as follows: "The county commissioners of the various counties in the state of Idaho, shall have power to refund to the taxpayer any money to which he may be entitled by reason of the taxes upon property having been paid twice for the same year, or any moneys to which any taxpayer may be entitled by reason of the double assessment or erroneous assessment of property through clerical or other errors, or where, in the judgment of the county commissioners, the assessment upon property

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was so grossly overestimated that the same was a mistake. The said money shall be refunded by warrants drawn on the current expense fund of the county."

[2] This claim was based particularly on that clause of the foregoing section which provides that the board may refund taxes when, in their judgment, the "assessment upon property was so grossly overestimated that the same amounts to a mistake." The statute is quite clear as to the refunding of taxes paid under certain conditions: First, where the taxes have been paid twice in the same year; second, where a double assessment has been made; third, where an assessment has been made erroneously through clerical or other errors. It is not a difficult matter to ascertain when a case comes within one of the foregoing provisions of the statute; but it becomes a more difficult problem to determine just what the lawmakers intended when writing the provision authorizing a refund, "when the property has been so grossly overestimated that the same amounts to a mistake." In fact, it is a difficult problem to determine just when an overestimate of property, however gross the overestimate may be, will "amount to a mistake." The clause, "so grossly overestimated that the same was a mistake," certainly cannot have reference to an assessment made in good faith, with full knowledge on the part of the assessor of the extent, location, situation, and probable value of the property, and where the assessment was made in the regular way and in due course of official duty.

[3] We are rather inclined to believe that the Legislature meant by this statute to provide for granting relief in a case where a valuation has been placed on the property, as the same appears from the assessment roll, so excessive and disproportionate to the actual or generally estimated value of the property as to suggest in itself error and mistake as to the description or extent of the property or its true situation or location. If, for example, a piece of property worth but \$1,000 were assessed at \$10,000, the presumption might be raised thereby that the assessor was mistaken as to the location, description, extent, or bounds of the property, or was misinformed as to the value of that or similar property, or else that he had acted fraudulently and that the property owner had no notice of the valuation placed on such property, otherwise he would have applied to the board of equalization for relief.

Taking the case at bar, the property was assessed as follows: Lot, \$180; improvements, which consisted of a hotel, at \$23,400, and furniture contained in the hotel at \$6,000, making a total of \$29,580. When the case finally reached the district court on appeal from the board of commissioners, the court found that the true and correct value of the

property and the amount at which it should have been assessed was \$17,000, and that the property had been overestimated in the sum of \$12,580, and accordingly ordered that the commissioners draw a warrant on the current expense fund of the county for the sum of \$339.66 to reimburse the property owner for excess of taxes for the year. When the case was tried in court, a number of witnesses were called, and they variously estimated the value of this property at all the way from a nominal sum to about \$31,000. One of the contractors who built the building testifies that the construction of the building was commenced in the year 1908, and that the building actually cost \$26,000. It also seems to have been generally admitted that the furnishings in the building cost \$6,000. The lot on which the building stood was estimated at about \$200. An abstractor and real estate man of Mountain Home, the town in which the building is situated, estimated that the building and lot was worth \$20,000 at the time this assessment was made, exclusive of the furnishings in the building. The assessor testified that he made this assessment deliberately and in the same manner he made all other assessments; that he knew what he was doing, and that there was no mistake about the assessment; that he made assessments generally after discussing values with citizens and property owners in the community and vicinity where the property was located. In other words, the evidence shows an utter lack of agreement or unanimity as to the true value of this property—it is the kind and class of property about which men honestly disagree as to its value.

Now, while it is admitted that this is a high, and perhaps an over, assessment, still there is no fact disclosed which would bring the case within the provisions of this statute, or would raise the inference that any mistake had been made such as is contemplated by the statute and could be characterized as a "gross overestimate." We presume that hundreds of cases of this character, and differing only in degree, might be found in almost every county in the state; and, if a taxpayer is to recover in a case like this, then there are hundreds, and perhaps thousands, of taxpayers in the state who would be entitled to recover varying amounts on account of overestimates as to the value of their property. The statute certainly never meant to cover such a case. The Legislature has provided that the taxpayer, who is dissatisfied with the valuation placed upon his property, must apply to the board of equalization, and that he may then and there have a hearing. Section 1695, Rev. Codes, as amended by extraordinary session of 1912 (Laws 1912, c. 8), provides that no reduction in valuation shall be made to any taxpayer, "unless such person or agent making application attends and answers all questions per-

tinent to the inquiry." This application must be made at the regular session of the board of equalization. It has been the uniform policy of the Legislature of this state to limit changes and alterations in assessed value of property to specified times and a special body, namely, before the board of equalization at its regular session held for that purpose. The Legislature has declined to provide for any appeal to be taken from an order of the board of equalization in equalizing taxes. It is therefore clear to us that the Legislature, in adopting section 1791, did not mean or intend to provide another method whereby the taxpayer, after assessments have been made and equalization had and taxes have been paid, may present his bill to the board and collect back a part of those taxes; or, if the board refuses to allow any claim, he may then appeal to the courts and thus tie up the revenues, and, if he gets a judgment, embarrasses the county in the administration of the public affairs.

In this case, the money had been paid into the county treasury and distributed and disbursed to the various funds; part of it having been paid to school districts and the village or city government of Mountain Home. The remedy of the taxpayer was by application to the board of equalization. He had notice of the valuation placed on his property, and the law gave him the right to apply to the board for a reduction where both sides might have had a hearing.

It is clear to us that the statute (section 1791) was not intended to cover a case of this kind; and for that reason the judgment herein must be reversed, and it is so ordered, and the cause is remanded, with direction to the district court to reverse the action of the board of commissioners in accordance with the views herein expressed. Costs awarded in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

(23 Idaho 540)

STATE v. DOWNING.

(Supreme Court of Idaho. March 11, 1913.)

1. CRIMINAL LAW (§ 44*)—ATTEMPTS TO COMMIT CRIME.

Section 7235, Rev. Codes, provides for the punishment of attempts to commit crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*]

2. CRIMINAL LAW (§ 753*)—EVIDENCE—INSTRUCTION TO ACQUIT.

Under the provisions of section 7877, Rev. Codes, if at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant; but the jury are not bound by such advice. The court is not required to give such advice unless it deems the evidence insufficient to convict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1730; Dec. Dig. § 753.*]

3. CRIMINAL LAW (§ 534*)—EXTRAJUDICIAL CONFESSION — CORROBORATING CIRCUMSTANCES.

An extrajudicial confession by the accused is not sufficient to warrant a conviction unless there are some corroborating circumstances, and as to whether the corroborating circumstances are sufficient is a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1205, 1222-1224; Dec. Dig. § 534.*]

4. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW OF EVIDENCE.

Where there is a substantial conflict in the evidence and the evidence taken as a whole is sufficient to sustain the verdict, the verdict will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

5. WORDS AND PHRASES—"INSTRUCT"—"ADVISE."

The generally accepted meaning of the word "instruct," when applied to courts, means a direction that is to be obeyed; while, under the meaning given to the word "advise," it is optional with the person addressed whether he will act on such advice or not.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 237; vol. 8, p. 7568; vol. 4, p. 3663.]

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

J. R. Downing, alias Cyclone Burns, was convicted of crime, and appeals. Affirmed.

Frank Harris and J. W. Galloway, both of Weiser, for appellant. J. H. Peterson, Atty. Gen., and J. L. Richards, of Weiser, for the State.

SULLIVAN, J. The defendant was prosecuted on the information of the prosecuting attorney, wherein it is alleged "that said defendant on or about the 20th day of August, 1912, at Weiser * * * then and there being, did willfully, unlawfully, and feloniously make an assault upon the person of one Neva Kingsbury, a female child then and there being under the age of 18 years, to wit, of the age of 13 years and upwards, and did then and there willfully, unlawfully, and feloniously attempt to have sexual intercourse with her, the said Neva Kingsbury, she, the said Neva Kingsbury, not being then and there the wife of him, the said defendant, and thus said defendant did become and now is guilty of the crime of attempt to commit rape as aforesaid, contrary," etc., and was convicted as therein charged and sentenced to imprisonment in the state penitentiary for not less than one year and not more than five years. A motion for a new trial was denied, and the appeal is from the judgment and order denying the new trial.

[1] Said action was prosecuted under the provisions of section 7235, Rev. Codes, which provides for the punishment of attempts to commit crime. At the close of the state's evidence, counsel for the defendant requested

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the court to instruct the jury to return a verdict of not guilty on account of the insufficiency of the evidence and the failure to prove the corpus delicti, which motion was denied by the court, and the denial of said motion is assigned as error.

[2] It is provided in section 7877, Rev. Codes, as follows: "If at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant, but the jury are not bound by the advice."

[5] In the case of *State v. Peck*, 14 Idaho, 712, 95 Pac. 515, this court had under consideration a similar motion and there held that an "instruction" directing a jury to acquit was erroneous, as the court is only authorized to "advise" the jury to acquit; and it is authorized to so advise the jury only if the court deems the evidence insufficient to warrant a conviction, under the provisions of said section. If under the provisions of that section the court advises the jury to acquit, it ought also to advise them that they are not bound by such advice but may bring in a verdict of conviction regardless of it. The Legislature, in using the word "advise" in said section, evidently intended to give it a different meaning from that which is generally given to the word "instruct." The generally accepted meaning of the word "instruct," when applied to courts, means a direction that is to be obeyed; while, under the meaning given to the word "advise," it is left optional with the person advised as to whether he will act on such advice or not.

It is next contended that the evidence is insufficient to prove the corpus delicti. The girl upon whom the attempt to commit rape was made did not testify on the trial, and the state's case rests principally on the testimony of Mrs. Fix and Miss Sprinkles. The testimony of Fix shows that she saw the defendant and the Kingsbury girl at the Palace Café in Weiser and at that time he spoke of the Kingsbury girl as his wife; that the witness Fix and the girl did some shopping that afternoon, but parted about 3 o'clock, and about 4 o'clock witness returned to her room in the Vendome Hotel and found the girl's hat in her room; that a little after 4 o'clock the defendant came into the witness' room in his stocking feet; that he and witness had some conversation as to where the Kingsbury girl was, and the defendant professed ignorance of her whereabouts; that in a few minutes the girl came into the room with her hair down and her clothes unfastened. She threw her arms around the witness' neck and told her that the defendant had endeavored to have sexual intercourse with her, and the

witness Fix remarked to the defendant that he ought to be ashamed of himself, whereupon he turned to the girl and said, "I didn't hurt you, did I?" to which the girl replied: "It was not your fault if you didn't; it was because I would not let you." There is other evidence in the record showing that the defendant and other women had conversations in regard to the girl and in regard to the defendant's "developing" her. The defendant testified in his own behalf and denied the conversations with the other witnesses. We think the evidence is sufficient to show that the defendant attempted to have illicit relations with the girl.

[3] Counsel for appellant relied upon the proposition that an extrajudicial confession of the accused is not sufficient to warrant a conviction of the defendant, but that there must be independent evidence to establish the corpus delicti of the crime. There is no doubt about that proposition, and it is stated in *People v. Badgley*, 16 Wend. (N. Y.) 53, that: "Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts are held sufficient." The defendant was present in the room of witness Fix in his stocking feet when the girl came in there crying and charged him with the attempt, and he did not deny it, but suggested to her that he did not hurt her. While it is true he denied this conversation, the jury were the judges of that evidence, and they evidently disbelieved the defendant.

[4] As to whether the corroborating circumstances are sufficient, that is a question for the jury. *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *Ryan v. State*, 100 Ala. 94, 14 South. 868; 2 *Wharton on Criminal Evidence* (10th Ed.) § 634, p. 1315. Some of the circumstances corroborating the alleged confession of the defendant in this case are his appearance in the room of witness Fix in his stocking feet, and, shortly after, the girl's coming in crying and in a disheveled condition. We think the corroboration was sufficient. See *State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66, and *State v. Silva*, 21 Idaho, 247, 120 Pac. 835, where it is held that, where there is evidence to sustain the verdict and there is a substantial conflict in the evidence, the verdict will not be disturbed. The conflict in the evidence in this case is found in the testimony of the defendant; he denying the conversation with the witness Fix.

On the whole record we think the judgment of the trial court must be affirmed, and it is so ordered.

AILSHIE, C. J., and STEWART, J., concur.

(23 Idaho 548)

STATE v. CARLSON.

(Supreme Court of Idaho. March 12, 1913.)

1. CRIMINAL LAW (§ 236*)—PRELIMINARY EXAMINATION—TAKING TESTIMONY.

By the provisions of section 7576, Rev. Codes, as amended by the act of March 13, 1909 (Laws of 1909, p. 146), two methods are provided governing the taking of testimony at a preliminary examination: First, when the evidence is taken in writing, the same must be signed and sworn to by the witness, and the evidence must also be signed and certified by the magistrate; second, when the evidence is taken by a duly appointed stenographer in shorthand at the request of the prosecuting attorney, it must be transcribed and certified to as true and correct by such stenographer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 489-491; Dec. Dig. § 236.*]

2. CRIMINAL LAW (§ 236*)—PRELIMINARY EXAMINATION—TAKING TESTIMONY.

The provision of section 7576, Rev. Codes, as amended by Laws 1909, p. 146, is mandatory in requiring that the evidence taken at a preliminary examination shall be in writing and subscribed by the witness, or taken by a stenographer appointed as provided in said section, and certified to by the stenographer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 489-491; Dec. Dig. § 236.*]

3. CRIMINAL LAW (§ 244*)—EVIDENCE AT PRELIMINARY EXAMINATION—CERTIFICATE BY STENOGRAPHER.

Under the provisions of section 7576, Rev. Codes, as amended by Laws 1909, p. 146, the evidence of witnesses at a preliminary examination, if taken in writing, must be certified by the magistrate, but, where such evidence is taken by a stenographer and transcribed and certified by such stenographer, the certificate of the magistrate to the testimony becomes unnecessary; the certificate of the stenographer takes the place of the certificate of the magistrate as to the correctness of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 511-514; Dec. Dig. § 244.*]

Ailshie, C. J., dissenting in part.

Appeal from District Court, Bonneville County; James G. Gwinn, Judge.

Emil Carlson was convicted of a nuisance, and appeals. Affirmed.

J. Ed. Smith, of Idaho Falls, for appellant. J. H. Peterson, Atty. Gen., and T. C. Coffin, Asst. Atty. Gen., for the State.

STEWART, J. A complaint was filed against the appellant in the probate court of Bonneville county charging him with the crime of maintaining a common nuisance in Idaho Falls, contrary to the provisions of section 8 of the Search and Seizure Act as found in Sess. Laws of 1911, p. 30. On the 11th day of January, 1912, a preliminary examination was held before the probate judge of said county. At the preliminary examination a stenographer was present who was appointed by the board of county commissioners under the provisions of an act approved March 13, 1909 (Laws of 1909, p. 146),

and such stenographer took and transcribed the testimony of the witnesses in said examination, and after transcribing the shorthand notes certified to the same as follows: "I, Della Lundgren, do hereby certify that I am the duly appointed, qualified and acting reporter for Bonneville county; that I reported the evidence and proceedings had at the hearing in the above-entitled action in shorthand; that the above and foregoing is a true and correct transcript of the evidence given at said hearing; and that the same was transcribed from the shorthand notes, and taken by me at said hearing. Della E. Lundgren." Upon the conclusion of the preliminary examination the probate judge made an order as follows: "This matter coming on for hearing this 11th day of January, 1912, and after listening to the evidence adduced on the part of the state and the evidence adduced on the part of defendant, and it appearing to me that the offense of maintaining a common nuisance in the city of Idaho Falls, county of Bonneville, state of Idaho, has been committed, and that there is sufficient cause to believe the within named Emil Carlson guilty thereof, I order that he be held to answer the same to the district court of the Ninth judicial district in and for the county of Bonneville, state of Idaho, and that he be admitted to bail in the sum of \$500, and committed to the sheriff of the county of Bonneville, state of Idaho, until he gives such bail."

On the 26th day of January, 1912, the docket entry committing the defendant to the district court was filed in the district court, together with the transcript of the evidence at said preliminary examination. Upon that day the prosecuting attorney filed an information in the district court charging the defendant with maintaining a common nuisance. On the 27th day of January, 1912, the defendant before pleading to the information filed a motion to quash the information upon the grounds that the court had no jurisdiction to try the cause, for the reasons that previous to the filing of the information the defendant had not been committed by any magistrate having jurisdiction or authority to commit him, and that the commitment was procured contrary to the provisions of section 8, art. 1, of the Constitution of Idaho, and section 7576, Rev. Codes. This motion was overruled, and an exception was taken by the defendant, and the ruling of the court is assigned as error.

On the 27th day of February, 1912, the defendant pleaded not guilty to the information. The defendant was tried before a jury, and a verdict of guilty was found by the jury on the 5th day of June, 1912. On the 11th day of June, 1912, the defendant filed a motion in arrest of judgment on the grounds that the court had no jurisdiction to try the defendant, for the reason that the law had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

not been complied with in the arrest and preliminary examination in the probate court. This motion was overruled. The defendant excepted and the ruling of the court is assigned as error. No demurrer to the information was at any time filed. This appeal is from the judgment.

The grounds assigned for reversal are: First, that the magistrate had no authority to commit the defendant to the custody of the sheriff without a written or transcribed deposition or depositions in existence; second, that his commitment was procured in an unlawful manner; third, that the trial court had no jurisdiction to try the defendant after motion to quash was filed; fourth, that the motion in arrest of judgment was wrongfully denied and should have been sustained.

[1, 2] The foregoing grounds will be considered together, inasmuch as the contention rests wholly upon the question whether, upon the preliminary examination, the evidence can be taken by a stenographer and certified to by such stenographer as true and correct, and whether such certificate is proof of the correctness of said depositions, and whether the reading of the same to the witness and the signing of the same by the witness can be dispensed with by legislative enactment.

Section 7576, Rev. Codes, provides: "In all cases which must afterward be investigated by the grand jury, or prosecuted by information, the examination must be taken, unless the person charged * * * shall waive his right * * * and the testimony must be reduced to writing by the magistrate, or under his direction, and authenticated in one of the following forms: * * * (4) The evidence, if taken by a stenographer in shorthand, shall be transcribed by the stenographer and certified to as true and correct; if taken in writing it must be subscribed and sworn to by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it. (5) It must be signed and certified by the magistrate."

It would seem from the provisions of this section, when taken as a whole, it was the intention of the Legislature in enacting the same to require that the testimony must be reduced to writing by the magistrate or under his direction, and that each witness is required to subscribe his name to the evidence and swear to the same, if taken in writing; but, if taken by a stenographer in shorthand, the statute does not require that the evidence shall be subscribed to by the witness or sworn to by the witness, but the stenographer is required to certify the same as true and correct. This section was a legislative enactment. It was modified to a certain extent by the act of March 13, 1909 (Laws of 1909, p. 146), and the Legislature provided that the board of county commissioners were authorized to employ a stenographer, and that the stenographer should be

under the control and direction of the prosecuting attorney, and that the stenographer so appointed should be required to be present at preliminary examinations and when requested by the prosecuting attorney to take and subscribe the testimony of the witnesses in said examination and to certify the same as true and correct, which said certificate should be sufficient proof of the correctness of said depositions. The reading of the same by or to the witnesses and the signing of the same by the witnesses were dispensed with.

Section 7576, Rev. Codes, and the modification thereof by the act of March 3, 1909 (Laws of 1909, p. 146), when considered together, provide two methods which govern the taking of testimony at a preliminary examination: First, the evidence, if taken in writing, must be signed and sworn to by the witness; second, if a duly employed stenographer at the request of the prosecuting attorney takes the evidence in shorthand and transcribes the same and certifies that the same is true and correct, the reading of the same to or by the witness and the signing of the same are dispensed with. Either of these methods may be pursued; the statute is mandatory, and either one or the other must be followed in taking the testimony in a preliminary examination.

[3] By the provisions of the foregoing statute, the evidence of witnesses at a preliminary examination, if taken in writing, must be certified by the magistrate, but, where such evidence is taken by a stenographer and transcribed and certified to by such stenographer, the certificate of the magistrate to the evidence becomes unnecessary; the certificate of the stenographer takes the place of the certificate of the magistrate as to the correctness of the evidence. The evidence so certified and the record of the magistrate and the commitment is the record upon which the prosecuting attorney is authorized to file an information and the record upon which a grand jury may make an inquiry.

In the present case we find that the law has been fully complied with and that the defendant had a preliminary examination as provided by law. For these reasons the judgment is affirmed.

SULLIVAN, J., concurs.

AILSHIE, C. J. (dissenting in part and concurring in judgment). Under subdivision 5 of section 7576, Rev. Codes, the committing magistrate should sign and certify the evidence taken before him, whether it be taken in writing and signed by the witness or in shorthand and transcribed by the stenographer who acts as reporter. Subdivision 5 applies to all cases and makes no distinction. If there were room for doubt as to this view, sections 7578 and 7579 should set the matter at rest. I do not think, however, that the judgment in this case should

be reversed as the case comes to this court. It is very evident that the error of the committing magistrate has not been prejudicial or detrimental to the appellant.

(35 Nev. 494)

McKINNON et al. v. SECOND JUDICIAL DISTRICT COURT IN AND FOR WASHOE COUNTY et al.
(No. 2,061.)

(Supreme Court of Nevada. March 11, 1913.)

INFANTS (§ 18*)—PLACE OF IMPRISONMENT—"ORPHANS' HOME"—"REFORMATORY"—"DEPENDENT AND NEGLECTED CHILDREN."

Under the act of 1873 (St. 1873, c. 45), as amended by St. 1903, c. 41, relative to the State Orphans' Home, providing that any district judge upon a showing that an orphan is the child of parents one or both of whom were at the time of their decease residents of the state, and that the condition of the orphan is such that it would be for his best interest to be admitted to such home, may commit the orphan to the home at the expense of the county, and that the directors at their discretion may receive any child from a living resident parent or guardian and require such parent or guardian to contribute to its support, but that no child shall be so received unless sent by the county commissioners of the county in which the child resides, who shall agree to pay for its maintenance, and Juvenile Court Law March 24, 1909 (St. 1909, c. 180) § 7, as amended by St. 1911, c. 197, providing for the commission of dependent and neglected children to any suitable state institution organized for the care of dependent or neglected children, and section 1, under which "dependent and neglected children" include those having immoral, evil, or incorrigible tendencies, the court could not commit to the state orphans' home a dependent or neglected child who was not an orphan, since an "orphans' home" is an institution or home for the care of destitute orphans, and not a "reformatory" or institution in which young offenders are confined and instructed, with a view to their reformation.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 18; Dec. Dig. § 18.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6129, 6130.]

Original petition by J. E. McKinnon and others for a writ of prohibition, addressed to the Second Judicial District Court of the State of Nevada in and for the County of Washoe, and another. Writ granted.

George B. Thatcher, Atty. Gen., for petitioners. Hoyt & Gibbons, of Reno, for respondents.

TALBOT, C. J. The petitioner McKinnon is the superintendent of the State Orphans' Home, and petitioners Bray, superintendent of public instruction, C. L. Dady, surveyor general, and William McMillan, state treasurer, constitute the board of directors of that institution. This is an application by them for a writ to prohibit the Second judicial district court and Hon. Cole L. Harwood, the judge thereof, from punishing them for contempt for refusing to receive at the Orphans' Home a child which was by that

court ordered committed to that institution under the act relating to dependent, neglected, or delinquent children, and designated as the "Juvenile Court Law." The order was made in a proceeding entitled "The State of Nevada, in the Interest of Howard Eggendorfer, a Dependent Child, Plaintiff, v. Carrie Eggendorfer, his Mother, Defendant," to which the petitioners were not made parties. The order recites: "The above-named Howard Eggendorfer having been regularly brought before the above-entitled court upon a petition duly verified and filed, as provided in the statute of the state of Nevada, said petition showing that said Howard Eggendorfer was within the said county of Washoe, and is a dependent child within the meaning of said statute, and due notice of the hearing of said petition having been given, and Carrie Eggendorfer, the mother of said child, and the only parent thereof, appearing and being present in the above-entitled court upon the hearing thereof, and it appearing to the satisfaction of the court that the said Howard Eggendorfer is under the age of 18 years, and is of the age of 13 years, and within the said county of Washoe, and is a dependent child within the meaning of said statute, and that his mother is unable to properly take care of, train, educate, and maintain said dependent child, and it further appearing that it is for the best interests of said child and other people of this state that said child be taken from the custody of his mother, and that he be committed to the care of the State Orphans' Home of Carson City, Nevada, the same being a suitable state institution for the care of dependent and neglected children; Now, therefore, it is hereby ordered, adjudged, and decreed that the said Howard Eggendorfer is a dependent child within the meaning of the statute of this state, and that he be and hereby is committed to the care of said State Orphans' Home at Carson City, Nev., for the period of his minority, or until the further order of this court, and that the superintendent of said institution, J. E. McKinnon, is hereby appointed guardian of said dependent child, Howard Eggendorfer, during the time he is kept under this order in said institution, and that the expense of his keep and care shall be borne by and paid by the state of Nevada at a monthly cost of not to exceed \$10, and that said J. E. McKinnon, as guardian, shall place said child in said State Orphans' Home and hold said child, care for, train, and educate him subject to the rules and laws in force governing said State Orphans' Home, and said J. E. McKinnon and said State Orphans' Home are hereby directed and authorized to receive and care for said dependent child, Howard Eggendorfer." In the petition filed in this court it is alleged that the order of the district court was made without the consent and without con-

sultation with or notice to any of the petitioners, and that the petitioner, McKinnon, the superintendent of the State Orphans' Home, was appointed the guardian of the child without his consent or notice to him; that no order of the board of county commissioners of Washoe county was ever made committing Howard Eggendorfer to the State Orphans' Home; that the petitioners "Bray, Deady, and McMillan, acting as the board of directors of the State Orphans' Home, in the exercise of their discretion imposed on them by statute, and acting upon the advice and report of its examining physician that said Howard Eggendorfer, by reason of his diseased condition and unclean habits, was an unfit person to be received into the said home, refused to admit into or accept such Howard Eggendorfer as an inmate therein." Thereafter, upon affidavit, the Second judicial district court cited the petitioners to show cause why they should not be punished for contempt of court in refusing to obey the order committing the child to the State Orphans' Home. The petitioners applied to the district court to set aside the order that citation issue and the citation and order to show cause why the petitioners should not be punished for contempt, and also moved to set aside the original order committing Howard Eggendorfer to the State Orphans' Home and appointing J. A. McKinnon, as superintendent, guardian of the child.

It is alleged that the district court refuses to set aside these orders, and threatens to, and will, unless prohibited by this court, punish the petitioners for contempt in refusing to obey the orders of the district court, notwithstanding that these orders and citation are wholly void and in violation of law, and without authority or jurisdiction of the district court, and in usurpation of the rights, powers, and duties of the petitioners as the board of directors of the State Orphans' Home. Provision was made for a State Orphans' Home by the acts of March 3, 1869 (Laws 1869, c. 62), and March 1, 1873 (Laws 1873, c. 45). The act of 1873 provides that the administration of the State Orphans' Home shall be under the control of three directors, to consist of the superintendent of public instruction, surveyor general, and state treasurer, and that they shall have power to manage and administer the affairs of the home. It also provides that all orphans duly admitted to the State Orphans' Home become the wards of the state and are entitled to the care, protection, and guardianship of the state, which for the care, protection, and guardianship of such wards is entitled to their services, and has the right to train and educate them for useful places in society, and that such rights of the state are superior to the claims of relations or persons, resident or nonresident. It is also provided that upon the application in

writing of any citizen of the state to the district judge of any county in behalf of any whole orphan, showing such orphan to be the child of parents, one or both of whom at the time of decease were residents of the state, and that the condition of the orphan is such that it would be for his or her best interest to be admitted to the State Orphans' Home, the district court may after notice take testimony and order the orphan committed to the home, the expenses of the proceedings and the transportation of the orphan to the home to be a county charge.

It is also provided by section 11 of the act that "whenever said board shall deem it for the best interests of any orphan in said home, or of the state, they may discharge any orphan therein," and apprentice any orphan in the home to the head of any family or person carrying on a useful or proper business.

Sections 12 and 13 of the act of 1873, as amended in 1903 (St. 1903, c. 41, §§ 1, 2), are as follows:

"Sec. 12. Nothing in this act shall be construed to prevent the board of directors at their discretion, from receiving any child from its living resident parent, parents, guardian or guardians, upon a proper showing to their satisfaction of the inability of such parent, parents, guardian or guardians, to support and care for such child; and that such board may require the living parent, parents, guardian or guardians of such child, so admitted to contribute such sum to its support as said board may determine.

"Sec. 13. Children admitted to the State Orphans' Home under the provisions of section 12 of this act, as amended, are hereby adjudged and declared to be wards of the state as fully as whole orphans, subject only to such conditions of admission as may be fixed by the board of directors; provided, that no child shall be received by the board of directors of said Orphans' Home unless they be sent by the county commissioners of the county in which the children reside; and further provided, that the county from which the child is sent shall agree by its county commissioners to pay for the maintenance of said child at a reasonable rate, said rate to be fixed by the board of directors of said Orphans' Home."

The forepart of section 1 of the act of March 24, 1909 (St. 1909, c. 180), relating to dependent, neglected, or delinquent children, is as follows: "This act shall be known as the 'Juvenile Court Law' and shall apply only to children under the age of eighteen years not now or hereafter inmates of a state institution, except as otherwise herein provided. For the purpose of this act the words 'dependent child' and 'neglected child' shall mean any child who, while under the age of eighteen years, for any reason is destitute, homeless or abandoned; or dependent upon the public for support; or has

not proper parental care or guardianship; or habitually begs or receives alms; or is found living in any house of ill fame, or with any vicious or disreputable person, or has a home which by reason of neglect, cruelty or depravity on the part of its parents, guardian or any other person in whose care it may be, is an unfit place for such child, or who, while under the age of ten years, is found begging, peddling or selling any article or articles, or singing or playing any musical instrument for gain or giving any public entertainments upon the street, or accompanies or is used in the aid of any person so doing; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause, and without the consent of the parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents or visits a house of ill fame or ill repute; or knowingly frequents or visits any policy shop or place where any gaming device is operated; or patronizes, visits or frequents any saloon or dram shop where intoxicating liquors are sold; or patronizes any public poolroom where the game of billiards or pool is being carried on for pay or hire; or who wanders about the streets in the nighttime without being on any lawful business or any lawful occupation; or habitually wanders about any railroad yards or tracks, or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority, or writes or uses vile, obscene, profane or indecent language, or smokes cigarettes in any public place or about any schoolhouse; or is guilty of indecent, immoral or lascivious conduct; any child committing any of these acts shall be deemed a delinquent child, and when proceeded against, such proceedings shall be on behalf of the state in the interest of the child and the state, with due regard for the rights and duties of parents and others, by petition to be filed by any reputable person, and to that end it shall be dealt with, protected and cared for in the district court as a ward of the state in the manner hereinafter provided. The words 'delinquent person' shall include any person under the age of eighteen years who violates any law of this state or any ordinances of any town, city, county, or city and county of this state, defining crime." Section 2 confers jurisdiction on the district courts in all cases coming within the terms of the act. In the latter part of section 7 the following provision appears: "And if parent, parents, guardian or custodian consent thereto, or if the court shall further find that the parent, parents, guardian or custodian of such child are unfit or improper guardians or are unable or unwilling to care for, protect, train, educate, correct or discipline such child and that it is for the interest of such child and other people of this state that

such child be taken from the custody of its parents, custodian or guardian, the court may make an order appointing as guardian of the person of such child, some reputable citizen of good moral character, and order such guardian to place such child in some suitable family, home or other suitable place which such guardian may provide for such child, or the court may enter an order committing such child to some suitable state institution, of this or any other state organized for the care of dependent or neglected children, or to some training or industrial school or childrens' home-finding society of this or any other state, or to some association embracing in its objects the purpose of caring for or obtaining homes for neglected or dependent children, which association shall have been accredited as heretofore provided. As amended, Stats. 1911, 387."

The real question to be determined is whether the Juvenile Court Law enacted in 1909 authorizes the commitment of dependent or neglected children to the State Orphans' Home established by an act of the Legislature approved 40 years ago. The Orphans' Home Act contains humane provisions for the care, education, protection, guardianship, and admission to the home of orphans. As amended in 1903, sections 12 and 13, above quoted, provide that the board of directors at their discretion may receive any child from its living resident parent, parents or guardian, upon the proper showing to their satisfaction of the inability of such parent, parents, or guardian to support and care for such child, and that the board may require the living parent, parents, or guardian to contribute to its support, provided that no child shall be received by the board of directors of the Orphans' Home, unless sent by the county commissioners of the county in which the child resides, and provided that the county commissioners shall agree to pay for the maintenance of the child at a reasonable rate, to be fixed by the board.

It is apparent that this act makes provision for the care only of orphans, and at the discretion of the board of children whose parents are unable to support or care for them, and that the latter class of children can be admitted only at the discretion of the board, upon an order of the county commissioners, and payment by the parent or county of a reasonable rate for maintenance, to be fixed by the board.

It is contended that the provision in section 7 of the Juvenile Court Law that "the court may enter an order committing such child to some suitable state institution, of this or any other state organized for the care of dependent or neglected children" authorizes the court to commit dependent or neglected children to the Orphans' Home. Is the Orphans' Home a state institution organized for the care of dependent and neglected children? Under the definition and

language in section 1 of the Juvenile Court Law, hereinbefore quoted, dependent children and neglected children include ones of immoral, vicious, or incorrigible tendencies, and the act further relates to "delinquent" or criminal children. It does not mention the Orphans' Home, nor as a class does it refer to orphans or to children having parents who are unable to give them support.

If respondent is correct in the contention that the district court is authorized to commit dependent and neglected children to the Orphans' Home, the children of the various counties of the state having immoral, evil, and incorrigible tendencies, included under the definition of dependent child and neglected child, may be committed to the Orphans' Home and maintained there at the expense of the state, notwithstanding the protest of the board of directors of that institution, to associate with and influence for bad the most innocent and worthy children there, with the result that the home would be converted into a reform school for the children of evil tendencies, to the detriment of the orphans free from vicious inclinations, and for whom the home was established. We do not believe that the Legislature intended such results without saying so. We are of the opinion that the Orphans' Home was wisely and charitably provided only for such children as are so unfortunate as to be without parents and need to be maintained at the expense of the state, and at the discretion of the board of directors for children whose parents are unable to give them support and proper care, if the expense of their maintenance at the home is paid for by the parent or county; and that, notwithstanding the Juvenile Court Law, the home is not intended for non-orphans, dependent and neglected children, which under the statute includes children of vicious tendencies. "Orphans' Home" has a well-known meaning, different from a reformatory. Leading dictionaries contain the following definitions: "Orphanage—An institution or asylum for the care of orphans." "Reformatory—A penal institution to which young offenders are committed." Webster. "Orphanage—An institution for the care of destitute orphans." "Reformatory—An institution in which offenders are confined and instructed with a view to their reformation rather than mere punishment." Standard. "Orphanage—An institution or home for orphans." "Reformatory—An institution for the reception and reformation of youths who have already begun a career of vice or crime." Century.

As the order of the district court committing Howard Eggendorfer to the Orphans' Home as a delinquent and neglected child is unauthorized by law, the writ of prohibition against the district court and the judge thereof will issue as demanded.

NORCROSS and McCARRAN, JJ., concur.

STATE v. UNIVERSITY CLUB. (No. 2,005.)

(35 Nev. 475)

(Supreme Court of Nevada. March 11, 1913.)

INTOXICATING LIQUORS (§ 50*)—LICENSES—SOCIAL CLUB—"BUSINESS."

A bona fide social club, which disposes of liquors at its clubhouse to members and guests at a fixed charge as an incident to the general purposes of the club, the profit on the sales going to pay the general expenses of the organization, is not required to take out a license by Rev. Laws, §§ 3777-3785, approved March 15, 1905, which provides for a license upon the business of disposing of intoxicating liquors; the term "business" in such statute meaning business in the trade or commercial sense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 51; Dec. Dig. § 50.*

For other definitions, see Words and Phrases, vol. 1, pp. 915-926; vol. 8, pp. 7593, 7594.]

Appeal from District Court, White Pine County; M. R. Averill, Judge.

Action by the State of Nevada against the University Club, a corporation. From judgment for plaintiff, defendant appeals. Reversed.

Chandler & Quayle, of Ely, for appellant. Cleveland H. Baker, Atty. Gen., C. J. McFadden, Dist. Atty., of Ely, and C. R. Reeves, Ex Dist. Atty., of Reno, for respondent.

NORCROSS, J. This is an action brought by the state to recover from the appellant the sum of \$377.50, alleged to be owing by appellant on account of state and county retail liquor licenses. Appellant denied liability for any such licenses. The case was tried upon an agreed statement of facts, and judgment rendered in favor of the state. From the judgment, the defendant has appealed. The case presents the question of the liability of a bona fide social club disposing of liquors to members and guests to pay the state and county retail liquor licenses.

It is provided in the articles of incorporation of the defendant company that "the corporation shall not be conducted for profit to its members and shall not have any capital stock." The management of the affairs of the club is in a board of trustees, consisting of seven members.

Article 3 of the articles of incorporation provides: "The nature of the business and the objects and purposes proposed to be transacted, promoted and carried on by the said corporation are: 1. To promote the social, intellectual and moral welfare of its members. 2. To encourage, when practical, the establishment of scholarships in American institutions of learning. 3. To assist in the growth and development of a liberal system of education. 4. To advance the study of the sciences, arts and literature. 5. To buy, own, acquire, sell, mortgage and lease real estate and personal property of all kinds and description necessary, incidental to or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

convenient for the objects and purposes of the said corporation as herein set forth and for the purpose of providing a meeting place for and the entertainment of the members of said corporation."

The constitution and by-laws of the defendant corporation places restrictions upon its membership and those who may be admitted to its clubhouse as guests. The corporation maintains a clubhouse in the town of Ely as a place of meeting and for the comfort and entertainment of its members and guests. Visitors to the club are confined to nonresidents of Ely district, with the exception that a member may introduce to the club residents of the district not oftener than once in 60 days, nor more than two at any one time. At the clubhouse liquors are disposed of to members and guests at a fixed charge as an incident to the general purposes of the club. Whatever profit is made upon sales of liquor goes to pay the general expenses of the organization. That the defendant is in every respect what is frequently mentioned in decisions as a bona fide social club is conceded.

An act supplementary to the general revenue act "and to provide for a state license upon the business of disposing at retail or wholesale of spirituous, malt or vinous liquors in this state, and providing penalties for violation hereof," approved March 15, 1905 (Rev. Laws, §§ 3777-3785), in so far as the same is material to a consideration of the questions involved in this case, provides:

"On the first day of July, A. D. one thousand nine hundred and five, and annually thereafter on January first, every person, firm, company or corporation manufacturing or selling, either at retail or wholesale, any spirituous, malt or vinous liquors shall, in addition to the licenses now provided by law, take out a state liquor license as hereinafter provided, which license shall not be transferable by sale, assignment or otherwise. * * *

"Sec. 3. The several sheriffs of the respective counties of this state are hereby made the collectors of, and authorized and required to issue and collect; said licenses, and shall, upon the payment of fifty (\$50) dollars, issue a retail state license to any person, firm, company or corporation engaged in selling spirituous, malt or vinous liquors in quantities less than five gallons. * * *

Section 121 of the general revenue act (Rev. Laws, § 3733) provides: "Any person or persons who may dispose of any spirituous, malt or fermented liquors or wines, in less quantities than one quart, shall, before the transaction of any such business, take out a license from the sheriff of the county in which he or she proposes to do such business, and pay therefor the sum of ten dollars per month. * * *

The following section, relative to the license upon hotels, innkeepers, restaurants,

and the like, contains the provision: "Nothing in this section shall be so construed as to include the right to sell spirituous or malt liquors and wines, but the same shall be distinct and separate business therefrom, and require separate and exclusive license therefor." Rev. Laws, § 3734.

The question of the liability for license of social clubs which dispose of liquors to members and guests has been frequently before the courts. Many of the cases turn upon the question of bona fides of the organization as a social club. The decisions are unanimous in holding that sham organizations for the purpose of evading license, but in reality conducted for profit, are liable for license. Other cases, considering the liability of bona fide social clubs which dispense liquors to their members and guests, turn upon the language of the statute under consideration. Where the statute imposes a license upon the sale of liquors, as distinguished from a license upon the business of disposing of liquors, the authorities are not entirely in accord as to the liability of a bona fide social club for liquor license.

The federal internal revenue law provides: "Every person who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors." Rev. Stats. § 3244 (U. S. Comp. St. 1901, p. 2097).

Considering the liability of an incorporated social club to pay the federal license, McPherson, J., in *U. S. v. Alexis Club* (D. C.) 98 Fed. 725, said: "The question has usually arisen upon the construction of a law licensing the sale of intoxicating drink, and the decisions that declare the transaction not to be a sale have naturally and properly been much influenced by the language of the particular law, and also by the fact that such a statute is generally, perhaps always, a penal statute, which punishes a violation of its provisions by fine and imprisonment, and is therefore to be construed strictly in favor of the accused. When such a statute speaks of a 'dealer,' or of a 'drumshop keeper,' or of 'selling by retail,' or of 'the business of selling,' without defining these terms, the task of definition falls upon the trial court; and there may then be little difficulty in concluding that a social club does not 'deal' in liquors, or is not engaged in the 'business' of selling, within the common meaning of these words. * * * But section 3244 of the Revised Statutes differs in an important particular from the statutes that were construed in these cases, and in some others that are cited upon the defendant's brief. This section declares expressly what is meant by a retail 'dealer,' and necessarily implies what is meant by a 'sale.' Every person is a retail dealer 'who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five

wine gallons at the same time.' Nothing is said about selling as a business, or selling as an innkeeper; nor is there any other limitation of the words 'sells or offers for sale' than the single limitation concerning the quantity to be sold at one time. In the face of language so clear, there is no room for construction. In my opinion, the plain meaning is that a single sale of spirits or wines, by any person, in a smaller quantity than five wine gallons, constitutes the seller a retail dealer in liquors, and makes him liable to pay to the United States a special tax of \$25."

Where, as in this state, the statute imposes a license on persons engaged in the "business" of selling liquors, the courts have universally held that bona fide social clubs are not liable to take out such a license, for the reason that they are not engaged in the "business," within the meaning of the statute. *Cuzner v. California Club*, 155 Cal. 303, 100 Pac. 868, 20 L. R. A. (N. S.) 1095; *State v. Austin Club*, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Piedmont Club v. Commonwealth*, 87 Va. 540, 12 S. E. 963; *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27; *Manassas Club v. Mobile*, 121 Ala. 561, 25 South. 628; *Tennessee Club v. Dwyer*, 11 Lea (Tenn.) 452, 47 Am. Rep. 298; *State v. New Orleans Club*, 116 La. 46, 40 South. 526; *Koenig v. State*, 33 Tex. Cr. 1. 367, 26 S. W. 835, 47 Am. St. Rep. 35; *State v. Duke* (Tex.) 137 S. W. 654.

As said in the *Cuzner Case*, supra, "the term 'business,' as used in a law imposing a license tax on business, trades, professions, and callings, ordinarily means a business in the trade or commercial sense; one carried on with a view to profit or livelihood."

Mr. Black, in his work on *Intoxicating Liquors*, reviews the authorities and makes therefrom the following deductions: "Upon the whole, therefore, notwithstanding some conflicting rules, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink when they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it can-

not be considered as within either the purpose or letter of the law." Black on *Intoxicating Liquors*, § 142.

While the question involved in this case is presented for the first time to this court, it has heretofore been presented to the Attorney General's office for an opinion. From an opinion of the Attorney General, found on page 71 of the Biennial Report for the years 1907-08, we quote: "In view of the foregoing provision of the statutes of this state, and of the weight of authority to the effect that clubs or associations organized in good faith for lawful social enjoyment, under the usual rules, owning property, having a board or committee for the government of its affairs, limiting or restricting its membership to a certain number or class, requiring individual members to possess certain qualifications, and charging an admission fee or dues, do not come within the purview of similar statutes, I am of the opinion that no such club or organization in Nevada, in the absence of further municipal regulation, is liable for such license under the present law."

The title of the act relative to state liquor licenses, the form of the license prescribed in said act, and the provisions of the statute relative to county liquor licenses specifically refer to the "business" of disposing of liquors by retail or wholesale. *Rev. Laws*, §§ 3733, 3734, 3777, 3778, supra. The term "business," as used in these statutes, clearly, we think, means business in the trade or commercial sense, as held by the courts construing similar statutes.

As the question is one entirely subject to legislative control, the Legislature can, if it so desires, amend the law so as to require licenses from social clubs the same as it now requires the same from persons engaged in the business of selling liquors.

The judgment is reversed.

TALBOT, C. J., concurs.

NOTE.—McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

(42 Utah, 344)

LAWHORN v DENVER & R. G. R. CO.

(Supreme Court of Utah. Jan. 28, 1913.)

1. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

Where the complaint, in an action against a railroad company, by an infant who, in attempting to board one of its slowly moving freight trains, fell beneath the cars and was injured, averred that defendant was in the habit of permitting persons, especially children, to ride on its freight trains without warning them that it was dangerous to board moving trains, and on the day in question the engineer knowingly invited plaintiff to ride, and, observing that he was about to board the train, wantonly jerked it, throwing him to the ground, a charge that the operatives of the railroad company were bound to use ordinary care to avoid injur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ing plaintiff, or to prevent him from getting on the car, is authorized.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. RAILROADS (§ 276*)—LICENSEES—CHILDREN—STANDARD OF CARE.

Where it was the long-continued habit and custom of children to board defendant's freight trains in the presence of the crew, without objection, a child, who boarded defendant's train with the acquiescence and consent of the engineer, is not to be treated as a trespasser whose only rights are that the train crew should not willfully and wantonly injure him, but is entitled to ordinary care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 878-886; Dec. Dig. § 276.*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Holman Lawhorn, an infant, by his guardian ad litem, J. W. Lawhorn, against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The cases cited by appellant, referred to in the opinion, were as follows: Smalley v. R. G. W., 34 Utah, 423, 98 Pac. 311; Wilson v. Railway Co., 66 Kan. 183, 71 Pac. 282; Barney v. Railway Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; Railway Co. v. Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767; Powers v. Railway Co., 57 Minn. 332, 59 N. W. 307; Haberlau v. Railway Co., 73 Ill. App. 261; Catlett v. Railway Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; Underwood v. Western & A. Ry. Co., 105 Ga. 48, 31 S. E. 123; Bishop v. Railway Co., 14 R. I. 314, 51 Am. Rep. 386; Railway Co. v. Stumps, 69 Ill. 409; Emerson v. Peteler, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337; Railway Co. v. Connell, 88 Pa. 520, 32 Am. Rep. 472; Snyder v. Railway Co., 60 Mo. 413; Atchison, T. & S. F. R. Co. v. Plaskett, 47 Kan. 107, 26 Pac. 401; Railway Co. v. Roath, 35 Ill. App. 349; Railway Co. v. Jenks, 54 Ill. App. 91; Meehan v. Railway Co., 67 Ill. App. 39; Railway Co. v. Hurt (Ky.), 13 S. W. 275; Railway Co. v. Webb, 99 Ky. 332, 35 S. W. 1117; Wabash R. Co. v. Norway, 7 Ohio Cir. Ct. R. (O. S.) 449; Murray v. Railway Co., 93 N. C. 92; Seeley v. Railway Co., 157 Mich. 688, 122 N. W. 214; Jefferson v. Railway Co., 116 Ala. 294, 22 South. 546, 38 L. R. A. 458, 67 Am. St. Rep. 116; Railway Co. v. Ledbetter, 45 Ark. 246.

Van Cott, Allison & Riter, of Salt Lake City, for appellant. Powers & Marioneaux and Jas. D. Pardee, all of Salt Lake City, for respondent.

STRAUP, J. This is an action to recover damages for injuries alleged to have been occasioned through the negligence of the defendant. The injury occurred in Bingham Canyon. There the defendant operated two lines of railroad, one along the bed of the canyon for the transportation of passengers

and freight, called the low line; the other, called the high line, along the side of the canyon for the transportation of freight, mostly ore, from mines up the canyon to a place below, called Welby, a distance of about 14 miles. The grade is very steep. Special ore cars of steel and hopper bottom, about 36 feet long, were used for this purpose. About 28 cars were generally operated in a train from Welby to the mine. The crew of each was composed of an engineer and a fireman on the engine, a head brakeman on the pilot, and a conductor and a brakeman in the caboose at the rear. The plaintiff, at the time of the accident, was nine years old. He lived in the canyon with his parents. The record recites that the plaintiff introduced evidence tending to show that, at and for a long time prior to the day in question, boys of various ages, and adults, almost daily jumped on the defendant's trains and cars on the low line and the connecting track near the depot in the canyon, particularly during switching operations, and rode for shorter or longer distances, sometimes hanging on the sides of the cars, sometimes riding on top, and sometimes on the footboard of the engine; so, too, on the high line, men and boys of various ages frequently boarded the defendant's trains, going to and coming from the mines, and rode for longer or shorter distances; and that all this was done in plain sight of the train crews, for the most part on trains not intended for passengers, without molestation or objection or any effort on their part to put them off, and without demanding or collecting fare. On two occasions a brakeman had invited two or three boys to ride in the caboose with him on the high line for a bunch of wild flowers which they had picked. The record further recites that there was no direct evidence that any officer or agent of the company, other than train operatives such as conductors, brakemen, engineers, and firemen, had permitted boys or men to ride; but the evidence was such (so recites the record) that a jury might find that such a practice was so general, notorious, and long continued that the defendant's officers knew thereof, or ought to have known of it.

On the day of the accident, the plaintiff and five other boys, from 8 to 13 years of age, about 2 o'clock in the afternoon, started from near the depot in the canyon carrying two guns, intending to shoot squirrels and birds. They climbed the side of the mountain until they reached the high line. They then walked down that track shooting at squirrels and birds, and roamed about the country in the vicinity of the railroad. They kept on in this way till they came to a point on the high line called Midas, a passing track. There, at about 4 o'clock, they saw, about half a mile away, an ore train coming up the canyon from Welby to the mines. It

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

consisted of an engine, 28 empty ore cars, and a caboose at the rear. The engine was a Mallet engine, with a double set of driving wheels. Its tender was nearly as long as an ore car. The crew consisted of an engineer and fireman on the engine, a head brakeman on the pilot, and a conductor and rear brakeman in the caboose. When the boys saw the train coming, according to the testimony of some of them, one said, "Here comes the train. Let's catch it. We'll get home quicker." According to others, one of them said, "Here comes a train. Let's ask the engineer for a ride"—to which the others replied, "All right, that's a go." Ammon Lawhorn, the plaintiff's brother, and Albert Ray, the two oldest boys, each about 13 years of age, then left the other four and walked farther down the track towards the train. It soon came along, going from six to nine miles an hour. The two boys were on the engineer's side of the track. The engineer was in the cab, the fireman shoveling coal, the head brakeman on the pilot of the engine, and the conductor and rear brakeman in the caboose. One of the boys hallooed to the engineer, as he came opposite them, "Give us a ride." The engineer replied, "All right, there are plenty of cars in the train," and pointed to the rear. They boarded the train, Ammon getting on the step near the front end, and Albert on the step near the rear end of the same car, and rode either standing on the steps or sitting on the side of the car as they passed the other boys. The two were in sight, but not in the hearing, of the others, when the two boarded the train. The four, including the plaintiff, were also on the engineer's side of the train as it proceeded up the canyon. Before it reached them, some discussion was had as to which of them should ask the engineer for a ride. It was decided that George Ray, 12 years old, should do so. When the engine was opposite them, George hallooed to the engineer and said, "Give us a ride." The engineer "nodded yes," and pointed to the cars behind the engine, indicating that the boys might board the train. There was some conflict in the evidence as to which car the plaintiff boarded. Some witnesses testified that he got on the car immediately behind the car his brother was on; others that he got on the sixth or seventh car from the engine. There were two ladders on the outside of the cars, one near the front, and one near the rear, end. The cars extended about $2\frac{1}{2}$ feet over the rails. The plaintiff was a boy of average intelligence and strength for one of his age. He attempted to mount the ladder near the front end of the car. He failed, and fell to the ground, clear of the rails and the car. He arose and tried to mount the rear ladder. One of the boys, George Ray, testified that between the two attempts he told the plaintiff not to get on, that it was dangerous, and

that the plaintiff replied, "By gosh, I will get on. If Ammon gets home before I do and does the chores, I'll get a licking." This conversation was denied by the plaintiff. The plaintiff succeeded in climbing the ladder on the second attempt. He rode a car length or two, when he lost his hold, as he was climbing over the side to reach the inside of the car, and fell to the ground between the end of the car he had mounted and the one next behind it, and was run over and injured.

The record further recites that evidence was introduced by the plaintiff tending to show that shortly after the engineer passed the four boys, and just as the plaintiff attempted to board the train the first time, the engineer looked back out of the cab window at him, and then, putting his head back in the cab jerked the train, thereby causing the plaintiff to fall the first time. The engineer then again looked back at him and grinned; that immediately thereafter the jerk was twice repeated, the last time just as the plaintiff was climbing over the side to reach the inside of the car; and that the jerk caused him to lose his hold and to fall to the ground between the end of the cars. George Ray ran along the train until he caught up with Ammon Lawhorn, and shouted that the plaintiff had been run over. Ammon jumped off and ran back. By that time the caboose had passed the plaintiff a car length or two. Ammon ran towards the caboose, shouting to the men inside. The air brakes were applied and the train stopped. The plaintiff was placed in the caboose and taken to the depot, where he received medical attention. There is further testimony tending to show that the head brakeman and the fireman also saw the boys and heard the conversation between them and the engineer. The conductor and the rear brakeman were in the caboose; but there is no evidence to show that they had knowledge of the boys' presence until after the accident. The record further recites that evidence was adduced by the defendant tending to show that no such custom or habit existed as was testified to by plaintiff's witnesses; that train operatives were greatly annoyed by boys who, against the protest and objections of train operatives, boarded and hung on cars; that they drove and warned them away whenever they saw them about the cars, and did not permit or consent to their boarding or riding on them; and that, on the day in question, neither the engineer nor any other train operative gave the plaintiff or any of his companions permission to ride on the cars, and had no conversation with any of them, and did not jerk the train, as testified to by the plaintiff's witnesses. There was also testimony tending to show that in the ordinary operation of the train there would be jerks and vibrations of the cars which could not be avoided; but that jerks and vibrations might also be

caused by the application of air brakes by the engineer and suddenly releasing them, or suddenly shutting off and quickly turning on steam.

The case was tried to the court and a jury. A verdict was rendered in favor of the plaintiff. The defendant appeals.

The assignments of error relate to the charge. The substance of four or five paragraphs of it, relating to plaintiff's evidence and theory of the case, is: If the jury found that the plaintiff, by reason of his age and want of intelligence, was not capable of appreciating the danger of getting on cars in motion and riding thereon; that men of ordinary prudence and intelligence, situated as were the train operatives, would have appreciated the dangerous situation of a child, such as the plaintiff, in attempting to board or ride on cars in motion; that the train operatives saw him along the track and had reason to believe that he intended to, and probably would, mount the cars in motion, or would attempt to do so; that railroad men of ordinary prudence would have appreciated that such an act, on the part of such a child, was, under the circumstances, accompanied with danger to life or limb, and would probably result in injury; and that it appeared to them, or to a person of ordinary prudence, that the plaintiff, by reason of his age and want of intelligence, was not capable of appreciating the danger—then a duty was owing from the train operatives to exercise ordinary care to refrain from conduct that would probably result in injury to him, and to take such affirmative precaution, if any, with a view of keeping him from being injured, as appeared necessary to railroad men of ordinary prudence and experience in the business, and to exercise ordinary care to prevent him from getting or riding on the cars. The court further charged that if, under the facts and circumstances enumerated, the engineer consented, or indicated consent, to the plaintiff to get on the train in motion, that a person of ordinary prudence, under the existing circumstances, would not have given, or indicated such consent to a youth of apparent immaturity and tender years, and apparently lacking in strength and experience to attempt with safety to mount and ride on the cars, and that the plaintiff, by reason of such consent or indication, got upon the cars, and did not, because of his tender years and inexperience, appreciate the attending danger, then the engineer was guilty of negligence; and if the plaintiff, in attempting to mount the cars, or after he had mounted them, fell therefrom and was injured, not as the result of a sudden jerking of them by the engineer, but of a vibration naturally connected with their movement, he was entitled to recover, unless the jury found that he was guilty of contributory negligence, as otherwise in the charge defined. The defendant proposed re-

quests on the theory that the plaintiff, under all the evidence, was a trespasser, and that the train operatives owed him no legal duty whatever, except to refrain from willfully or wantonly injuring him after discovering his presence, and to use ordinary care to avoid injuring him after seeing or discovering him in a perilous position.

[1] The court refused to so charge on the whole case, but, in effect, did so on the defendant's evidence and theory. The charge in such respect is: "You are instructed if the plaintiff attempted to get on the train at the time of his injury without any permission from any of the employés of the defendant company, and was not induced to board the train in question because of any custom or habit on the part of children to ride defendant's trains without objection on the part of defendant's employés, then you are instructed that the plaintiff was a trespasser in attempting to board the train at the time of his injury and the only duty which the railroad company and its employés owed to him was to refrain from willfully or wantonly injuring him, or, if he was actually seen in a position of peril, then to exercise ordinary care to avoid injuring him. If you should find that the plaintiff fell from the car because of any jerk or jar or vibration, due wholly to the ordinary movement of the wheels along the rails or to the fact that the car he was attempting to ride was rounding a curve, you have no right to return a verdict against the defendant on the theory that the engineer wantonly or recklessly or with gross negligence jerked the train with his engine, unless the engineer knew the plaintiff to be in a position of peril, and the engineer could have avoided the jerk or jar by the use of ordinary care."

The complaint made is that the court, even on plaintiff's theory and evidence, erred in stating that a duty was imposed on the train operatives to use ordinary care to avoid injuring the plaintiff or to prevent him getting on the cars. It is urged that the charge in such respect was without the issues and is against law. In support of this, it is said that in the complaint it is not alleged that a duty was imposed on the defendant to prevent children or the plaintiff from boarding cars, or that the train operatives failed in such particular, or were guilty of such a specific omission of duty. There are no such direct allegations in the complaint. But such direct averments were not essential. The question is, Were there sufficient facts alleged upon which a legal duty arose to use care in such particular and to show a breach thereof? We think there were. It is alleged that the defendant was in the habit of permitting persons, especially children, to ride on its freight trains, without warning them of the danger; that it was dangerous, under the circumstances, for children to board moving cars, but that the defendant habitually per-

mitted and invited them to do so without warning them of the danger; that, on the day in question, the engineer and other members of the train crew knowingly invited and permitted the plaintiff, an infant nine years of age, to board the train without warning him of the danger, and, upon observing that he was about to board the train, wantonly and negligently jerked it, throwing him to the ground; that the defendant knowingly and negligently suffered and permitted the plaintiff and other children to board and ride upon its freight trains, and knowingly and negligently failed and omitted to make objections thereto; and that the plaintiff, without warning of the danger, was, by reason of such custom and habit, permission, invitation, and consent induced to mount the train, and was injured. We think these allegations are sufficient to justify the charge. We are also of the opinion that, upon the evidence on behalf of the plaintiff, a legal duty arose on the part of the train operatives to use care.

[2] Appellant has argued that no affirmative duty arose to use care until the plaintiff was actually seen or discovered in a position of peril; then a duty arose to use ordinary care to avoid injuring him, otherwise no affirmative duty whatever arose, only a passive duty to refrain from willfully injuring him upon discovering his presence. Many cases are cited by appellant where such a rule is announced. We think in nearly all of them the doctrine, as applied to the facts of the respective cases, was properly applied. But, as can be seen on a reading of the cases (which will be noted by the reporter), the facts there and here are very dissimilar. This dissimilarity the appellant seemingly has regarded of but little importance. What particularly distinguishes this case from those cited and relied on by the appellant is the evidence in respect of: (1) The habit and custom of children and others, without objection of any kind, boarding the defendant's cars and trains in the presence and with the knowledge and acquiescence of train crews in charge of its cars and trains, and that such custom or practice was so general, notorious, and long continued as to impart actual or presumptive knowledge thereof to the defendant; (2) the permission which the engineer gave the plaintiff and his companions, on the day in question, to board and ride on the train; (3) the plaintiff's boarding the car by reason of such custom, practice, and permission; (4) the youth and inexperience of the plaintiff as bearing on his knowledge and appreciation of the danger, and his ability to guard against it; (5) the discovery of his presence along the tracks under the circumstances heretofore stated, and his efforts to board the car, and his position thereon, noticed and observed by the engineer oper-

ating the train, and who had given the plaintiff and his companions permission to board it; (6) the engineer's knowledge—or what must be presumed of every man of ordinary intelligence, knowing and seeing what the engineer here knew and saw—of a perilous situation and danger of a child of plaintiff's age boarding cars in motion, and climbing over the sides of them, under the circumstances disclosed by the record. Viewed from such facts, a charge that no duty arose, except abstention from willful and wanton injury, would have been erroneous. When the charge complained of is looked at as a whole, and is viewed in connection with and applied to the evidence as adduced by the plaintiff, we think it a correct statement of the law. And as the court fully submitted the case to the jury on the defendant's theory and evidence, and upon statements of the law, as requested by it, we think it has shown no just ground for complaint.

The judgment of the court below is therefore affirmed, with costs. Such is the order.

McCARTY, C. J., and FRICK, J., concur.

(72 Wash. 398)

DICUS et ux. v. MAJOR et al.

(Supreme Court of Washington. March 8, 1913.)

1. EJECTMENT (§ 86*)—BURDEN OF PROOF—OUSTER.

Where, in an action to recover possession of land, the plaintiffs proved that they were in peaceable, exclusive possession when they were forcibly ousted by defendants, the burden then shifted to defendants to prove a superior title, independent of possession by either party.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

2. EJECTMENT (§ 96*)—EVIDENCE—SUFFICIENCY.

Evidence, in an action to recover possession of land, wherein the controversy was over the location of a boundary line, held insufficient to overcome the prima facie case made out by plaintiffs' proof of prior peaceable possession and forcible ouster.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 296-298; Dec. Dig. § 96.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Hartwell Samuel Dicus and wife against George Major and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellants. Murphy & Wall, of Seattle, for respondents.

PARKER, J. This is an action to recover possession of a strip of land about 4 feet wide and 133 feet long, lying along the common boundary line of two lots in different additions to the city of Seattle, which the plaintiffs claim they have been unlaw-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fully dispossessed of by the defendants. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs, from which the defendants have appealed.

This is in substance a boundary dispute, the question being, Where upon the ground is the common boundary line of the adjoining lots of the respective parties? Respondents are the owners of fractional block 16, consisting of a single lot, in Washington addition to the city of Seattle, which addition and lot are bounded upon the south by the line dividing the N. $\frac{1}{2}$ and S. $\frac{1}{2}$ of section 17, township 25 N., range 4 E. Appellants are the owners of lot 1, in block 31, of Lake Union addition to the city of Seattle, which addition and lot are bounded on the north by the same half section line, the lots of the respective parties having a common boundary along their entire length of 133 feet. Appellants insist that this line is some four feet to the north of where respondents claim it to be. In March, 1883, the owners of land in the S. $\frac{1}{2}$ of the section, having no title to the adjoining land in the N. $\frac{1}{2}$, surveyed and platted their land into lots, blocks, and streets, and caused the plat thereof, called Lake Union addition, to be duly recorded in the office of the auditor for King county. It is plain from this plat that they intended to plat all of their land up to the half section line, and that that line should be the northern boundary of their addition. Not only was this land platted upon paper, but it was actually surveyed and staked upon the ground; the northern boundary being plainly marked by stakes at block corners, at least one of which stakes is still standing where it was originally placed at the northeast corner of appellants' lot 1. While it is plain that this north boundary line of the addition was then marked by the owners' survey thereof as the half section line, it is not shown in what manner it was then ascertained to be such half section line. Very soon thereafter the owners of land in the N. $\frac{1}{2}$ of the section bordering upon this line surveyed and platted their land into lots, blocks, and streets, and caused the plat thereof, called Washington addition, to be recorded in the office of the auditor for King county. In surveying and platting this addition upon the ground, the owners conformed to the platting of Lake Union addition as to size of blocks and width of streets, and adopted the north boundary line of that addition as surveyed and staked upon the ground as the south boundary line of Washington addition. Since then there have been some fences constructed on the line thus marked upon the ground by lot owners other than the owners of the lots here involved, upon the assumption that that was the correct common boundary line of the two additions. It appears that no doubt or controversy arose between owners of prop-

erty along this line as to its correct location until within the last few years when surveys made by the city engineering department indicated that the half section line was not as originally marked upon the ground in the survey of these additions, but that it was some four feet to the north thereof as now claimed by appellants; but, as in the case of the original survey of the additions, we have no evidence in this record as to the manner in which the city determined the location of this half section line. Whether the line was determined by either survey in the proper manner according to the legal method of subdividing sections in order to determine the correct lines of legal subdivisions we are not informed.

Respondents became the owners of block 16 of Washington addition in July, 1907. Soon thereafter they improved this block by building a dwelling house thereon and improving their lawn adjacent to their dwelling, clear up to the common boundary line of the additions as originally surveyed and marked upon the ground by the stakes, one of which, as we have noticed, is still standing as marking the northeast corner of appellants' lot and the southeast corner of respondents' lot. Respondents thus continued in peaceable and exclusive possession of their lot as originally marked upon the ground, until March 10, 1911, when they were forcibly ousted of their possession of the strip here involved. Very soon thereafter respondents commenced this action to recover possession of the land they had been thus dispossessed of.

[1] Counsel for appellants, seeking at the outset to avoid the burden of proof and keep it upon respondents, invoke the general rule that a plaintiff seeking to recover possession of land must do so upon the strength of his own title, and not upon the weakness of that of his adversary. Passing for the moment the question of the superiority of the respective paper titles of the parties, let us see where the burden of proof would rest when we arrive at the solution of that question. We assume that neither of the parties has acquired title against all the world by adverse possession; but it by no means follows that respondents have not superior title to that of appellants, viewed from the standpoint of possession alone. We have seen that respondents were in peaceable, exclusive possession of the land in controversy when they were forcibly ousted of their possession by appellants. The law seems to be well settled that in such cases the party so ousted, suing to recover possession, makes a *prima facie* case entitling him to so recover when he has shown that he was in peaceable, exclusive possession, and was forcibly ousted therefrom by the defendant. That is, he has by such a showing proven *prima facie* that he has the superior title. In the early California case of *Hutchinson v. Perley*, 4 Cal. 33,

60 Am. Dec. 578, there was involved the sufficiency of a complaint in ejectment where the plaintiff rested his title upon his peaceable possession alone at the time he was ousted. Sustaining this complaint as stating a cause of action, the court said: "Possession is always prima facie evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. The allegation that the plaintiff was in possession at the time of the ouster complained of is a sufficient allegation of title to make the declaration good. The demurrer was therefore improperly sustained." It is manifest that, if such a complaint states a cause of action, proof to the same extent would make a prima facie case. Among the numerous decisions in harmony with this view the following may be noted: *McLawrin v. Salmons*, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563; *Green v. Jordan*, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; *Adm'r of Jones v. Nunn*, 12 Ga. 469; *Ashmead et al. v. Wilson, Executrix*, 22 Fla. 255. In the text of 15 Cyc. 129, the rule is stated thus: "A prior possession creates a presumption of title which entitles plaintiff to recover against a naked trespasser. And this presumption can only be rebutted or overcome by showing title in defendant, or an outstanding title in a third party, or that plaintiff's title was subordinate and permissive, or that the action is barred by the statute of limitations." See note in 18 L. R. A. 784.

[2] Supposing now that all parties had rested with the evidence showing these facts of possession and ouster, it is plain that respondents would have been entitled to judgment for recovery of the land. This being true, it follows that thereupon the burden of proof shifted to appellants, and it was for them to show a superior title, independent of possession of either party. Have they then maintained this burden of proof to the extent that they are entitled to retain possession? We are constrained to hold to the contrary. It is true that the evidence introduced of the city surveys is of some weight tending to show the location of the half section line as claimed by appellants. But we regard the surveys made by the owners of the respective additions establishing the common boundary as they plainly intended on the half section line of at least equal weight as evidence showing the true location of that line. It is manifest that neither of these is very cogent or convincing as to the true location of the half section line, because we have no evidence as to the methods followed in either survey in determining the location of the half section line. As to whether that line was determined by a proper legal subdivision of the section, we are wholly in the dark in both cases. It seems clear to us that appellants have not overcome the prima facie case made by re-

spondents by their showing of the fact that they were in peaceable possession and were forcibly ousted by appellants. This, we think, turns the scale in favor of respondents and entitles them to recover.

The judgment is affirmed.

CROW, C. J., and CHADWICK, GOSE, and MOUNT, JJ., concur.

(72 Wash. 387)

GRAVES v. TACOMA RY. & POWER CO.
(Supreme Court of Washington. March 8, 1913.)

1. STREET RAILROADS (§ 93*)—INJURY TO PERSON ON STREET—NEGLIGENCE.

While a street car company must operate its cars with ordinary care according to the circumstances, it was not negligence, as against a person on the street, to permit passengers to ride on the steps of its cars with their bodies protruding, where the car approached slowly, sounding an alarm, and was in plain view of the injured party, so that he saw such passengers in time to have avoided being struck by their bodies.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

2. STREET RAILROADS (§ 98*)—INJURY TO PERSON ON STREET—CONTRIBUTORY NEGLIGENCE.

Where a person awaiting an approaching street car saw that persons were clinging to the steps of the car outside the closed gates, in time to have gotten out of the way and avoided being struck by their bodies, he was guilty of contributory negligence barring a recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-206; Dec. Dig. § 98.*]

Department 2. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by John Graves against the Tacoma Railway & Power Company, a corporation. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, all of Tacoma, for appellant. J. A. Shackelford and F. D. Oakley, both of Tacoma, for respondent.

FULLERTON, J. The appellant brought this action against the respondent to recover damages for personal injuries. He was nonsuited in the court below, and appeals.

The appellant lives near the line of the respondent's suburban road, which runs between the cities of Tacoma and Puyallup. Cars passing over the line of the road enter the city of Tacoma on one of its principal avenues, from whence they proceed to the heart of the city where they turn on a loop and pass out of the city on the same track on which they enter it. In passing in and out the cars receive and discharge passengers at all of the principal street crossings. On the evening of September 4, 1911, some form of public entertainment was given in the city of Tacoma which had attracted to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

city numbers of people, many of whom, and among them the appellant, had come into the city over the respondent's road. At the close of the entertainment there was a rush to return, and the appellant, finding the usual places of boarding the cars blocked with people, went to the place where the cars made the turn for the outward journey, intending to take a car at that point. He took a position along the side of the track on the outward or convex side of the curve. Before a car arrived, a number of people having the same purpose as the appellant collected at the same place, and massed along the side of the track. Others again, anticipating that there would be a crowd waiting to take the cars at the loop, went along the track towards the approaching cars, and, meeting an incoming car, boarded it before it reached the loop, loading it to its capacity. After the car was filled, the entrance gates were closed, and a number of persons mounted the steps and clung to the outside of the gates; their bodies projecting some little distance beyond the sides of the car. Loaded in this manner the car approached the place where the appellant was standing. The front end of the car passed him without touching him, but before the rear end reached him, or about the time the rear end reached him, the people behind him surged forward, pressing him against the bodies of the persons hanging on to the rear steps, and he was dragged along in the direction of the motion of the car and injured. The car approached the place slowly, at about the speed of an ordinary walk. Its gong was being sounded and its lights were burning. It was in plain view of the appellant long before it reached him, and before it reached him, as he himself testified, he "looked back and saw a crowd on the rear steps of the car."

[1] It is alleged that the respondent was negligent in permitting persons to ride on the steps of the car outside of the gates, and that this was the proximate cause of the appellant's injuries. We have not been, however, able to take this view of the record. It is not negligence in itself as against persons on the streets for a street car company to permit persons to ride on the steps of its cars, even though the bodies of the persons so riding may protrude beyond the ordinary line of the sides of the cars. If such an act is negligence at all, it must be so only under peculiar circumstances; circumstances where injuries therefrom were or ought to have been reasonably foreseen. It is, of course, the duty of a street car company to operate its cars at all times with ordinary care; and it is true, also, that what constitutes ordinary care in the operation of a car varies with the circumstances. But clearly there is no circumstance shown here that takes the case from without the ordinary rule. The car approached slowly. An

alarm was sounded giving warning of its approach. The car was in plain view of the appellant. He observed its exact condition before it reached him, and knew that it was loaded to its capacity, and that persons were clinging to the steps outside the closed gates. He had time and opportunity to escape after he had knowledge of the conditions.

[2] And, when it is remembered that he had the same duty to exercise ordinary care to avoid being injured that the respondent had to avoid injuring him, it seems clear that his conduct was negligent, sufficiently so to bar a recovery even were negligence shown on the part of the railway company in the particulars alleged.

The judgment will stand affirmed.

CROW, C. J., and MAIN, MORRIS, and ELLIS, JJ., concur.

(72 Wash. 336)

PYLE v. STARBIRD.

(Supreme Court of Washington. March 8, 1913.)

MONEY LENT (§ 7*)—PRESUMPTION.

That a person remitted by check certain moneys to another did not create a presumption that the remittance was intended as a loan, or create an implied promise to repay the same.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. §§ 11-13; Dec. Dig. § 7.*]

Department 2 Appeal from Superior Court, King County; H. A. F. Myers, Judge.

Action by Frank Pyle, as executor of the estate of Emma Starbird, deceased, against John H. Starbird. From a judgment for defendant, plaintiff appeals. Affirmed.

McCafferty, Robinson & Godfrey, of Seattle, for appellant. Revelle & Revelle, of Seattle, for respondent.

PER CURIAM. The appellant, as executor of the estate of Emma Starbird, deceased, brought this action against the respondent to recover the sum of \$350, alleged to have been loaned the respondent by Mrs. Starbird in her lifetime. After issue had been joined on the complaint, a trial was had by the court sitting without a jury, and resulted in findings and a judgment for the respondent, from which the executor appeals.

From the record it appears that Mrs. Starbird, some months preceding her death, remitted to the respondent, by check, the money for which the administrator sues. No writing passed between the parties showing the purpose of the remittance; but Mrs. Starbird afterwards claimed that the remittance was a loan, and placed the claim in the hands of her counsel for collection. Under the advice of her counsel, a letter was written to the respondent demanding payment. To this the respondent answered, denying

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

liability, seemingly resting his contention of nonliability on the ground that the money was a gift to him. In defense of the action, however, he sought to show that the money was paid him for advances made for Mrs. Starbird's use and for services he had rendered her in the conduct of a certain business in which she was engaged. Owing to the statute, he was not permitted to testify to the facts himself; but he introduced the testimony of certain persons, who were witnesses to transactions between himself and Mrs. Starbird, which, while somewhat fragmentary, tended to support his contentions. On the whole, we are not inclined to overturn the findings of the trial judge. The mere showing that Mrs. Starbird, in her lifetime, remitted by check certain moneys to the respondent does not of itself create a presumption that the remittance was intended as a loan, or create an implied promise on his part to repay the money; and such presumption as may have been raised by the fact that Mrs. Starbird sought to recover it back as a loan we think was overcome by the showing made on the part of the respondent.

The judgment is affirmed.

(72 Wash. 362)

HIGSON v. HUGHES.

(Supreme Court of Washington. March 6, 1913.)

1. SALES (§ 118*)—RESCISSION BY BUYER—EFFECT OF DELAY.

Where property was sold subject to incumbrances described as chattel mortgages, the fact that one of the instruments was a conditional bill of sale, and not a chattel mortgage, did not justify a rescission where the misdescription was inadvertent and without intent to defraud, the purchaser was not disturbed in her possession because of the difference in the character of the instrument, and no attempt was made to rescind until an action for the purchase price was brought long after the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 292; Dec. Dig. § 118.*]

2. SALES (§ 126*)—RESCISSION BY BUYER—EFFECT OF DELAY.

Rescission depends on equitable principles, and must be resorted to within a reasonable time after the defect or breach of warranty upon which it is based is known or might have been known, and when not resorted to until a suit to recover the purchase price after a lapse of considerable time is not favored.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Rose Higson against Margaret J. Hughes. Judgment for plaintiff, and defendant appeals. Affirmed.

Caldwell & Riddell, of Seattle, for appellant. Penrose L. McElwain and E. V. Griswold, both of Seattle, for respondent.

CHADWICK, J. Plaintiff brought suit to recover on a promissory note given in part payment for a lodging house previously sold by her to the defendant. The defendant answered, setting up a "failure of title or breach of warranty of title to the property conveyed." From a judgment in favor of plaintiff, defendant has appealed.

[1] The first contention made in the briefs goes to the facts of the case. It will serve no purpose to review them. We have read the record and agree with the trial judge that plaintiff is entitled to recover, unless there was a breach of covenant of title. A part of the consideration for the property sold was the assumption on the part of the defendant of three several debts described in the bill of sale as chattel mortgages. One of these items of debt was, in fact, evidenced by a conditional bill of sale. The court found, and we think properly so, that there was no intention to defraud, that the debt was described and understood, and that the use of the words, "chattel mortgage," was an inadvertence. It may be admitted that there is a difference between the legal effect of the chattel mortgage and a bill of sale. In case of foreclosure, the mortgagor might pay the debt at any time before judgment and release the property; whereas, if possession is taken under a conditional bill of sale, no grace or time would remain in the vendee. But we do not think this rule, if it be a rule, should obtain in all cases and without qualification. This action was begun by the vendor long after the sale and after a deferred payment had matured. It nowhere appears that the vendee has been or will be disturbed because of the difference in the character of the instruments evidencing the debt. The time elapsing would imply that she was willing to accept the property whether covered by chattel mortgage or a conditional sale, and meet the debt when due; for, if she had desired in the first place to rely upon the alleged misrepresentation, she could have brought an action to rescind at once. This she did not do, but has contented herself by keeping and conducting the lodging house and offering rescission only as a defense. The general rule is that failure of title operates as a failure of consideration, and, so long as the purchaser is not disturbed in his possession, he cannot plead rescission upon suit for the purchase price unless the seller was guilty of fraud in relation to the title. 35 Cyc. 542.

[2] Whether this rule prevails in its entirety in this state (Klock v. Newbury, 63 Wash. 153, 114 Pac. 1032) we do not now decide; but it is certain that rescission is a doctrine sustained by reference to equitable principles, and must be resorted to within a reasonable time after the defect or breach of warranty is known or might have been

known. As a defense to an action at law rescission is not favored. The burden of acting and acting promptly is on the one asserting the right to rescind. To act only after the lapse of time and upon suit to recover the purchase price, nothing appearing to excuse the delay, will bar the right to rescind. The case of *Baker v. McAllister*, 2 Wash. T. 48, 3 Pac. 581, is relied upon by appellant. Without questioning that case or its proper application to the existent facts, we think where bad faith is not proved, and cannot be imputed to the seller and time has elapsed, that the later case of *Decker v. Schultz*, 11 Wash. 47, 39 Pac. 261, 27 L. R. A. 335, 48 Am. St. Rep. 858, is more in point. In the first case there was a "lien not known to the vendee," and the property was taken by the claimant through no fault of his own. Here there was no concealment of any material fact. The defendant has not been disturbed. She has not moved upon her right, but has retained the property. She has not done equity, nor has she been vigilant, and therefore she cannot recover.

Judgment affirmed.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

(72 Wash. 409)

STATE ex rel. SHORT, Mayor, et al. v. CLAUSEN, State Auditor.

(Supreme Court of Washington. March 8, 1913.)

MUNICIPAL CORPORATIONS (§ 918*)—UNINTELLIGIBLE BALLOTS.

Under Rem. & Bal. Code, § 8006, requiring a proposition to issue water bonds to be adopted and assented to by three-fifths of the qualified voters of the city voting at the election on the question, ballots improperly cast or rejected for illegality or because unintelligible cannot be counted in determining the vote cast.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

Crow, C. J., dissenting.

Department 2. Proceedings by the State of Washington on the relation of Thomas Short, Mayor, and others against C. W. Clausen, State Auditor, for a writ of mandate. Writ issued.

F. W. Greenman, of Tacoma, for relators. W. V. Tanner and R. E. Campbell, both of Olympia, for respondent.

MORRIS, J. Relators, as officials of the town of Milton, apply for a writ of mandate to respondent to compel the issuance of a warrant in the sum of \$5,500 in payment of water bonds purchased by the state. The warrant was refused on account of a doubt as to whether or not the bonds received the necessary three-fifths affirmative vote. In determining this question, we are called upon to decide whether ballots rejected as

unintelligible or illegal should be counted in ascertaining the total number of votes cast in the submitted proposition. The language of the statute governing matters of this kind, as found in section 8006, Rem. & Bal. Code, is: "And such proposition shall be adopted and assented to by three-fifths of the qualified voters of the said city or town voting at said election." We have found some conflict in the authorities; but a careful examination convinces us that the decided weight of authority is to the effect that ballots improperly cast or rejected because of illegality or unintelligibility cannot be counted in determining the total vote cast. We shall not attempt to review all the authorities submitted to us, nor discuss the various reasons advanced by those courts reaching a different conclusion from the one we adopt. One of the latest cases upon a like question is *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565, upon which respondent places strong reliance. This was a county seat removal case, and the requirement of the statute was "a majority of all votes cast." It was held that, under the peculiar language of this requirement, all ballots, whether defective or not, should be counted in ascertaining this majority. The court in so holding reviews many cases, and distinguishes its statute from a requirement reading, "If a majority of said electors shall ratify the same," as construed in *Re Denny*, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722; or, "Whenever a majority of the electors voting shall so determine," as in *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838, and *People v. Brown*, 11 Ill. 478; or, "A majority of the legal voters," as in *State v. Winkelmeier*, 35 Mo. 103; or, "If a majority of the electors qualified to vote . . . voting thereon shall approve," as in *Bott v. Wurts*, Secretary of State, 62 N. J. Law, 107, 40 Atl. 740; and seems to agree that, in the face of such requirements, those cases state the correct rule in holding that only those ballots entitled by law to be counted for or against the proposition can be counted in determining the required majority.

The New Jersey court, in the last-cited case, also recognizes such a distinction, and says: "To sustain the contention that, in the determination of the board of state canvassers, the number of names on the poll books, which included the votes given for and against each proposed amendment, as well as the number of ballots rejected, should be considered in ascertaining the majority. *Slingerland v. Norton* [59 Minn. 351] 61 N. W. 322, and *Smith v. Board* [64 Minn. 16] 65 N. W. 956, were cited. Those decisions were made upon a statute submitting to an election the question of the removal of county seats, which provided that, if 55 per cent. of the votes cast at such election shall be in favor of changing the county seat to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

place named, the change shall be made. The court, on a construction of the words 'votes cast,' held that the majority was to be ascertained from all the ballots that were cast at the election, although some of the ballots could not be deciphered or counted either for or against the proposed change of the county seat. Decisions of which the cases cited are types have no relevancy to the construction of our Constitution. The constitutional provision does not require a majority of the voters, who are admitted as such at the election, and who, in fact, exercise, or attempt to exercise, the elective franchise. The certificate of the number of votes received by the several election boards is presumptive evidence that the persons by whom they were cast were qualified voters. But that concession does not dispose of this question. The Constitution requires that the approval and ratification of any amendment shall be by a majority of electors, who are not only qualified to vote, but who did actually vote, upon such amendment; that is, qualified voters whose ballots were entitled by law to be counted in declaring the result of the election either for or against the amendment. Though a qualified voter succeeds in getting his name on the poll list, and a ballot in the ballot box, he is not a voter voting on the amendments, unless his ballot is such as is prescribed by law, and conforms to the general law regulating elections. The act contains no provision for the certificate and return of the ballots that were rejected; nor does it provide for an inquiry, either before the county boards of election or before the board of state canvassers, with respect to the grounds upon which votes have been rejected; nor are either of these boards empowered to embody in their official action any results other than such as are exhibited by the official statements produced before them. The ballots returned as rejected must be taken to have been properly rejected, and consequently are to be excluded from the computation of the votes cast for or against the amendments. Such ballots are simply nullities."

Referring now to the language of our statute requiring an affirmative vote by "three-fifths of the qualified voters * * * voting at said election," it is apparent, we think, that such language is within the rule of the Wurts and other cases above cited, rather than within that of the Eufaula Case. In fact, there is little, if any, distinction between the language in the Wurts Case, "The electors qualified to vote * * * voting thereon," which the Eufaula Case says calls for a different rule than the one it announces, and the language of our statute, "The qualified voters * * * voting at said election." So that it may almost be said that the Eufaula Case, after reviewing a vast number of authorities, is authority for our

holding that, under language such as ours, illegal or rejected ballots shall not be counted. Respondent also relies upon *State v. Roper*, 46 Neb. 724, 61 N. W. 753, another county seat removal case, where, under the provision, "Any place receiving three-fifths of all the votes cast shall become and remain the county seat," it was held that void and unintelligible ballots should be counted in determining the result. The same case and question, we find, were subsequently submitted to the court in *Hocknell v. Roper*, 47 Neb. 417, 66 N. W. 539; and upon a re-examination the court was convinced of its error in so ruling, and then held that rejected and unintelligible ballots could not be considered in determining the result. *Smith v. Board of Commissioners*, 64 Minn. 16, 65 N. W. 956, is also cited by respondent. This was also a county seat removal case. The statute provided that the proposition must receive "55 per cent. of the votes cast"; and it was held "votes cast" was equivalent to ballots cast, and all ballots cast, whether good or bad, should be counted. The court bases its opinion upon the evident intent of the Legislature in view of all the provisions of the removal statute. The same court later on, in *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536, in a case involving the submission of a new municipal charter, where it was provided that the proposition must receive the affirmative vote of "four-sevenths of the qualified voters voting at such election," held that unintelligible ballots should be excluded in arriving at the result, saying, in referring to these rejected ballots: "The effort of the voter, in each instance, to avail himself of his right of franchise amounted to nothing; and the most we can say for it is that it was a mere attempt to vote and could not be counted." The court then proceeds to distinguish this ruling from its former ruling in the county seat removal case, and defends its former ruling upon the peculiar situation presented in cases of that character calling for the announcement of such a rule. The court's distinguishment of the two cases must be accepted, or the latter case must be regarded as overruling the former. It will be noted that the statutory requirement considered in the latter case is in effect identical with the provision of our statute.

In *Wightman v. Tecumseh*, 157 Mich. 326, 122 N. W. 122, the requirement considered was "a two-thirds vote of the electors voting upon the question." Fifty-five ballots were rejected as illegal because of distinguishing marks; and it was held that, under this requirement, these rejected ballots could not be counted in determining whether or not the submitted proposition had received the necessary two-thirds affirmative vote. Discussing this holding, it is said: "Complainant * * * insists that the legal electors voted these ballots, and therefore they should be

(73 Wash. 371)

STATE v. McPHERSON.

(Supreme Court of Washington. March 6, 1913.)

counted in estimating the two-thirds vote. In other words, he insists that these votes were valid for one purpose, but void for all others. The position is untenable. The statute makes all such votes void. A void vote is of no more effect than no vote." A like rule is announced in *Murdoch v. Strange*, 99 Md. 89, 57 Atl. 628, 3 Ann. Cas. 66, where it is said: "The overwhelming weight of authority is in favor of these views." Similar views upon like questions are found in *Cattlett v. Railway Co.*, 120 Tenn. 699, 112 S. W. 559; *Battle Creek Brewing Co. v. Supervisors*, 166 Mich. 52, 131 N. W. 160, Ann. Cas. 1912D, 946; *Attorney General v. Supervisors*, 166 Mich. 61, 131 N. W. 163; *State v. Blaisdell*, 18 N. D. 31, 119 N. W. 360.

It is clear, we think, in considering whether or not any like submitted proposition has received the requisite affirmative vote, that only those ballots that express the voter's choice with such clearness that the ballot can be counted either for or against the submitted proposition can be counted in the totals. The requirement contemplates two ballots only, one affirmative and the other negative. To adopt the other rule would be to say that three ballots were contemplated. One affirmative, one negative, and the other neither affirmative nor negative, but forming a new class into which all ballots for any reason void must go. Nothing of this kind was ever contemplated by the Legislature. In demanding a three-fifths affirmative vote, the essential requirement was intended to mean the affirmative votes should exceed the negative votes by one-fifth. To make the requirement read the affirmative votes should exceed the negative votes, plus all other votes by one-fifth, is to read into the statute something not there nor intended to be there.

Let the writ issue.

MAIN, ELLIS, and FULLERTON, JJ., concur.

CROW, C. J. (dissenting). As stated in the majority opinion the statute, section 8006, Rem. & Bal., requires that "such proposition shall be adopted and assented to by three-fifths of the qualified voters of the said city or town voting at said election." In other words, the mandate of the statute is that the affirmative assent of three-fifths of all qualified voters voting at the election shall be required to adopt the proposition. It is conceded that the proposition did not receive the requisite three-fifths, unless the electors, who cast the so-called unintelligible ballots, and who were qualified voters, are to be ignored, or held not to have voted at the election. I am of the opinion that, in contemplation of the statute, they did vote at the election; that the proposition failed to carry; and that the writ should not issue. I therefore dissent.

1. INDICTMENT AND INFORMATION (§ 110*)—PROSECUTION FOR NONSUPPORT—INFORMATION—SUFFICIENCY.

An information in the language of Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to willfully and without lawful excuse desert or willfully neglect or refuse to provide for the support of his wife, she being in necessitous circumstances, was not demurrable. [Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. HUSBAND AND WIFE (§ 313*)—PROSECUTION FOR NONSUPPORT—EVIDENCE—NECESSITOUS CIRCUMSTANCES.

Evidence in the prosecution of a husband for failure to support his wife, in violation of Rem. & Bal. Code, § 2444, held to sustain a finding that she was in necessitous circumstances.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. § 313.*]

3. HUSBAND AND WIFE (§ 313*)—PROSECUTION FOR NONSUPPORT—EVIDENCE—WILLFUL NEGLECT.

Evidence, in a prosecution of a husband for failure to support his wife, in violation of Rem. & Bal. Code, § 2444, held to sustain a finding that he was guilty of a willful neglect and refusal to provide for her support and maintenance.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. § 313.*]

4. HUSBAND AND WIFE (§ 4*)—SUPPORT OF WIFE—DUTY OF HUSBAND.

It is the husband's duty to do the best he can to support and maintain his wife in the manner suitable to his station and circumstances.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 9, 10; Dec. Dig. § 4.*]

5. HUSBAND AND WIFE (§ 313*)—PROSECUTION FOR NONSUPPORT—EVIDENCE—ADMISSIBILITY.

In a prosecution of a husband for violating Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to willfully and without lawful excuse fail to support his wife, she being in necessitous circumstances, evidence of the wife's pregnancy was admissible as a circumstance tending to prove her necessitous condition.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. § 313.*]

6. INFANTS (§ 69*)—CRIMES—MINOR HUSBAND—PROSECUTION FOR NONSUPPORT—"DELINQUENT CHILD."

A husband under 18 years of age was not exempt from punishment under Rem. & Bal. Code, § 2444, for failing to support his wife, and punishable only as a delinquent child as provided by Rem. & Bal. Code, § 1990, providing that a delinquent child may be tried under the provisions of the Criminal Code.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 176, 177; Dec. Dig. § 69.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1956.]

7. INFANTS (§ 65*)—CRIMES—NONSUPPORT OF WIFE—VOIDABLE MARRIAGE.

Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to willfully neglect or refuse to support his wife, she being in necessitous circumstances, applies in a case of a voidable marriage between minors; it being

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the husband's duty to support his wife until there has been a decree of annulment.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 171; Dec. Dig. § 65.*]

8. HUSBAND AND WIFE (§ 304*)—“CRIMINAL NONSUPPORT”—DESERTION.

Mere desertion without criminal nonsupport does not constitute a violation of Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to willfully desert or neglect or refuse to provide for the support of his wife; she being in necessitous circumstances.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1102; Dec. Dig. § 304.*]

9. CRIMINAL LAW (§ 823*)—INSTRUCTIONS — CURE OF ERROR.

In a prosecution for a violation of Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to willfully desert or unlawfully neglect or refuse to support his wife, she being in necessitous circumstances, error in instructing to find defendant guilty if he deserted his wife without lawful excuse was not cured by a proper instruction to acquit him if he did not willfully fail to support her, she being in necessitous circumstances; the two instructions being in direct conflict and irreconcilable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

10. INFANTS (§ 69*)—CRIMES—NONSUPPORT OF WIFE—JUDGMENT.

On conviction of a husband under 18 years of age for willful nonsupport of his wife, she being in necessitous circumstances, in violation of Rem. & Bal. Code, § 2444, a judgment, imposing imprisonment, should have been limited to the time during which the marital state should continue, where it appeared that the marriage was voidable.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 176, 177; Dec. Dig. § 69.*]

11. INFANTS (§ 69*)—CRIMES—NONSUPPORT OF WIFE—JUDGMENT.

On conviction of a minor, Laws 1909, c. 190, § 11, providing for the confinement of minors apart from adult convicts, should be embodied as a part of the judgment.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 176, 177; Dec. Dig. § 69.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Gordon McPherson was convicted of unlawful desertion and nonsupport of his wife, and he appeals. Reversed.

Geo. McKay, of Seattle, for appellant. John F. Murphy and Thos. J. L. Kennedy, both of Seattle, for the State.

GOSE, J. The charge against the defendant is that on the 7th day of February, 1912, he willfully and without lawful excuse deserted, and willfully neglected and refused to provide for the support and maintenance of, Louise McPherson, his wife, she then being in necessitous circumstances. The verdict was “guilty as charged.” A judgment was thereupon entered, whereby it was ordered and adjudged that he be punished “by confinement in the county jail of the county of King” for the term of 12 months, and that execution of the sentence be stayed on condition that he file a bond, in the sum of \$1,000 with sureties to be ap-

proved by the court, for the payment of \$5 weekly to and for the benefit of his wife. The defendant has appealed.

[1] His first contention is that his demurrer to the information should have been sustained because of the failure to allege a continuing neglect. The information follows the language of the statute, and is not vulnerable to a demurrer. Rem. & Bal. Code, § 2444; 21 Cyc. 1613, 1614. The statute makes it a crime for the husband willfully and without lawful excuse to desert, or to willfully neglect or refuse to provide for the support and maintenance of, his wife, if she is in necessitous circumstances. This is covered by the information.

[2] It is further contended that there is no evidence that the wife was in necessitous circumstances. The facts pertinent to this inquiry are that the appellant was married to his wife on the 10th day of December, 1911; that he was 16 years of age in the month of July preceding; that she was 17 years of age in the month of October preceding; that they lived with the wife's mother for a short time, and thereafter lived in apartments until the 11th day of February, 1912, when she returned to her mother's home at his command, and that thereafter she lived with her mother and stepfather, and he lived with his parents. She testified that she had been pregnant five or six months at the time of the separation. When they left their apartments, they had about three days' provisions in the house. The wife testified that she had no money, and her mother said that the wife had no means to make the payments upon the furniture, which were \$10 per month. Upon these facts the jury was warranted in finding that the wife was in necessitous circumstances.

[3] It is argued that the evidence does not show a willful neglect or refusal to provide for the support and maintenance of the wife. The appellant testified that he was earning \$9 per week as a clerk in a department store at the time of the separation; that his salary was not sufficient to meet the necessary family expenses; that his wife promised to do outside work, and did not; and that he was driven to the extremity of sending her to her mother. The wife and mother testified that the appellant represented to them that his salary was \$15 per week, and the mother said that he told her that he was expecting a raise in his salary. The wife told him that she would get a lodging house and keep roomers, and that her mother would supply such furniture as they needed. To this offer he demurred. Between the date of the separation and the trial three months later the appellant contributed nothing toward the support of his wife. His confession of his inability to support his wife is not to his credit. It shows a moral cowardice that few young men would confess. The prosecuting attor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ney very pertinently asked him if he was the only married clerk in the city.

[4] The court properly instructed the jury that it is the duty of the husband "to do the best he can" to support and maintain his wife "in the manner suitable to his station and circumstances." He contributed nothing at all to his wife's support, and the jury evidently concluded that he had not done the best he could.

[5] The contention that the evidence of the wife's pregnancy was inadmissible is without merit. It was a circumstance tending to prove her necessitous condition.

[6] It is strenuously contended that the statute (Rem. & Bal. Code, § 2444; Laws 1909, p. 946, § 192) does not apply to a husband under 18 years of age, but that he can be punished only as a delinquent child, as defined by Laws 1909, p. 668, § 1 (Rem. & Bal. Code, §§ 1987 to 2004), and in the manner therein provided. Section 12 of this act provides that a delinquent child may be tried under the provisions of the Criminal Code.

[7] The argument that the abandonment statute under which the appellant was convicted does not apply to a voidable marriage is inherently unsound. The appellant was married by a regularly ordained minister, upon a license issued upon an affidavit of a third party, which falsely stated that the appellant was over 21 years of age. He was married without the knowledge or consent of either of his parents, both of whom were living. Our statute (Rem. & Bal. Code, § 7150) has established the age of matrimonial consent at 21 years in males and 18 years in females. It is provided in section 7164 that a license may be granted if consented to in writing by the father, mother, or legal guardian of the minor, where the female is under the age of 18 years and over the age of 15 years and where the male is under the age of 21 years. Our statute (Rem. & Bal. Code § 7162) provides that, where either party to a marriage shall be incapable of consenting for want of legal age, the marriage is voidable, but only at the suit of the party laboring under the disability. It follows, we think, that it is the duty of the husband, even though the marriage is voidable, to give his wife such support as his earning ability and circumstances in life will reasonably justify, until there has been a decree of annulment entered in a court of competent jurisdiction. This conclusion is within the principle announced in *Re Holloper*, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847, 132 Am. St. Rep. 952, 17 Ann. Cas. 91; *Hunt v. Hunt*, 23 Okl. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202; *Willits v. Willits*, 78 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883; *Bostick v. State*, 1 Ala. App. 255, 55 South. 260; *State v. Lowell*, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358; *Town, etc., v. Town, etc.*, 50 Vt. 62. This view is based upon the principle that, under

the statute, the marriage is not void, but merely voidable, and, until legally annulled, is valid for all civil purposes. In the *Holloper* Case we said: "The ordinary legal consequences follow his (the minor's) marriage." In the *Bostick* Case the court said that, when a minor married, "the law cast on him the legal duty of providing for his wife." In the *Willits* Case it is said: "As before stated, the marriage was valid until annulled by the court. Until it was annulled, therefore, the defendant was liable for the expenses of his family and the support and maintenance of his child." The marriage of a minor emancipates him. In *re Holloper*, supra; 1 *Bishop on Marriage, Divorce, and Separation*, § 557; *Town v. Town, etc.*, supra. "The better opinion now is that parties marrying before the age of consent may dissent to the marriage within nonage and thus avoid it in toto." *Tyler on Infancy & Coverture* (2d Ed.) p. 81. See to the same effect 2 *Parsons on Contracts* (9th Ed.) p. 83; *Elliot v. Elliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *State v. Lowell*, supra. The reason for the rule is thus stated in the *Elliot* Case: "If the plaintiff had capacity to become a party to such imperfect and inchoate or conditional marriage, he should have capacity to disaffirm it at any time thereafter before it has ripened into an absolute marriage by invoking the authority of the court to annul it under the statute. No good reason is perceived why the parties should be compelled to remain in so unfortunate a position until the plaintiff becomes eighteen years of age." The opinion of this court in the *Holloper* Case is based on this principle. The right to annul such a marriage is given by statute, and this construction will more nearly protect the right than the construction contended for by the appellant; i. e., that the right is unavailing during nonage. In *State v. Lowell*, supra, it was held that the marriage of a minor above the age of consent established by the common law—14 years for males and 12 years for females—emancipates the child from the custody of the parent, is voidable only, and must be treated as valid for all civil purposes until annulled by judicial decree at the election of the party under age of legal consent, "to be exercised at any time before reaching such age or afterwards if the parties have not voluntarily cohabited as husband and wife."

[8,9] The court instructed the jury: "(a) So the question in this case is: Did this defendant desert his wife without lawful excuse? If he did, he is guilty." (b) "If you find that he has not willfully failed to support and maintain her, she being in necessitous circumstances, then you will find him not guilty. If you find he has failed willfully, she being in necessitous circumstances, then you will find him guilty as charged."

The statute (Rem. & Bal. Code, § 2444), upon which the charge is rested, provides: "Every person who shall willfully and without lawful excuse, desert or willfully neglect or refuse to provide for the support and maintenance of his wife or child under the age of 16 years, either said wife or child being in necessitous circumstances," shall be punished, etc. The words "being in necessitous circumstances" qualify all the preceding words in the section. Desertion alone is not a crime. It is only a crime when it is willful and without lawful excuse, and the wife or a child under the age of 16 years is left in necessitous circumstances. The clause of the instruction last quoted covers the whole law of the case. The record shows that the appellant claimed immunity from liability to support on two grounds: (1) Because the marriage is voidable; and (2) because of his inability to support his wife. As we have seen, neither of these grounds is tenable as a matter of law. The instruction first quoted was wrong and the second instruction was right. They are in direct conflict and irreconcilable, and for this error the appellant is entitled to a reversal.

[10] In view of the fact that there will probably be a new trial, we desire to say that the judgment of the court should have been limited in point of time. It should not have gone beyond the continuance of the marital state.

[11] Section 11 of Laws 1909, p. 674, c. 190, relating to the punishment of delinquent children, provides: "When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to confine such child in the same yard or inclosure with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present." This clause should be embodied in any judgment hereafter entered in this case.

For the reasons stated, the judgment is reversed.

CROW, C. J., and MOUNT, PARKER, and CHADWICK, JJ., concur.

(72 Wash. 441)

NORTHWESTERN MARBLE & TILE CO. v. MEGRATH et al.

(Supreme Court of Washington. March 12, 1913.)

1. CONTRACTS (§ 199*)—SPECIFICATION—CONSTRUCTION.

Plumbing specification for a federal building provided that all soil, waste, drain, down water, and vent pipes, unless otherwise specified, should be best quality galvanized, wrought-iron or mild steel, screw-jointed pipe of standard weight and thickness. *Held*, that the contractor was entitled to install either kind of pipe at his election, and, having installed "mild steel pipe," was not bound to remove the same and install

galvanized iron pipe at the direction of the supervising architect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 884-889; Dec. Dig. § 199.*]

2. CONTRACTS (§ 196*)—CONSTRUCTION—SUPERVISING ARCHITECT—AUTHORITY.

A provision in a contract for the construction of a federal building that the decision of the supervising architect as to the proper interpretation of the specifications should be final and conclusive did not warrant such architect in interpolating something into the contract not justified by its fair interpretation, nor authorize him to require the removal of pipe of a character authorized by the plumbing contract, because the contractor did not furnish pipe of a different character, also authorized.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 856-860; Dec. Dig. § 196.*]

Parker, J., dissenting.

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by the Northwestern Marble & Tile Company against John Megrath and others. Judgment for plaintiff and defendants John J. Ward and others appeal. Reversed, with directions.

John W. Roberts, of Seattle, for appellants. Million & Houser and George Friend, all of Seattle, for respondent.

GOSE, J. [1] The respondents Megrath and Duhamel had a contract for the construction of the federal building in the city of Seattle. The appellants Ward and Scherer made a subcontract with them for the installation of the plumbing. The specifications, which formed a part of both the original and subcontract, contained the following provision: "All soil, waste, drain, down water, and vent pipe (unless otherwise specified) must be best quality galvanized, wrought-iron or mild steel, screw-jointed pipe of standard weight and thickness." The original contract provided that "the decision of the supervising architect as to the proper interpretation of the drawings and specifications shall be final and conclusive." The contract further provided that all defective or unsatisfactory material or work should be remedied and removed at the expense of the contractors. Under the clause first quoted the subcontractors, with the knowledge and approval of the superintendent in charge of the work and the respondents Megrath and Duhamel, installed "mild steel" pipe. After its installation it was tested and approved by the superintendent of the work. The appellants, the respondents, and the superintendent of the work construed the clause to give the contractor the option to install either "galvanized, wrought-iron" or "mild steel pipe." After the installation of mild steel pipe the supervising architect directed the respondents to remove it and to install "galvanized iron pipe." The respondents in turn called upon the appellants to make the substitution, and upon their refusal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so to do the respondents made the change as directed, and now claim that the appellants should bear the expense thereof. Their claim was sustained in the court below, and this appeal followed.

The clause in controversy clearly confers an option upon the contractor to use either "galvanized, wrought-iron" or "mild steel." In other words, it specifies two kinds of pipe, with the option to the contractor to use either. The testimony shows that the words "mild steel" mean ungalvanized steel. The language in the specification quoted seems too plain to require construction, further than to ascertain the meaning of the words "mild steel." When the appellants properly installed mild steel pipe of standard weight and thickness, they did all they had contracted to do; and the supervising architect had no warrant, under the terms of the contract, to arbitrarily direct them to remove it and install galvanized iron pipe. *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. 640, 22 L. R. A. (N. S.) 376; 9 Cyc. 617, 618.

[2] The respondents rely upon the clause which provides that the decision of the supervising architect as to the proper interpretation of the specifications shall be "final and conclusive." This clause did not warrant him in interpolating something into the contract not justified by any fair interpretation of its terms. In short, it did not justify him in requiring the parties to do that which the contract itself did not require. The power reserved to the supervising architect was to interpret the specifications, not to rewrite them.

The judgment is reversed, with directions to enter a judgment in harmony with this opinion.

CHADWICK and MOUNT, JJ., concur.
CROW, C. J., concurs in result.

PARKER, J. I dissent. Respondents' original contract was with the United States government. Hence they were helpless as against the demands of the supervising architect, so far as legal procedure is concerned. Appellants as subcontractors, by the terms of their contract subjected themselves to the same hazard, and should not be permitted to recover from respondents for work under their subcontract which respondents cannot recover for under their original contract.

(73 Wash. 481)

MAYHEW v. YAKIMA POWER CO.

(Supreme Court of Washington. March 12, 1913.)

1. NEGLIGENCE (§§ 1, 10*) — WHAT CONSTITUTES.

"Negligence" is an omission of duty imposed by statute or implied by law; but an act which may result in harm to another is not negligence, unless its consequences are such as

could have been reasonably foreseen and guarded against.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 1, 12; Dec. Dig. §§ 1, 10.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

2. NEGLIGENCE (§ 121*)—PRESUMPTION AND BURDEN OF PROOF.

Negligence is not presumed, but is to be proven as a fact.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

3. ELECTRICITY (§ 14*)—INJURIES INCIDENTAL TO USE—CARE REQUIRED.

A company owning a line transmitting a heavy voltage of electricity is bound to put its wires high enough to leave the road safe, not for any and all travel, but for usual and ordinary travel.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

4. ELECTRICITY (§ 18*)—ACTION — QUESTION FOR JURY—CUSTOM.

Evidence that, on occasion required, witness hauled the 45-foot hay derrick in question over the road, and that other derricks had occasionally been hauled over other roads in that part of the county, was not sufficient to make the existence of a custom of hauling such derricks a question for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

5. EVIDENCE (§ 5*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE—HEIGHT OF DERRICK HAULED ON HIGHWAY.

The court judicially knows that a hay derrick with a revolving arm 45 feet high is an extraordinarily high thing to haul on the highway, and that derricks of that structure and height are not so generally hauled as to make their hauling an ordinary use of the highway.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 4; Dec. Dig. § 5.*]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by Cloyd Mayhew against the Yakima Power Company. From a directed verdict for defendant, plaintiff appeals. Affirmed.

J. M. Dunn, of Sunnyside, and Frank A. Luse, of North Yakima, for appellant. Danson, Williams & Danson and Geo. D. Lantz, all of Spokane, and Luhman & Clark, of North Yakima, for respondent.

CHADWICK, J. Defendant is the owner of a high power transmission line in the Yakima valley. It runs parallel with and along the edge of the right of way of the public roads. The posts are set the usual distance apart, and the power line is run on cross-arms which are about 40 feet above the ground. The voltage was very heavy, and there is evidence to sustain a finding that insulation would have been impractical, if not impossible. Plaintiff, a boy of 16 years but well grown and strong, was employed as one of a hay stacking crew. Hay is usually stacked in the Yakima valley by means of a derrick. The one to which we shall refer was rigged in the following manner: Large timbers were set on the ground, and upon these a stack pole 45 feet high was reared.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On the top of the stack pole there was an arm 18 feet long. The whole superstructure was so arranged that it would swing or revolve freely. From the end of the arm a long cable was extended through a block and tackle. When this was pulled down it formed a loop which would reach to the ground. The ground timbers of the derrick were cut to serve the purpose of sled runners, and the structure was moved by hitching horses to it and dragging it from place to place. At the time of the injury complained of, the derrick was being hauled along the road, and plaintiff was riding in the loop of the cable, which hung so low that it came within a short distance of the ground. The ground was sufficiently rough and uneven to jar the structure, and the mast swung around so that the wire cable came in contact with the power line, at a time when plaintiff had his foot on the ground. A circuit was thus formed, and plaintiff was severely shocked and burned. An action was brought to recover damages, and from a directed verdict plaintiff has appealed.

[1, 2] Negligence is alleged, in this, that, respondent having placed a dangerous force on the highway, it was its duty to make the highway as safe for those who had a right to travel on it as it was before. He also invokes the rule that, where people have a right to go either for business or pleasure, it is the duty of those who handle dangerous agencies to insulate or protect them so as to insure the safety of those who might come in contact with them. But it seems to us, as it did to the trial judge, that there was no negligence on the part of respondent. "Negligence" is an omission of duty imposed by statute or implied by law. Negligence is not presumed, but is to be proven as a fact. Nor does the law charge as negligence an act which may result in harm to another, unless the consequences of the act are such as could have been reasonably foreseen and guarded against.

[3-5] The duty of the respondent is accurately defined by the trial judge when taking the case from the jury. He said: "That duty was to put the wires high enough to leave the road safe, not for any and all travel, but for usual and ordinary travel." In the course of his opinion he said: "There is not any evidence, worthy evidence, tending to prove that, at the time defendant built its power line, hay derricks 45 feet high, including the projection of the arm above the mast, were so generally hauled over said road as to constitute ordinary and usual travel. There is evidence tending to prove that Mr. Mayhew had, as occasion required, hauled his derrick in question over the road, and that other derricks had occasionally been hauled over other roads in that part of the county; but the habit of Mr. Mayhew to haul his derrick is not a custom of the community to haul derricks, and is not, in my opinion,

sufficient evidence upon which to submit to you the question of the existence of such a custom. There is no evidence that the other derricks occasionally hauled were 45 feet high, though there is perhaps some evidence tending to show that they were not that high. The evidence, in my opinion, not being sufficient to submit to the jury the question whether derricks 45 feet high were so generally hauled over said road as to constitute usual and ordinary travel, the question arises: Ought the court judicially to know that derricks 45 feet high were so generally hauled over that road as to constitute usual and ordinary travel, or were so generally hauled over the roads in that vicinity as to constitute ordinary and usual travel thereon? It seems to me the court does not judicially know that fact, if it be a fact. Doubtless it is judicially known that common vehicles are ordinarily hauled on the highways. But it seems to me the court judicially knows that a derrick with a revolving arm 45 feet high is an extraordinarily high thing to haul on the highway, and while, as aforesaid, an extraordinarily high thing may be so generally hauled as to constitute ordinary travel, I do not think that derricks of the height and structure of the one in question are so generally hauled that the court judicially knows that such hauling is an ordinary use of the highway. If the court does judicially know it, it follows on elementary law that the court should so charge the jury. In my opinion, no lawyer will maintain that the court should charge the jury in this case that hauling derricks like the one in question was an ordinary use of said highway."

We can add nothing to this conclusion. It is elementary law and sustained by many adjudged cases. 15 Cyc. 471, 472; *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452. Judgment affirmed.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

STATE v. McBRIDE

(Supreme Court of Washington. March 8, 1913.)

1. INDICTMENT AND INFORMATION (§ 133*)—DEMURRER OR MOTION TO QUASH.

After a plea of not guilty, a demurrer to the information, or any motion in the nature of a demurrer, except a motion in arrest of judgment, cannot be entertained without withdrawing the plea; and hence an objection to the reception of any evidence because of the insufficiency of the information was properly overruled.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. § 133.*]

2. CRIMINAL LAW (§ 970*)—GROUNDS FOR ARREST OF JUDGMENT.

Under Rem. & Bal. Code, § 2183, authorizing the arrest of judgment, on motion of de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

fendant, where the grand jury had no jurisdiction, or where the facts stated in the indictment or information do not constitute a crime or misdemeanor, and section 2105, authorizing a demurrer to the indictment or information where it does not substantially conform to the requirements of the Code, charges more than one crime, charges facts not constituting a crime, or contains matter which, if true, would constitute a defense or other legal bar, the question of duplicity can be raised only by demurrer, motion to quash, or motion to compel an election, and unless so raised is waived, and cannot be raised by a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

3. INDICTMENT AND INFORMATION (§ 125*)—ELEMENTS OF OFFENSE.

Under Rem. & Bal. Code, § 2583, providing that every person who, with intent to defraud, shall forge any writing or instrument, etc., shall be guilty of forgery in the first degree, and section 2587, providing that every person who, knowing the same to be forged or altered, and with intent to defraud, shall utter any forged writing, instrument, or other thing, the forging of which is punishable as forgery, shall be guilty of forgery in the same degree as if he had forged it, the forging alone or the uttering alone constitutes a crime, but the forging and uttering of the same instrument by the same person constitutes only one crime; and hence an information was not duplicitous because it charged both the forging and the uttering.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2900-2910; vol. 8, p. 7665.]

4. INDICTMENT AND INFORMATION (§ 125*)—CHARGING COMMISSION OF CRIME IN DIFFERENT WAYS.

An information may charge the same crime in any or all ways not repugnant to each other.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

5. FORGERY (§ 20*)—ELEMENTS OF OFFENSE.

That the proceeds of a forged check were used in a gambling game conducted by the party that cashed the check was not a defense to a charge of forgery, the crime being complete when the check was forged and passed for money, regardless of what was done with the money received; and hence evidence of such fact was properly excluded.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 56; Dec. Dig. § 20.*]

6. FORGERY (§ 43*)—EVIDENCE—ADMISSIBILITY.

On a trial for forging a check, evidence that the person whose name was forged was indebted to accused in a sum exceeding the amount of the check was properly excluded; a debt not authorizing or excusing a forgery.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 116; Dec. Dig. § 43.*]

7. FORGERY (§ 43*)—EVIDENCE—ADMISSIBILITY.

On a trial for forging a check, a question asked the person whose name was forged, if he would have paid the check if presented by a bank or person who held it legitimately, was properly excluded as immaterial.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 116; Dec. Dig. § 43.*]

8. CRIMINAL LAW (§ 1048*)—APPEAL—REVIEW—EXCEPTIONS TO INSTRUCTIONS.

Exceptions to the instructions, filed with the clerk after the return of the verdict and not called to the attention of the trial court and noted in the minutes or embodied in the record by the stenographer, will not be considered on appeal, especially where no motion for a new trial was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. § 1048.*]

9. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS.

An instruction that if accused had possession of a forged check and obtained money upon it his possession raised a presumption of guilt, unless rebutted, was erroneous; his possession being a mere circumstance, the weight of which was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1743, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

10. CRIMINAL LAW (§ 1056*)—APPEAL—REVIEW—EXCEPTIONS TO INSTRUCTIONS.

Such instruction was not fundamentally erroneous, since it was not a comment on the evidence, assumed no fact, and violated no positive statute or constitutional provision, but merely misstated the law; and hence did not justify a reversal, in the absence of a proper exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

Department 2. Appeal from Superior Court, Pacific County; A. E. Rice, Judge.

Alex McBride was convicted of forgery in the first degree, and he appeals. Affirmed.

Chas. E. Miller, of South Bend, for appellant. Robt. G. Chambers, of Raymond, for the State.

ELLIS, J. The appellant was convicted of the crime of forgery in the first degree upon an information, the material part of which was as follows: "The said Alex McBride, on or about the 14th day of January, A. D. 1911, in Pacific county, Washington, then and there being, did then and there feloniously forge a writing, on paper, the said writing on paper being then and there an instrument by which the title of personal property was evidenced, created, acknowledged, and transferred, the same being a request for the payment of money, of the tenor following: 'South Bend, Wash., Jan. 14, 1911. No. 16. Pacific State Bank. Pay to E. McBride or order \$15.00. Fifteen dollars. Chas. Funk.' And the said Alex McBride did then and there, knowing said writing to be forged and fraudulent, utter the same as true to one Thomas Connors, with the intent to defraud the said Thomas Connors, the said Charles Funk, the said Pacific State Bank, and some other person or persons to the prosecuting attorney unknown." This information was filed February 28, 1911. The appellant pleaded not guilty. The cause was tried on January 16, 1912. On January 18, 1912, a motion in arrest of judgment was

overruled and sentence imposed. No motion for a new trial was ever made.

The testimony developed the following facts: That Connors and his partner, Baker, conducted a pool hall in South Bend; that on the evening of January 14, 1911, the appellant and others were playing at cards in a room back of the pool hall; that late that night the appellant left the hall, was gone for about half an hour, and on his return presented to Connors for cashing a check for \$15, purporting to be the check of, and purporting to be signed by, one Chas. Funk; that the appellant then told Connors that he had called Funk from bed, and Funk had written the check for him; that Connors cashed the check, giving the appellant a \$10 and a \$5 gold piece. Funk testified that he did not write or sign the check, and that it was neither written nor signed with his knowledge or consent; that at the time he had no account with the bank on which the check was drawn, nor had he such an account for at least a year prior thereto. Two bankers of South Bend testified that they were familiar with the handwriting of the appellant, and that, in their opinion, the check in question was written by him. The appellant has made 34 assignments of error. They were all, save 3, directed to the rulings of the trial court in admitting evidence, excluding evidence and offered proof, and to the court's instructions to the jury.

[1] When the first witness was called and before any testimony was taken, the appellant, without withdrawing his plea of not guilty, objected to the reception of any evidence upon the ground of an alleged insufficiency of the information. The overruling of this motion is the basis of the first assignment of error. There was no error in this ruling. We have repeatedly held that a demurrer to the information, or any motion in the nature of a demurrer, may not be entertained pending a plea of not guilty, save the motion in arrest of judgment. The reasons for the rule are well stated in the following decisions: *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377; *State v. Bodeckar*, 11 Wash. 417, 39 Pac. 645; *State v. Strange*, 50 Wash. 321, 97 Pac. 233; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43.

[2] The denial of the motion in arrest of judgment is also assigned as error. It was based on grounds as follows: (1) That the information does not state any offense known to the laws of this state; (2) that it does not substantially conform to the requirements of the Criminal Code; (3) that it charges more than one crime; (4) that the facts charged do not constitute a crime. The first and fourth grounds mean the same thing, namely, that the facts charged do not constitute a crime. Under the second and third was presented the sole question of duplicity. The statute (*Rem. & Bal. Code*, § 2183), prescribing the grounds for motion in

arrest, provides: "Judgment may be arrested on the motion of the defendant for the following causes: 1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court. 2. That the facts as stated in the indictment or information do not constitute a crime or misdemeanor." Section 2105 prescribes the grounds of demurrer to the indictment or information, as follows: "1. That it does not substantially conform to the requirements of this Code. 2. That more than one crime is charged. 3. That the facts charged do not constitute a crime. 4. That the indictment or information contains any matter which if true would constitute a defense or other legal bar to the action." These sections make it clear that the only question properly raised by the motion in arrest was, Did the information charge a crime? The question of duplicity could only be raised by demurrer or motion to quash in the nature of a demurrer, or by motion to compel an election. It was therefore waived, as we have seen, by the failure to so demur or move prior to the plea of not guilty, and without withdrawing that plea. Such an objection comes too late after verdict. 1 *Bishop's New Crim. Proc.* §§ 442, 443; *Territory v. Heywood*, 2 Wash. T. 180, 2 Pac. 189; *State v. Snider*, 32 Wash. 299, 73 Pac. 355. Manifestly, therefore, the only question presented by the motion in arrest was, Did the information charge a crime sufficiently to support the verdict?

[3, 4] We are convinced that the information contains but one count, and charges only one crime, namely, forgery in the first degree. The statute under which forgery in the first degree may be charged is contained in two sections. *Rem. & Bal. Code*, § 2583 declares: "Every person who, with intent to defraud, shall forge any writing or instrument * * * or any request for the payment of money or delivery of property or any assurance of money or property * * * shall be guilty of forgery in the first degree. * * *" Section 2587 is as follows: "Every person who, knowing the same to be forged or altered, and with intent to defraud, shall utter, offer, dispose of or put off as true, or have in his possession with intent so to utter, offer, dispose of or put off any forged writing, instrument or other thing, the false making, forging or altering of which is punishable as forgery, shall be guilty of forgery in the same degree as if he had forged the same." It is obvious that the same crime may be committed in either of the two ways, by actually forging with intent to defraud, or by uttering, offering, disposing of, or putting out as true with intent to defraud. It is equally plain that the one crime may be committed by the same person in both of these ways, when the acts are done with reference to the same instrument and in the same transaction. While the two

modes of commission are set out in separate sections, the degree of the crime, when committed in the manner set out in section 2587, can only be ascertained by a reference to section 2583, or the other sections defining the degrees of forgery by the primary act of commission. Section 2587 is therefore not an independent provision, but must be read and construed in connection with some other section, according to the degree of forgery charged. In this instance it must be read in connection with section 2583, defining forgery in the first degree. The effect is the same as if the provisions of section 2587 were repeated as a part of each section defining forgery by the primary act. When so considered, it is clear that the information here involved charges but the one crime, and charges its commission in both of the statutory ways as a part of the one connected transaction continuous in point of time, as shown by the words "then and there," and that the words "with intent to defraud" relate to both of the acts of commission preceding them and alleged conjunctively. The statute, as we construe it and as it must be construed to be intelligible, thus leaves the decisions of this court as applicable now as they were under the old statute (Bal. Code, § 7128), which included both modes of commission in the same section. The guilt of forgery attaches to both or either of these acts; and when both are committed in reference to the same instrument but one forgery is committed. Since both acts may be proved as establishing the same crime, both may be included in the same indictment or information in charging the same crime. One or all of the series of acts constituting the crime may be charged in the same indictment and constitute but one offense. *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *State v. Adams*, 41 Wash. 552, 83 Pac. 1108; *State v. Ray*, 62 Wash. 582, 114 Pac. 439; *State v. Wapenstein*, 67 Wash. 502, 121 Pac. 989; 1 Wharton's Crim. Law (10th Ed.) § 727; Wharton's Crim. Pl. (9th Ed.) § 251. The same crime may be charged in any or all of the ways not repugnant to each other. *State v. Justus*, 86 Kan. 848, 122 Pac. 877; *State v. Mitton*, 37 Mont. 368, 96 Pac. 926, 127 Am. St. Rep. 732.

[5] The appellant offered to prove that there was a poker game going on upon the premises of Baker & Connors when the check was cashed; that the game was maintained by that firm and conducted by Connors; that the appellant had lost money in the game and left for the purpose of getting more money to continue his play; that he came back with the check and cashed it and bought poker chips with the proceeds; that the game was later raided by the sheriff, and the participants pleaded guilty to a misdemeanor and paid fines. The refusal to permit this proof is assigned as error. The of-

fer related to matters wholly immaterial, save the admission that the check was cashed. It was a request for the payment of money, and money was actually paid upon it. The act falls directly within the statutory definition of the crime. The crime was complete when he forged and passed the check for money. What he did with the money was wholly immaterial. It is no defense that he paid it out for an illegal purpose or consideration. *Dunn v. People*, 4 Colo. 126; *Ex parte Warford*, 3 Okl. Cr. 381, 106 Pac. 559; *People v. Collins*, 9 Cal. App. 622, 99 Pac. 1109.

[6, 7] The several assignments of error relating to the exclusion of evidence, save two, went to the same matter as this offer, and are sufficiently disposed of by what we have said. The two exceptions are as follows: The witness Funk was asked if, at the time of the forgery, he was not indebted to the appellant in a sum of at least \$20. There was no error in the court's refusal to permit an answer. A debt does not authorize or excuse the forgery of the debtor's name by the creditor, even to raise money to pay the debt. *Curtis v. State*, 118 Ala. 125, 24 South. 111; *Clalborne v. State*, 51 Ark. 88, 9 S. W. 851; *Plemons v. State*, 44 Tex. Cr. R. 555, 72 S. W. 854. The same witness was asked whether he would have paid the check if it had been presented to him by any bank or person who held it legitimately. The court was clearly right in sustaining the objection to this question. The matter was immaterial. It affected neither the appellant's act nor his intention in committing it.

[8] Many assignments of error are based upon the instructions. No sufficient exceptions, however, were taken to the instructions. The exceptions were merely filed with the clerk after the verdict was returned. There is nothing in the record indicating that they were ever in any manner called to the attention of the trial court. There is nothing to indicate that they were stated to the trial judge and noted in the minutes or embodied in the record by the stenographer taking the record. We have repeatedly held that the mere filing of the exceptions is insufficient. *Coffey v. Seattle Electric Co.*, 59 Wash. 686, 109 Pac. 202; *Gerber v. Aetna Indemnity Co.*, 61 Wash. 184, 112 Pac. 272; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *State v. Peebles*, 129 Pac. 108. Moreover, no motion for a new trial was ever made. The trial court was never accorded an opportunity to review the many errors assigned.

[9, 10] We will, however, notice one instruction, because it is urged that it violated the constitutional inhibition against comment upon the evidence, and was of such a fundamental character as to constitute ground for reversal without the reservation of any exception. The court instructed the jury to the effect that, if it was satisfied beyond a reasonable doubt that the check was

a forgery, and that the defendant had it in his possession and obtained money upon it from Connors, then the possession raised a presumption of guilt, unless rebutted. This was error. Possession of the instrument was a mere circumstance. Its weight was for the jury. *State v. Hatfield*, 66 Wash. 9, 118 Pac. 893, 38 L. R. A. (N. S.) 609. The instruction, however, was not a comment upon the evidence. It assumed no fact. It merely misstated the law. It violated no positive statute or constitutional provision. The error, therefore, was not of such fundamental character that it could not be waived. It is not within the rule touching the misconduct of a juror, announced in *State v. Bennett*, 129 Pac. 409. The failure to properly except to the instruction waived the error.

There was ample evidence to sustain the verdict. The judgment is affirmed.

OROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

(73 Wash. 417)

BOGART v. PITCHLESS LUMBER CO.
(Supreme Court of Washington. March 11, 1913.)

1. DAMAGES (§ 120*)—CONTRACT FOR LABOR—BREACH—MEASURE OF DAMAGE.

Where plaintiff contracted to remove the timber from defendant's land, but shortly after plaintiff entered on the performance of his undertaking was directed by defendant to cease work and prevented by defendant from thereafter completing his contract, plaintiff's measure of damages was the difference between the cost of performing the work and the contract price.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

2. EVIDENCE (§ 498*)—CONTRACT—BREACH—EVIDENCE.

Where, in an action for breach of a contract to cut the timber from defendant's land, plaintiff was entitled to recover the difference between the cost of performing the work and the contract price, evidence of estimates of those who were competent to pass judgment on the work acquired was admissible to prove the cost to plaintiff of doing the work.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2289; Dec. Dig. § 498.*]

3. DAMAGES (§ 157*)—UNLIQUIDATED DAMAGES—ESTIMATES—EVIDENCE.

Where damages for breach of a contract depended on varying estimates and could not be measured with mathematical nicety, it was no objection that the amount allowed by the trial judge was not based on particular evidence; it being sufficient that it was within the evidence.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 429-438, 440, 447, 449-453; Dec. Dig. § 157.*]

Department 1. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by F. Bogart against the Pitchless Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Connor & Akins, for appellant. H. W. Arnold, of Vancouver, for respondent.

CHADWICK, J. Plaintiff brought this action to recover damages for the breach of a contract. Defendant was the owner of a certain body of saw timber, and plaintiff engaged to remove it. It is unnecessary to go into the detail of the contract. Plaintiff entered upon the performance of his undertaking, but was ordered by the defendant to cease work pending a season of possible high water in the Columbia river. Thereafter, and after all danger from high water had passed, defendant notified plaintiff it would not log its timber. Plaintiff was at all times ready and willing to perform, but performance was refused by defendant. The court allowed a recovery of \$408, being 34 cents per 1,000 feet board measure, which the court found to be the prospective profits on 1,200,000 feet. From a judgment for this amount defendant has appealed.

The case comes here upon exceptions to the findings of fact. There is evidence to sustain the finding of the court that a contract was made and breached by the defendant, and the only question open is whether the court properly measured the damages. Plaintiff was to receive \$4.50 per M. A number of witnesses, most of them being qualified as competent timber men and who knew the local conditions, were asked how much it would cost to log the land, or how much it would cost to perform particular parts of the work, as falling, bucking, and swamping. From all of this evidence the court found that plaintiff might have made a profit. This method of arriving at the amount to be assessed as damages is challenged by appellant.

It is true, as contended, that "what one thinks and calculates that he could have made a certain sum, for a breach of contract, is not evidence on the question of damages." Nor is the subject one that is usually determined by opinion or expert testimony, based upon a hypothetical question, for, as is aptly said, as many witnesses might be found to swear that there would be no profits as might swear that there would be profits. This would tend to speculation, while the theory upon which prospective profits are allowed is that they can be estimated with reasonable certainty. Such profits do not have to be accurately known. They are to be determined from a consideration of all of the tangible evidence upon the subject. *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174.

[1] This court is committed to the doctrine of allowing prospective profits. In *Watson v. Grays Harbor Brick Co.*, 3 Wash. 283, 289, 28 Pac. 527, 529, it was held that: "When one contracts to perform work for another at a stipulated price, and is prevented by him from entering upon the performance, the measure of damages is the difference between the cost of performing the work

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the party agreeing to do it and the price agreed to be paid for it." See, also, *Skagit R. & L. Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Graham v. McCoy*, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

[2] To ascertain the cost of performing any contract so as to arrive at the measure laid down in the above cases, resort must of necessity be had to the estimates of those who are competent to pass judgment and who have knowledge of the particular conditions.

"The trees were there from which the logs, spars, and piles could be manufactured; and at the time of the breaches there was the benefit of past experience—the known results of previous efforts in carrying on the work—from which to form an estimate of what could have been done thereafter had the supplies been furnished." *Skagit Ry. & L. Co. v. Cole*, 2 Wash. 57, 73, 25 Pac. 1077. Such evidence is received upon the theory that it is the best evidence obtainable. Consequently men who know conditions, and have dealt in commodities, lands, or manufactured goods, are constantly called upon to advise courts and juries as to cost and value. 5 Encl. Ev. 535, 569; *Jones on Evidence*, § 375 et seq.; *Wigmore on Evidence*, §§ 558, 713, 721. Whether a witness is competent to express an opinion depends largely upon the discretion and sound judgment of the trial judge. No hard and fast rule can be laid down in such cases. The object of every trial is to elicit the truth, and whether the opinion is to be based upon personal knowledge or upon hypothetical questions must necessarily vary as the cases present themselves; the court keeping in mind at all times the rule of best evidence. In this case the witnesses had personal knowledge and estimated the cost of getting out the logs. Appellant says respondent should have shown his profit in some other way. No other way is pointed out, nor do we know of a better way than to take the difference between the cost and the price to be paid. The cases cited and relied on by appellant all follow the general rule, and proof of profits was denied because of some element, added or omitted, which made the question one of speculation or conjecture, rather than one of reasonable certainty.

[3] It is complained that there is no evidence to sustain the exact sum allowed by the trial judge. This is probably true. Damages depending on varying estimates cannot be measured with mathematical nicety. It is enough that the judgment is within the evidence. There is testimony that would sustain a larger recovery, and appellant is not injured.

Judgment affirmed.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

(72 Wash. 429)

BLUMAUER v. MANN et al.

(Supreme Court of Washington. March 12, 1913.)

1. TAXATION (§ 482*)—VALUATION—INCREASE—NOTICE.

Where complainant appeared before a county board of equalization in response to a notice to show cause why the valuation of his property should not be raised, and endeavored to prevent an increase, the object of the notice was accomplished, and the complainant could not thereafter complain that it was insufficient.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 854-857; Dec. Dig. § 482.*]

2. TAXATION (§ 494*)—EQUALIZATION—INCREASE OF VALUE—FRAUD.

An assessment cannot be set aside on the ground that the board of equalization in increasing its value acted unjustly and arbitrarily without substantial evidence that the action of the board was arbitrary or fraudulent.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 884-888; Dec. Dig. § 494.*]

Department. 1. Appeal from Superior Court, Thurston County; Ben Sheeks, Judge.

Suit by Isaac Blumauer against C. B. Mann and others. Decree for defendants, and complainant appeals. Affirmed.

Thomas M. Vance, and Harry L. Parr, both of Olympia, for appellant. John M. Wilson, of Olympia, for respondents.

MOUNT, J. This action was brought to restrain the county officers of Thurston county from collecting taxes against certain described lands belonging to the plaintiff. The action is based upon the alleged ground that in the year 1908 the values returned by the county assessor were raised by the county board of equalization without notice to the plaintiff, and that the increased value as fixed by the county board of equalization was unjust and arbitrary. These allegations were denied. The action was tried to the court, and resulted in a judgment in favor of defendants for their costs, and denying the relief prayed for in the complaint. Plaintiff has appealed.

[1] The appellant argues that the values of his property, as fixed by the county board of equalization in the year 1908, were increased without notice and therefore without authority of law, and were fixed arbitrarily and unjustly. As we read the record, a notice of intention to increase the values was sent to and received by the appellant, who appeared before the board of equalization and protested against the increase in value. It is true that some of the descriptions in this notice were of property that did not belong to the plaintiff, but it also appears that all the property which was increased in value was described in the notice. It also appears that a hearing was had and evidence taken by the board of equalization as to the value. No objections were made at that time to the form of the notice or to the sufficiency of it. The appellant ap-

peared before the board of equalization in answer to the notice, and endeavored to prevent an increase, but his protests were denied. The object of the notice was accomplished, and plaintiff cannot now complain that the notice was insufficient. *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126; *Edison Elec. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132.

[2] We find no substantial evidence in the record to indicate that the board of equalization acted arbitrarily or fraudulently when it increased the values as returned by the assessor. Before an assessment can be set aside upon these grounds, the evidence must be clear to that effect. *N. P. Ry. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912B, 870. The lower court therefore properly dismissed the action.

Judgment affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(72 Wash. 437)

CANAL LUMBER CO. v. KONG YICK INV. CO. et al.

(Supreme Court of Washington. March 12, 1913.)

1. APPEAL AND ERROR (§ 695*)—RECORD—QUESTIONS PRESENTED—CONCLUSIONS OF LAW—CONFORMITY TO FINDINGS.

The complaint, in an action to establish and foreclose a mechanic's lien against property of one of the defendants, for material furnished to the other alleged a compliance with Rem. & Bal. Code, §§ 1129, 1130, and the court found that plaintiff furnished to one defendant certain material delivered to and used in the construction of a building on property of the other defendant, and that plaintiff duly filed its lien, and, as a matter of law, concluded that plaintiff was not entitled to a lien against the premises, and that the owner was entitled to costs against plaintiff. *Held* that, as the lower court did not find that the defendant, to whom the material was furnished, sustained any such relation to the owner as to entitle plaintiff to a lien upon the property, or that the lien sought to be foreclosed complied with the statutory provision as to notice, the appellate court, in the absence of evidence, could not say that the conclusion was not justified by the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.*]

2. APPEAL AND ERROR (§ 714*)—REVIEW—EVIDENCE CONSIDERED—ADMISSIONS IN A FORMER APPEAL.

The Supreme Court, in its review of a case, must be governed by the record therein—that is, by the issues raised by the pleadings, the findings of fact, the conclusions of law, and the judgment—and in aid of the findings cannot consider admissions made in the record on appeal from an order granting a new trial, which appeal was dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.*]

3. APPEAL AND ERROR (§ 934*)—REVIEW—BURDEN OF SHOWING ERROR.

The presumption always is, in courts of general jurisdiction, that the evidence supports the judgment; and it devolves upon the party who attacks the judgment to show either that the evidence does not support it, or, failing to bring the evidence up, to show that the conclusions of law and judgment do not follow the facts as found by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Canal Lumber Company against the Kong Yick Investment Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 67 Wash. 126, 120 Pac. 882.

Myers & Johnstone, of Seattle, for appellant. Tucker & Hyland, of Seattle, for respondents.

GOSE, J. [1, 2] This case is before us on the findings of fact and conclusions of law; the contention of the appellant being that the conclusions of law are not justified by the facts as found by the court. The facts found, material to the inquiry as we view the case, are as follows: "That between the 14th day of June, A. D. 1910, and the 15th day of August, 1910, plaintiff furnished to the defendant Washington Interior Finish Company certain lumber and materials to be used in the construction of that certain building or structure situate upon lots 1 and 8, block 54, D. S. Maynard's addition to Seattle, King county, Wash., all of which materials were delivered to and used upon the property above described, and all of which were of the reasonable value of \$1,853.49; that no part of the same has been paid, except the sum of \$1,457.96, leaving a balance of \$395.53 due and owing the plaintiff; * * * that thereafter, and within 90 days after the furnishing of said last item, to wit, within 90 days from August 15, 1910, plaintiff filed and recorded its lien, which is introduced in evidence and is recorded in volume 36 of Liens, at page 603." The material conclusion of law is as follows: "That plaintiff is not entitled to a lien against the premises herein described, and that defendant Kong Yick Investment Company is entitled to costs against plaintiff herein to be taxed." The appellant seeks to establish and foreclose a lien upon property in the city of Seattle owned by the respondent Kong Yick Investment Company, a corporation.

The allegations in the complaint are that the appellant, at the special instance and request of the respondent Washington Interior Finish Company, a corporation, who was then and there the agent and contractor for the respondent Kong Yick Investment Company, sold and delivered to the latter certain lumber and materials to be used, and which

were used, in the construction of a building situated upon its property in the city of Seattle. This allegation was put in issue by the respondent Kong Yick Investment Company. The appellant further alleged that, within 90 days after it ceased to furnish material, it filed and recorded with the county auditor of King county its claim of lien duly verified by oath, containing a statement of its demands, after deducting all just credits and offsets, with the name of the owner and the name of the reputed owner and the name of the contractor or agent of the owner of the property, together with a description of the property sought to be charged with the lien sufficient for identification. This allegation is also put in issue by the same respondent.

Section 1129 of Rem. & Bal. Code gives a lien to every person furnishing material to be used in the construction of certain enumerated structures for the material furnished, "whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder, or person having charge of the construction, alteration, or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter." Section 1130 provides that so much of the lot or parcel of land, upon which the improvement is made, as may be necessary to satisfy the lien, to be determined by the court on rendering judgment in a foreclosure of the lien, is also subject to the lien to the extent of the interest of the person or company "who in his or its own behalf, or who through any of the persons designated in section 1129 to be the agent of the owner or owners, caused the performance of the labor, or the construction, alteration, or repair of the property." It will be observed that the complaint alleges a compliance with these sections of the statute. The court, however, did not find that the Washington Interior Finish Company sustained any relation to the owner of the property which, under the terms of the statute, would give it the power to bind the property. It must be assumed, in the light of the conclusion of law and the judgment in favor of the owner of the property, that the court had sufficient reason for declining to find that the Washington Interior Finish Company sustained any such relation to the owner. It is further apparent that the latter part of the finding does not show a compliance with the statute Rem. & Bal. Code, § 1134, which prescribes what the notice of lien shall contain.

This case was before this court and is reported in 67 Wash. 126, 120 Pac. 882, on an appeal from an order granting this appellant a new trial, and the appeal was dismissed for want of sufficient bond. The appellant now invites the court to take judicial

notice of its record on the former appeal, and of certain admissions made in the former briefs in aid of the findings in this case. It is contended that the findings thus supplemented are sufficient to show that the Washington Interior Finish Company was a subcontractor, and as such the agent of the respondent Kong Yick Investment Company. The case is now before us after a new trial has been had, and we must be governed by the record here; that is, by the issues raised by the pleadings and the findings of fact, the conclusions of law, and the judgment. Reading these together, in the absence of the evidence, we cannot say (1) that the Washington Interior Finish Company sustained any such relation to the owner of the property as to give the appellant a right to a lien upon its property; and (2) we cannot say that the lien sought to be foreclosed complied with the statute.

[3] The presumption always is, in courts of general jurisdiction, that the evidence supports the judgment; and it devolves upon the party who attacks the judgment to show either that the evidence does not support the judgment, or, failing to bring the evidence here, to show that the conclusions of law and judgment do not follow the facts as found by the court. "The record in each particular case must be complete in itself, and exhibit the ground upon which the final decision is based." *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833. See, also, *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

On the record before us, we conclude that there is no error shown, and the judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

(72 Wash. 359)

SEATTLE & PUGET SOUND PACKING CO. v. CITY OF SEATTLE et al.
(Supreme Court of Washington. March 6, 1913.)

1. MUNICIPAL CORPORATIONS (§ 845*)—DAMAGES FROM DEFECTIVE WATER PIPES—NEGLECT OF EMPLOYEES.

In an action against a city for injury to plaintiff's stock by water escaping from a city main, evidence held to show the escape due to negligence of city employé in connecting service pipes with the main.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

2. APPEAL AND ERROR (§ 837*)—MOTION FOR DIRECTED VERDICT—EVIDENCE CONSIDERED ON REVIEW.

On review of the court's action in overruling defendant's motion for a directed verdict, made at the close of plaintiff's case on the ground of insufficiency of the evidence, evidence introduced after the ruling on the motion will be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by the Seattle & Puget Sound Packing Company against the City of Seattle and others. From a judgment for plaintiff, the defendant city appeals. Affirmed.

Jas. B. Bradford and Wm. B. Allison, both of Seattle, for appellant. Revelle, Revelle & Revelle, of Seattle, for respondent.

FULLERTON, J. The respondent, Seattle & Puget Sound Packing Company, recovered against the city of Seattle for damages caused its stock of goods by water escaping from one of the city's water mains. The action was brought against the city and MacAdam & Co. jointly; the last-named company being the contractors who laid the main from which the water escaped. On the trial at the conclusion of the respondent's case in chief each of the defendants challenged the legal sufficiency of the evidence to make a case sufficient for the jury and moved for a directed verdict. The challenges and motions were denied, whereupon MacAdam & Co. introduced evidence on their own behalf and rested. The city announced that it would introduce no evidence on its behalf but would stand on the record as made. Both defendants thereupon renewed their challenges to the sufficiency of the evidence, and again moved for directed verdicts. The court granted the challenge and motion of MacAdam & Co., but denied the challenge and motion of the city. Judgment was afterwards entered against the city, from which it appeals.

[1] The only question discussed in the brief of the city is the legal sufficiency of the evidence to sustain the judgment. Its attorneys argue that before any recovery could be had it was incumbent on the respondent to show that the city was guilty of some act of commission or omission which permitted the water causing the injury to escape from the water main, and that there is no such evidence in the record. We cannot, however, accept this view of the record. To our minds it shows both acts of commission and omission which were directly responsible for the escape of the water. It appears that the main was of considerable dimensions and that the terminal end thereof was closed by a cap placed over it which was held in place by braces made of timbers and carried back some little distance to an embankment, where they found support against the solid earth; that, after the cap had been in place for some time, the city's employes tapped the main some five feet from its end and placed therein service pipes which were extended to the nearby dwellings. These service pipes were laid over and through the timbers bracing the cap, were not absolutely water-tight, and suffered more or less water to escape.

The effect was to soften the earth surrounding the timbers, causing them to loosen, and, together with the cap, to give way to the pressure of the water. Clearly there was here acts of negligence on the part of the employes of the city sufficient to support a judgment for damages caused by the escaping water.

[2] Some of the facts we have recited appeared in the testimony of the witnesses produced by MacAdam & Co. in support of their defense after the respondent had rested and after the city had challenged the legal sufficiency of the evidence. The city's brief proceeds on the theory that this evidence cannot be considered in determining the question of the legal sufficiency of the evidence against its challenges, but we think the rule otherwise. Under the practice in this state a plaintiff does not rest at his peril. On the contrary, should a challenge be interposed to the legal sufficiency of his evidence which the trial judge should deem well taken, it would be an abuse of discretion, under all ordinary circumstances, to refuse to allow him to reopen his case and supply the omitted proofs if he requested so to do. In this case, had the trial judge sustained the challenge in the place of overruling it, undoubtedly the respondent would have supplied the defect, as the evidence was within his call. Since this is so, and since the evidence is now in the record, it would be but little better than farcical to send the case back to an already overburdened court for another hearing, with its accompanying waste in costs and time, simply because evidence, which abundantly sustains the judgment, did not get into the record according to the strict rules of practice. The appellant is not denied justice by this principle, it had its opportunity to defend on the merits, and if it failed to do so the fault is entirely its own.

The judgment is affirmed.

MOUNT, MORRIS, ELLIS, and MAIN, JJ., concur.

(72 Wash. 434)

SMITH v. ADELBURG.

(Supreme Court of Washington. March 12, 1913.)

BROKERS (§ 63*)—COMMISSIONS—FAILURE OF ENTERPRISE.

Where defendant contracted to give plaintiff 100 shares in a syndicate, or its equivalent in money, if he would secure a subscriber for 3,000 shares, and plaintiff obtained one able, ready, and willing to subscribe for the 3,000 shares, but the syndicate failed because of defendant's misrepresentations that he had bona fide subscribers for all the remaining shares, and also as to the commission he would make out of the enterprise as to the value of the land, plaintiff was entitled to recover the value of the shares which he was to receive as commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.
Action by P. K. Smith against A. K. Adelberg. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. D. Fullen and Jas. G. Raley, both of Seattle, for appellant. H. R. Clise and C. K. Poe, both of Seattle, for respondent.

GOSE, J. This appeal involves two questions: (1) Are the findings of fact supported by the evidence? and (2) does the evidence justify the judgment, as a matter of law? The material facts found are that the appellant employed the respondent to secure subscribers to a syndicate then in process of organization, for the purpose of purchasing about 13,000 acres of land situated in the state of Montana, at the price of \$9.50 per share; that he agreed to give the respondent 100 shares in the syndicate, or its equivalent in money, if he would secure a subscriber for 3,000 shares; that he represented to the respondent that he had bona fide subscribers for all of the remaining shares; that he had an option to purchase the land at \$9.50 per acre; that the land was reasonably worth \$14 or \$15 per acre; that, relying on these representations, the respondent introduced the appellant to one Kerry, whom they jointly induced to subscribe for the 3,000 shares; that Kerry was at all times ready, willing, and able to pay for such shares; that, as an inducement to Kerry to subscribe, the appellant misrepresented the facts to the respondent and to Kerry in this: That he did not have bona fide subscribers for the balance of the shares, and in the further particular that he had an option on the land at \$6.50 per acre, and intended to wrongfully make a secret profit upon the purchase of the land, which fact was unknown to the respondent and Kerry; that by reason of the fact that the appellant did not have bona fide subscribers for the remainder of such shares, and because of the other misrepresentations set forth, the enterprise failed of consummation; that, had the appellant's representations been true, the syndicate would have been organized, and Kerry would have paid for the shares which he subscribed; and that the reasonable value of 100 shares is \$950. The conclusion of law deduced was that the respondent was entitled to a judgment against the appellant for \$950, together with his costs, and a judgment was entered accordingly.

These findings are abundantly supported by the evidence. The plan proposed was that each share of stock should represent one acre of land. The testimony shows that the appellant was to give the respondent 100 shares of stock in a corporation to be organized by the former, or to give him its equivalent in money. The appellant represented that his commission on the basis pro-

posed would be \$3,000, whilst the testimony shows that it would have been about \$30,000. It further appears from the testimony that the appellant represented to the respondent that the 3,000 shares subscribed by Kerry at the instance of the respondent would complete the stock subscription, and that Kerry was ready, able, and willing to pay his subscription, if the appellant's representations had been found true. The respondent had no employment other than to secure a subscription of 3,000 shares. There was no arrangement whereby he was to be a party to the organization of the corporation. The duty of organizing the corporation and issuing the 100 shares of its stock to the respondent, or paying him its equivalent in money, was devolved by the transaction upon the appellant alone. The enterprise failed of consummation because he did not have the bona fide subscribers which he represented to have, and because of his misrepresentations as to the commission he would make out of the enterprise, and as to the value of the land. The respondent did all that he was required to do when he had procured the subscription. The enterprise failed, not because of anything the respondent failed to do, but solely in consequence of the misrepresentations of the appellant.

The appellant relies upon the recent case of *Watson v. Bayliss*, 128 Pac. 1061. The two cases have nothing in common. In that case it was alleged that the plaintiff and the defendant agreed to organize a corporation for the purpose of carrying out a certain business enterprise; and we held that, under the allegations of the complaint and the proof submitted in support thereof, there was no meeting of minds upon the substantial features of the corporation.

The judgment is affirmed.

CROW, C. J., and MOUNT and PARKER, JJ., concur.

(72 Wash. 268)

GENNAUX v. NORTHWESTERN IMPROVEMENT CO. et al.

(Supreme Court of Washington. Feb. 24, 1913.)

1. MASTER AND SERVANT (§ 286*) — ACTION FOR INJURIES—QUESTION FOR JURY—NEG- LIGENCE.

On evidence in a miner's action for personal injuries from rocks alleged to have fallen from the roof of an adjoining chute as a result of the negligent condition in which it was left, held, that the question of negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 125*) — SAFE PLACE FOR WORK—KNOWLEDGE OF MASTER—KNOWLEDGE OF FOREMAN.

The knowledge of the mine foreman and the fire boss of a mining company that a set-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ting of a roof had set in was notice to the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

3. MASTER AND SERVANT (§ 124*) — SAFE PLACE FOR WORK—DUTY OF INSPECTION.

Where a miner was expected to work right up to the line of a certain chute which he was not supposed to enter or inspect, it was the company's continuing duty to inspect and to keep that adjacent space in a safe condition for work, so long as its unsafe condition would endanger men in adjacent workings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

4. MASTER AND SERVANT (§ 150*)—MASTER'S LIABILITY—WARNING—FAILING TO INSPECT AND KEEP SAFE SPACES IN A MINE.

It was the company's continuing duty to warn men in mine workings of the danger from an adjacent chute, that they might take steps to protect themselves.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.*]

5. MASTER AND SERVANT (§ 211*)—ASSUMPTION OF RISK—PLACE NOT UNDER SERVANT'S CONTROL.

Plaintiff, a minor, did not assume the risk of dangers in his place of work resulting from the condition of adjacent workings not under his control, nor subject to his inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. § 211.*]

6. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—DANGEROUS PLACE—MINES.

The rule that, where during the work conditions are constantly changing, a servant, knowing of such change, accepts the risks ordinarily incident thereto, has no application to a settling of the roof in an adjoining chute, of which plaintiff at work in an adjacent space had no knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

7. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—PLACES FOR WORK.

Where there was no evidence except the falling of a roof that the injury therefrom to plaintiff was caused by the insecure placing of the props thereto, and the cause of its fall was a question for the jury, contributory negligence as a matter of law was not established.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 311*)—LIABILITY OF SERVANT—FELLOW SERVANTS.

A mine foreman having the direct supervision of the mine, who knew of the dangerous condition of a chute, took no steps to remedy it, and failed to warn plaintiff, working in an adjacent space, of its existence, was guilty of personal negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

9. MASTER AND SERVANT (§ 254*) — ACTION FOR INJURIES—PARTIES.

The negligence of a mine foreman was the negligence of the mining company, and he and the company were liable as joint tort-feasors who might be joined as defendants in the same action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 808; Dec. Dig. § 254.*]

10. MASTER AND SERVANT (§ 311*)—LIABILITY OF SERVANT—FELLOW SERVANT.

Where the general superintendent of a mine was not shown to have a duty of personal inspection of the underground workings or to have had actual knowledge, or knowledge on information, as to its unsafe condition, he was not liable to a minor injured thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

11. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

A verdict of \$18,000 to plaintiff, a strong, well man of 29 years of age, capable of earning \$4 a day as a coal miner, for injuries rendering him a cripple for life, with his left leg atrophied, and almost completely paralyzed with little control of his urinary organs, and suffering constant pain, with little hope of recovery, and able to earn practically nothing, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Edmond Gennaux against the Northwestern Improvement Company, William Lawrence, and T. T. Edwards. Judgment for plaintiff against defendants jointly, and they appeal. Affirmed as to defendants Northwestern Improvement Company and William Lawrence, and reversed, with directions to dismiss as to defendant Edwards.

C. H. Winders, of Seattle, for appellants. Vanderveer & Cummings, of Seattle, for respondent.

ELLIS, J. This is an appeal from a judgment entered upon a verdict against the appellants jointly in favor of respondent for \$18,000 damages for personal injuries sustained by the respondent while employed by the appellant Northwestern Improvement Company as a miner in one of its coal mines at Ravensdale, Wash. The appellants Lawrence and Edwards were, respectively, mine foreman and general mine superintendent. The careful and dispassionate manner in which the case was tried by counsel on both sides renders an inherently complicated situation comparatively easy of statement. In the mine in question the coal lies in a vein about six feet thick, tilted in an upward pitch of about 30 degrees. The mine is entered by a slope sunk on the vein from which, at the various levels, counters and gangways are run at right angles. From these counters and gangways chutes about 10 feet wide are drifted upward, dividing the vein at intervals of 30 to 50 feet. These chutes are connected at intervals of about 50 feet by passages for ventilation called cross-cuts. The miners worked in pairs, each pair digging a chute and the adjacent half of the cross-cuts to the chutes on either side. The coal in the vein is thus blocked into irregular segments called pillars, extending from the gangway upward to the end of the vein or working. These pillars contain about 75 per cent. of the coal in the vein, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and apparently in chute 26 above the cross-cut, and immediately thereafter was knocked senseless. His partner testified that he heard a sound as of something falling in chute 26 on the opposite side of the stump of coal from where he was working, causing a jar so violent as to shake the body of coal and cause pieces to fall therefrom on his side; that he at once went to the respondent, and found him almost covered by rocks and debris, with a large rock on his legs, which he rolled off; that one of the props was down, and there was a hole in the roof immediately above respondent, about a foot or eighteen inches deep, and three, four, or possibly five feet square, from which some of the roof had fallen; that while he was extricating the respondent some rocks rolled down from above in chute 26 and onto respondent's place of work. After the accident there were about two car loads, or over four tons, of rocks and debris lying in chute 26 opposite the eighth cross-cut and extending over into the cross-cut and onto respondent's place of work. There was no evidence of a fall of roof in chute 26 over this pile. The undisputed evidence shows that all of this rock could not have come from the respondent's own roof, as the hole there was not large enough to have furnished it. The prop which was down had stood within less than three feet of the line of chute 26, and it is respondent's contention that it was knocked down by stones rolling from a fall of roof a short distance up 26 down the incline, and deflected by posts or other rocks into the respondent's workings. The mine was in absolute darkness but for the oil lamps worn upon the miners' caps, which, the evidence shows, threw a light but for a distance of six or seven feet.

[1; 2] The negligence charged in the complaint is that rocks fell from the roof of chute 26 above cross-cut 8 as a result of the careless and negligent condition in which it was left, and rolled with the pitch across the respondent's workings, injuring him; that the place was under the supervision and control of the appellants Lawrence and Edwards, who knew of the danger, but failed to warn the respondent of it. The answer denied the allegation of negligence, and set up, as affirmative defenses, assumption of risk, contributory negligence, and negligence of fellow servants. At appropriate stages of the trial motions were made for nonsuit as to each of the defendants for judgment notwithstanding the verdict as to each defendant, and for a new trial as to each. The overruling of these motions are assigned as errors.

It is first contended that there was no proof of negligence. It is, of course, conceded that the respondent was injured by a fall of rock; but the appellants contend that there was no evidence that it came from chute 26. Stress is laid upon the respondent's testimony that it all happened in the

"clap of a hand," and that of his partner that it happened in the "flash of an eye." They did assent to questions so worded on cross-examination, but this was manifest hyperbole. The men were foreigners, expressing themselves with some difficulty, and from their whole testimony it is plain they merely meant that the catastrophe covered but a short interval of time. The respondent testified that he heard the noise in chute 26, and thought the rock came from there. This, together with the undisputed fact that upon and near the respondent's place of work immediately after the accident were some four tons of rocks which no one testified were there before, and his partner's testimony that there was a sound and jar as of a fall in chute 26 sufficient to shake the stump of coal from 6 to 10 feet thick, was certainly persuasive evidence that rocks coming from a fall in 26 rolled upon the respondent's place of work, knocked out the prop, and caused whatever fall there was from his own roof. The evidence is conclusive that rocks had before been falling in the upper end of 26, that a "squeeze" or settling of the roof there had already set in, and that the fire boss and Lawrence, the mine foreman, knew of this condition. Their knowledge was notice to the company. It is urged that where the rocks causing the injury came from was a matter of mere conjecture. It was no more conjectural than any other fact depending upon circumstantial evidence. They could have come but from one of two places, either from chute 26 or from respondent's own roof; and the positive evidence as to the sound of a fall in 26 immediately prior to the accident and of large masses of rock upon and near respondent's place which could only have come from 26, and that other rocks rolled down from 26 onto respondent's place of work while his partner was removing him, was evidence which, considering the admitted bad condition of chute 26 above cross-cut 8, was sufficient to take the case to the jury upon this question.

[3] It was admitted that respondent and his partner were expected to work right up to the line of chute 26, which chute they were not supposed to enter or inspect. It was therefore the appellant's duty to inspect and keep that adjacent space in such condition as not to cause injury to these men. *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244. This duty was not at an end when the miners in 26 had finished there. The duty continued so long as an unsafe condition in 26 would be an unnecessary menace to men in adjacent workings.

[4] The duty to inspect and keep safe or to warn these men of the danger that they might take steps to protect themselves was a continuing duty of the master. No warning of any kind was given. The question of fellow servant is not involved. *Shannon v. Consolidated, etc., Min. Co.*, 24 Wash. 119, 64

Pac. 169; McKenzie v. North Coast Colliery Co., *supra*; Uren v. Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174; McMillan v. North Star Min. Co., 32 Wash. 579, 73 Pac. 685, 98 Am. St. Rep. 908; Costa v. Pacific Coast Co., 26 Wash. 138, 66 Pac. 898. The fire boss had inspected the mine on the morning in question, knew of the dangerous condition of chute 26, but neither warned these men who were working right up to its margin, nor posted any notice of danger upon the bulletin board. Lawrence, the pit boss or mine foreman, had gone through the mine, knew of the dangerous condition of chute 26, knew that a squeeze had there set in, but neither warned those men nor took any step to remedy the conditions. The evidence was uncontradicted that it was his duty to supervise the workings, and to see that the methods employed by the men were safe. The respondent testified that no one ever warned him of this danger, and there is no evidence that any one ever did warn him or that he knew of it.

[5] He did not assume the risk of dangers in his place of work resulting from the condition of adjacent workings, not under his control nor subject to his inspection. This case falls directly within the rule announced in McKenzie v. North Coast Colliery Co., *supra*.

[6] Appellants cite many cases holding that where, in the operations of the work, conditions are constantly changing and the employé knows it, he accepts such risks as are ordinarily incident to such operations. Cully v. Northern Pacific Ry. Co., 35 Wash. 248, 77 Pac. 202. That rule has no application here. The changed conditions in chute 26 were not due to work then in progress. It was due to a squeeze of which the appellant had knowledge but of which the respondent had neither knowledge nor warning.

[7] The respondent was not guilty of contributory negligence, unless the injury was caused by the insecure placing of the prop to his own roof which fell, and of this there was no evidence except that it fell. What caused it to fall was, as we have seen, under the evidence a question for the jury. Contributory negligence as a matter of law was not established.

[8] The evidence which we have discussed makes it plain that the appellant Lawrence was guilty of personal negligence. He had the direct supervision of this mine. He knew of the dangerous conditions, took no steps to remedy them, and failed to warn the respondent of their existence.

[9] His negligence was that of the company. He and the company were liable as joint tort-feasors, and may be joined as defendants in the same action. Shear. & Red. on Neg. (5th Ed.) § 122; Howe v. Northern Pacific Ry. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; McHugh v. Northern Pa-

cific Ry. Co., 32 Wash. 80, 72 Pac. 450; Morrison v. Northern Pacific Ry. Co., 34 Wash. 70, 74 Pac. 1064.

[10] As to the appellant Edwards, the evidence presents a different aspect. He was general superintendent, not alone of this mine, but of all of the company's mines in that locality. While he had a general supervision, there was no evidence showing a duty of personal inspection of the underground workings on his part. There was no evidence that he had actual knowledge of the condition of chute 26, or that either the fire boss or mine foreman had reported these conditions to him. As to him the action should have been dismissed.

Several assignments of error were based upon the court's instructions. We have read these instructions with care, and find that, as a whole, they correctly presented the law as applied to the evidence. We find no prejudicial error in the instructions.

[11] Finally, it is contended that the verdict was excessive. At the time of the injury the respondent was a strong, well man, 29 years old. He is now by reason of the accident a cripple for life. He was capable of earning as a coal miner an average of \$4 a day. He can now earn practically nothing. His left leg is atrophied, and almost completely paralyzed. He has little control of his urinary organs, and suffers constant pain. There is little hope of relief from any of these conditions so long as he lives. While the verdict seems large, we cannot say, in view of the respondent's helpless and hopeless condition, that it is unreasonable. McKenzie v. North Coast Colliery Co., *supra*; Murphy v. Pacific Telephone & Tel. Co., 68 Wash. 648, 124 Pac. 114.

The judgment is affirmed as to the appellants Northwestern Improvement Company and William Lawrence. It is reversed, with directions to dismiss as to the appellant Edwards, who is entitled to his costs.

MOUNT, MAIN, MORRIS, and FULLERTON, JJ., concur.

(72 Wash. 420)

STATE v. CHERRY POINT FISH CO.

SAME v. CARLISLE FISH CO.

(Supreme Court of Washington. March 11, 1913.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW.

Where there is substantial evidence to sustain a conviction, it will not be set aside on appeal, because the evidence appears to the Supreme Court to preponderate in favor of the defendants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. FISH (§ 18*)—FISHING—REGULATION—STATUTES—VIOLATION—INTENT.

In a prosecution for violating Rem. & Bal. Code, § 5186, requiring all fish traps, weirs, etc., to be closed, by an apron placed across

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the entrance to the heart of the trap or net, between 4 o'clock p. m. on Friday and 4 o'clock a. m. on Sunday of each week, and making a violation thereof a misdemeanor punishable by a fine or imprisonment, it is not necessary that the state prove a specific intent to violate the act; it being sufficient that the fact showed the omission to close their traps in the manner prescribed by the act.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 22-24; Dec. Dig. § 13.*]

3. FISH (§ 15*)—TAKING BY TRAPS—REGULATION—"TAUT"—"EFFECTUALLY PREVENTING."

Rem. & Bal. Code, § 5186, requires all fish traps, in any of the open waters of Puget Sound, to be closed between 4 o'clock p. m. Friday and 4 o'clock a. m. Sunday of each week by an apron placed across the entrance to the heart of the trap fastened by rings not more than four feet apart on a taut wire stretched from the top to the bottom of piles, so as to effectually prevent any salmon from entering the heart of the trap or net. *Held*, that the word "taut" should not be construed as meaning substantially and practically tight, and the phrase "effectually preventing" as meaning substantially and practically preventing salmon from entering the net, but should be construed according to their natural and accepted meanings; and hence an instruction that, if defendants equipped their traps with aprons in the manner prescribed, they would not be guilty, though some space or opening was left between the lead and the apron by reason of the action or force of the tide, and that some fish could pass into the trap through such space or opening, was as favorable to defendants as they were entitled to.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 27-30; Dec. Dig. § 15.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

Refusal of requests to charge is not error, where, so far as they were material, they were included in the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. CRIMINAL LAW (§ 834*)—REQUEST TO CHARGE—LANGUAGE OF INSTRUCTION.

It is not error to refuse to charge in the language and form requested, though both be unobjectionable; the court being authorized to instruct in its own language..

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

6. FISH (§ 15*)—FISH TRAPS—REGULATION—EVIDENCE—REBUTTAL.

Where, in a prosecution for violating Rem. & Bal. Code, § 5186, requiring all fish traps in the open waters of Puget Sound to be closed with an apron between certain hours, defendants introduced evidence that the opening found in the aprons to their traps during the prohibited hours was the inevitable result of the plan on which the traps were constructed to comply with the statute, and not to faulty construction, evidence that similar traps in the same waters, constructed on the same plan, effectually prevented the entrance of salmon into the heart of such traps, when the aprons thereto were closed, was admissible in rebuttal.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 27-30; Dec. Dig. § 15.*]

7. CRIMINAL LAW (§ 369*)—EVIDENCE—RELEVANCY.

In a prosecution for violating Rem. & Bal. Code, § 5186, requiring fish traps in the open waters of Puget Sound to be closed during certain hours of each week by an apron from the mouth of the trap supported by ca-

bles, evidence that the wire cables supporting the aprons on one of defendants' traps were examined by the witness a week previous to the time specified in the information, and found to be in a slack condition, and not drawn as tight as they reasonably could have been, was admissible to show their condition at the time specified, and was not objectionable as tending to prove a distinct offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

Mount, J., dissenting.

Department 2. Appeal from Superior Court, Whatcom County; John A. Kellogg, Judge.

The Cherry Point Fish Company and the Carlisle Fish Company were convicted of violating Rem. & Bal. Code, § 5186, requiring all fish traps to be closed between 4 o'clock p. m. Friday and 4 o'clock a. m. Sunday of each week, and they appeal. *Affirmed*.

Charles A. Sather, of Bellingham, and Kerr & McCord, of Seattle, for appellants. Frank W. Bixby and H. C. Thompson, both of Bellingham, for the State.

FULLERTON, J. The statute regulating salmon fishing in the waters of Puget Sound in the state of Washington, among other things, provides that: "It shall be unlawful * * * to take or fish for salmon with pound nets, fish traps, weirs, or fish wheels, or other fixed appliances, * * * in any of the open waters of Puget Sound, between the hours of 4 o'clock p. m., Friday, and 4 o'clock a. m., Sunday, of each week of each year. * * * That between 4 o'clock p. m., Friday, and 4 o'clock a. m., Sunday, of each week of each year, as above provided, all pound nets or fish traps operated within the waters of Puget Sound shall be closed by an apron placed across the entrance to the heart of the trap or pound net, which apron shall extend from above the surface of the water to the bottom of the sound at the place where the trap is maintained and be connected securely to the piles on either side of the entrance to the heart of such trap or pound net, fastened by rings not more than four feet apart on a taut wire stretched from top to bottom of piles so as to effectually prevent any salmon from entering the heart of such trap or pound net. Any person violating any of the provisions of this section, whether or not such a violation is otherwise specifically declared to be a misdemeanor, either by neglecting to observe the requirements of this section, or by violating any of the requirements thereof shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in each and every offense be subject to a fine of not less than two hundred and fifty dollars (\$250) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not less than twenty-five days nor more than one year, or by both such fine and imprisonment." Rem. & Bal. Code, § 5186.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On September 29, 1911, the prosecuting attorney of Whatcom county filed separate informations against the appellant corporations, the Cherry Point Fish Company and the Carlisle Fish Company, charging each of them with maintaining a fish trap and fishing for salmon between the hours of 4 o'clock p. m. on Friday August 11, 1911, and 4 o'clock a. m. Sunday, August 13, 1911. The informations were similar in form; the specific charge in each of them being that the defendant had maintained the trap by "then and there unlawfully and wilfully neglecting to close the entrance to the heart of the said fish trap * * * by then and there unlawfully and wilfully so placing the apron at the opening to the heart of said trap that space was left on the side next to the lead for the free entrance of salmon fish," during the hours in which the statute required the opening to the heart of the trap to be closed.

The defendants, on being brought into court to answer to the informations, demurred thereto, which demurrers the trial court overruled, whereupon they entered pleas of not guilty. The parties thereupon stipulated that the causes should be consolidated for trial before a single jury as one cause, except that separate verdicts should be returned by the jury for or against each defendant. An order of consolidation was entered, and the cause tried before a single jury, as stipulated. The jury returned a verdict of guilty against each of the defendants, on which a judgment was entered imposing upon them a fine of \$250. From the judgment, this appeal is prosecuted.

[1] The appellants first assign error on the ruling of the court denying their motion for a directed verdict. It is not contended that there is not competent evidence in the record tending to support all of the material allegations of the information; but it is thought that "an examination of the testimony, both the plaintiff's witnesses and the defendants' witnesses, will convince the court, beyond a reasonable doubt, that there was no opening between the apron and the lead on the flood side of either of the traps in question at the times claimed," such as is alleged in the information. In response to the appellants' suggestion, we have examined the evidence; and, while it has failed to convince us, beyond a reasonable doubt, that the apron effectually closed the hearts of the traps at the time in question, we are impressed with the idea that the jury could well have found with the appellants on the question. Indeed, we may go further and say that the evidence to our minds preponderates in favor of their contention. But, nevertheless, we have no legitimate warrant to interfere with the verdicts. There is in the record the positive evidence of three witnesses who visited the traps on the day in question, to the effect

that the aprons placed over the openings to the hearts of the traps did not effectually close them; that at the one they propelled their rowboat into the heart of the trap passing through an opening between the apron and the lead, and found fish in considerable numbers within the trap; and that the other was in a similar condition, although the opening between the lead in the apron was perhaps not quite so wide. They testify also to the general conditions surrounding the traps, showing, if their evidence is to be believed, a clear violation of the statutes. This, as we say, relegates the question to the jury, and renders their verdict conclusive, in so far as this court is concerned; it not being our province to interfere with a verdict which is sustained by substantial evidence. *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Norris*, 27 Wash. 453, 67 Pac. 983; *State v. Roller*, 30 Wash. 692, 71 Pac. 718; *State v. Bailey*, 31 Wash. 89, 71 Pac. 715; *State v. Katon*, 47 Wash. 1, 91 Pac. 250; *State v. Clem*, 49 Wash. 273, 94 Pac. 1079; *State v. Gilluly*, 50 Wash. 1, 96 Pac. 512.

[2] The court instructed the jury, in effect, that a specific intent to violate or evade the statute regulating the construction and maintenance of fish traps was not necessary to constitute an offense under the statute; but on the contrary, if they found that the appellants were guilty of the acts of commission or omission charged against them in the informations, they could be found guilty of the offense charged therein, regardless of their purpose or intent in committing the prohibited acts. The appellants assail the instruction for a number of reasons; but we think it correct in principle. It is not here denied, of course, that, where a specific intent is required by statute to constitute an offense, such specific intent is a part of the offense, and must be alleged and proven before a conviction can be had. But where the statute makes it an offense to do a particular thing, and, like the one before us, is silent concerning the intent with which the thing is done, a person commits the offense when he does the forbidden thing, even if he had no evil or wrongful intent beyond that which is implied from the doing of the prohibited act. This principle was announced by us in the case of *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088, wherein this language was used: "Nor does the lack of intent excuse the offense. While it is an axiom of the law that there can be no crime without criminal intent, there are many cases where the execution and enforcement of the law demand that the intent be implied; a presumption flowing from the acts of the parties. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word 'knowingly' or other apt words are not em-

ployed to indicate that knowledge is an essential element of the crime charged. In the statute before us, no qualifying words are employed. One who sells, gives, or barter intoxicating liquor to an Indian or one of mixed blood is guilty. The fact of selling being established, the law supplies the element of intent." There are cases to the contrary; but we think the great weight of authority and the better reason supports the rule as we have announced it. *State v. Henzell*, 17 Idaho, 725, 107 Pac. 67, 27 L. R. A. (N. S.) 159; *United States v. Gallant* (D. C.) 177 Fed. 281; *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800; *Commonwealth v. N. Y. Cent. & H. R. R. Co.*, 202 Mass. 394, 88 N. E. 764, 23 L. R. A. (N. S.) 350, 132 Am. St. Rep. 507, 16 Ann. Cas. 587; *Farmer v. People*, 77 Ill. 322; *State v. Voight*, 90 N. C. 741; *State v. Goodenow*, 65 Me. 30.

[3] The court, further instructing the jury, defined the meaning of the words "taut" and "effectually," used in the statute, giving to them the meaning usually accorded the words in the standard dictionaries. The appellants contend that the text of the act of the Legislature, from which the words are taken, shows that the Legislature did not use the words in their formal and technical sense, but gave to them a more liberal meaning, using the word "taut" as meaning "substantially and practically tight," and the phrase "effectually preventing" salmon from entering the heart of the trap as meaning "substantially and practically" preventing them from so entering. But, without following the argument by which the appellants seek to justify the contention, we think it not tenable. We find nothing in the text of the act that leads us to believe that the Legislature intended to use the words in question in other than their natural and accepted meanings; and we think the court did not err in so instructing the jury. But that the jury might not be misled by the language of the definitions read to them, this further instruction was given, namely: "You are instructed that if you find from the evidence in this case that the defendants, or either of them, used and maintained, in the construction and maintenance of the aprons across the entrance to the hearts of the fish traps operated by them, the appliances required by the law of this state, which I have hereinbefore read to you, then I instruct you that the use and maintenance of such appliances, if it complies with the method and manner prescribed by law, amounts to a compliance with the law; and, even if you should find that the appliances provided by law do not in fact effectually prevent the entrance of fish into the heart of such trap, then you are instructed that such defendant, who has complied with the law, cannot be found guilty of the offense charged in the information. And you are further instructed that if you find from

the evidence in this case that the defendants, or either of them, installed and maintained the appliances required by the law of this state, which I have hereinbefore read to you, and that the wire or cable, to which the apron across the entrance of the heart of the trap was attached by rings not more than four feet apart, was drawn as taut or tight as it could reasonably be drawn, consistent with the proper manipulation of such apron in raising and lowering the same, then I instruct you that such defendant cannot be found guilty of the offense charged in the information herein, even though the evidence may show that, notwithstanding the compliance of such defendant with the law of this state, some space or opening was left between the lead and the apron by reason of the action and force of the tide, and that some fish could pass into the heart of the trap through this space or opening." Clearly this view of the requirements of the statute is as favorable to the appellants as a proper construction of the same warrants.

The appellants have also assigned error on the instruction of the court relating to the size of the wire cables used to hold the apron in place, contending that there was no evidence upon which to base such an instruction. But we find there was evidence touching this question; indeed, a part of the cable itself was exhibited to the jury. So in regard to the instructions concerning the testimony of the expert witnesses. The court therein stated nothing more than the general rules governing the weight and credibility to be given to such evidence; and to do so is not to charge the jury with respect to matters of fact, nor to comment thereon, within the meaning of the constitutional inhibition.

[4] The assignments of error based on the refusal of the court to give certain requested instructions need no separate consideration.

[5] In so far as they were material, they were included in the instructions given by the court, and, under the practice in this state, it is not error to refuse to instruct in the language and form requested, even though both be unobjectionable; it being proper under all circumstances for the court to instruct in its own language.

[6] The witnesses Aiken, Dakin, and Jones were allowed to testify, in rebuttal, that, on the day they visited the appellants' traps, they visited traps in the same vicinity belonging to another fishing company, and found that the aprons thereon, which were constructed in the same manner that the aprons on the appellants' traps were constructed, remained in place and effectually closed the hearts of the traps. This is assigned as error; but we think it proper rebuttal testimony. The appellants had sought to show that the opening found in the aprons to their traps was the inevitable result of the plan upon which they were constructed, and not

to faulty construction. To rebut this testimony, it was competent for the state to show that similar traps in the same waters, constructed on the same plan, effectually prevented the entrance of salmon into the hearts of such traps when the aprons thereto were closed.

[7] Finally it is urged that the court erred in permitting a witness to testify that the wire cables supporting the apron on one of the traps were examined by him a week previous to the time mentioned in the information, and found them to be in a slack condition, and not drawn as tight as they could reasonably have been drawn. It is urged in this court that this was to admit evidence of a separate and distinct offense, in no way connected with the offense of which the appellants are accused, and hence erroneous. But the appellants mistake the effect of the testimony. As tending to show the condition of the cables at a particular time, it is competent to show their condition a reasonable time before, and a reasonable time after, the particular time; the admissibility of the evidence depending upon the remoteness of such time. The time to which the witness was permitted to testify was somewhat remote from the time informations alleged the offense to have been committed; but we do not think it so much so as to render its admission reversible error.

We find no substantial error in the record, and the judgment appealed from will stand affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

MOUNT, J. (dissenting). The defendant did not attempt to take fish within the prohibited time. They closed their traps in good faith, in the manner provided by law. If that method was not effective, the fault was in the law. The trial court should have directed an acquittal. I therefore dissent.

(72 Wash. 364)

KELLEY v. SAKAI et al.

(Supreme Court of Washington. March 6, 1913.)

1. JUDGMENT (§ 569*)—OPENING OR VACATING—OPERATION AND EFFECT OF DENIAL.

After judgment for plaintiff by default, defendant moved to vacate it for lack of service. The motion was denied because not supported by an affidavit of merits, and a second motion made for the same relief, presumably based on an affidavit of merits. This motion was denied on the ground that the matter had theretofore been adjudicated against defendant, and an appeal from the order of denial was dismissed for insufficiency of the record. *Held*, that an action to vacate the judgment could not be maintained; the order denying the second motion being conclusive that the validity of the judgment had been theretofore adjudicated, even though both motions were erroneously denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.*]

2. JUDGMENT (§ 569*)—OPENING OR VACATING—OPERATION AND EFFECT OF DENIAL.

An order denying a motion to vacate a judgment is a bar to any subsequent proceeding, either by motion or action, for the same relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.*]

3. JUDGMENT (§ 151*)—OPENING OR VACATING—PLEADING.

Where a petition in an action to vacate a judgment recovered by S. for lack of service alleged that S. was a fictitious character, that plaintiff did not know any such person, was not indebted to him, and at no time had contractual relations with him, the force of such allegations was destroyed by an allegation that defendants and each of them were residents of K. county.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 296-298, 727, 730; Dec. Dig. § 151.*]

4. JUDGMENT (§ 713*)—OPENING OR VACATING—OPERATION AND EFFECT OF DENIAL.

A claim that a judgment creditor was a fictitious character, that defendant was not indebted to him, and had no contractual relations with him, related to the merits of the case in which the judgment was rendered, and could not be raised in another action after the validity of the judgment had been adjudicated on a motion to vacate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

5. APPEAL AND ERROR (§ 675*)—RECORD—PRESENTATION OF GROUNDS OF REVIEW.

Whether a motion for a change of venue because of the prejudice of the trial judge was improperly denied could not be determined, where the record on appeal contained neither the motion nor the supporting affidavit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2875; Dec. Dig. § 675.*]

6. APPEAL AND ERROR (§ 912*)—RECORD—PRESENTATION OF GROUNDS OF REVIEW.

It could not be presumed that a motion for a change of venue because of the prejudice of the trial judge, dated before the date of the trial, but filed after the settlement of the statement of facts and not made a part thereof, was the same motion presented before the trial, the denial of which was complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3689; Dec. Dig. § 912.*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by H. G. Kelley against G. Y. Sakai and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 127 Pac. 107.

R. B. Brown and Thos. R. Horner, both of Seattle, for appellant. Hamlin & Meier, of Seattle, for respondents.

PARKER, J. The plaintiff commenced this action to procure a decree setting aside a judgment rendered against him in the superior court for King county, upon the ground that the judgment was rendered without any service of summons upon him. The trial court denied the relief prayed for and dismissed the action, being of the opinion that the validity of the judgment had been finally adjudicated against the contentions

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the plaintiff in former proceedings prosecuted by him in the superior court for King county, wherein he sought to have it set aside (66 Wash. 172, 119 Pac. 190). The plaintiff has appealed.

[1] The controlling facts touching the question of former adjudication appear beyond controversy in the pleadings. The trial court disposed of the cause upon these facts, rejecting offered evidence upon the other questions raised. These facts may be summarized as follows: In September, 1908, an action was commenced in the superior court for King county by respondent G. Y. Sakai against appellant, H. G. Kelley, to recover the sum of \$271.80 for services rendered. Thereafter proof of personal service of the summons and complaint upon appellant, plaintiff in this action, was made by affidavit of a private citizen. Thereafter appellant, having failed to appear and answer in that action within the time prescribed by law, was by the court adjudged to be in default, and thereafter judgment was accordingly rendered against him as prayed for. Referring to the judgment and proof of service, appellant alleges in his complaint: "That the said judgment so entered as aforesaid was fraudulently obtained, and is void for the following reasons, to wit: That said purported affidavit of personal service upon the defendant therein H. G. Kelley, plaintiff herein, is false and untrue, in that no service whatever was ever had upon said Kelley. * * *" About ten months after the rendering of the judgment, appellant moved the court to set aside the judgment, alleging as grounds therefor: "That the defendant H. G. Kelley was never served with process in this action, and the court was without jurisdiction to render judgment against said defendant." This motion was signed by his attorney, and was supported by the affidavit of himself attached thereto. Thereafter this motion, coming on for hearing, was by the court denied, the court in its order assigning as its reason therefor that the motion was not accompanied by an affidavit of merits. Thereafter appellant made another motion to vacate the judgment, alleging as grounds therefor the same facts in substance as in his first motion. This second motion stated that it was based upon the affidavit of H. G. Kelley, this appellant, filed therewith. We assume that this was an affidavit verifying the allegation of no service of summons, and also an affidavit of merits, though the affidavit does not appear in this record. Thereafter this second motion to vacate the judgment was regularly brought on for hearing before the court, when it was disposed of by the following order: "Now in open court, the above-entitled matter coming on for hearing and trial, Hon. Ben Sheeks, judge presiding, parties appearing, the plaintiff F. A. Gilman, his attorney, and the defendant, H. G. Kelley, in person and by A. P. Moran,

his attorney, said cause was heard and tried upon the motion of the defendant Kelley filed in this court on the 31st day of Dec., 1910, and the evidence of the respective parties being adduced and heard and the court being fully advised in the premises, it is hereby ordered that said motion be and the same is denied for the reason that the matters therein have been heretofore adjudicated against defendant, H. G. Kelley. To which order defendant Kelley excepted and exception allowed. Ben Sheeks, Judge. Dated January 27th, 1911." Thereafter H. G. Kelley, this appellant, appealed from that disposition of his second motion to this court, which appeal was thereafter dismissed because of the insufficiency of the record brought up to enable the court to review the correctness of the order. Our decision upon that appeal is reported in 66 Wash. 172, 119 Pac. 190. F. A. Gilman was made a defendant in this action because he filed and claimed a lien upon the judgment; he having been attorney for Sakai in that action.

Does the order of the superior court disposing of the second motion to vacate the judgment, and the dismissal of the appeal therefrom by this court, render final as against appellant the validity of the judgment here sought to be vacated? It seems to us that this question must be answered in the affirmative. It is manifest that both the first and second motions to vacate the judgment, as well as this action, all had the same object in view, to wit, the vacation of the judgment upon the ground that appellant had never been served with summons in the action. If we were here concerned with questions of error of the superior court in denying appellant's first and second motions to vacate the judgment, it is not impossible that both could be shown to have been erroneously denied. But we have no such question here, and could not have, because this is not an appeal or proceeding to review either of those orders. Of course, there was no want of jurisdiction in making them. Nor are we here concerned with the question of the finality of the first order as an original question. It will be noticed that the second motion was denied, for the reason that the questions raised thereby had theretofore been formally adjudicated against the appellant. We assume for argument's sake that the former adjudication there referred to was that made by the first order denying the motion to vacate, though we have nothing before us so showing. This second order was in any event a final adjudication upon the effect of the first order or possibly some other order or judgment. The exact nature of the order or judgment constituting the adjudication mentioned in the second order, however, is wholly foreign to the question here involved, because this second order finally adjudicated that there had been a former adjudication as to the validity of the judgment against ap-

pellant, and, as we have noticed, we are not here reviewing the correctness of the second order. That order was attempted to be reviewed on appeal, which, being dismissed, left it in full force and effect as an adjudication that there had been a former adjudication.

[2] It has become the settled law of this state by the repeated decisions of this court that an order denying a motion to vacate a judgment is a bar to any subsequent proceeding, whether it be by motion or an independent action seeking the same relief. The subject is noticed at some length in *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005, where our former decisions are reviewed. In the later case of *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, Justice Rudkin, speaking for the court, said: "In the case of *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955, it was held that our statute affords a full, complete, and adequate remedy against an illegal judgment by authorizing the aggrieved party to proceed by motion to vacate and set aside, and permitting an appeal from an order entered on such motion, and that one who has attacked a judgment by motion to vacate, and has failed to prosecute an appeal from a denial of his motion, cannot subsequently maintain an action to cancel the judgment, since the question of the validity of the judgment is *res judicata*. The doctrine announced in that case was reaffirmed in *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748, *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164, and in the recent case of *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159 [133 Am. St. Rep. 1005], and has become the settled law of this state." *Newell v. Young*, 59 Wash. 286, 109 Pac. 801, reaffirms this view. We are of the opinion that the order denying the second motion to vacate the judgment became a final adjudication as to the validity of the judgment against appellant.

[3] Some contention is made in behalf of appellant, upon the theory that the complaint alleges facts showing that there is no such person as the respondent Sakai; that, therefore, respondent Gilman had no authority to represent Sakai in procuring the judgment; and that appellant was entitled to introduce evidence so showing in this case. The only allegations of the complaint which could possibly be considered as tendering this issue are that: "Plaintiff believes that said Sakai is a fictitious character; that he does not know any such person as G. Y. Sakai; that he is not indebted to said Sakai in any sum whatever, and at no time had any contractual relation with him." If these allegations be deemed sufficient for the purpose claimed, their force is entirely destroyed by the first allegation of the complaint, reading as follows: "That the defendants and each of them are residents of said King county,

Wash., wherein this cause of action arose."

[4] Another answer to this contention is that these questions relate to the merits of the case in which the judgment was rendered. In its final analysis this contention is simply that appellant is not indebted to Sakai. That is the very question adjudicated against appellant by that judgment, which, as we have seen, has since been adjudged to be a valid judgment. It seems clear to us that these are not issues properly in this case.

[5] It is contended that the trial judge erred in denying appellant's motion for the transfer of the case to another department of the court, on account of the prejudice of the judge of the department where the case was pending. The court evidently denied the motion upon the ground that it was not timely made. No such motion was filed until long after the judgment of dismissal was rendered and the statement of facts settled. A motion of this nature seems to have been presented to the court just before trial without notice to or knowledge of respondent's counsel, which was at the same time denied by the court. The only record made of that motion and its disposition is the statement of the trial judge, embodied in the statement of facts made when he rendered his oral decision and directed entry of the judgment of dismissal, when counsel for appellant asked to have his exception to the denial of the motion noted. This was the first intimation counsel for respondents had that there had been any such motion. The judge then stated: "I do not think the statute requires that, when a motion for a change of venue is made, that motion must be served on the other party. I don't know whether it is the custom or not to do that. But for the benefit of the record I state that the motion was presented yesterday, and, as I stated this morning, I did not know that motion was being made until just at the commencement of the trial, and, if it had been made at the proper time the court would, of course, have complied with the statute and granted it." The statement of facts showing this was settled and certified July 26, 1912, at which time no other record of the presenting or disposition of the motion had been filed or made in the case. Taking this as the only proper record of the motion and its disposition, it is manifest that we cannot say the court committed error in denying it, since neither the motion nor the affidavit supporting it are before us to enable us to determine their sufficiency. If they were before us, it might appear that the attempted showing was not in compliance with the statute. We are inclined to agree with the trial court that the motion was not timely made in view of former proceedings in the cause before the same judge; but, even if the judge was in error as to his reason for denying the motion, it does not follow

that there may not have been other valid reasons for its denial. *Sakai v. Keeley*, 66 Wash. 172, 175, 119 Pac. 190.

[8] On September 23, 1912, long after the trial and rendering of the judgment and even two months after the settlement of the statement of facts, a motion, accompanied by affidavit in usual form asking for transfer of the case to another department, was filed with the papers in the case. This motion purports to have been dated before the date of the trial, but we have no means of knowing that it is the same motion presented to the judge before the trial, since it was not then of record, nor is it made part of the statement of facts. We cannot, upon this record, say that the trial court erred in denying appellant's motion for transfer of the case to another department of the court.

The judgment is affirmed.

CROW, C. J., and GOSE, MOUNT, and CHADWICK, JJ., concur.

(72 Wash. 415)

ARCHITECTURAL DECORATING CO.
v. NICKLASON et al.

(Supreme Court of Washington. March 11, 1913.)

APPEAL AND ERROR (§ 1207*)—JUDGMENT ON
APPEAL—CONCLUSIVENESS.

A defendant who, though a party to a former appeal, failed to present a question now relied on, cannot attack a judgment entered below after such appeal under direction of the Supreme Court, either by petition in the trial court to vacate such judgment or by independent action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4690-4699; Dec. Dig. § 1207.*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by the Architectural Decorating Company against Gustaf Nicklason and others. From a judgment dismissing a petition for an order vacating a judgment, defendant the Rose Theater Company appeals. Affirmed.

Wilson R. Gay, of Seattle, and E. J. Adams, of Eugene, Or., for appellant. John W. Roberts, of Seattle, for respondent.

PER CURIAM. This case is no stranger here. *Architectural Decorating Co. v. Nicklason*, 66 Wash. 193, 119 Pac. 177. It was brought to this court upon "a short record containing only the findings of fact, conclusions of law, decree, and two exhibits." The only question decided was whether the findings supported the decree. That question was decided against the Rose Theater Company, and the case was remanded with instructions to enter a decree in favor of the present respondent. Thereafter appellant filed a petition, praying for an order of the trial court vacating the judgment entered under the direction of this court. The peti-

tion was dismissed by the trial judge, and the case is brought here on appeal.

Appellant, having been a party to the former appeal and having then failed to bring the record, showing the facts it now sets up, to the attention of the court, and not having asked leave of this court to attack the judgment which was entered under our direction, cannot be heard either by way of petition or in an independent action under the authority of the following decisions: *Kath v. Brown*, 69 Wash. 306, 124 Pac. 900; *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1084; *Kelly v. Sakai*, 130 Pac. 503; *Cochrane v. Van de Vanter*, 13 Wash. 323, 43 Pac. 42; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443.

Affirmed.

(72 Wash. 376)

TAYLOR v. SPOKANE, P. & S. RY. CO.
(Supreme Court of Washington. March 8, 1913.)

1. EVIDENCE (§ 359*)—INJURY TO PASSENGER—
—ADMISSION OF EVIDENCE—PHOTOGRAPH.

In a passenger's action for injuries from a collision, a photograph taken of the car after the accident was competent to show the force of the impact as bearing upon the question whether plaintiff was actually injured upon the car.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

2. EVIDENCE (§ 123*)—RES GESTÆ—ADMISSIBILITY.

In a passenger's action for injuries from a collision, it was error to admit evidence that, after she was taken upon a street car some time after the collision, she heard statements relative to the injuries of another, where it did not appear either that the speakers or the other person injured were on the same car with her at the time of the collision, or that any officer of the company was present when the statements were made; such statements not being a part of the res gestæ.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

3. DAMAGES (§ 53*)—INJURY TO PASSENGER—
EVIDENCE—MENTAL DISTRESS.

In a passenger's action for injuries from a collision, it was error to admit evidence that after her injury she saw other passengers covered with blood; mental distress caused by sympathy for another's suffering not being a recoverable element of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. § 53.*]

4. TRIAL (§ 114*)—ARGUMENT OF COUNSEL—
ADMITTED ISSUES.

Where, in a passenger's action for injuries from a collision, defendant admitted negligence, it was error for plaintiff's counsel in his closing argument to discuss the question of negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 275-278, 296; Dec. Dig. § 114.*]

Crow, C. J., dissenting. Morris and Chadwick, JJ., dissenting in part.

En Banc. On Rehearing. Judgment for plaintiff reversed.

For former opinion, see 67 Wash. 96, 120 Pac. 889.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MOUNT, J. A rehearing was granted in this case, and it has been reargued to all the judges sitting en banc. A fair statement of the facts was made in the original opinion, which may be found in 67 Wash. 96, 120 Pac. 889. The facts need not be restated here.

[1] Upon this rehearing, we have concluded that a new trial must be granted for the errors hereinafter noticed. As stated in the former majority opinion, "appellant did not dispute its negligence; nor did it deny its liability for any injuries which may have resulted to respondent" on account of the collision of the appellant's trains. "The controlling question was the amount of damages to be awarded." The appellant denied that the injury which the respondent received was caused by the collision. In the former opinion the majority sitting on the first hearing said, in reference to certain photographs which were received in evidence, "We fail to see the materiality of the photograph, or that its admission was prejudicial." We are of the opinion now that this photograph was properly admitted to show the probable force of the impact of the train, because it is a well-known fact that a collision which will crush a car is reasonably certain to cause injury to passengers within the car. The force of the impact, therefore, is a material matter to be considered in determining whether or not the passenger was actually injured upon the car. A photograph taken of the car at the time is competent to show the result of the impact, the same as oral evidence of that fact. Maynard v. O. R. & R. Co., 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477.

[2, 3] We are satisfied, however, that the court erred in admitting in evidence the fact that, after the plaintiff was taken upon a street car, she saw there other passengers who were covered with blood and heard statements made by persons on the street car at that time. It was not shown that these persons were in the same car with plaintiff at the time of her injury, but it is shown that the injured man referred to in that conversation was brought out of the mail car, which was not the car in which the plaintiff was riding at the time of the collision. The statements were made some time after the accident and away from the scene of the accident, where no officer of the company was present. The respondent says, "The conductor said to him," but by that statement she plainly meant the conductor upon the street car, as the fact was, and she did not mean the conductor of the train which was wrecked. The conversation, therefore, could not have been a part of the res gestæ.

The fact that the plaintiff saw persons covered with blood upon the street car, and that the sight of mangled persons might cause a shock which would contribute to the plaintiff's condition, was wholly immaterial

and improper, because "mental distress caused by sympathy for another's suffering is not a recoverable element of damages." 8 Am. & Eng. Ency. Law (2d Ed.) 64. "Were the rule otherwise, the passenger in a railroad wreck might claim the right to recover, not only for the distress of mind which arose from his own injuries, but also for that which he sustained from contemplating the mangled condition of his fellow passengers. * * * Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96. The plaintiff was entitled to recover for the injuries inflicted upon her by the wreck, but not for that which took place or what she saw or heard upon the street car at some other place. All this evidence was therefore erroneously admitted.

[4] We are also satisfied that the closing argument of counsel for the plaintiff as noted in the majority opinion was prejudicial, and that the trial court should have required counsel to desist from discussing a question of negligence which was admitted in the case and should have instructed the jury to disregard it. If that were the only error in the case, we might agree that this was cured by the trial court when a reduction was made in the award of the jury; but, when we consider these "improper and inflammable" statements in connection with the erroneous evidence above referred to and in connection also with the fact that the trial court ordered a reduced verdict in the belief that it was excessive, we must conclude that the jury was influenced thereby and prejudiced to such an extent that the appellant did not have a fair trial before an impartial jury, and that a new trial should be granted. It is so ordered.

The judgment is reversed.

PARKER, ELLIS, FULLERTON, GOSE, and MAIN, JJ., concur.

MORRIS, J. I concur in the reversal, but I am still of the opinion, for the reasons expressed in my dissent to the first opinion, that the photographs were improperly received in evidence.

CHADWICK, J., concurs.

CROW, C. J. I dissent. The only question to be determined by the jury was the amount of damages to be awarded to the respondent. As stated in the original opinion: "The only possible effect of the misconduct of which appellant complains would be upon the amount of damages awarded. The trial judge, in the exercise of his discretion, reduced the damages awarded by the jury, and denied the motion for a new trial on condition that respondent consent to such reduction, which she did. The trial judge saw the respondent, knew her condition, heard the evidence and the arguments of counsel,

and in the exercise of his judgment and discretion concluded that the damages for which judgment was finally entered would not be excessive. He corrected any prejudicial effect that may have resulted to appellant either from misconduct of counsel or from rulings on the admissibility of evidence, even though such rulings be regarded as technically erroneous. The only purpose of a new trial in this action would be to fix compensatory damages to which the respondent is entitled. That purpose has already been accomplished, through the medium of the former trial, the verdict of the jury, and the final action of the trial judge." This being true, I am still of the opinion that the judgment should be affirmed.

(9 Okl. Cr. 16)

STATE v. LAWRENCE

(Criminal Court of Appeals of Oklahoma.
March 8, 1913.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 70*)—CRIMINAL LAW (§ 13*)—GAMING (§ 67*)—DISTRIBUTION OF GOVERNMENTAL POWERS—STATUTORY PROVISIONS—DEFINITION OF OFFENSE OF "GAMING."

(a) It is the exclusive province of the Legislature to declare what shall constitute a crime, but it is the duty of the courts to determine whether a particular act done or omitted is within the intendment of a general statute.

(b) The Legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces or is reasonably calculated to produce a certain defined or described result.

(c) Section 2782, Comp. Laws 1909, which provides that any person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, is guilty of a misdemeanor, is not void for uncertainty, but constitutes a valid provision of our law, and as such should be enforced.

(d) When the Legislature creates without defining an offense which was a crime under the common law, the definition of the crime given by the common law will be treated by the courts as though it were a part of the statute itself, and will render certain and definite that which might otherwise be uncertain and indefinite.

(e) Gaming has always been an offense at common law. A wager laid upon the result of any contest of chance, skill, or strength between men or beasts or men and beasts constitutes gaming.

(f) Bets publicly and openly made in the presence of and among an assembly of men, women, boys, and girls who are witnessing a game of baseball are prohibited by section 2782, Comp. Laws 1909.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70;* Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13;* Gaming, Cent. Dig. §§ 135-139; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3023-3028; vol. 8, p. 7668.]

2. CRIMINAL LAW (§ 304*)—INDICTMENT AND INFORMATION (§ 125*)—EVIDENCE—JUDICIAL NOTICE—DUPLICITY IN INDICTMENT.

(a) This court takes judicial notice of the fact that the game of baseball when properly conducted is an innocent public amusement, and constitutes the most entertaining and popular public pastime or sport of the American people.

(b) For an indictment held to be good which charged the offense of openly and publicly betting upon a game of baseball, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 295½, 700-717; Dec. Dig. § 304;* Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

Appeal from Bryan County Court; J. L. Rappolee, Judge.

R. J. Lawrence was prosecuted for openly and publicly betting on a game of baseball, in violation of Comp. Laws 1909, § 2782. A demurrer to the information was sustained, and defendant discharged, and the State appeals. Reversed and remanded.

J. T. McIntosh, Co. Atty., of Durant, for the State.

FURMAN, J. The information alleges that on the 27th day of April, 1911, in Bryan county, the defendant did "willfully and wrongfully commit an act which grossly disturbed the public peace, openly outraged public decency, and injured the public morals, by then and there, in the presence of and among divers and sundry persons assembled at a baseball game and consisting of men and women, boys and girls, bet the sum of five dollars with one Jake Sims on said game, and said betting and gambling was done publicly and openly in the presence of said persons so assembled." To this information the defendant filed a demurrer, upon the ground that the facts stated therein did not constitute a crime under the statutes of this state. The trial court sustained the demurrer, and ordered that the defendant be released from custody, to all of which the state excepted. The information in this case is based on section 2782, Comp. Laws 1909, which is as follows: "Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefore by this code, is guilty of a misdemeanor." Two questions are presented by this appeal. The first is as to whether or not the statute upon which this information is based is void for uncertainty. The second is as to whether or not the information is bad for duplicity.

[1] First. Our Constitution provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him, and have a copy thereof, and be confronted with the witnesses against him, and have compulsory

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

process for obtaining witnesses in his behalf, and that he shall have the right to be heard by himself and counsel. See Williams' Const. § 28. This provision of the Constitution would become nugatory if the Legislature could create a crime in such broad and indefinite language that a citizen charged with a violation of such statute would not know what he must prepare to defend against, and where the court and jury would be without a fixed standard to determine what acts would constitute such offense. Penal statutes ought not to be expressed in language so uncertain as to mislead or deceive the common mind. It may be stated as a general principle of criminal jurisprudence that penal statutes should be expressed in such language that every man of ordinary understanding may be able to know when he has committed a crime. If this be not true, then to a large extent the judicial would be substituted for the legislative department of the state. See *Ex parte Hunnicutt*, 7 Okl. Cr. 213, 123 Pac. 179.

We are satisfied that in sustaining the demurrer to the information in this case the trial court acted upon the views which have just been expressed. While these views are correct, yet it is equally true that, when a statute uses words and terms which are of settled legal meaning or which indicate offenses known to and defined by the common law, the statute is sufficient, and should be sustained. Greater certainty in describing an offense is never necessary than the nature of the subject-matter dealt with will reasonably admit. See *State v. Coyle et al.*, 130 Pac. 316, decided at the present term. Reasonable certainty is all that is required. It is true that the language of section 2782 is general, yet the words and terms which it uses in describing the offenses therein created are of settled meaning and indicate offenses well known to and defined by the common law. As every man is charged with knowledge of the law, we cannot see how it can be said that a person of ordinary understanding could fail to know what offenses were intended to be created by the section in question. But this statute has already been sustained by this court. In the case of *Stewart v. State*, 4 Okl. Cr. 564, 100 Pac. 243, 32 L. R. A. (N. S.) 506, this court in construing this very statute in express terms decided that where the Legislature creates, without defining an offense which was a crime under the common law, the common-law definition of the crime will be adopted, and will be considered as a part of the statute itself. The opinion is by Judge Richardson, who was then a member of this court. It considers this question exhaustively, and we think that the opinion is a magnificent and unanswerable piece of reasoning. We earnestly commend it to the careful consideration of the judges and lawyers of Oklahoma. It may be said that the opin-

ion in *Stewart's Case*, being based upon a state of facts involving a breach of the peace, is not decisive of the question presented by the information in this case, which alleges a state of facts which openly outraged public justice and decency, and which injured public morals. But a careful reading of the *Stewart Case* will show that the reasoning and the authorities cited apply with equal force to the allegations contained in the information now before us as they apply to the allegations contained in the information in *Stewart's Case*. Gaming has always been an offense at common law. A wager laid upon the result of any contest of chance, skill, or strength between men or beasts or men and beasts constitutes gaming. Mr. Blackstone says it is an offense of the most alarming nature, tending by necessary consequence to promote idleness, theft, and debauchery among those of the lower class, and that among persons of a superior rank it has frequently been attended with sudden ruin and destruction and abandoned prostitution of every principle of honor and virtue. See 4 Blackstone, p. 171.

Every appellate court in Christendom has characterized gaming as a crime against public decency and as being injurious to public morals, and as an offense which agitates and disturbs the public peace. This court has announced its views on this subject in no uncertain terms in the case of *James v. State*, 4 Okl. Cr. 587, 112 Pac. 944, 34 L. R. A. (N. S.) 515, 140 Am. St. Rep. 693. James had been convicted of keeping what was known as a "Turf Exchange," at which his patrons congregated and bet upon horse races run at another place. He was prosecuted under section 2422, Comp. Laws 1909. This court held that the conviction could not be sustained by virtue of section 2422, but the court went further, and said: "There is no doubt but that the making of bets and wagers in these exchanges constitutes gambling, and the exchanges themselves are common gambling houses, and are therefore nuisances per se. *Rex v. Rogier*, 1 B. & C. 272, 8 E. C. L. 117, 2 Dowl. & R. 431; *U. S. v. Dixon*, 4 Cranch, C. C. 107 [Fed. Cas. No. 14,970]; *Vanderworker v. State*, 13 Ark. 700; *State v. Layman*, 5 Har. (Del.) 510; *State v. Black*, 94 N. C. 809; *People v. Weithoff*, 51 Mich. 203 [16 N. W. 442], 47 Am. Rep. 557; *Anderson v. State* (Tex. App.) 12 S. W. 868. See, also, 14 Am. & Eng. Enc. L. p. 694, and cases there cited. They are such under our statutes. Under section 5771 of Snyder's Comp. L. Okla., their operation may be enjoined, they may be abated as provided in chapter 71 of said laws, and under section 2465 of said laws their operation constitutes a misdemeanor, and those who conduct them may be prosecuted criminally and have inflicted upon them the punishment prescribed by section 2032, but a

prosecution will not lie on an information based upon section 2422." We are of the opinion that section 2782 is not void for uncertainty and that it is valid and enforceable, and that any act which is willful and wrongful and which results in grossly disturbing the public peace, or openly outrages public decency, or injures public morals, is within its terms, and constitutes an offense against the laws of the state of Oklahoma.

[2] Second. The indictment is not bad for duplicity because it charges that the defendant did willfully and wrongfully commit certain acts which grossly disturbed the public peace, openly outraged public decency, and injured public morals. If the acts charged were of such a nature as to produce either one or all of the results mentioned, the offense would be complete. The information charged that the defendant publicly and openly and willfully and wrongfully and in the presence of and among divers and sundry persons, consisting of men, women, boys, and girls assembled at a baseball game, did bet the sum of \$5 with one Jake Sims on said game, and that this act grossly disturbed the public peace, openly outraged public decency, and injured public morals. This court takes judicial notice of the fact that the game of baseball, when properly conducted, is an innocent public amusement, and constitutes the most popular and entertaining public pastime or sport of the American people. It is known from one end of our country to the other as the great American game, and is patronized by all classes, conditions, and sexes of our people, both old and young. As gaming is recognized as a pernicious crime by the law, it logically follows that open and public betting on this game in the presence of and among men, women, boys, and girls when assembled to witness a game of baseball is injurious to public morals and outrages public decency, and tends to destroy the peace and tranquillity of the persons so assembled, and thereby disturbs the public peace. We do not desire to be understood as holding that a private wager upon the result of a baseball game, when not openly and publicly made, would constitute a violation of this provision of the statute.

We are therefore of the opinion that the trial court erred in sustaining the demurrer to the information in this case. The judgment of the lower court is reversed, and the cause is remanded, with directions to the county court of Bryan county to set aside its order sustaining the demurrer and discharging the defendant, and to reinstate this case upon its docket, and proceed with the trial of the same in accordance with the views herein expressed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(3 Okl. Cr. 40)

CLINE et al. v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1130*)—BRIEFS—FORM.

When typewritten briefs are filed in this court, they should be so prepared that they may be read and understood by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. CONSTITUTIONAL LAW (§ 84*)—DISTURBANCE OF PUBLIC ASSEMBLAGE (§§ 1, 14*)—STATUTES (§ 241*)—PENAL STATUTES—ENACTMENT—"RELIGIOUS MEETINGS"—DISTURBANCE—RELIGIOUS LIBERTY—"RELIGIOUS SERVICE."

(a) The common-law doctrine of a strict construction of penal statutes has no place in the criminal jurisprudence of Oklahoma; but, on the contrary, such statutes must be liberally construed, and the fair import of their provisions must be accorded them, with a view to effect the objects for which they were enacted and to promote justice.

(b) As to whether or not a congregation of persons constitutes a religious meeting assembled for religious worship is always a question of fact to be determined by the jury from the testimony in each case and the instructions of the court.

(c) A "religious meeting" is an assemblage of people met for the purpose of performing acts of adoration to the Supreme Being, or to perform religious services in recognition of God as an object of worship, love, and obedience, it matters not the faith with respect to the Deity entertained by the persons so assembled.

(d) The crowning glory of American freedom is absolute religious liberty and the unquestioned and untrammelled right of each person to worship God according to the dictates of his own conscience, without let or hindrance from any person or any source whatever.

(e) The law affords equal protection to the religious views, rights, and forms of worship of all denominations, all classes, and all sects, and does not undertake to state of what they shall consist, or how such services shall be conducted.

(f) The celebration of the birth of Christ is a "religious service" in commemoration of an event upon which the hopes and destinies of all Christendom depends.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 152-154; Dec. Dig. § 84;* Disturbance of Public Assemblage, Cent. Dig. §§ 1-5, 16; Dec. Dig. §§ 1, 14;* Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

For other definitions, see Words and Phrases, vol. 7, p. 6064.]

Appeal from Pottawatomie County Court; Ross F. Lockridge, Judge.

Joe Cline and Ellis Cline were convicted in the county court of Pottawatomie county, charged with the offense of disturbing religious worship. The punishment of appellant Joe Cline was assessed at a fine of \$50 and 10 days confinement in the county jail. The punishment of appellant Ellis Cline was assessed at a fine of \$25 and 10 days confinement in the county jail. Appealed. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The evidence in this case may be stated in narrative form, as follows: On the evening of the 24th day of December, 1910, there was a Christmas tree celebration in a public school building in Pottawatomie county, which building was used both as a schoolhouse and also as a churchhouse. The meeting in question was held under the auspices of the Methodist denomination. The exercises were to consist of distributing presents from a Christmas tree, recitations by Sunday school scholars, and an address or sermon upon the life of Christ by Rev. Mr. Cross, the Methodist preacher in charge of that station. The meeting was opened by singing. The schoolroom was about 30x50 feet, and was full of men, women, and children. While Mr. Cross was speaking with reference to the birth of Christ and asking the Sunday school children some questions, some one in the rear of the room threw a pecan at the preacher, and great confusion was created by a number of young men in the rear of the building. Mr. Cross asked the question as to where Jesus was born. Some one among the young men in the rear of the building answered, "at Waco." It appears that Waco was the name of a store in this neighborhood. So much noise was made by the young men in the rear of the building, and the meeting was so much disturbed thereat, that Mr. Cross was not able to conclude his remarks, and was compelled to take his seat. Several persons were requested to go back in the rear of the building and get the names of those who were creating the disturbance. As a result of this a fight ensued, in which the appellant Joe Cline participated, and the appellant Ellis Cline used the most shocking profanity. The testimony shows that great confusion resulted from this disturbance, in which both of the appellants participated.

A. J. Carlton and Baldwin & Pitman, all of Tecumseh, for appellants. Charles West, Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First. The briefs filed in behalf of appellants in this cause are so badly typewritten, indistinct, blotted, and blurred as to be almost unintelligible. For the purpose of saving expense to their clients, we are perfectly willing to permit lawyers to file typewritten briefs; but these briefs should be so prepared that they may be readily read and understood by the court. It is an abuse of the privilege to file typewritten briefs to prepare them in such manner that they cannot be easily read. We have had so much trouble with indistinct typewritten briefs that we are seriously considering the proposition of requiring all briefs to be printed, and will be forced to do so if counsel do not exercise more care in the future in this matter. We will either have to adopt this rule, or we will be forced to strike from the rec-

ords all briefs which are not clearly typewritten and treat the cases in which they are filed as having been submitted without briefs.

[2] Second. After spending nearly two days in trying to find out from the indistinct briefs filed just what the contentions of counsel for appellants are, we think that their position may be summed up in the proposition that the meeting at which the disturbance complained of occurred was simply a Christmas festival; and that, as such, it did not constitute a religious meeting, within the meaning of our statute. Counsel for appellants have cited authorities from a number of states supporting this view; but they have overlooked the fact that in each of the states from whose opinions they quote the common-law doctrine of a strict construction of penal statutes prevails, and that the opinions upon which they rely are based upon this doctrine. An entirely different rule in the construction of penal statutes exists in Oklahoma. Section 2027, Comp. Laws 1909, is as follows: "The rule of common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Let us now apply the doctrine of a liberal construction to the statutes upon which this prosecution is based and accord to all of their provisions the fair import of their terms, with a view to effect the objects for which they were enacted and to promote justice. This is just what we are required to do by section 2027, Comp. Laws 1909.

The offense of disturbing religious meetings is created and defined by sections 2072 and 2073, Comp. Laws 1909, as follows:

"Sec. 2072. Disturbing religious meetings.—Every person who willfully disturbs, interrupts or disquiets any assemblage of people met for religious worship, by any of the acts or things hereinafter enumerated, is guilty of a misdemeanor.

"Sec. 2073. Definition of disturbance.—The following are the acts deemed to constitute disturbance of a religious meeting: 1. Uttering any profane discourse, committing any rude or indecent act, or making any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting. 2. Exposing to sale or gift any ardent or distilled liquors, or keeping open any huckster shop within one mile of the place where any religious society or assembly shall be actually convened for religious worship, and in any other place than such as shall have been duly licensed and in which the person accused shall have actually resided or carried on business. 3. Exhibiting, within a like distance, any shows or plays without a license by the proper authority. 4. Engaging in, or aiding or promoting, within the

like distance, any racing of animals or gaming of any description. 5. Obstructing in any manner, without authority of law, within the like distance, the free passage along any highway to the place of such meeting."

It is seen by these statutes that the terms "religious meetings" and "religious worship" are used interchangeably with each other; and that the same meaning is attached to each. The law guards such meetings so carefully that it makes it an offense to do certain things within one mile of the place at which they are held, although no actual disturbance be proven to have been occasioned thereby. The theory of the law is that the doing of these prohibited things within such close proximity to the place of such meetings is inconsistent with and violative of the spirit and harmony of such meetings, and the law therefore necessarily implies a disturbance therefrom.

What is the fair import of the terms "religious meetings" and "religious worship"? The word "religion" is defined in Webster's New International Dictionary as follows: "The outward act or form by which men indicate their recognition of the existence of a god or of gods having power over their destiny, to whom obedience, service, and honor are due; the feeling or expression of human love, fear, or awe of some superhuman and overruling power, whether by profession of belief, by observance of rites and ceremonies, or by the conduct of life; a system of faith and worship; a manifestation of piety; as, *ethical religions*; *monotheistic religions*; *natural religion*; *revealed religion*; the *religion* of idol worshippers. *Religion* (as distinguished from *theology*) is subjective, designating the feelings and acts of men which relate to God. As distinguished from *morality*, *religion* denotes the influences and motives to human duty which are found in the character and will of God, while *morality* describes the duties to man, which true *religion* always influences."

In attempting to construe our statutes with reference to disturbing religious meetings and religious worship, we must remember that the crowning glory of American freedom is absolute religious liberty; and that every American has the unquestioned and untrammelled right to worship God according to the dictates of his own conscience, without let or hindrance from any person or from any source. The term "religious worship," therefore, can have no technical meaning in a legal sense, and is not restricted to any denomination, sect, or mode of religious worship. In its true sense a religious meeting is an assemblage of people met for the purpose of performing acts of adoration to the Supreme Being, or to perform religious services in recognition of God as an object of worship, love, and obedience, it matters not the faith with respect to the Deity entertained by the persons so assembled.

The law affords equal protection to the religious views, rites, and forms of worship of all denominations, all classes, and all sects, and does not undertake to state of what they shall consist, or how such services shall be conducted. Therefore, as to whether or not a congregation of persons constitutes a religious meeting assembled for religious worship is necessarily largely a question of fact to be determined by the jury from the evidence and under proper instructions from the court. A Christmas festival is not necessarily a religious meeting, and unfortunately it sometimes constitutes anything except a religious service; and as to whether or not this is true is always a question for the jury, under the testimony of each case and proper instructions from the court. This court takes judicial notice of the fact that religious services in this country generally consist of songs, sermons, and prayers. Counsel for appellants lay great stress upon the fact that there is no direct proof in the record that any formal prayer had been offered on this occasion prior to the disturbance; but this court also takes judicial notice of the fact that some religious meetings are held without formal prayer. But even if formal prayer was necessary and had not been offered, there is every reason to believe from the evidence in the record that it would have been offered, had it not been for the conduct of appellants and those acting with them. The proof is certain that the Methodist denomination had charge of the meeting, and a song had been sung, and that Rev. Mr. Cross, the Methodist preacher in charge of that station, was delivering an address or sermon upon the birth of Christ, a theme upon which the hopes and destinies of all Christendom depends. It was at this point that the meeting was disturbed by the brutal, cowardly, ruffianly, and sacrilegious conduct of appellants and those acting with them, as charged in the information and proven by the testimony. It would be difficult to imagine anything more highly calculated to wound the religious sentiments of the persons there assembled and to create a disturbance than the conduct of which the testimony shows appellants and those acting with them were guilty. To sustain the contention of counsel for appellants would be to make a burlesque of both religion and the law, and to place the most sacred emotions of the human heart at the mercy of brutality, ruffianism, and rowdiness. We are only surprised that appellants and all persons acting with them were not each sent to jail for six months and fined the sum of \$500. The conduct of which appellants were clearly proven to be guilty cannot be too severely condemned and all such characters should be made to know that if they do not respect the law, which protects the rights and feelings of others, they will be treated and punished as common criminals.

This is the first time that the question as

to what constitutes a disturbance of religious worship has ever been presented to this court for determination. This character of offense is so wanton and inexcusable, and is so destructive of peace, morals, and good order, that we feel that the law should be liberally construed in favor of the state and strictly construed against appellants. Such characters are notified that they will look in vain to this court for protection when they violate either the letter or spirit of these statutes.

We find no prejudicial error in the record. The judgment of the lower court is therefore affirmed.

ARMSTRONG, P. J., and DOYLE, J.,
concur.

(9 Okl. Cr. 38)

CURRY v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 13, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1160*)—APPEAL—REVIEW OF CONVICTION.

Where the jury find a verdict of guilty, which is approved by the trial court, and there is evidence in the record to sustain the verdict, it will not be set aside in the absence of prejudicial error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Appeal from District Court, Pontotoc County; Robert M. Rainey, Judge.

Charles Curry was convicted of larceny, and appeals. Affirmed.

Crawford & Bolen, of Ada, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and H. A. King, of Oklahoma City, for the State.

DOYLE, J. Plaintiff in error, hereinafter referred to as "defendant," was tried and convicted in the district court of Pontotoc county for the offense of larceny of domestic animals and was sentenced to imprisonment for one year in the penitentiary. The judgment and sentence was entered March 3, 1911. An appeal was perfected by filing in this court September 2, 1911, petition in error with case-made.

Without going into a detailed statement of the testimony, the transcript shows that defendant came to Tyrola Friday evening and put his horse in Lewis Waldon's barn. The next night, the defendant and Lewis Waldon were seen on horseback driving two cows from Tyrola towards Francis, about 9:30 p. m. The next morning about 4 o'clock they were seen going back toward Tyrola without the cattle. This was Saturday night. Monday morning these cows strayed into Francis, their ears had been fresh marked and the bush of their tails cut off. They

were placed in a lot and identified by J. M. Manley as his cows, that were driven away from his place some time Saturday night. A witness testified that he found pieces of cow ears and the bush of their tails about half a mile from Francis. From Tyrola, where they started with the cattle, it is about 10 miles to Francis. Defendant testified on his own behalf that he was hired by Lewis Waldon to help drive the cattle, and that he did not know that they were stolen.

The errors assigned are, in effect, that the verdict is contrary to the law and the evidence, and that the court erred in the instructions given. This review of the facts suffices to show that the case was one for the jury. The sufficiency of the evidence to show the commission of the crime and the guilt of defendant is not a question in the discretion of the court, and this court will not review the evidence in a case for the purpose of passing upon the weight and credibility of the evidence.

The instructions of the court were fair, and no good purpose would be served by reviewing the objections to them, further than to state that we find no error in any of the matters complained of pertaining thereto.

From a careful examination of the record we are clearly of opinion that the appeal in this case is destitute of merit.

The judgment of the district court of Pontotoc county will therefore be affirmed.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

(9 Okl. Cr. 35)

GOINS v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 13, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1163*)—TRIAL—SEPARATION OF JURY.

On proof of a violation of the provisions of Procedure Criminal (section 6858, Comp. Laws 1909), by permitting the jury to separate after the case is finally submitted, the defendant is entitled to the presumption that such separation has been prejudicial to him, and the burden of proof is on the prosecution to show that no injury could have resulted therefrom to the defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

2. CRIMINAL LAW (§ 927*)—NEW TRIAL—SEPARATION OF JURY.

Where the bailiff in charge of a jury, after the case has been finally submitted, permits a juror to leave the jury room and go out upon the streets, and such juror's conduct during his absence is unexplained, the trial court should sustain the motion for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2257-2262; Dec. Dig. § 927.*]

Appeal from Payne County Court; P. D. Mitchell, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.
130 P.—33

J. W. Goins was convicted of violating the prohibitory law. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 6 Okl. Cr. 704, 119 Pac. 1130.

J. M. Springer, of Stillwater, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and C. J. Daventport, of Oklahoma City, for the State.

DOYLE, J. Plaintiff in error was convicted of having possession of intoxicating liquors with intent to sell the same, and was sentenced, in accordance with the verdict, to serve a term of 30 days in the county jail and pay a fine of \$50.

The judgment and sentence was entered on July 24, 1911. To reverse the judgment, an appeal was perfected by filing in this court, on November 4th, a petition in error with case-made.

Of the numerous assignments of error relied on for a reversal of the judgment, it is only necessary to consider the one: "That the jury were allowed to separate, without leave of court, after they had retired to and during the time they were deliberating upon their verdict, and before said verdict had been agreed upon by the jury." In the motion for new trial, this was assigned as one of the grounds, and was supported by two affidavits, to the effect that one of the jurors, O. P. Furman, was permitted to leave the jury room, and went out on the streets of Stillwater and bought bananas, which he brought back to the rest of the jury. This occurred about half past 10 o'clock at night. This fact is not disputed by the state, and no explanation is offered. We are of the opinion that the motion for a new trial should have been allowed.

[1] Section 6858, Procedure Criminal, provides: "After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court." This statute has been construed in the following cases: *Bilton v. Territory*, 1 Okl. Cr. 566, 90 Pac. 163; *Armstrong v. State*, 2 Okl. Cr. 567, 103 Pac. 658, 24 L. R. A. (N. S.) 776; *Ridley v. State*, 5 Okl. Cr. 522, 115 Pac. 628; *Selstrom v. State*, 7 Okl. Cr. 345, 123 Pac. 557.

In *Armstrong v. State*, supra, it is said: "It is our opinion that this section imperatively requires that, upon the final submis-

sion of the case to the jury, they cannot be permitted to separate, and if, after such submission, the jury separates, such separation vitiates the verdict, notwithstanding no affirmative proof of prejudice is offered. When this provision of the law is violated, the legal presumption is, that it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

In *Selstrom v. State*, supra, it is said: "Under the statute (section 6858, supra), the true rule is that upon proof of a violation of the provisions thereof, by permitting the jury to separate and converse with unauthorized persons after the final submission of the case and before a verdict, the defendant is entitled to the presumption that such misconduct has been prejudicial to him; and the burden of proof is on the prosecution to show that the defendant has suffered no injury by reason of such misconduct. There are many instances where necessary separations may be held trivial and nonprejudicial, especially where the undisputed facts are sufficient to rebut the presumption of prejudice; but that is not this case. While the act of the juror Green returning to the jury room was harmless, the conduct of the foreman of the jury, the bailiff, and the sheriff, whether inadvertent or otherwise, was improper and in violation of the statute, and the instructions of the court, and the defendant was entitled to the benefit of the presumption that such misconduct was prejudicial to him, while these officers may have intended no wrong, and their improper acts were not prompted by evil intent, the prosecution only called the bailiff, and did not meet the burden by calling the others to testify in explanation of their misconduct."

[2] It will be presumed, in the absence of anything to the contrary, that the rights of the defendant were prejudiced by the misconduct of the bailiff in permitting the separation of the jury in disregard of the requirements of the statute. Courts cannot be too strict in compelling a rigid and vigilant observance of the provisions of the statute designed to preserve the purity of jury trials.

For the reasons stated, the trial court erred in overruling the motion for a new trial. The judgment is therefore reversed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 33)

WELCH v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 11, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—BRIEFS. Where lawyers take an appeal to this court, it is their duty to file a printed or typewritten brief in which they must clearly point

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

out the errors upon which they rely and make an argument in support of the positions which they assume.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. CRIMINAL LAW (§ 1106*)—APPEAL IN MISDEMEANOR CASE—FILING CASE-MADE.

Under our statute, an appeal in a misdemeanor case must be perfected by filing a case-made or transcript of the record in this court within 60 days from the date of the judgment, unless this time is extended by an order duly entered by the trial judge in the records of his court; and in no event can an appeal be perfected after the lapse of 120 days from the date of the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.*]

3. CRIMINAL LAW (§ 1081*)—APPEAL—NOTICE OF APPEAL.

Notices of appeal must be served upon the county attorney and the clerk of the court from which the appeal is taken, as required by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724, 2962; Dec. Dig. § 1081.*]

Appeal from Garvin County Court; W. B. M. Mitchell, Judge.

J. T. Welch was convicted of violation of the prohibition law, and appeals. Dismissed.

J. S. Garrison, of Lindsey, for appellant, E. G. Spilman, Asst. Atty. Gen., for the State.

FURMAN, J. On the 27th day of January, 1911, judgment was rendered in the county court of Garvin county against appellant for a violation of the prohibitory liquor law, and his punishment was assessed at a fine of \$50 and 30 days' confinement in the county jail. From this judgment, appellant attempted to appeal.

The transcript of the record was filed in this court on the 24th day of January, 1912; but counsel, who represented appellant in the trial court, have evidently abandoned the appeal, as no brief has ever been filed or any appearance made in this court in behalf of appellant.

[1] It would be impossible for this court to transact its business if it did not require lawyers, who appeal cases, to properly present them to the court; and, when no brief is filed pointing out the errors relied upon, this court cannot do more than examine the record for jurisdictional errors.

[2, 3] On an examination of this record, we find that the time for perfecting the appeal, which the statute places at 60 days from the date of the judgment, was never extended by the trial court. This time expired on the 26th day of November, 1911. The record was not filed in this court until the 24th day of January, 1912, 59 days after the time allowed by law had expired. We also find that notices of appeal, as required by statute, were never served on the county attorney and the clerk of the court from which the appeal was taken. Both of these defects

are jurisdictional and are fatal to this appeal. For these reasons, the court has never acquired jurisdiction of this case, and cannot consider the record for any purpose.

The appeal is dismissed, with directions to the county court of Garvin county to proceed to enforce its judgment.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 50)

BELCHER v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1131*)—APPEAL—ESCAPE OF APPELLANT—DISMISSAL.

Where a defendant has been convicted and sentenced, and perfects an appeal, this court will not consider his appeal, unless defendant is where he can be made to respond to any judgment or order which may be rendered in the case. And where a defendant makes his escape from the custody of the law and becomes a fugitive from justice, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

2. CONSTITUTIONAL LAW (§ 271*)—DUE PROCESS OF LAW—DISMISSAL OF APPEAL.

The dismissal of an appeal, taken from a judgment of conviction because the defendant is a fugitive from justice, is not a denial of due process of law, and, where the fugitive is brought again within the custody of the court, a refusal of the court to set aside its order of dismissal and reopen the case does not constitute a denial of due process of law within the meaning of the United States Constitution or the Constitution of the state of Oklahoma.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 760; Dec. Dig. § 271.*]

Appeal from District Court, Jackson County; Frank Mathews, Judge.

Percy Belcher was convicted of crime and appeals. Dismissed.

S. B. Garrett and S. J. Castleman, both of Altus, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and M. L. Hankins, County Atty., of Altus (W. C. Austin, of Eldorado, of counsel), for the State.

DOYLE, J. The plaintiff in error was convicted in the district court of Jackson county of the crime of rape in the first degree, alleged to have been committed on one Julia S. Johnson, and was sentenced to be imprisoned in the state reformatory at Granite for a term of five years. The judgment and sentence was entered on April 25, 1912. To reverse the judgment an appeal was perfected by filing in this court September 17, 1912, a petition in error with case-made.

A motion to dismiss the appeal has been filed, which, omitting the formal parts, reads as follows: "Comes now Charles West, Attorney General of the state of Oklahoma,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

M. L. Hankins, county attorney of Jackson county, Okl., and W. C. Austin of counsel for the state of Oklahoma, and informs and gives the court to understand that the plaintiff in error, Percy Belcher, soon after his conviction and sentence in the district court of Jackson county, from which this appeal originated, made and executed a bond for appeal in this cause conditioned, among other things, that he would not leave the state without leave of court; that after the execution of said bond and pending the perfection of the record for the appeal, without leave of court and without the knowledge or consent of the officers of the state of Oklahoma, voluntarily left the state of Oklahoma and established a residence in the county of Hardeman, state of Texas, and while there, he, the said Percy Belcher, murdered his father, W. R. Belcher, on, to wit, about the 31st day of May, 1912, and thereafter, for the purpose of escaping from and of avoiding arrest by the authorities of the state of Texas, came into the state of Oklahoma and took up a temporary residence in the state of Oklahoma at Oklahoma City, appearing under assumed names of Pendergraft and W. M. Clark, and while in Oklahoma City, Frank Walker, the duly elected, qualified, and acting sheriff of Hardeman county, Tex., acting under a warrant issued by the proper court in the state of Texas in an action wherein the state of Texas prosecuted the said Percy Belcher for murder as aforesaid, effected the arrest of Percy Belcher, alias ——— Parker; that thereafter the said Percy Belcher waiving requisition returned with the said Frank Walker as such sheriff to the state of Texas, where in due course of procedure the said Percy Belcher was held without bail by the authorities of the state of Texas to answer the charge of murder as aforesaid; that ever since said time and at the present time the said Percy Belcher was and is lodged in the county jail at Quanah, Tex. And your informants further say that by reason of these matters the said Percy Belcher is a fugitive from justice; that he has voluntarily placed himself beyond the reach of the writs of this court or the inferior court, and has therefore forfeited his right to have this appeal considered and the same ought to be dismissed. And in support of these allegations the state attaches hereto the affidavits of M. L. Hankins, county attorney of Jackson county, Okl., Frank Walker, sheriff of Hardeman county, Tex., and a certified copy of the indictment returned against said Percy Belcher in Hardeman county, Tex., on the 25th day of October, 1912, charging said crime of murder, also a certified copy of the appeal bond in this case and makes each of said affidavits a part of this motion by reference, and also said copies of indictment and appeal bond. Wherefore, the state of Oklahoma, through its Attorney General and the other attorneys herein mentioned, prays

that an order be made dismissing this appeal and directing that the original judgment of conviction and sentence of imprisonment be executed."

In reply to this, three affidavits were filed, including that of the plaintiff in error, wherein he states, at the time of his conviction he was a minor of 18 years of age; that when his appeal bond was approved he went to Texas with his parents; that when he was arrested June 9, 1912, in Oklahoma City, on the charge of murder, for which he is now held in the state of Texas, he agreed to waive extradition and go back to Texas, if the Texas sheriff would go over the Frisco Railroad from Oklahoma City through Altus, Jackson county, and there permit his sureties to surrender him to the sheriff of Jackson county; that, after making said agreement, said sheriff, without his consent, and without an extradition warrant, took him by Ft. Worth, and on to Quanah, Tex., and did not bring him into and through said Jackson county as he had agreed to do; that he is not now at this time out of the state of Oklahoma with his own consent; and that his present detention outside of the state of Oklahoma is without his consent, and is not voluntary upon his part. In his affidavit he does not deny that he was living at Oklahoma City under an assumed name, nor that he was a fugitive from justice from the state of Texas at the time of his arrest in Oklahoma City. It is now more than nine months since plaintiff in error was taken to Texas, and he has not yet returned to Oklahoma.

On the undisputed facts we think this case comes within the following rule declared by this court in numerous decisions.

[1] The Criminal Court of Appeals will not consider an appeal unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the case, and, where the defendant makes his escape from the custody of the law and is at large as a fugitive from justice, this court will on motion dismiss the appeal. *Tyler v. State*, 3 Okl. Cr. 179, 104 Pac. 919, 26 L. R. A. (N. S.) 921; *Tanner v. State*, 5 Okl. Cr. 298, 114 Pac. 360; *McGraw v. State*, 7 Okl. Cr. 105, 122 Pac. 242. Under the provisions of Procedure Criminal (section 6945, Snyder's St.), an appeal may be taken by the defendant, as a matter of right, from any judgment against him; and there is no express provision authorizing the dismissal of an appeal on the grounds stated; yet we think that it is no part of our duty as an appellate court to consider or review the judgments, orders, and rulings of which a plaintiff in error complains, while he is at large as a fugitive from justice.

In *People v. Genet*, 59 N. Y. 80, 17 Am. Rep. 315, it was said: "The provisions of the statutes, giving to defendants in criminal cases the right to make a bill of exceptions, are not so absolute as to displace all

the other principles which belong to criminal proceedings, but must be taken in subordination to them. We think they do not require the court to encourage escapes and facilitate the evasion of the justice of the state, by extending to escaped convicts the means of reviewing their convictions." *State v. Scott*, 70 Kan. 692, 79 Pac. 126, 3 Ann. Cas. 511. Also, *State v. Keebler*, 145 N. C. 560, 59 S. E. 872, 13 Ann. Cas. 496.

[2] In the case of *Allen v. Georgia*, 166 U. S. 138, 17 Sup. Ct. 525, 41 L. Ed. 949, the defendant had been convicted and sentenced to death in a superior court, and had sued out a writ of error from the Supreme Court of the state of Georgia, which was assigned for hearing. The case having been called, it was made to appear to the court by affidavits that the defendant after his conviction and sentence had escaped and was a fugitive from justice. From this showing the Supreme Court of Georgia ordered that the writ of error be dismissed. Afterwards the defendant, having been recaptured, was resented to death by the superior court, and thereupon made application to one of the Justices of the Supreme Court of the United States for writ of error, which was duly granted, assigning as error that the dismissing of his writ of error by the Supreme Court of the state of Georgia was a denial of due process of law. The Supreme Court of the United States held that the dismissal by a state court of a writ of error taken by the accused from a conviction, because he has escaped and is a fugitive from justice, is not a denial of due process of law, and, where the fugitive is brought again within the custody of the court, a refusal of the court to set aside its order of dismissal and reopen the case does not constitute a denial of due process of law, within the meaning of the federal Constitution.

In this case it appears that about a month after the judgment of conviction was rendered, and more than three months before his appeal was perfected in this court, he became a fugitive from justice from the state of Texas.

It is our opinion that plaintiff in error has waived the right to have his appeal in this case considered and determined.

The appeal is therefore dismissed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 15)

SMITH v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 8, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1130*)—APPEAL—AFFIRMANCE.

When a petition in error and case-made is filed in this court, it is the duty of counsel to

prepare and file briefs or appear and orally argue any assignments of error relied upon for reversal. When this is not done, the appeal is treated as abandoned, and, in the absence of fundamental error, the judgment of the lower court will be affirmed for want of prosecution.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2956, 2965–2970, 8206; Dec. Dig. § 1130.*]

Appeal from District Court, Le Flore County; Malcolm E. Rosser, Judge.

Charley Smith was convicted of larceny of domestic animals, and appeals. Affirmed.

Tom W. Neal, of Poteau, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Charley Smith, was convicted at the April, 1911, term of the district court of Le Flore county on a charge of larceny of domestic animals, and his punishment fixed at imprisonment in the state penitentiary for a period of three years. The appeal was perfected in this court on the 21st day of October, 1911. The petition in error points out no specific ground for reversal, but generally alleges error in the overruling of the motion for new trial and in arrest of judgment. No briefs have been filed by counsel on behalf of the plaintiff in error, and no appearance made for oral argument. We have examined the record, and find that no constitutional right was denied the accused.

The judgment of the trial court is in all things affirmed.

DOYLE and FURMAN, JJ., concur.

(9 Okl. Cr. 9)

MOORE v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 8, 1913.)

(Syllabus by the Court.)

1. GAMING (§§ 68, 92*)—"GAMBLING DEVICE"—INFORMATION.

The prohibitions contained in sections 2422 and 2426, Comp. Laws 1909, do not alone extend to those who deal or play or conduct the various games of chance therein specified, but such prohibition extends to the carrying on or opening of any such prohibited game, and the use therein of any device. And any table or other device, necessarily adapted to the use, and necessarily used in the carrying on of any such game, is a gambling device in contemplation of law, and the setting up or using of such table or device is prohibited; and an information under said sections, charging the defendant with permitting certain tables to be set up and used for the purpose of gambling in rooms occupied by him and under his control, charges a public offense.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 140–142, 164, 165, 263–272; Dec. Dig. §§ 68, 92.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3029–3032.]

2. JURY (§ 70*)—SUMMONING TALESMEN.

Where all of the jurors, whose names have been regularly drawn from the jury box and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

summoned, do not appear at a term of the court, the trial judge, in his discretion, may order other drawings from the jury box, or he may order an open venire addressed to the sheriff summoning the necessary number of talesmen from the body of the county to complete the jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. § 70.*]

Appeal from Tulsa County Court; N. J. Gubser, Judge.

Dug Moore was convicted of violating the gambling laws, and appeals. Affirmed.

Davidson & Williams, of Tulsa, for appellant. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

FURMAN, J. Appellant demurred to the information upon the ground that it did not state facts sufficient to constitute a public offense against the laws of the state of Oklahoma. The information alleged that on the 15th day of January, 1910, in Tulsa county, appellant "did unlawfully and wrongfully permit a certain gambling table and devices to be set up and used, to wit, one crap table and one roulette wheel in a certain room of a certain building situate on the west side of Main street in the city of Tulsa, Okl., and known as the Moore Hotel, said room and hotel being then and there in the possession and occupied by said Dug Moore, at and on which certain games, to wit, craps and roulette, were then and there conducted and played by divers persons, whose names are unknown to your informant, for money and other representations of value; said Dug Moore then and there having the control of said room and building described as aforesaid."

[1] Sections 2422 and 2426, Comp. Laws 1909, are as follows:

"Sec. 2422. Owners or Employers of Games Guilty.—That every person who deals, plays or carries on, or opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, poker, roulette, craps, or any banking or percentage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not less than thirty days nor more than six months."

"Sec. 2426. Penalty for Leasing Building or Grounds for Gambling.—Every person who shall permit any gambling table, bank, or gaming device prohibited by sections 2422 and 2424 of this act, to be set up or used for the purpose of gambling in any house, building, shed, shelter, or booth, lot or other premises to him belonging, or by him, occupied, or of which he hath, at the time, possession or control, shall be, on conviction thereof, ad-

judged guilty of a misdemeanor, and punished by a fine not exceeding two hundred dollars, nor less than one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months nor less than thirty days, or by both such fine and imprisonment in the discretion of the court."

The two sections above quoted were enacted by the Legislature of Oklahoma territory in 1893, and were continued in force in this state by the terms of the Constitution. In 1897 these sections were construed; and an information charging substantially the same offense as that charged in the information now before us was held to be good by the Supreme Court of Oklahoma territory in the case of *Jones v. Territory*, 5 Okl. 536, 49 Pac. 934. Judge Tarsney, speaking for the court, said: "We are bound to give the language used by the Legislature such interpretation as will support its evident intent, if the language used is fairly susceptible of such interpretation. That the Legislature intended to prohibit the setting up or use of gambling tables is beyond doubt; and that they intended to punish those who should permit such tables to be set up cannot be questioned. * * * We are therefore clearly of the opinion that it was the intention of the Legislature to prohibit the owners, occupants, or persons in possession or control of houses, buildings, etc., from permitting any gaming table, bank, or gaming device to be set up or used for the purpose of gambling therein. and that the language of sections 1 and 2, above quoted, with sufficient clearness, shows such intent, and that therefore the information in this case did charge a public offense, and that the demurrer was rightly overruled." We think that Judge Tarsney was correct in his interpretation of these statutes, and that his decision in the case of *Jones v. Territory* is conclusive of this question.

[2] Second. It appears from the record that out of the list of jurors selected by the jury commissioners and regularly drawn and summoned for the regular panel in the county court of Tulsa county, at the term at which this cause was tried, only seven of the jurors so drawn and summoned qualified, and that appellant objected to going to trial until a full panel had been regularly drawn and summoned and impaneled as the regular trial jury for that term of the court. The court overruled this objection, and ordered the clerk to issue an open venire addressed to the sheriff of Tulsa county for eight talesmen from which to complete the trial panel for this cause, to which the appellant objected. The objection was by the court overruled, and appellant excepted thereto. Eight talesmen were summoned and appeared under said open venire, and five of these qualified upon examination for cause, and these five talesmen were placed upon the panel, to all of which appellant excepted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The contention of counsel for appellant is that he had a right to a full panel of jurors duly drawn from the jury box, as selected by the jury commissioners, and that the trial court was without authority to order the sheriff to summon additional jurors upon an open venire from the body of the county. To sustain this contention would be to oftentimes subject the trial courts to great and unnecessary delay in drawing and summoning talesmen. This objection was passed upon in an elaborate opinion by Judge Doyle in the case of *Robert Watson v. State*, 130 Pac. 816, decided at the present term of this court; and we there held that the objection was not well taken. Even if the matter had never been decided by this court, it is settled by the provisions of the statute.

Section 3987, Comp. Laws 1909, relating to juries in county courts, among other things provides: "The court may for any cause in its discretion, excuse any person drawn and summoned as a petit juror: Provided, further, that any time during a term of court, after a petit jury has been drawn and summoned, in the manner as herein provided, for the trial of any cause, a regular panel of jurors shall appear to be insufficient, the jury may be completed from talesmen, or the court may direct an open venire to issue to the sheriff for such number of jurors as may be deemed necessary, to be selected from the body of the county: Provided, that jurors in the county court shall receive the same compensation as jurors in the district court."

Our statute does not require that the names of additional jurors shall be drawn from the box when all of those who were originally drawn do not appear. The judge, whenever in his discretion he regards it as necessary, may order other drawings from the box, or he may order an open venire and have the talesmen selected from the body of the county. A defendant is not entitled to any particular juror. All that the law vouchsafes to him is a fair and impartial trial jury, selected in substantial compliance with the law. No authorities are cited by counsel for appellant in support of their contention, and no attempt is made to show any injury to appellant or how he was deprived of any substantial right by the ruling of the trial court.

Section 3995, Comp. Laws 1909, is as follows: "A substantial compliance with the provisions of this act shall be sufficient to prevent the quashing or setting aside of any indictment of a grand jury chosen hereunder, unless the irregularity in drawing, summoning or impaneling the grand jury resulted in depriving a defendant of some substantial right, but such irregularity must be specifically presented to the court on or before the cause is first set for trial. A substantial compliance with the provisions of this act, shall be sufficient to prevent the setting aside

of any verdict rendered by a jury chosen hereunder, unless the irregularity in drawing, and summoning or impaneling the same, resulted in depriving a party litigant of some substantial right: provided, however, that such irregularity must be specifically presented to the court at, or before, the time the jury is sworn to try the cause."

We think that the action of the court in this case was a substantial compliance with the provisions of our statute, and that, in the absence of any showing of injury to appellant, it would be a miscarriage of justice to set aside this verdict upon the objection made. This is not only the law in Oklahoma; but it is manifestly just, and is in strict harmony with the weight of authorities.

The law is thus stated in 24 Cyc. 254: "Where some of the jurors summoned fail to appear, it is not necessary, in the absence of statute, for the court to delay the impaneling of the jury or postpone the trial; nor is it necessary for the court to have other jurors summoned to fill the places of those who are absent, or to issue attachments for the absent jurors."

In *Patterson v. State*, 48 N. J. Law, 381, 384, 4 Atl. 449, loc. cit. 451, the court said: "The third assignment of error is that the court allowed the call of the jury to proceed before all the jurors were present, and without a full list thereof. The record shows that, after the challenge to the array was overruled, the court ordered the list of jurors to be called. Upon the call, six jurors did not answer. The counsel of defendant objected to proceeding until all the jury were present. The objection was overruled, and the names of 48 jurors summoned were put in the box, from which the jury for this cause was drawn. If it is necessary that every juror of the 48 summoned for service at the term should be present in court when a case is called for trial, it would be quite impossible to conduct the prosecution of criminal trials successfully. Our statute requires only that the list of 48 jurors be served. It does not require that all the jurors shall be present when the case is moved. The language of the section, with respect to a tales, clearly shows that the presence of all is not essential. It provides that if, by reason of challenges or the default of jurors, or otherwise, a sufficient number cannot be had of the original panel to try the issue, a tales may be awarded. The power of the court to excuse a juror from the general panel for cause is recognized in this as well as in other states. *Smith v. Clayton*, 29 N. J. Law, 358; *Ware v. Ware*, 8 Me. [8 Greenl.] 42; *State v. Ward*, 39 Vt. 230."

In *People v. Lee*, 17 Cal. 76, loc. cit. 80, the court, upon a like proposition, said: "(7) When the court directed the clerk to call and impanel the jury in the cause, objection was

made on the ground that several of the jurors of the original panel, summoned for the term, had been previously excused without the consent of the defendant; and, being overruled, the further objection was made that there was not a full panel present, and this was in the same manner disposed of. There was no error in these rulings."

In *State v. Hallback et al.*, 40 S. C. 298, 18 S. E. 919, the court held that: "Defendant in a criminal case is not entitled to have the panel full, or entirely read over, before entering on his right of challenge."

The testimony in this case is overwhelming and conclusive as to the guilt of appellant. Appellant offered no evidence in his own behalf, but relies alone upon the technical skill and ability of his attorneys to secure a reversal of the judgment of the lower court. The instructions of the court are in harmony with the views expressed in this opinion. We find no error in the record.

The judgment is in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 27)

BAYLESS v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 11, 1913.)

(Syllabus by the Court.)

1. LARCENY (§ 33*)—INFORMATION—ALLEGATIONS AS TO OWNERSHIP—POSSESSION.

In an information for "larceny of live stock" when the ownership of the property stolen is alleged, and that the defendant did then and there willfully, unlawfully, and feloniously take, steal, and carry away by stealth said property without the knowledge or consent of said owner, and with the felonious intent to deprive said owner of said property, and with the felonious intent to convert said property to the use and benefit of the taker, possession and taking from possession of the owner is sufficiently alleged; the law implying his possession from his ownership.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 93; Dec. Dig. § 33.*]

2. CRIMINAL LAW (§ 742*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

The jury are not bound to believe testimony because it is uncontradicted, and not directly impeached. The credibility of the witnesses testifying in behalf of defendant is the exclusive province of the jury to determine, and although such testimony may be uncontradicted, and not directly impeached, when there are facts and circumstances admitted and proven tending to lessen the probability that such testimony is true, the jury may give it such weight as they deem proper, even to the extent of wholly disregarding the same.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. § 742.*]

3. CRIMINAL LAW (§ 1155*)—APPEAL—DISCRETION OF COURT.

The discharge of the jury without the consent of the defendant, where the jury returned a verdict of guilty and failed to agree on the punishment, is a matter in the discretion of the trial court, and its action will be conclusive,

unless there appears to have been a clear abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3056, 3060; Dec. Dig. § 1155.*]

Appeal from District Court, Le Flore County; Malcolm E. Rosser, Judge.

James R. Bayless was convicted of larceny of two mules, and appeals. Affirmed.

Tom W. Neal, of Poteau, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, hereinafter referred to as defendant, was convicted in the district court of Le Flore county, and sentenced to serve a term of 2½ years' imprisonment in the penitentiary on an information, the charging part of which is as follows: "That the said James R. Bayless on the day and within the county and state aforesaid did then and there willfully, unlawfully, and feloniously steal, take, and carry away by stealth two mules, the property of John Blaylock, without his knowledge or consent, and with the felonious intent to deprive the said John Blaylock of the said property, and with the felonious intent to convert the same to the use and benefit of him the said James R. Bayless, contrary to," etc. To reverse the judgment an appeal was perfected. The errors assigned will be considered in the order presented.

[1] First. It is contended that the court erred in denying the motion in arrest of judgment. The motion was based on the ground that the information does not state facts sufficient to constitute the crime of larceny of live stock under the statute. The learned counsel in his brief insists that the information is fatally defective, in that "it fails to allege the possession of the property taken to be in another at the time it was taken." In a prosecution of this character the information is predicated upon the statute defining the crime of larceny of live stock, the ownership of the animals stolen must be alleged and proved, and it is necessary to allege and prove a felonious intent on the part of the taker to deprive the owner thereof, and to convert the same to his, the taker's, own use. *Crowell v. State*, 6 Okl. Cr. 148, 117 Pac. 883. Presumably, possession, actual or constructive, accompanies ownership. Where ownership is alleged, possession is sufficiently alleged, and a specific allegation that the taking was from the possession of the owner is not essential. This information is sufficient in that respect, and we have no doubt whatever of its sufficiency.

Second. That the verdict of the jury is not sustained by sufficient evidence. We think the verdict was amply sustained, and in support of this conclusion we submit a summary of the evidence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

John Blaylock testified, in substance, that at the time in question he was the owner of two mules which he described as two yearling mare mules, one was blue or mouse-colored and the other he would call a yellow bay; that he kept them in a pasture near Heavener; that he missed the mules in the fall of 1908, and employed defendant to help search for them; that the following June he found one of the mules in a pasture near Summersfield in the possession of W. R. Franklin; that Mr. Franklin then paid him for both mules; that originally he bought these mules from John Bayless, a brother of defendant.

John Roberts testified that he lived at Summersfield; that in the fall of 1908 he met defendant and another man on the road east of Summersfield with two young mules. Defendant offered to sell them to him for \$85. Defendant said he was on his way to Mr. Franklin.

W. D. Mitchell testified that he lived near Summersfield; that in the fall of 1908 defendant passed his house with another man and they had a pair of mule colts, one was a blue mouse-colored, and the other what he would call a light bay. Since then he saw these mules with Mr. Franklin.

W. R. Franklin testified that he was in the mercantile business in Summersfield. In the fall of 1908 he bought from defendant two yearling mules. One was a mouse-colored, and one sort of brown colored. In the spring of 1909 these mules were claimed by John Blaylock, and he paid Mr. Blaylock for them. He paid defendant for the mules by paying a \$75 note due by him at the Le Flore County Bank and two cash payments of \$10 and \$5.

On behalf of defendant, Tip Sloan testified that in 1908 he sold defendant a gray mare pony; that he afterwards saw the pony in the possession of some horse traders in Monroe; that his wife was the defendant's sister.

Jim Watson testified, in substance, that he was with defendant when he traded this pony to some horse traders; that defendant gave the pony and \$40 for two mules about two years old; that he is a nephew of defendant.

C. D. Pittsford testified that he was present when defendant traded the pony for the mules.

William Kellog testified that he saw defendant's gray pony in the possession of the horse traders.

Oscar Davis testified that he saw these mules in the possession of the horse traders, and about two or three days later he saw the mules at Mr. Franklin's.

In rebuttal the state offered in evidence records of the county court showing the information and conviction of the witness Jim Watson for the offense of selling intoxicating liquors.

It is argued by the learned counsel that the records show that no attempt was made to impeach or discredit defendant's witnesses Pittsford, Kellog, and Davis, and their testimony, including that of the witness Watson, stood uncontradicted by the state at the time of the submission of the case to the jury.

[2] The jury are not bound to believe testimony because it is uncontradicted, and not directly impeached. The credibility of the witnesses testifying in behalf of defendant is the exclusive province of the jury to determine; and, although such testimony may be uncontradicted and not directly impeached, when there are facts and circumstances admitted and proven tending to lessen the probability that such testimony is true, the jury may give it such weight as they deem proper, even to the extent of wholly disregarding the same. *Wainwright v. State*, 8 Okl. Cr. —, 129 Pac. 655. Here the defendant, without testifying on his own behalf, attempts to explain his possession of the mules by the story of a trade of a gray pony and some money for them with "some horse traders." Who these mysterious horse traders were is not shown, whence they came or where they went does not appear, and no one seems to have seen them there except defendant's relatives. If defendant's witnesses told the truth in their account of this trade, why did the defendant accept the employment by Mr. Blaylock to search for the missing mules? If the trade really took place, why did not the defendant then tell Mr. Blaylock that he had traded for the mules and had sold them to Mr. Franklin? This, surely, would have been the course and conduct of an innocent man. The story of the trade is absolutely inconsistent with the uncontradicted testimony as to defendant's subsequent conduct, and his conduct was absolutely inconsistent with innocence. A common explanation of possession given by the thief upon discovery is that he bought the goods from an unknown person. This explanation is entitled to little weight with the jury, or with the court which is passing on the facts. The explanation may be so improbable that, even if not contradicted by evidence, the jury will misbelieve it. The reasonableness of it is for the jury. See 25 Cyc. 138. It is our opinion that the evidence is amply sufficient to establish beyond a reasonable doubt the falsity of the explanation of defendant's possession.

Third. Error is assigned on the ruling relative to the record proof of the conviction of the witness Watson, contained in the county court. There was no prejudicial error therein.

Several assignments relate to the refusal of the court to give requested instructions. We have carefully examined these assignments, and find that the instructions given were more favorable to the defendant than the law warrants. The following instruc-

tion was given at the defendant's request: "The recent or unexplained possession of stolen property is a circumstance which you should consider in connection with the other evidence in the case, but you cannot convict the defendant on such possession alone, unless the possession is recent and unexplained." Besides this, the court instructed fully on the law of circumstantial evidence. Where the fact of the theft has been shown, and the question is whether or not the defendant committed it, his recent possession of the stolen property is a circumstance for the jury to consider and weigh in connection with the other evidence in the case. The presumption against the defendant is one of fact, to be drawn or not, as the jury may determine, in connection with and in consideration of all the evidence in the case. *Davis v. State*, 7 Okl. Cr. 322, 123 Pac. 560. The defendant cannot complain of an instruction given on his request.

[3] Finally, it is urged that the court erred in refusing to require the jury to retire and reconsider their verdict when they returned a verdict of guilty, which failed to assess the punishment. The record shows that the court instructed the jury as to the penalty to be inflicted. The jury had deliberated some 50 minutes, and reported to the court that they could not agree upon the punishment. Section 2029, Snyder's Sts., provides: "Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly." This was a matter within the discretion of the trial court, and its action will be conclusive, unless there appears to have been a clear abuse of discretion. There is nothing in the record to show an abuse of discretion.

There being no reversible error, the judgment of the district court of Le Flore county is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(4 Okl. Cr. 22)

MORGAN v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW OF EVIDENCE.

The credibility of witnesses, and the weight and effect to be given to their testimony, is a question solely for the jury's determination; and, to reverse a judgment for the reason that the verdict is contrary to the evidence, the court must find, as a matter of law, that the evidence is insufficient to warrant the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 1171*)—TRIAL—REMARKS OF PROSECUTING ATTORNEY.

Remarks of the prosecuting attorney in his argument before the jury, objected to as improper, will be considered and construed in reference to the evidence; and, in order to constitute reversible error, the impropriety indulged in must have been such as may have influenced the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

3. CRIMINAL LAW (§ 720*)—ARGUMENT OF PROSECUTING ATTORNEY.

The prosecuting attorney has the right, in his argument before the jury, to discuss all the facts bearing upon the issue within the scope of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

Appeal from District Court, Seminole County; Tom D. McKeown, Judge.

Edmond Morgan was convicted of manslaughter in the first degree, and appeals. Affirmed.

Crump & Skinner, of Wewoka, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and C. J. Davenport, of Oklahoma City, for the State.

DOYLE, J. Plaintiff in error, Edmond Morgan, hereinafter referred to as the defendant, was convicted of first degree manslaughter, in the district court of Seminole county, on an information filed in said court November 29, 1909, charging him with the murder of one Willie Nusky in said county on or about October 24, 1909, and, in accordance with the verdict of the jury, was sentenced to serve a term of four years' imprisonment in the penitentiary. The judgment and sentence was entered on April 29, 1911. To reverse the judgment, an appeal was perfected by filing in this court October 2, 1911, a petition in error with case made.

The petition alleges numerous assignments of error, only two of which are presented in the brief. First it is contended "that the evidence is insufficient to sustain the verdict." The circumstances under which the homicide was committed are briefly as follows: Defendant and the deceased were full-blood Indians. On the night of the homicide, they attended a negro dance some five or six miles from the home of the deceased. Some time after midnight they left the dance and returned to the home of the deceased about 4 o'clock in the morning. The testimony for the state tends to show that the defendant there stabbed the deceased, and he died almost immediately. The defense was a denial, and that, on the road from the dance, the deceased had a fight with a negro whisky peddler, and that the negro had cut him.

The first witness for the state, Mollie Wilson, testified that she and her sister Roda Wilson were staying at the house of the deceased, and were sleeping in the same room

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with his wife, but on different beds; that the deceased came home about 4 o'clock in the morning, and shortly afterwards the defendant came in; that they both then went out, and she heard the deceased groan; that his wife then went out and said, "They are striking him;" that she went out, and the deceased was lying on the ground; that they picked him up, the defendant assisting, and carried him into the house, and he was dead in a few minutes.

Roda Wilson testified that when she heard Millie Nusky, the wife of the deceased, say, "They are striking him," she took a light and went out. The deceased was lying on the ground, and the defendant was standing by, and she saw the defendant give a knife to Millie Nusky, and Millie handed the knife to her, and the next day, at the inquest, she gave the knife to the officers; that there was blood on the knife and blood on the ground where the deceased fell; that the defendant stayed at the house until daylight.

Dr. Yates testified that he was a practicing physician; that he examined the body of the deceased, and found a slight wound, just an abrasion, across the forehead, also a wound on the temporal eminence of the cranium, and a third wound below the collar bone, between the second and third ribs, that seemed to be a stab with a knife blade; that the wound ranged down in the direction of the heart; and that this wound would have caused almost if not instant death.

On behalf of the defendant, Jim Woods testified that he met the deceased and the defendant at Konawa, and went with them three miles south to a negro dance, the night of the killing.

Millie Nusky testified that she was the wife of the deceased; that, on the night of the homicide, her husband, Willie Nusky, did not come home until about 4 o'clock in the morning; that he came into the house and sat down on the bed and said "that they had been having a fight and a negro stabbed me"; that there was blood on his face, and, while he was talking to her, the defendant came in and said, "I am going on home;" and her husband said to him, "You had better stay with me to-night and go home in the morning;" and the defendant said, "All right, I will strip my horse," and went out the door, and her husband followed him out; that her husband and the defendant "had nothing against each other, and he did not kill her husband." Her cross-examination we quote from the record: "Q. Didn't you state to Rebecca West, who was acting as interpreter before the coroner's jury on the 25th day of October, 1909, at the inquest held over the dead body of Willie Nusky, that you saw Edmond Morgan stab Willie Nusky, and that he then gave you the knife? * * * Q. Or that in substance? * * * A. No, sir; I never said it. Q. Didn't you state

to Rebecca West, at the coroner's inquest held before W. A. Duncan on the 25th day of October, 1909, that there was nobody present at the time Willie Nusky was killed but Edmond Morgan? * * * A. No, sir." Further: "Q. Did you see Willie Nusky fall? A. Yes, sir. Q. What did you say when you saw him fall? A. I stated 'that they were striking him and he was falling.' Q. Who was outside of the house with Willie Nusky other than Edmond Morgan? A. No one else."

The defendant testified on his own behalf that he was about 20 years old; that he was with Willie Nusky the night he was killed and when he died; that he and the deceased and Jim Woods went to the negro dance from Konawa, got there about midnight, stayed about an hour, and he and the deceased then started home; after going a few miles, they were overtaken by a negro whisky peddler named Dindy, and a difficulty took place; that the deceased and Dindy got off their horses and were fighting, and witness took a knife from the negro and put the deceased on a horse and brought him home; that he did not exactly know where Dindy lived, but that he was now dead; that, just before they reached the Nusky home, the deceased's hat fell off, and witness stopped to hunt for the hat, and then followed him into the house; that deceased asked him to stay all night, and he said, "All right," and went out to strip his horse, and the deceased followed him out, and, as he started to unsaddle the horse, he saw him fall; that the women came out with a light, and he helped them take him into the house, and then stayed there until daylight; and that he (the defendant) did not stab and kill the deceased.

In rebuttal, Mrs. Rebecca West testified that she acted as interpreter at the inquest, and that Millie Nusky stated in that examination that Edmond Morgan, the defendant, stabbed her husband, Willie Nusky.

[1] It is the exclusive province of the jury to determine questions of fact. They, and they only, have a right to judge the credibility of the various witnesses; and the weight and effect to be given their testimony was a question solely for the jury's determination; and we think that the defendant received, at the hands of the jury, the benefit of every doubt in the case, and we only wonder that the jury by their verdict assessed the minimum penalty.

The second relates to alleged misconduct on the part of the prosecuting attorney during the trial, and in his argument to the jury. Exception was taken and objection is made to the rigor of the cross-examination of Millie Nusky and the defendant. These are matters largely within the discretion of the trial judge; and, in view of the testimony of the wife of the deceased and the defendant's testimony, we think the discre-

tion was not abused. Their testimony justified a searching examination into her relations with the defendant.

In the course of the argument, the prosecuting attorney used this language: "I did say the woman had been fixed, and I say it now. You don't only have my word for it, gentlemen of the jury, but you have the word of Dr. Yates, and you have the word of Mrs. West." This statement was objected to, and the prosecuting attorney said: "I don't know; probably a better word would be that I believe, from the evidence, that she committed perjury." This it is claimed constitutes misconduct on the part of the prosecuting attorney.

[2, 3] The remarks of counsel must be considered and construed in reference to the evidence, and it is doubtful if they were objectionable. The testimony teems with indications of willful perjury upon the part of the wife of the deceased. She had testified, at the preliminary, that the defendant stabbed the deceased. On the trial as a witness for the defendant, her testimony was just the opposite. A prosecuting attorney, confronted with such a witness, necessarily feels a great surprise, and naturally concludes that perjury has been committed. The second objection is that he used the following language: "All must be drawn on the conclusion that he was a frequent caller at the home of the deceased, and that the deceased's wife is now trying to shield him by her testifying as it is shown from the witness stand. Where is the motive?" This was the conclusion of an elaborate argument on the question of motive, and we think the argument was legitimate, under the evidence in the case. However, the trial court sustained the objections.

In order to constitute reversible error, the impropriety indulged in must have been such that may have wrongfully influenced the verdict. The verdict returned shows that no injury was suffered by the defendant.

In *Thacker v. State*, 3 Okl. Cr. 485, 106 Pac. 986, it is held: "Remarks of the prosecuting attorney in his argument before the jury, objected to as improper, will be considered and construed in reference to the evidence; and, in order to constitute reversible error, the impropriety indulged in must have been such as may have influenced the verdict."

After a careful examination and consideration of the entire record, we are of opinion that the defendant had a fair trial, and we are satisfied that the verdict is sufficiently supported by competent evidence, and that no error was committed prejudicial to his substantial rights.

The judgment of the district court of Seminole county is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 47)

BAKER v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.

In the absence of prejudicial error, this court has uniformly declined to disturb the verdict of a jury on controverted questions of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 740*)—TRIAL—QUESTIONS FOR JURY—INSANITY OF ACCUSED.

When a plea of insanity is entered on behalf of a person on trial for crime in the courts of this state, the issue as to whether or not he was sane or insane at the time of the commission of the offense is one for the jury, to be determined from all the facts and circumstances in evidence under proper instructions from the court, and is not an issue upon which an accused is entitled to an instruction advising an acquittal. Such issue should be fairly submitted to the jury under the doctrine laid down in *Adair v. State*, 6 Okl. Cr. 284, 118 Pac. 416.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1712; Dec. Dig. § 740.*]

3. CRIMINAL LAW (§§ 1031, 1048*)—OBJECTION TO PANEL—WAIVER OF ERROR.

(a) An objection to the jury panel, raised after the verdict of the jury, in the absence of any showing or contention that the accused had any other than a fair and impartial trial, will not be considered on appeal.

(b) It is the duty of counsel to raise, at the proper time and in the proper manner, all objections to the proceedings, and save proper exceptions. When this is not done, they are treated as waived, and there are few exceptions to this rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2622, 2626, 2631, 2656, 2657, 2670; Dec. Dig. §§ 1031, 1048.*]

Appeal from Superior Court, Logan County; John D. Chappelle, Judge Pro Tempore.

F. C. Baker was convicted of felonious assault, and appeals. Affirmed.

John A. Remy, of Guthrie, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen. (R. E. Gish, of Oklahoma City, of counsel), for the State.

ARMSTRONG, P. J. The plaintiff in error, F. C. Baker, was convicted in the superior court of Logan county on a charge of assault with intent to kill, committed on the person of his wife, and his punishment fixed at imprisonment in the penitentiary for a period of seven years. The accused as a defense interposed a plea of insanity. We have carefully considered the proofs introduced at the trial and find that they fully warrant the verdict of the jury.

[1] Counsel urge certain errors of law as ground for reversal. The fact that there was testimony introduced at the trial which would warrant a jury in returning a verdict of not guilty is no ground for reversal when there is strong testimony justifying a conviction. This court has uniformly declin-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed to disturb the verdict of a jury on issues involving controverted questions of fact, in the absence of prejudicial errors of law.

[2] Counsel in his brief urges the court to reverse this judgment on the ground that the court erred in overruling the motion to advise a verdict. It appears from the record that this motion, omitting the caption and formal parts, is as follows: "The court instructs the jury in this case that the defendant interposes the defense of insanity; that there has been substantial evidence introduced by the defendant in support of said plea, and therefore, as there has been no substantial evidence introduced by the state which tends to contradict the same, it will be your duty to return a verdict of not guilty because of his insanity." The motion was overruled, and properly so. This question was correctly submitted to the jury by the instructions of the court. Trial courts in Oklahoma are limited in their power to interfere with the determination of issues of fact; and, where there are any facts from which the jury can legitimately deduct either of two conclusions, a motion to advise a verdict should always be denied, and the question of fact properly submitted under instructions given.

[3] Counsel next urges that the court erred in permitting nine of the jurors, who served on this panel, to sit in this case, because they had served more than two weeks prior to the time this case was called, and had not been held over for further service by an order of the court. The record is silent on this point. No objection was made to the panel, and this question was not raised until conviction resulted. There is nothing in the record to indicate that the accused had other than a fair and impartial trial at the hands of the jury as it was selected. We have uniformly declined to consider questions on appeal that were not raised at the proper time in the trial court, except such as constitute fundamental error or error prejudicial per se. Without entering into a discussion of the statute bearing on this point, we decline to interfere with this judgment on this ground, for the reason that the question was not properly raised in the trial court. Counsel next complains of instructions of the court. We have carefully read the instructions, and find that the issues were properly submitted, and the doctrine laid down in the case of *Adair v. State*, 6 Okl. Cr. 284, 118 Pac. 416, strictly adhered to. There is no prejudicial error in the instructions.

The only other assignment of error argued in the brief is based upon alleged prejudicial statements made by the county attorney in his argument to the jury. We have carefully examined the record; and, while the argument of the county attorney may be subject to criticism, we are not able to say that

this judgment should be reversed upon the ground that the argument was improper and prejudicial. The county attorney should have been reprimanded and the jury admonished to ignore the statements upon which this assignment is based. But counsel for the accused did not ask such action of the court; and the statements are not of sufficient prejudicial character to justify this court in reversing the judgment on the ground that the error was fundamental.

We are of opinion that the judgment should be affirmed, and it is so ordered.

DOYLE and FURMAN, JJ., concur.

(35 Okl. 378)

FT. SMITH & W. R. CO. v. BLEVINS.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

1. REMOVAL OF CAUSES (§§ 76, 89*) — INCREASE OR AD DAMNUM.

Where plaintiff amends his petition, increasing the amount sued for so as to constitute a removable cause to the proper federal court, the right to remove is thereby given, and, if the defendant by proper application in due time avails itself of that right, it cannot be denied.

(a) Where the defendant, resident of another state, regularly and strictly in accordance with Act Cong. Sept. 24, 1789, c. 20, 1 Stat. 73, known as the "Judiciary Act," as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 506), files his petition in the state court for the removal of the cause to the United States Circuit Court, and a sufficient bond, which is offered for the approval of the state court, the said court is ipso facto ousted of jurisdiction; and whether an order for removal is granted or denied by the state court all further proceedings therein are coram non judice and void.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 133, 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. §§ 76, 89.*]

2. REMOVAL OF CAUSES (§ 2*)—ACTIONS UNDER EMPLOYER'S LIABILITY ACT.

Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), amending section 6 of the Employer's Liability Act (Act April 22, 1906, c. 149, 35 Stat. 86 [U. S. Comp. St. Supp. 1909, p. 1173]), so as to provide that the jurisdiction of the courts of the United States under said act shall be concurrent with that of the courts of the several states, and no case arising thereunder and brought in any state court of competent jurisdiction shall be removed to any court of the United States, has no application to actions brought prior to the amendment.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by Robert L. Blevins against the Ft. Smith & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. E. & H. P. Warner, of Ft. Smith, Ark., for plaintiff in error. Winston T. Banks, of McAlester, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

WILLIAMS, J. This proceeding in error seeks to review the judgment of the trial court wherein the defendant in error as plaintiff sued the plaintiff in error as defendant to recover for personal injuries. By petition filed January 19, 1909, plaintiff alleged injuries to have been sustained by him on May 21, 1909, as a result of the negligence of the defendant in the sum of \$1,999.90 whilst in the employ of the said defendant on a work train assisting in ditching the sides of its track and removing the dirt to fills, and doing such other things connected with the work as he was directed by the defendant's foreman in charge. At the first trial on May 10, 1910, a verdict was rendered for plaintiff in the sum of \$300. Plaintiff moved for a new trial. This motion being concurred in by the defendant the same was granted; the plaintiff being given 20 days to file an amended petition. On May 26, 1910, plaintiff filed such amended petition to recover in the sum of \$1,999.90. On February 15, 1911, the case was called for trial, and plaintiff, upon application, was given leave to amend his petition by changing the general allegation to read that the plaintiff had been damaged in the sum of \$12,250 instead of \$1,999.90, and changed the prayer in said petition and asked for the recovery of \$12,000 damages and \$250 expenses and medical aid, making a total of \$12,250, instead of \$1,999.90, to which defendant excepted. Thereupon defendant was given until 1:30 o'clock to plead to the amended pleading. On the same day the defendant asked leave to file application to remove the cause to the federal court, and same was in due form with the required bond.

[1] 1. Where the plaintiff amends his petition increasing the amount or ad damnum, so as to constitute a removable cause, the right to remove is thereby given, and, if the defendant by proper application in due time avails itself of that right, it cannot be denied. *Huskins v. Cincinnati, N. O. & T. P. Ry. Co.*, 37 Fed. 504, 3 L. R. A. 545; *Cookerly v. Great Northern Ry. Co.* (C. C.) 70 Fed. 277; *Speckart v. German National Bank et al.* (C. C.) 85 Fed. 12; *Balley v. Mosher et al.* (C. C.) 95 Fed. 223. In *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 100, 18 Sup. Ct. 264, 42 L. Ed. 676, it was held that under Act Cong. March 3, 1887, c. 373, 24 Stat. 552, amending Act Cong. 1789, c. 20, 1 Stat. 73, known as the "Judiciary Act," as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), the right to remove could be exercised as soon as the pleadings on behalf of plaintiff were so amended as to show a removable cause, although as originally begun the action was not removable because the necessary diversity of citizenship or amount in controversy did not appear. In *Stevens et al. v. Phoenix Insurance Co.*, 41 N. Y. 149, it is held: "Where the defendant, citizen of another state, regularly, and strictly in accordance with act of Congress of 1789 known

as the 'Judiciary Act,' files his petition in the state court for the removal of the cause to the United States Circuit Court, and a sufficient bond, which is offered for the approval of the state court, the state court is ipso facto ousted of jurisdiction; and, whether an order for removal is granted or denied by the state court, all further proceedings therein are coram non judge and void." See, also, *C., R. I. & P. Ry. Co. v. Brazzel*, 124 Pac. 40; *Western Coal & Mining Co. et al. v. Osborne*, 30 Okl. 235, 119 Pac. 973; *Bolen-Darnell Coal Co. v. Kirk*, 25 Okl. 273, 106 Pac. 813, 26 L. R. A. (N. S.) 270; *Choctaw O. & G. R. Co. v. Burgess*, 21 Okl. 110, 95 Pac. 606. The foregoing proposition does not appear to be controverted by counsel on either side; both sides joining in stating that the trial court denied same on the theory that Act Cong. April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), passed to amend Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1173; U. S. Comp. St. Supp. 1911, p. 1322), deprived defendant of such right of removal.

[2] 2. This identical question is passed on in *Newell v. Baltimore & O. R. Co.* (C. C.) 181 Fed. 698, wherein it is said: "In addition, the amendment of 1910 does not confer jurisdiction upon pending suits. The use of the words, 'may be brought,' clearly indicates that it refers to actions to be commenced after its passage. In addition, also, it is a general proposition of law that statutes will not be given a retroactive effect or apply to pending cases, unless they relate to procedure merely, or are so expressed in the act. As said by Mr. Justice Clifford in *Twenty Per Cent. Cases*, 20 Wall. 187, 22 L. Ed. 339: 'Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.' I am of the opinion that the amendment of 1910 was not retroactive, and did not confer jurisdiction upon this court over the defendant. Had plaintiff elected to proceed without amendment of his statement or declaration, the benefits which he hoped to have by reason of the employer's liability act, which are unnecessary to be stated, might have been lost to him. He insisted upon the amendment, and as well asserts that the original statement sets forth a cause of action under the statute. The jurisdiction sought was not founded only upon diverse citizenship. * * * An act of the Indiana Legislature of 1853 (Acts of 1853, p. 113) authorized suits to be brought before a justice of the peace only, and hence the recovery was limited to \$100; but by the mandatory act (Acts 1859, p. 105), where the damages exceed \$50, the party may bring his suit in the circuit or common pleas court, and recover the value of the animal killed or

injury inflicted. In the opinion it is said (Indianapolis & Cincinnati R. Co. v. Kercheval, 16 Ind. 88): "The language of the amendment, so far as it indicates any legislative intent in respect to the question now under consideration, is as follows: 'That whenever any animal or animals shall be killed or injured by the cars or locomotives, or other carriages, used on any railroad in this state, the owner thereof may go before some justice of the peace,' etc. 'The language here employed seems to be clear and explicit. The amendment applies only to such animals as 'shall be' killed. 'Shall be' clearly indicates the future, and not the past. There is nothing in the amendment which indicates, so far as we can discover, an intent on the part of the Legislature to make it retrospective, and embrace animals previously killed. This court has in two instances at least indicated the rule of construction in this respect. Thus: 'It is a well-settled principle of law that the courts are to give statutes a prospective operation, where there is nothing indicating a different intention on the part of the Legislature which enacted the statutes.' Pritchard v. Spencer, 2 Ind. 486. Again: 'Statutes are to be considered prospective, unless the intention to give a retrospective operation is clearly expressed; and not even then, if, by such construction, the act would divest vested rights.' Aurora, etc., Turnpike Co. v. Holthouse, 7 Ind. 60." See, also, Wright v. Southern Ry. Co. et al. (C. C.) 80 Fed. 260; Ranney v. Bostic, 15 Mo. 216; Murray v. Gibson, 15 How. 421, 14 L. Ed. 755; N. Y. & O. M. R. Co. v. Van Horn, 57 N. Y. 477; McEwen et al. v. Dem et al., 24 How. 242, 16 L. Ed. 672; Rolater v. Strain, 31 Okl. 58, 119 Pac. 992; Good et al. v. Keel et al., 29 Okl. 325, 116 Pac. 777. The cases of McHarry v. Eatman, 29 Okl. 46, 116 Pac. 935, and Harris v. Gale (C. C.) 188 Fed. 712, do not militate against the rule announced by the foregoing cases. This court, as well as the United States Court for the Eastern District of this state, reached the conclusion therein expressed not only from the language and the context of the whole act, its subject-matter, purpose, application, etc., but also from its prior contemporaneous construction by the Interior Department. The proviso of section 6 of the act of May 27, 1908 (35 Stat. 313, c. 199), passed on in said cases by this court and the federal court for the Eastern district of this state, was solely remedial. Such statutes as a rule receive a liberal and expansive application at the hands of courts, to correct innocent mistakes, cure irregularities in proceedings, or give effect to the acts and contracts of individuals according to the intent thereof. That rule was applied in McHarry v. Eatman, supra, and Harris v. Gale, supra.

Does the petition state a cause of action under the terms of the Employer's Federal Liability Act (Act Cong. April 22, 1908), entitled: "An act relating to the liability of

common carriers by railroad to their employes in certain cases" (chapter 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322])? Said act is as follows: "That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable to damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover

damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employes,' approved June eleventh, nineteen hundred and six."

Act April 5, 1910, amending the foregoing act (chapter 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]), is as follows:

"That an act entitled 'An act relating to the liability of common carriers by railroad to their employes in certain cases' approved April twenty-second, nineteen hundred and eight, be amended in section six so that said said section shall read:

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of com-

petent jurisdiction shall be removed to any court of the United States."

"Sec. 2. That said act be further amended by adding the following section as section nine of said act:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury."

In *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, it is said: "So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carrier, and that the words 'any employe,' as found in the statute, should be held to mean any employe when such employe is engaged only in interstate commerce. * * *

If we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read 'any employe when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy." In *Hyde v. Southern R. Co.*, 31 App. D. C. 466, referring to the foregoing case, it is said: "Necessarily all that was actually decided in that case was that, in so far as the act relates to carriers engaged in business in the states, it is repugnant to the Constitution, in that it applies to all employes, whether engaged or not in interstate commerce at the time of injury, and that it cannot be restricted, by construction, to employes engaged in interstate commerce alone, in order to save its constitutionality." In *El Paso & Northeastern Ry. Co. v. Einedina Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106, referring to the *Employer's Liability Cases*, supra, it is said: "In that case this court held that, conceding the power of Congress to regulate the relations of employer and employe engaged in interstate commerce, the act of June 11, 1906 (34 Stat. at L. 232, c. 3073, U. S. Comp. St. Supp. 1907, p. 891), was unconstitutional, in this: that in its provisions regulating interstate commerce Congress exceeded its constitutional authority in undertaking to make employers responsible not only to employes when engaged in interstate commerce, but to any of its employes, whether engaged in interstate commerce or in commerce wholly within a state."

In *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, it is said:

"(1) The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

"(2) The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

"(3) 'To regulate,' in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

"(4) This power over commerce among the states, so conferred upon Congress is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

"(5) Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employes.

"(6) The duties of common carriers in respect to the safety of their employes, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. * * * 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not the right kind or quality, commerce in consequence becomes slow or

costly or unsafe or otherwise inefficient; and; if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.' In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employes, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged."

In *Southern R. Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, it is said: "The original act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), imposed upon every common carrier 'engaged in interstate commerce by railroad' the duty of equipping all trains, locomotives, and cars used on its line of railroad in moving interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employes engaged in its movement; and the second section of that act made it unlawful for 'any such common carrier' to haul or permit to be hauled or used on its line of railroad any car 'used in moving interstate traffic' not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. Act March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1909, p. 1143]), amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should 'apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith. * * *' The real controversy is over the true significance of the words 'on any railroad engaged' in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car, or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate

traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. And so certain is this that we think there would be no contention to the contrary were it not for the presence in the amendatory provision of the third clause—"and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." In this there is a suggestion that what precedes does not cover the entire field; but, at most, it is only a suggestion, and gives no warrant for disregarding the plain words, 'on any railroad engaged' in the first clause. True, if they were rejected, the two clauses, in the instance of a train composed of many cars, some moving interstate traffic and others moving intrastate traffic, would by their concurrent operation bring the entire train within the statute. But it is not necessary to reject them to accomplish this result, for the first clause, with those words in it, does even more; that is to say, it embraces every train on a railroad which is a highway of interstate commerce, without regard to the class of traffic which the cars are moving. The two clauses are in no wise antagonistic, but, at most, only redundant; and we perceive no reason for believing that Congress intended that less than full effect should be given to the more comprehensive one, but, on the contrary, good reason for believing otherwise. As between the two opposing views, one rejecting the words 'on any railroad engaged' in the first clause, and the other treating the third clause as redundant, the latter is to be preferred, first, because it is in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective, and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in process of adoption (Cong. Rec. 57th Cong., 1st Sess. vol. 25, pt. 7, p. 7300; Id., 2d Sess. vol. 36, pt. 3, p. 2268), thus making it certain that without them the act would not express the will of Congress. * * *

We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is: Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those

who are employed in its movement? Or, stating it in another way: Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and, when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employes, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others. * * *

Employer's Liability Act June 11, 1906 (34 U. S. Stat. 232, c. 3073 [U. S. Comp. St. Supp. 1907, p. 891]), having been held to be violative of the federal Constitution and not authorized by the powers granted to the federal government by the interstate commerce clause (par. 3, sec. 8, art. 1, Const. of United States) on the ground that it included any employe of every common carrier engaged in interstate commerce, so far as it related to the states, it being assumed in said opinion that, if the act read, "An employe when engaged in interstate commerce," it would be valid, in the light of that opinion the Act

of April 22, 1908, was passed wherein it is provided that "every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury, while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The plaintiff, in his petition, alleged that he was a resident citizen of Okfuskee county, in this state, and that the defendant was a corporation existing under the laws of the state of Arkansas for the purpose of building, equipping, and operating a line of railway from Ft. Smith, Ark., to Guthrie, Okl., said line running through said county. He further alleged: "That on and before the 21st day of May, A. D. 1909, this plaintiff was in the employ of said defendant company, as one of the employes on a work train of the said defendant company, and that plaintiff's duties were to assist in ditching the sides of the track, and removing the dirt to fills, and doing such other things connected with the work as he was told to do by the defendant's foreman in charge of said work train, and at the time there were eight other men beside plaintiff working with that train; that on May the 21st, A. D. 1909, between the towns of Boley and Castle, in said county and state, this plaintiff and the other work hands on said train were engaged in the same common employment of fixing and repairing the track of the said line of railroad of the said defendant company at said point, and that this plaintiff and said workers were at the said time and place, under the direction and control of one * * * Fleceustine, whose initials are to this plaintiff unknown, who was at that time the conductor of said train, and the foreman of this plaintiff and the other workers on said defendant's work train. * * * That on the said 21st day of May, 1909, and at said place, and while in the proper exercise and discharge of his duties under such employment, plaintiff and the one who worked with him in handling the tackle block up next to the plow that was used on defendant's cars to unload dirt from said cars were ordered and directed by said foreman to get upon the cars, and move that said tackle block three cars ahead. That, in obedience of said order from said conductor of said train, this plaintiff quit his place in the clear on the ground by side of the car, and mounted the car on which the tackle block was fastened, and stooped to unfasten the chain holding said tackle block to the side of said car, and, stooping down to unfasten the chain, found the cable caught, and asked the conductor to signal the engineer in charge

of the engine to back up and give slack, so plaintiff could unloose the said chain, and that the conductor gave such signal to back up, or should have given it, and in place of doing that the said conductor either signaled the engineer to go ahead, or the engineer mistook the conductor's signal, and the engineer did jerk the engine ahead, thus jerking the plow to which the cable was attached up near the block where this plaintiff was standing, and broke the defective and rotten chain that was holding the tackle block and cable to said car, and in some way the said tackle block or cable struck this plaintiff on his right leg, breaking it in four places."

In *Newell v. Baltimore & O. R. Co.*, supra, it is said: "The action is brought to recover damages for personal injuries alleged to have resulted from the negligence of the defendant. The suit was brought on March 5, 1910. The statement then filed set forth nothing from which an inference could be drawn that the action was not an ordinary common-law action. This being so, and there being a diversity of citizenship alleged, this court clearly had jurisdiction at the time suit was brought. It is true that in the original statement of the plaintiff's case the words 'interstate traffic' were used, but their use was apparently for the purpose of describing certain cars by which the plaintiff alleged he was injured, and not as descriptive of the employment of the plaintiff. After the general issue had been pleaded, and after the case was upon the trial list, the court permitted the plaintiff to amend his original statement by the addition of the following words: 'Plaintiff avers that on May 6, 1909, and for some time previous thereto, he was employed by the defendant in the capacity of a freight brakeman, and, being so as aforesaid in the service of defendant, he was on said date engaged in the performance of his duties as such in interstate commerce work, and, while he was as aforesaid engaged, it became necessary in conducting the defendant's business for the crew of which he was a member to place several freight cars used and engaged in interstate traffic on a certain siding or side track of defendant's situate in its railroad yards in the borough of Connellsville, Fayette county, Pa.' It will thus be seen that what had been the common-law action of the plaintiff became by the amendment an action under the act of Congress approved April 22, 1908, commonly called 'Employer's Liability Act,' entitled 'An act relating to the liability of common carriers to their employes in certain cases.' * * * When the case was reached for trial, and before the jury was selected and sworn, counsel for the defendant moved the court to dismiss the action for want of jurisdiction upon the ground that it appeared from the pleadings that the controversy is one arising under the Constitution and laws of the United States. It was urged by plaintiff's counsel

at that time, and at the time of the argument of this motion, that the suit was brought for the purpose of having the benefit of the federal statutes, that the question of jurisdiction should have been raised at once by the defendant, and, that not having been done, the jurisdiction was waived. To this assent could not be given because the original statement of claim gave no notice of plaintiff's intention to have the benefits of the federal act, and the defendant at the first convenient time after the amendment, which for the first time set out the plaintiff's purpose, raised the question of jurisdiction."

Obviously, under said petition, the plaintiff was not "employed by" defendant "while engaged in commerce between any of the several states," and therefore this action does not come either within the provision of the act of April 22, 1908, or April 5, 1910.

The cause is reversed and remanded, with instructions to allow the application for removal. All the Justices concur.

AULT v. ROBERTS.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

In an action where the decisive question involved is a question of fact, and such fact is fairly submitted to the jury under proper instructions from the court, the verdict of the jury will not be disturbed by this court, where the evidence submitted fairly tends to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Commissioners' Opinion, Division No. 2. Error from Tulsa County Court; A. J. Gubser, Judge.

Action by R. R. Roberts against A. F. Ault. Judgment for plaintiff, and defendant brings error. Affirmed.

Biddison & Campbell, of Tulsa, for plaintiff in error. Lydecker & Steele, of Tulsa, for defendant in error.

HARRISON, C. This action was begun in the county court of Tulsa county February 24, 1910, by R. R. Roberts against A. F. Ault to recover the sum of \$500 and interest at the rate of 6 per cent. per annum, alleged to be due as commissions on a sale of real estate brought about by plaintiff for defendant. The cause was tried November 18, 1910, resulting in a verdict and judgment for \$500 and interest, amounting to \$23.95. From this judgment and order overruling motion for a new trial, defendant brings the case here.

Several assignments of error are presented, but the only material question involved is whether the facts were sufficient to warrant

recovery; that is, whether the evidence was sufficient to justify the conclusion of the jury that the plaintiff, Roberts, acting for the defendant, Ault, as his authorized agent, made a sale of certain lots in the city of Tulsa to a third party for defendant, and whether the acts of Roberts in bringing about the sale constituted the procuring cause of such sale, and whether he was entitled to a commission therefor. As stated by plaintiff in error in his brief, there is no conflict in the testimony. The only question submitted to the jury was whether plaintiff had, by a preponderance of the testimony, proved his right to recover. This question, in all its different phases, was, in our judgment, very fully and fairly submitted to the jury by the court. The jury heard the testimony and returned a verdict in favor of plaintiff, thereby impliedly saying that the acts of plaintiff in the premises were the procuring cause of the sale. From an examination of the record, we do not feel authorized to say that such verdict is erroneous and not supported by the evidence, and following the oft-repeated rule of this court that, where questions of fact are properly submitted to the jury, their verdict, based upon the testimony submitted, and guided by the court's charge, will not be disturbed, where it is reasonably supported by the evidence. And being unable from the record before us to say that the verdict herein is not reasonably supported, the judgment of the court below is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 106)

WALTERS v. HODGES.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where the issues presented by the pleadings and the law applicable to the facts in the case are fully and clearly presented to the jury in the instructions of the court, and under such instructions and the testimony in the case the jury returns a verdict, such verdict will not be reversed, where it is sufficiently supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Commissioners' Opinion, Division No. 2. Error from Oklahoma County Court; John W. Hayson, Judge.

Action by Lizzie Hodges against George W. Walters. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert A. Rogers, of Oklahoma City, for plaintiff in error. E. H. Manning, of Boston, Mass., and Thomas E. Mallory, for defendant in error.

HARRISON, C. This action was begun in the county court of Oklahoma county Jan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

uary, 1911, by Mrs. Lizzie Hodges, a rooming house keeper, against George W. Walters, a plumber, for damages alleged to have been caused by the negligence and carelessness of defendant in doing a job of plumbing for plaintiff. It is alleged that the water pipes in plaintiff's rooming house were frozen and bursted, causing a damaging flow of water into plaintiff's rooms; that defendant was employed by plaintiff to repair said pipes; that in attempting to do so, instead of shutting off the water at the proper place, he recklessly dug down to the pipe, striking it with a pick and knocking a hole in it, causing the water to flow out into the street and into the house; that, owing to the pressure of water in the pipes, the hole thus made was not large enough to allow all the water to escape through it, and therefore insufficient to stop the flow into the house; that when plaintiff struck the pipe and knocked the hole in it, as aforesaid, he quit the job and went away and did not return, but left the pipes in that condition; that plaintiff procured other assistance to turn the water off, but, owing to the condition in which the pipes were left by defendant, she was unable to get them repaired, so as to get water into the house, until a number of her boarders left because of her inability to get water into the house; that by reason of the damage or injury done by the water flowing into the house, and by reason of the loss of her roomers after it was turned off, she was damaged in the sum of \$500, all of which was due to the alleged negligence and carelessness of defendant in repairing the pipes.

The answer was a general denial. The cause was tried in March, resulting in a verdict and judgment for plaintiff in the sum of \$50. From this judgment, the defendant appeals upon the one proposition that under the pleadings the evidence was insufficient to sustain the verdict.

The material issues involved were the employment, the negligence of defendant in the manner of repairing the pipes, and the amount of damages sustained by reason of such negligence. These issues, as well as the law applicable to the facts involved, were very fully and clearly presented to the jury in the court's instructions. No objection is made to the court's charge, but plaintiff in error bases his claim for reversal solely upon the ground that the verdict is not sustained by the evidence, contending that the evidence was insufficient to warrant recovery for damages caused by the flow of the water into the rooms; and that the allegations in the petition were insufficient to warrant recovery for damages sustained by a loss of plaintiff's boarders. It was alleged in the petition, however, that plaintiff was damaged both by reason of the water flowing into the house and by the loss of boarders after the water was shut off from the

house until she could get the pipes properly repaired. The testimony in support of these allegations was heard by the jury, and upon such testimony the jury returned its verdict; and from an examination of the record, aside from the oft-repeated rule of this court that a verdict will not be disturbed if it is reasonably supported by the evidence, we think the evidence is reasonably sufficient to sustain the verdict for \$50.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 430)

BILLY v. UNKNOWN HEIRS OF GRAY
et al.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*) — NECESSARY PARTIES.

Where an action was brought by a person claiming to be the sole owner of a tract of land against several defendants to quiet title and to remove cloud therefrom, and a third person intervened, claiming also to be the sole owner of said land and praying for judgment quieting his title, and the judgment rendered decrees plaintiff to be the owner of the title to an undivided half interest in said land and quiet same as against the claims and demands of the defendants named in plaintiff's petition and decrees the interpleader to be the owner of the title to the other undivided half interest in said land and quiet his title as against the claims and demands of defendants, in the prosecution of an appeal from said judgment by plaintiff, the defendants are necessary parties thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from District Court, Coal County; A. T. West, Judge.

Action by Lita Billy against the Unknown Heirs of D. T. Gray and others. Judgment for defendants, and plaintiff brings error. Dismissed.

George A. Trice and H. E. Cullom, both of Coalgate, for plaintiff in error. C. M. Threadgill and Fooshee & Brunson, all of Coalgate, for defendant in error Benjamin Finley.

HAYES, J. This action was originally instituted in the district court of Coal county by plaintiff in error, hereinafter called "plaintiff," against the unknown heirs of D. T. Gray, deceased, and W. B. Chism and the Mortgage & Debenture Company, a corporation. Plaintiff alleges in her petition that she is the legal owner in fee simple of the lands described in her petition; that said lands were patented to one Albert Billy, as his pro rata portion of the lands of the Chickasaw and Choctaw Nations; that the said Albert Billy died intestate, seized of said real estate before statehood, and left plaintiff as his only surviving heir at law.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

She alleges that defendants claim title and interest in and to said real estate adverse to her rights; that the unknown heirs of D. T. Gray claim title under and by virtue of two deeds, conveying said lands to D. T. Gray; that one of said deeds was executed by Benjamin Finley and the other by one Felinbean, both of which have been duly recorded. She alleges that defendant Chism holds a pretended deed to said lands, executed by one R. N. Cummings and wife; and that defendant Mortgage & Debiture Company holds a pretended mortgage, purported to have been executed by R. N. Cummings and wife, all of which instruments have been recorded. She alleges the same are wholly void and without effect, and that they constitute a cloud upon her title, and she prayed for a cancellation of said instruments, and that the cloud upon her title be removed. All of the defendants were summoned as required by law. Thereafter Benjamin Finley, after obtaining leave of court to intervene and be made a party defendant, filed an answer and cross-petition by which he alleges that he is the sole surviving heir of the said Albert Billy, the allottee of the lands in controversy, and alleges that the deed executed by him to D. T. Gray was executed during his minority, and was procured by fraud. He thereupon prays that he have judgment for said lands, and that the conveyances mentioned in plaintiff's petition be canceled as a cloud upon his title. The defendants named in plaintiff's petition failed to answer and made default. Issues having been joined upon plaintiff's petition and the interplea of Benjamin Finley, now defendant in error, the cause was tried to a jury. The verdict of the jury found facts upon which the court determined that both plaintiff and defendant in error are heirs of the deceased allottee, and that they each inherited from said allottee an undivided half interest in the lands in controversy, and the court rendered judgment in favor of plaintiff for an undivided half interest in the lands and quieting her title therein as against the defendants named in her petition, and defendant in error; and by the same judgment decreed that defendant is the owner of an undivided half interest in said land, and quieted his title as against defendants and plaintiff. From that judgment plaintiff alone prosecutes this proceeding in error against Benjamin Finley alone as defendant in error.

Defendant, in error has moved that the cause be dismissed, because defendants in the trial court have not been made parties to this proceeding. The time allowed by statute within which to perfect an appeal from the judgment of the trial court has already elapsed. Every necessary party to an appeal must either make general appearance within the time allowed for appealing from the judgment or final order of a court, or summons must issue within such time and

service thereof be had upon the necessary parties, or the appeal will be dismissed. *Strange et al. v. Crismon*, 22 Okl. 841, 98 Pac. 937. All parties to an action whose interests will be affected by a reversal of the judgment appealed from are necessary parties to an appeal. *Vaught v. Miners' Bank of Joplin*, 27 Okl. 101, 111 Pac. 214; *Trugeon v. Gallamore*, 28 Okl. 73, 117 Pac. 797; *Selbert v. First Nat. Bank of Okeene*, 25 Okl. 778, 108 Pac. 628.

It is contended by plaintiff in error that the omitted defendants are not necessary parties to the appeal, but with this contention we cannot concur. The judgment which plaintiff seeks to set aside by this proceeding decrees to her as against defendants an undivided half interest in the lands in controversy and quietes her title in said undivided half interest against all the claims and demands of the omitted defendants. It likewise decrees the title and possession to an undivided half interest in defendant in error and quietes his title thereto against all the claims and demands of the omitted defendants. What plaintiff sought in the court below, and what she seeks now, is a judgment-decreeing to her the title to said lands as the sole owner and quieting the same against all the claims and demands of defendants and a cancellation of the instruments described in her petition as constituting a cloud upon her title in and to the entire tract of land in controversy. This she hopes to accomplish either by having the judgment in which the omitted defendants are parties set aside by this court and a new trial granted, or by a rendition in this court of a judgment in her favor upon the record. In either event she seeks to set aside a judgment to which persons not before this court are parties and a different judgment rendered. If she should accomplish her purpose and a new trial be granted, the absent persons then, upon a proper showing, might be permitted by the lower court to appear and defend the action against them. At any event, such judgment could not be rendered in this court, or a new judgment rendered in the trial court, without affecting the interests of the absent defendants, and this court is therefore without authority to proceed in this cause.

It is urged upon the authority of *Hallwood v. Dailey*, 70 Kan. 620, 79 Pac. 158, and *Zinkelsen v. Lewis et ux.*, 71 Kan. 837, 80 Pac. 44, 83 Pac. 28, that because defendants defaulted in the court below they are not necessary parties on appeal; but, as heretofore observed by this court, the decisions in the foregoing cases were controlled by a statute adopted in Kansas in 1901, which constitutes no part of the statute adopted from that state into the territory of Oklahoma, and later into this state, and the fact alone that a person has made default in the lower court does not render him an unnecessary

party on appeal from a judgment to which he is a party, if by reversal of such judgment his interests will be affected. *Jones v. Balsley & Rogers*, 25 Okl. 344, 106 Pac. 830, 188 Am. St. Rep. 921; *Merrell v. Walters*, 30 Okl. 173, 119 Pac. 1122.

It follows that this proceeding in error must be dismissed, and it is so ordered.

TURNER, C. J., and KANE and DUNN, JJ., concur. WILLIAMS, J., not participating.

(37 Okl. 70)

POLOKE v. POLOKE.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 231*) — ALIMONY — LIABILITY OF WIFE.

A wife cannot be required to pay alimony for the support of her husband when a divorce is granted for the fault of the husband.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.*]

(Additional Syllabus by Editorial Staff.)

2. DIVORCE (§§ 209, 231*) — HUSBAND AND WIFE (§ 283*) — "ALIMONY" — DEFINITION.

"Alimony" is an allowance which the husband pays by order of the court to his wife for her maintenance while living separate from him, where no suit is brought for divorce, or during the pendency of a divorce suit, or after the divorce is granted.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 605-609, 658-661, 665; Dec. Dig. §§ 209, 231.* *Husband and Wife*, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 307-311; vol. 8, pp. 7571, 7572.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Creek County; W. L. Barnum, Judge.

Action by Lucy Poloke against Sam Poloke. Judgment for plaintiff for divorce, and, from the portion of the judgment requiring her to pay alimony to him, she appeals. Judgment for alimony reversed.

W. P. Root, of Sapulpa, and Biddison & Campbell, of Tulsa, for plaintiff in error.

ROSSER, C. This was an action for divorce by Lucy Poloke against Sam Poloke. The court rendered judgment for the plaintiff for the divorce, but required her to pay her husband the sum of \$50 per month during her lifetime as alimony, and also required her to pay him an attorney fee of \$100. From this portion of the judgment the appeal was taken.

The judgment should be reversed. The power of the court to grant alimony is governed by section 6179, Comp. L. 1909. That section is as follows: "When a divorce shall be granted by reason of the fault of aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before marriage

or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage and the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. If the divorce shall be granted by reason of the fault or aggression of the wife, the court shall order restoration to her of the whole of her property, lands, tenements and hereditaments owned by her before, or by her separately acquired after such marriage, and not previously disposed of, and also such share of her husband's real and personal property, or both, as to the court may appear just and reasonable; and she shall be barred of all right in all the remaining lands of which her husband may at any time have been seized. And as to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. But in case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may in its discretion set apart such a portion of the wife's separate estate as may seem proper for the support of the children, issue of the marriage."

It clearly appears from the reading of this section that it was the intention of the Legislature to cover the entire subject of the disposition of property when a divorce is granted. No mention is made of the husband's right to alimony, and it cannot be presumed that it was the intention of the Legislature to allow him alimony.

[2] The definition of "alimony," as given in nearly all the authorities, is, in substance, that it is an allowance which the husband pays, by order of court, to his wife for her maintenance while living separate from him, where no suit is brought for divorce, or during the pendency of a divorce suit or after the divorce is granted.

The evidence in this case shows that the property of the wife consists of her allotment as a member of the Creek tribe of Indians, and the royalties which she has received from oil produced on the allotment, all of which was paid to her after her separation from her husband. It is not claimed that she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was ordered to pay the money awarded her husband, to equalize a division of their joint property or property accumulated during marriage, or anything of that kind.

[1] No authority has been found sustaining a judgment requiring a wife to pay alimony to her husband. Several cases have been found holding that a husband cannot recover alimony from his wife. See *Somers v. Somers*, 39 Kan. 132, 17 Pac. 841; *Greene v. Greene*, 49 Neb. 546, 88 N. W. 947, 34 L. R. A. 110, 59 Am. St. Rep. 560; *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65.

No opinion is expressed as to the effect of section 3643, Comp. L., which makes it the duty of the wife to support the husband when he has not deserted her, out of her separate property when he has no separate property, and is unable on account of infirmity to support himself. No such facts exist here. The grounds alleged for divorce were desertion, and the court rendered judgment sustaining the allegations of the petition.

The judgment for alimony should be reversed, and judgment here rendered that defendant do not recover alimony.

PER CURIAM. Adopted in whole.

(37 Okl. 122)

BAKER v. VAN NESS et al.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

REPLEVIN (§ 98*) — NEW TRIAL — ERROR OF LAW.

Where a plaintiff in a replevin action states in open court that he does not intend to prosecute the case further, and that judgment may be rendered for the defendant, and the defendant introduces evidence as to the value of the property taken without objection by the plaintiff, and the court renders judgment for the defendant in the alternative for the return of the property or its value, without objection or exception by the defendant, it is error, as a matter of law, to sustain a motion for new trial.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 98.*]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Canadian County; John J. Carney, Judge.

Action by L. C. Van Ness and C. A. Van Ness, partners under the name of L. C. Van Ness & Co., against Emma L. Baker. Judgment for defendant. From an order granting a new trial, she appeals. Reversed and remanded.

W. E. Bennett and W. M. Wallace, both of El Reno, for plaintiff in error. Lucius Babcock, of El Reno, for defendants in error.

ROSSER, C. This was a replevin action brought by L. C. Van Ness and C. A. Van Ness, as partners, against Emma L. Baker, to recover the possession of a certain

stock of merchandise, of which they claimed possession by virtue of a certain chattel mortgage. The writ was issued and the property taken and delivered to the plaintiffs. The defendant answered, the case was set for trial, and both parties appeared. The plaintiffs in open court announced that they did not desire to prosecute the case further, and that judgment might be entered for the defendant. The defendant then introduced evidence as to the value of the property taken under the writ of replevin, and judgment was rendered in favor of the defendant in the alternative for the return of the property or its value, which was found to be \$2,000. The plaintiffs filed a motion for a new trial, and several months afterwards the motion was sustained and a new trial granted. From the order sustaining the motion for a new trial, the defendant appeals.

The case should be reversed. It is the duty of parties having rights to claim them at the proper time and place. The failure of a party seasonably to assert a known right, when called upon and afforded an opportunity to do so, is a waiver of that right. *Rooker v. Bruce* (Ind.) 85 N. E. 351. The plaintiffs were in the courtroom at the time the case was set. If they wanted a trial, it was their duty to try the case then or move for a continuance upon lawful grounds. Instead, they abandoned their case and stated that judgment might be rendered for the defendant. It is manifest that there were no legal grounds upon which a new trial could be granted. The plaintiffs knew when they dismissed their action that the defendant had the right to have her rights inquired into. *Thomas v. First National Bank*, 32 Okl. 115, 121 Pac. 272. The plaintiffs had a right to take part in the inquiry, but they neglected to do it. Defendant offered her evidence without objection or exception by the plaintiffs. It reasonably supports the finding of the court as to the value. Plaintiffs did not suggest at the time of the hearing that the evidence was insufficient. The plaintiffs offered no evidence. They permitted the judgment to be entered. There is no pretense that the plaintiffs were not in possession of all the facts at the time it was rendered.

If the motion filed by the plaintiffs be treated as a motion to set aside a default judgment, it is equally clear that there were no circumstances of accident, mistake, or inadvertence, not the fault of the plaintiffs, which justified the court in opening the default. Interest reipublice ut sit finis litium. The interest of the state, as well as the parties, requires that there be an end to a lawsuit. A man cannot come into court and say: "I do not intend to try this lawsuit. Render judgment for my opponent"—and the next day come back, and, without any sort of excuse, say: "I have changed my mind and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

now want a trial. Set aside the solemn judgment entered yesterday without objection from me and upon my suggestion, and give me a new trial." No court should permit such a proceeding.

It is suggested that, as plaintiffs hold a mortgage on the property to secure a debt that defendant owes them, it would be a great injustice to make them pay the value of the goods taken. There is no proof in the record that they hold a mortgage. They allege that they held one, but when the case was called they abandoned that allegation in open court. They, in effect, withdrew it, and from that conduct the natural inference would be that they had no valid mortgage.

If the plaintiffs have a valid debt, the judgment in this case will not prevent them from collecting it by proper proceedings; but neither reason nor authority will sustain the action of the court in setting aside the judgment in this case.

The case should be reversed and remanded, with instructions to set aside the order granting a new trial, and to reinstate the judgment for the defendant.

PER CURIAM. Adopted in whole.

(37 OKL. 80)

CLINGAN et al. v. BANK OF COMMERCE.
(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 516*)—ACTION ON NOTE.**

Evidence examined, and *held*, that the court was fully justified thereunder in directing the jury to return a verdict for plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1800-1806; Dec. Dig. § 516.*]

2. **EVIDENCE (§ 250*)—DECLARATIONS—ADMISSIBILITY.**

In a suit on a promissory note, where one of the signers of the note sets up the defense that he was a surety, and that he signed the note as such because of an agreement between the payee, the maker, and himself that the proceeds of the note were to be paid the maker in money, to pay out property of the maker, which he was to mortgage to the surety to indemnify him as such, and that the payee had violated the agreement, by appropriating the proceeds of the note to the payment of an alleged overdraft due by the maker, *held*, that the court did not commit error in refusing to allow the surety to testify as to what the maker said to him about the matter, in the absence of the payee, and in the absence of proof that the alleged agreement had been assented to by the payee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 976-982; Dec. Dig. § 250.*]

Commissioners' Opinion, Division No. 2. Error from Kiowa County Court; J. W. Mansell, Judge.

Action by the Bank of Commerce against C. J. Clingan and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Stevens & Myers and T. B. Orr, both of Lawton, for plaintiffs in error. Wilson & Roe, of Frederick, for defendant in error.

BREWER, C. This is a suit on a promissory note executed by C. J. and A. J. Clingan and John M. Zigler to the Bank of Commerce. The Clingans made no defense, and, at a trial upon the issues raised by the answer of Zigler, the court instructed the jury to return a verdict for the plaintiff, which was done, and judgment entered.

Counsel for Zigler contends that the court erred: (1) In instructing a verdict for plaintiff; and (2) in sustaining objections to certain questions asked defendant Zigler.

The defense relied on, in substance, is that defendant Zigler signed the note as a surety, with the agreement and understanding between the signers of the note and the bank that the principal in the note was to receive the proceeds of the note from the bank and purchase therewith certain town lots, and execute thereon to defendant Zigler a mortgage to secure and indemnify him against loss because of his suretyship on the note, and that, notwithstanding the agreements and understandings of the parties, the bank had not furnished the principal in the note the proceeds thereof to pay for the lots, but had applied the same to the discharge and payment of an overdraft due from the principal to the bank, thus defeating defendant's opportunity to have indemnity against his liability on the note. A general denial for reply raised the issue tried.

[1] 1. The court was right in directing a verdict in favor of plaintiff. There was a failure of proof. It is true the principal in the note, Clingan, testified that when he spoke to the officer of the bank about making a loan he mentioned that he could get Zigler on the note and would give him a mortgage on some lots, etc.; but, when asked what the officer of the bank said, the reply was, "He didn't make any reply to that," etc. Zigler was not present when arrangements were made for the money, nor did he ever have any communications with the bank regarding the matter. The note was taken by Clingan 35 miles to where Zigler lived, and he signed it, and it was taken back to the bank and the proceeds deposited to Clingan's credit.

[2] 2. The evidence of Zigler which the court refused to admit was clearly incompetent. The defendant offered to prove the conversation between Clingan and Zigler when the note was signed, all in the absence of any one connected with the bank, and without any showing that the bank had made any agreement along the lines of the conversation.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 109)

BANK OF COMMERCE OF ALBUQUERQUE, N. M., v. DILLON.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where a verdict is reasonably supported by the evidence, the judgment based upon it will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

2. ALTERATION OF INSTRUMENTS (§ 20*)—NOTE—EFFECT ON VALIDITY.

A material alteration of a promissory note renders it void.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 158-189; Dec. Dig. § 20.*]

Commissioners' Opinion, Division No. 2. Appeal from Washita County Court; L. R. Shean, Judge.

Action by the Bank of Commerce of Albuquerque, N. M., against G. A. Dillon. Judgment for defendant, and plaintiff appeals. Affirmed.

Burnette & Beets, of Cordell, for plaintiff in error. Smith & Wagner, of Cordell, for defendant in error.

ROSSER, C. This was an action by the Bank of Commerce of Albuquerque against G. A. Dillon on three promissory notes for the sum of \$50 each, given to the Rio Grande Woolen Mills Company. The notes were ordinary negotiable instruments, except that below the signature of the maker was printed on the same piece of paper the following: "Albuquerque, New Mexico. This is to certify to the giver of this note that the note will have indorsed upon its back the earnings of the ten shares of stock for which the note was given until the note is entirely paid. And it is further agreed that this note will not be presented for collection but will be renewed until paid as above stated. Rio Grande Woolen Mills Co., Co-operative." This certificate was detached from each note, and afterwards the notes were transferred to the plaintiff bank as collateral security for indebtedness of the Rio Grande Woolen Mills Company to it.

The defendant makes the defense that the removal from the contract of the certificate was a material alteration, amounting to a forgery, and defeated the note in the hands of an innocent purchaser, and also that the plaintiff was not an innocent purchaser, but that he received the notes after maturity and without indorsement. There was a judgment for defendant.

[1] The plaintiff contends that the contract not to present the note, which was attached at the bottom of the note, and the signing of the note with the contract attached, was such negligence as estopped the defendant

from taking advantage of the alteration. It seems to be conceded that if there was such a contract attached that it was an alteration to detach it. The greater portion of plaintiff's brief is taken up with the question of estoppel and negligence. It is not necessary to decide this question. The trial court instructed the jury fully and carefully that if the defendant signed the notes with the memorandum or agreement attached in such a way that it might be cut or torn off without altering the note above the signature, or changing its wording or outward appearance, or anything in connection with the portion above the signature, the defendant was guilty of such negligence as would estop him from making the defense that the note had been altered; and that he would be bound to pay the note in the hands of the person who received it in the due course of business before maturity, for value, and without notice. And throughout his instruction the jury was given to understand, in unmistakable language, that if the plaintiff received the notes by indorsement and delivery before maturity, without notice of the alteration, it should recover.

The only question here, then, is as to whether or not the plaintiff received the notes before maturity, and without notice of any change or alteration therein. The cashier of the bank testified that a large number of notes were left with the plaintiff bank by the general manager of the Rio Grande Woolen Mills Company, but did not specifically identify the notes in question as having been left with the bank before maturity, and did not give any particular time when they were left there. W. J. Johnson, who was employed by the bank at the time the Rio Grande Woolen Mills Company was depositing notes with the bank as collateral, testified to receiving a large number of notes from that company, and testified that the notes from that company were deposited before maturity. He does not identify the particular notes as having been deposited with him, and does not undertake to testify when they were delivered, with reference to whether it was before or after maturity. The plaintiff testified that he received a notice from the Rio Grande Woolen Mills Company long after the maturity of the notes, requesting their payment. T. W. Woodrow, who represented the Woolen Mills Company in obtaining the defendant's signature to the notes, testified that after the maturity of the notes he had a settlement with the Woolen Mills Company, at which time all of the notes taken by him were in the possession of the Woolen Mills Company; and that none of the notes had been indorsed to the bank at that time. He does not undertake to identify the particular note in question, but is positive that all the notes which he took were in the hands of the Woolen Mills Company; and that he set-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tled with that company with the notes before him and the company, and used as a basis of settlement. From a consideration of this evidence, it cannot be said that the verdict of the jury was not sustained by the evidence.

[2] Plaintiff further contends that, as the defendant admits that he was to pay \$5 in cash on the notes, it is entitled to a judgment for that sum, because there was no proof that he had ever paid the \$5. The notes having been materially altered, the payee could not recover upon them; and, unless the plaintiff received them before maturity and without notice of the alteration, it could not collect any part of the amount. 2 Cyc. 182, and authorities there cited.

The judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 73)

ANDERSON v. CHRISMAN.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 933*)—GROUNDS FOR GRANTING—PRESUMPTIONS.

When the court in granting a new trial specifies fully and in detail the reason upon which the act is based, it will be presumed that the reason thus stated is the only one upon which the court acts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.*]

2. NEW TRIAL (§ 110*)—GRANTING ON COURT'S MOTION.

The court set aside the verdict of a jury and granted a new trial, 20 days after the verdict had been returned, on its own motion; neither side having filed a motion therefor, and no claim of collusion, imposition, or fraud upon the court being claimed. *Held*, error.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 231; Dec. Dig. § 110.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by George O. Chrisman against Frank M. Anderson. From the judgment, Anderson brings error. Reversed.

Grinstead, Mason & Scott, of Pawhuska, for plaintiff in error. Hargis & Sams, of Pawhuska, for defendant in error.

BREWER, C. The court in this case set aside the verdict of the jury, on its own motion, without a motion being filed by either side in any wise complaining of the verdict. This action by the court was taken 20 days after the verdict was returned. The appellant here was defendant below against whom the verdict was rendered. The reasons given by the court for disturbing a verdict of the jury which was apparently satisfactory to both parties is stated by the court as fol-

lows: "For the reason that the court was of the opinion that the matter involved in this action should be tried out in case No. 636 on the trial docket of this court, which is a suit in equity for the dissolution of a partnership, accounting, and settlement of the partnership affairs in which action all the rights of the parties hereto can be determined; Frank M. Anderson and one John H. Harris being plaintiffs, and said George O. Chrisman, defendant," etc.

[1, 2] The reason of the court being stated fully and in detail, it must be presumed that there was no other reason for the action taken. This reason was not a sufficient one for disturbing the verdict of the jury. There is not a suggestion of fraud, collusion, or that the court had in any way been imposed upon, nor even that the verdict was an erroneous or improper one. It is therefore unnecessary to discuss the inherent powers of the court, in controlling its process and judgments during the term; if the power exercised in this case exists, and if *Long v. County Commissioners*, 5 Okl. 128, 47 Pac. 1063, takes too narrow a view of the law, which it is not necessary here to decide, yet still the court, under the facts of this case, erred in setting aside a verdict acquiesced in by the litigants.

The cause should be reversed.

PER CURIAM. Adopted in whole.

(37 Okl. 112)

BALLEN & FRIEDMAN v. BANK OF KRENLIN.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

BANKS AND BANKING (§ 140*)—CHECKS—LIABILITY OF BANK TO HOLDER.

Under section 132 of the act of March 20, 1909 (Laws 1909, c. 24), known as the Negotiable Instruments Law, which requires an acceptance of a bill of exchange to be in writing, and section 185 of said act, which provides that checks are governed by the provisions of the act with reference to bills of exchange with certain exceptions, and section 189 of said act, which provides that a check does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check, no liability is created against the bank by the oral statement of one of its officers that a check drawn on it is good, made to a person who is about to purchase the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 380-392, 394-397; Dec. Dig. § 140.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Garfield County; Dan Huett, Judge.

Action by Ballen & Friedman against the Bank of Krenlin. From a judgment sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

A. J. Jones, of Enid, for plaintiff in error.
Garber & Kruse, of Enid, for defendant in error.

ROSSER, C. This was an action by Mike Ballen and Dave Friedman, a partnership composed of Ballen & Friedman, against the Bank of Krenlin. The trial court sustained a demurrer to the plaintiffs' petition, and they have appealed. The petition alleges, in substance, that the defendant is indebted to plaintiffs upon two checks dated July 16, 1910; that the checks were drawn by Frank Lowery, one payable to the order of George Reihm, and the other to the order of Joe Fleming; that on the 18th day of July, 1910, the checks were offered by their holder to plaintiffs as a cash item; that the plaintiff then and there, through the agency of the Security State Bank of Enid, informed the defendant of the existence and presentation of said checks, and then and there inquired of the defendant as to their value; that the defendant, answering, said to plaintiffs' agent, the Security State Bank, "The checks are good;" that plaintiffs then accepted the checks and paid the face value of the same to the owners thereof; that they immediately presented the checks in the usual course of business; and that the defendant refused payment and protested them. The question presented is as to whether or not the petition alleges a cause of action.

This transaction occurred after the act of March 20, 1909 (Laws 1909, c. 24), commonly called the Negotiable Instruments Law, had become the law in this state. Section 185 of that act is as follows: "A check is a bill of exchange drawn on a bank on demand." Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." Section 132 of the act is as follows: "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

It is contended by the plaintiffs that, as they were informed, by the defendant's cashier, that the check was good and acted upon that information, the bank is estopped to deny liability, and is responsible for the amount of the checks. As a general proposition of law, as applied to ordinary transactions, the plaintiff is undoubtedly correct; but the question here is whether the ordinary principles of law in this regard apply to negotiable instruments, including bank checks. It is believed that they do not apply, at least in the absence of actual fraud, which is not alleged in this case. The Negotiable Instruments Law was intended to fix and settle the rights of the parties, so far as they are affected by its operation. *Columbian Banking Company v. Bowen*, 134 Wis.

218, 114 N. W. 451. Section 132 of that law, quoted above, provides that the acceptance of a bill of exchange must be in writing. Section 185, quoted above, provides that checks shall be governed by the same rules as bills of exchange. Section 189 provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawee with the bank, and that the bank is not liable, unless and until it accepts or certifies the check. The oral statement that the checks were good was not a lawful acceptance, as required by the statute. Neither was it a certification, because a certificate means a declaration in writing, and a certificate must be in writing. The identical question involved here was before the Supreme Court of the state of Colorado in the case of *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182. In that case the party receiving the check telephoned to the bank on which it was drawn and asked if the check was good, and was informed that the check was all right. The check was then cashed on the faith of this reply to the question. The drawer of the check within a few minutes, and before it was presented for payment, instructed the bank not to pay it; and the bank refused to pay it. The court held that the bank was not liable, and in doing so construed the identical sections of the Negotiable Instruments Law, which are quoted above.

In the case of *B. & O. R. Co. v. First National Bank*, 102 Va. 753, 47 S. E. 837, it was held, under section 132 of the Negotiable Instruments Law of that state, which is identical with the same section in force in this state, that the acceptance of a check must be in writing, and that the drawee is not liable to the holder, unless and until it certifies such a check. The same construction was given to the same statute in *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

In the case of *Lewin v. Greig*, 115 Ga. 127, 41 S. E. 497, the suit was brought on a bill of exchange. A colored man, desiring to purchase certain goods from the defendant, presented the bill of exchange in payment, and the plaintiff, before delivering him the articles, went to the defendant's office and inquired whether the draft was good, and whether they would accept it, and was told that the draft was good as gold, and that they would accept it and it would be paid. The Georgia Code required an acceptance to be in writing. The court held that the defendants were not liable. In the course of the opinion the court said: "There is no intimation in the petition that Greig, Jones & Wood agreed to accept the draft if the plaintiff would sell the goods to Dixon; indeed, it does not appear that they even knew that the plaintiff contemplated making such a sale. This being true, how can the sale and the delivery of the goods by the plaintiff to Dixon be such part performance as would

render it a fraud upon the part of Greig, Jones & Wood not to comply with their parol acceptance? They were not parties to the contract of sale; they knew nothing about such contract between the plaintiff and Dixon; and the fact that the plaintiff complied with his part of the contract that he made with Dixon surely cannot be said to be such part performance as would render it a fraud for Greig, Jones & Wood to fail to comply with their separate and distinct contract of parol acceptance of the bill of exchange. Even though the plaintiff, in selling the goods to Dixon, relied entirely upon the parol acceptance of the bill by Greig, Jones & Wood, he was bound to know the law and know that such an acceptance was absolutely void." See, also, *Duncan v. Berlin*, 60 N. Y. 151; *Risley v. Phoenix Bank of the State of New York*, 83 N. Y. 318 [38 Am. Rep. 421]; *Anderson v. Jones* [102 Ala. 537] 14 South. 871; *Upham v. Clute* [105 Mich. 350] 63 N. W. 317; *Izzo v. Ludington* [79 App. Div. 272] 79 N. Y. Supp. 744; *Haeblerle v. O'Day*, 61 Mo. App. 390.

The equitable grounds under which plaintiffs claim seem to be strong; but a consideration of all the facts show that, even on equitable grounds, the bank is entitled to consideration. Suppose that, when asked about the checks, the drawer had to his credit in the bank an amount sufficient to pay them. The bank would naturally answer that the checks were good. They were good as the account then stood; and if other checks, sufficient to reduce the balance below the face of those in controversy, had not come in before they were presented, they would have been paid. If no other checks had been issued, the bank would have done the drawee a grave injustice if it had answered that the checks were not good. Then, after giving out the information, suppose other checks had been presented. Under section 189 of the Negotiable Instruments Law, the giving of the checks in suit did not operate as an assignment of any part of the drawer's fund. The bank could not refuse to pay other checks that were presented. The checks sued on had not been certified. The bank would have been liable to any person presenting a check, unless they paid it. It is clear that to require the bank to pay these checks would be to make it responsible for having told the checks were good, without any fraudulent intention, and at a time when its books showed they were good. The inquiry was made concerning the checks as such; and there is nothing in the petition to indicate that either the plaintiffs or the bank had in mind anything except the status of the drawer's account, and certainly no contract, equitable or otherwise, except as contained in the checks was contemplated by the parties.

The case of *First National Bank v. School District*, 31 Okl. 139, 120 Pac. 614, 39 L. R.

A. (N. S.) 655, was decided on the statute in force in Oklahoma prior to the enactment of the Negotiable Instruments Law. In that case the school district gave one Bartsch a check on the bank. The next morning the district treasurer, acting for the district, instructed the vice president of the bank not to pay it. The check was left with the vice president by Bartsch the day it was drawn, and the vice president promised to give him credit for the amount. The bank paid the check to Bartsch and returned it to the school district as a voucher against its account. The school district sued the bank to recover the money, and it was held that it was entitled to recover. It was held that the retention of the check by the bank, and the verbal promise to pay it, was not such an acceptance as prevented the school district from countermanding payment. It was held, further, that the giving of the check did not operate as an assignment of the funds in the hands of the bank until it was presented for acceptance or payment.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(38 Okl. 807)

GALBRAITH et al. v. OKLAHOMA STATE BANK.

(Supreme Court of Oklahoma. Oct. 23, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 144*)—DEFAULT JUDGMENT—SETTING ASIDE.

Where a case against two defendants is called in its regular order, and one of them fails to appear, and the other appears and states that he has no defense to the action, and the court hears the evidence offered on the part of plaintiff and renders judgment for plaintiff, it is not error to refuse to set aside the judgment, although there was an answer on file at the time, and though the record of the judgment states that defendants had failed to appear and plead, answer, or demur, and were adjudged in default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 255; Dec. Dig. § 144.*]

2. FRAUDULENT CONVEYANCES (§ 276*) — TRANSACTIONS — INVALIDITY — TRANSFERS OF STOCK IN TRADE—PRESUMPTION.

Under the provisions of section 7908, Comp. Laws 1909, a sale of merchandise in bulk is presumed to be fraudulent and void, and this presumption can be rebutted only by the transferee showing that at least 10 days before the transfer in good faith he made full and explicit inquiry of the transferrer as to the names and addresses of each and all of his creditors, and that he demanded and received from the transferrer at least 10 days before such transfer a list of names and addresses of all the creditors of such transferrer, showing the amount owing each, which statement was sworn to by such transferrer and which contained a declaration that it was a correct list of all his creditors, with the post office address of each and the amount owing each, and that at least 10 days before such transfer he notified or caused to be notified of such proposed transfer, personally or by registered mail, each of the creditors of the transferrer of whom he had knowledge or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

could, with the exercise of reasonable diligence, acquire knowledge, and that such purchase was made by him in good faith for a fair consideration actually paid.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 808; Dec. Dig. § 276.*]

3. FRAUDULENT CONVEYANCES (§ 206*) — TRANSACTIONS — INVALIDITY — TRANSFERS OF STOCK IN TRADE—PRESUMPTION.

This presumption can be taken advantage of by any creditor of the transferor, although his debt was in existence before the transferor acquired the stock of merchandise, and although none of the consideration for the debt went into the stock.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 623, 630; Dec. Dig. § 206.*]

4. FRAUDULENT CONVEYANCES (§ 228*)—REMEDIES OF CREDITORS—ATTACHMENT.

A failure to comply with the statute raises such a presumption of fraud as will justify the attachment of the stock in the hands of the transferee.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 665-667; Dec. Dig. § 228.*]

Commissioners' Opinion, Division No. 2. Error from Pottawatomie County Court; J. H. Woods, Judge.

Action by the Oklahoma State Bank against Oliver Galbraith and another, and R. M. Galbraith intervenes. Judgment for plaintiff against defendants and against the interpleader sustaining an attachment of property claimed by him, and defendants and interpleader bring error. Affirmed.

H. H. Smith and W. T. Williams, both of Shawnee, for plaintiffs in error. Lydick & Eggerman, of Shawnee, for defendant in error.

ROSSER, C. The parties to this action are designated in this opinion in the same way as in the lower court.

In 1907 the defendant E. F. Galbraith jointly with the defendant Oliver Galbraith executed to the plaintiff the note sued on in this action. Some time after the note was given, he bought a stock of merchandise from the interpleader, R. M. Galbraith, and gave his note in payment of the purchase price, and assumed certain indebtedness of the business. He did not make a success of the business, and after some time he sold the stock back to the interpleader. The interpleader surrendered to him the note which he had given for the purchase price of the stock, and also paid the debts that were owing for the merchandise in the store, but did not pay the note upon which this suit was brought. In the sale of the stock back to the interpleader, neither the defendant E. F. Galbraith, nor the interpleader, R. M. Galbraith, made any attempt to comply with the provisions of section 7908, Comp. Laws (Laws 1907-08, p. 557). That section is as follows: "The transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordi-

nary course of trade, in the regular and usual prosecution of the transferor's business, or the transfer of an entire such stock in bulk shall be presumed to be fraudulent and void as against the creditors of such transferor and such presumption may be rebutted only by a proposed transferee showing that at least ten days before the transfer, and in good faith, he made a full and explicit inquiry of the transferor as to the names and addresses of each and all of his creditors, and that he demanded and received from such transferor at least ten days before such transfer a list of names and addresses of all of the creditors of such transferor, showing the amount owing each, which statement must be sworn to by such transferor and shall include a declaration that (it) is a correct list of all of his creditors with the post office address and the amount owing each; and that, at least, ten days before such transfer he notified or caused to be notified, of such proposed transfer, personally or by registered mail, each of the creditors of the transferor of whom such transferee had knowledge or could, with the exercise of reasonable diligence acquire knowledge; and that such purchase was made by him in good faith for a fair consideration, actually paid." L. 1907-08, p. 557. The plaintiff bank sued and attached the merchandise in the hands of R. M. Galbraith. There was a judgment for plaintiff, and defendants and interpleader have appealed. The case was tried to the court, who made special findings of fact. The court found that section 7908 was not complied with. He found that the interpleader did not use reasonable diligence to learn of its existence. The court further found, in substance, that the sale of the stock by E. F. Galbraith to the interpleader was made in actual good faith for a valuable consideration, and without any intent on the part of either purchaser or seller to hinder, delay, cheat, or defraud the creditors of E. F. Galbraith. The court rendered judgment by default against the defendants for the amount of the debt, and sustained the attachment.

[1] The defendant assigns as error the action of the court in rendering judgment by default. It is not necessary to decide whether a judgment by default was error or not. However, the answer was due on the 4th of October, and was not filed until November 26th, and then without leave of the court. Some of the minutes on the judge's bench docket are attached to the case-made for the purpose of showing that the answer was filed by leave of the court, but the minutes on the bench docket are for the convenience of the judge, and cannot be considered for the purpose of contradicting the recitals of the judgment on the record. *Cockrell v. Schmitt*, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737. The record of the judgment, as it appears on the journal, shows that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case came on in its regular order, that the defendants were called and failed to appear, and that the court heard evidence, including the oral testimony of witnesses, and thereupon rendered judgment. Even though the court had considered the answer as filed, unless the defendants had appeared and offered proof of the allegations, the plaintiff would have recovered just the same when it proved its case. But the order overruling the motion for new trial shows that the answer was filed out of time without leave of court, and also shows that one of the defendants, E. F. Galbraith, by his attorney, represented to the court at the time the judgment was entered that he owed the note, and that he had no defense to it. Even though a technical judgment by default had been improper under the circumstances, it was not error to render some sort of judgment for plaintiff. The defendants knew of the pendency of the action, and one of them was present, and offered no defense, and made no request for time in which to do so.

[2] The principal question involved in this case is as to the effect of the failure to comply with section 7908, Comp. Laws, above. It is contended that the failure to comply with the terms of the statute was only prima facie evidence of fraud and did not raise a conclusive presumption, and that the court having found as a matter of fact that, notwithstanding the failure to comply with the statute, the sale was not in fact fraudulent, the attachment should have been dissolved. It was held by this court in the case of Ellett-Kendall Shoe Co. v. Ross, 28 Okl. 697, 115 Pac. 892, following Williams v. Fourth National Bank, 15 Okl. 447, 82 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970, that the act of 1903, regulating the sales of stocks of merchandise in bulk, did not render a sale made in violation of that statute conclusively fraudulent and void, but that the failure to comply with such statute only created a rebuttable presumption that such a sale was void. But the sale in question here was governed by section 7908, quoted above. The language of the statute is different from the act of 1903, and more stringent in its terms. Act 1903, p. 249, provided that: "A sale of any portion of a stock of merchandise * * * will be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser together shall at least five days before the sale make a full and detail inventory," etc. Section 7908, Comp. Laws, provides that: "The transfer of any portion of a stock of goods, wares and merchandise otherwise then in the ordinary course of trade, * * * shall be presumed to be fraudulent and void as against the creditors of such transferrer, and such presumption may be rebutted only by a proposed transferee showing that at least ten days before the transfer, and in good faith, he made a full and explicit in-

quiry of the transferrer as to the names and addresses of each and all of his creditors," etc. The act of 1903 is not as stringent as the later act. Under the provisions of section 7908, the presumption of fraud arises whenever there is a sale in bulk. This presumption can only be rebutted by showing a compliance with the provisions of the act. The presumption is conclusive unless the provisions of the act are complied with. This is the plain meaning of the language used. As a failure to comply with the act raised the conclusive presumption that the sale was fraudulent, no evidence of good faith was competent, and the finding of the court that the sale was in fact in good faith and without a fraudulent intent was not supported by competent evidence, and must be disregarded. The court probably heard the testimony and made the finding, so that the question could be properly presented here. He did not err in declining to permit the judgment to be controlled by the finding.

[3] It is contended that as the debt upon which suit was brought was in existence before E. F. Galbraith bought the stock, and as the credit was not obtained upon the faith of his ownership of the stock, the plaintiff cannot take advantage of the failure to comply with the statute. But the statute provides that sales in bulk shall be presumed to be fraudulent and void as against creditors of the transferrer. There is nothing in the statute which justifies a holding that it does not apply in favor of all creditors. In the state of Indiana an act of the Legislature, similar to that here construed, provided that only those creditors who had sold goods or loaned money to go into the business were entitled to its benefits. In the case of McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268, the statute was held unconstitutional because only a portion of the seller's creditors were entitled to its benefits. It was held, upon what seems to be unassailable grounds, that the Legislature could not discriminate between creditors. It is to be presumed that our Legislature knew of the legislation in Indiana and of the action of the Supreme Court there, and that the benefits of the act were extended to all creditors in order to avoid the question of the unconstitutionality of the act upon this ground.

[4] Finally, it is contended that the sale without compliance with the act while a legal or constructive fraud does not furnish grounds for attachment. But it is believed the violation of the act is sufficient proof of fraud to justify an attachment. The eighth ground of the attachment, set forth in section 5701, Comp. Laws, is where the defendant "has assigned, removed, or disposed of, or is about to dispose of his property, or a part thereof, with the intent to defraud, hinder or delay his creditors." Section 7908, Comp. Laws, provides that sales without

compliance with its provisions shall be presumed to be fraudulent and void. The effect of this language is to dispense with proof of fraud. When fraud is proven attachment will lie. Under this statute, when its terms have not been complied with, the plaintiff, without making further proof, stands just as he would after making proof of actual fraud. In *Love, Sheriff, v. Hill*, 21 Okl. 347, 96 Pac. 623, it was held, in effect, that a transfer of personal property, not accompanied by immediate delivery and actual and continued change of possession as required by Wilson's Rev. & Ann. Stat. 1903, § 2775 (section 2933, Comp. Laws), was ground for attachment. In *Ellett-Kendall Shoe Co. v. Ross*, 28 Okl. 697, 115 Pac. 892, which was a proceeding by attachment, there are no expressions of the court indicating that attachment was not the proper proceeding. In *Williams v. Fourth National Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970, the court holds that under the act of 1903 the presumption of fraud may be rebutted, and that, when it is, the attachment should be dissolved. The reverse then must be true, that, until the presumption is overthrown, there are grounds for attachment. Under the act now in force, the presumption can be overthrown only by showing a compliance with its terms. That is not shown in the present case, and therefore the sale in contemplation of law was fraudulent, and the attachment lies. In *Cook v. Burnham*, 3 Kan. App. 27, 44 Pac. 447, it was held that, where an insolvent debtor made a disposition of his property inhibited by law, an attachment should be sustained, whether there was an actual fraudulent or corrupt purpose or not. In the course of the opinion the court said: "Then there is an actual transfer of the property, the natural and necessary consequence of which is to place obstacles in the way of creditors, and to hinder and delay or defraud them in the collection of their claims. The law conclusively presumes that such consequences were intended. Being intended through the doing of a voluntary act, which is, under the circumstances, unlawful, the law condemns the act as fraudulent. Law writers and courts have said much about fraud in law as distinguished from fraud in fact, creating no little confusion often by the different meanings attached to the terms, and given rise to at least apparent inconsistencies in decisions. But in most cases any differences of opinions are more seeming than real. It is of little importance whether it be said that a certain transaction is a fraud in law, or whether as is probably more nearly correct, it be simply held when viewed under the law, to be conclusive evidence of a fraudulent intent." To the same effect is *Curran v. Rothschild*, 14 Colo. App. 497, 60 Pac. 1111; *Martin v. Duncan*, 156 Ill. 274, 41 N.

E. 43. In *Rothschild Bros. v. Trewella*, 36 Wash. 679, 79 Pac. 480, 68 L. R. A. 281, 104 Am. St. Rep. 973, a creditor who had sold a stock of goods without complying with the bulk sales law brought an action against the purchaser to recover the debt the seller owed him. The court, in the course of the opinion holding that he could not recover, said: "It seems to be firmly established that the only remedy which the law affords a creditor against a fraudulent transfer of property by his debtor is to sue his debtor, and reach the property fraudulently transferred by attachment or garnishment. These remedies would seem to be adequate in all cases where the subject of the transfer is tangible personal property." In arriving at the conclusion that this case must be affirmed, the writer feels constrained to say that the result does not conform to his notions of justice. But the mandate of the Legislature must be followed, and, if the law they have written results in hardships, it cannot be helped. The Legislature, in their desire to prevent dishonest men from defrauding their creditors, have enacted a law which is a trouble and annoyance to honest retailers desiring to sell, and which (as in this case) results in injustices in individual cases, but the court must follow the reasonable construction of a statute, though it leads to hardship in some cases. The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(39 Okl. 434)

SCHERER v. HULQUIST.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

INDIANS (§ 16*)—CREEK CITIZENS—LEASES—VALIDITY.

Under section 17 of the Supplemental Creek Treaty, c. 1323 (Act of June 30, 1902, 32 Stat. 504), which provides that Creek citizens may rent their allotments for agricultural purposes for a term not to exceed five years, but without stipulation or obligation to renew the same, a lease executed by a Creek citizen during the life of a prior valid lease, but which does not exceed the term of five years from the date of the new lease, is valid.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Wagoner County; Robert M. Rainey, Judge.

Action by C. D. Scherer against Charles C. Hulquist. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Noffsinger, of Muskogee, for plaintiff in error. Watts & Watts, of Wagoner, for defendant in error.

AMES, C. On the 16th day of September, 1902, Jasper Sarty, a citizen of the Creek Nation, executed to W. A. Garrison an agricultural lease upon the land involved for a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

term of four years, commencing on the 1st day of January, 1903. Thereafter, on the 31st day of May, 1904, said Jasper Sarty executed to Charles C. Hulquist, the plaintiff, an agricultural lease upon the same land for a term of three years, commencing on the 1st day of January, 1906. Thereafter, on the 25th day of September, 1905, the said Jasper Sarty conveyed the land by general warranty deed to C. D. Scherer, the defendant in this case. The defendant took possession under his deed, and the plaintiff brought this suit to recover damages because the defendant wrongfully withheld possession from him, claiming possession under the second lease executed by Sarty.

The only question presented for our consideration is whether the existence of the Garrison lease rendered the Hulquist lease void from its inception. The trial court held that it was valid, and Hulquist recovered damages. No question is raised as to the measure of damages or the form of the action; but the only question presented is the validity of the lease. It is the contention of the defendant that the lease is void, under section 17 of the act of June 30, 1902, known as the Supplemental Creek Treaty, c. 1323, 32 Stat. 504. Section 17, is as follows: "Creek citizens may rent their allotments, for strictly nonmineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands." It will be observed that this section permits the Creek citizens to rent their allotments for agricultural purposes for a period of five years, without the approval of the Secretary of the Interior, and for a longer period with his approval, and expressly declares any lease in violation of the act to be absolutely void.

The original Garrison lease extended from January, 1, 1903, to January 1, 1907. The second or Hulquist lease was executed on May 31, 1904, and extended from January 1, 1906, to January 1, 1909, and was therefore for a term of less than five years from the

date on which it was executed. This is important. It will be observed that this is not a case of the Indian making a lease for a term to commence in futuro and extending for a period of five years from the commencement of the lease. It is a case of a lease being made while another valid lease is outstanding and to a different lessee, to commence in futuro, and not extending to a time in excess of five years from the date on which the lease is made. The question involved is whether, when a valid lease for agricultural purposes is outstanding, the Indian can make a new lease, or whether he must wait until the complete expiration of the old lease before another can be executed. This is the logic of the position taken by counsel for the defendant, who placed their reliance upon the language of this court in *Whitham v. Lehmer*, 22 Okl. 627, 632, 98 Pac. 351, 353, where this section of the Supplemental Creek Treaty was under consideration, and where Justice Dunn, in delivering the opinion, says: " * * * And also in our judgment the spirit and intention of the act goes to the extent of precluding the allottee from leasing his land in any manner, so that on the expiration of five years from any date, after the beginning of the term of a lease granted, he cannot have it free, clear, and unincumbered"—and it is insisted that, under this language, the Indian lessor cannot renew a lease or execute a new one until the complete expiration of the old one, and that there must be an interval of time, no matter how short, during which the land is free and clear from every rental contract; in other words, that the Indian lessor could make a new lease one minute after the expiration of the old lease, but could not make a new one one minute before the expiration of the old one. We do not so interpret the decision of the court. The question there involved grew out of the execution of three leases by the Indian. The first lease was executed prior to the time when the act under consideration became operative. The court treated this lease as void, for the express reason that it was so treated by the plaintiff, the allottee, and the defendant, and, holding it to be void, held that the second lease was valid. It was also held that the third lease was invalid, because " * * * The allottee could not, under the facts in this case and the terms of the act, make a lease on August 8, 1903, which would bind him and his allotment from January 1, 1904, to January 1, 1909, because, considering the term of the Hutchinson lease, it would cover a term of more than five years."

In *Scraper v. Boggs*, 27 Okl. 715, 117 Pac. 193, the syllabus is as follows: "On the 15th day of June, 1904, B. procured an agricultural lease from a Creek allottee for a period of five years. Prior to that time, to wit, on the 1st day of August, 1902, the same allottee had executed a like lease to the same land to O., which lease was purchased by B.

As a part of the consideration for the lease between the allottee and B., it was agreed between them that B. would surrender any rights that he might acquire by reason of his purchase of the prior lease to O. Held, that the lease from the allottee to B. is not in contravention of the federal statute, which provides that 'Creek citizens may rent their allotments for strictly nonmineral purposes for a term of not exceeding one year for grazing purposes, and for not exceeding five years for agricultural purposes, but without stipulation or obligation to renew the same.' This same section was before the court in *Williams v. Williams*, 22 Okl. 672, 98 Pac. 909, and *Groom v. Wright*, 30 Okl. 652, 121 Pac. 215; but this exact question was not touched upon in those cases.

The subject of overlapping leases is considered in several other cases which have escaped the attention of counsel in this case. In *Moore v. Girtlen*, 5 Ind. T. 384, 82 S. W. 848, it was held that, under the act of Congress allowing the Quapaw Indians to lease their lands for a term of three years, a lease of such lands, made in March, 1898, to begin in March, 1901, and to run for a term of two years, was valid, though made to one holding under a three-year lease from March, 1898. In *United States v. Abrams* (C. C.) 181 Fed. 847, Judge Campbell, District Judge of the Eastern District of this state, holds that, under the act of Congress permitting Quapaw Indians to lease their allotments for mining purposes for a term not exceeding 10 years, a 10-year lease, executed during the life of a previous lease, is valid, provided the aggregate outstanding terms do not exceed 10 years; and this holding is affirmed by the Circuit Court of Appeals in *United States v. Abrams*, 194 Fed. 82, 114 C. C. A. 160, and *United States v. Noble*, 197 Fed. 292, 295, 116 C. C. A. 654, 657. In the latter case it is said: "It is contended that what is styled overlapping leases are invalid; and, when an Indian allottee has leased his land for 10 years for mining purposes, he cannot again lease it until the expiration of that period, and that such a construction would be for the Indian's benefit and protection. It may be such a provision would be for the Indian's better protection; but it is for Congress to give the protection, and not the courts."

Creek citizens are citizens of the United States and of the state of Oklahoma (Act Feb. 8, 1887, 24 Stat. 390, c. 119, as amended by Act March 3, 1901, 31 Stat. 1447, c. 868; Act June 16, 1906, c. 3335, 34 Stat. 267), and as such have the right to make contracts, except when limited by law. In this case the express right to lease their lands for agricultural purposes, for a term not exceeding five years, is conferred upon them. The approval of the Secretary of the Interior is not necessary, unless the lease is for a

longer term. The policy of the government is to give them such a measure of control over their property as to train them in the duties and responsibilities of citizenship and of property owners; and it may be said to their credit that a very great percent. of the cases in which their disabilities are relied upon are cases to which they are not parties, and for which they are in no way responsible. The act conferring upon them the right to make these leases puts two limits; one is that the lease shall not exceed the term of five years, and that it shall be without any stipulation or obligation to renew the same. The lease here involved expired within five years from the date on which it was executed. It was not a renewal of any previous lease, and it contained no stipulation or obligation to renew the same. There is no claim of fraud and the Indian citizen is not seeking to repudiate.

Believing that the lease is valid, and that it does not come within any of the prohibitions of the act under consideration, we think the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 125)

CITY OF SHAWNEE v. HEWETT.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 185*) — DISCHARGE OF OFFICER — INSUFFICIENCY OF REVENUE.

Where the revenues of a city are not sufficient to pay an assistant chief of police, the council have the right to discontinue the office, and to discharge the incumbent of that office without charges having been preferred against him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

Commissioners' Opinion, Division No. 2. Error from Pottawatomie County Court; E. D. Reasor, Judge.

Action by John Hewett against the City of Shawnee. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

E. E. Hood and W. M. Engart, both of Shawnee, for plaintiff in error.

ROSSER, C. This was an action by John Hewett against the city of Shawnee to recover an amount which he claims the city owed him for salary for the month of January, 1908, as assistant chief of police for said city. The case was tried upon an agreed statement of facts, which is as follows:

"First. It is agreed that John Hewett was the regularly appointed, qualified, and acting assistant chief of police of the city of Shawnee on the 31st day of December, 1907, at a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

salary as provided by ordinance duly passed providing for assistant chief of police, of seventy-five (\$75) dollars per month, which ordinance was in force and effect during the month of January, 1908.

"Second. That after the adoption of the Constitution, and prohibition went into effect in this state, the revenues of the city dropped off to a large extent, and, in order to economize, the mayor and council on the 3d day of December, 1907, adopted the following resolution and motion: 'Motion by Clayton seconded by Day that the mayor appoint a committee of four to act in conjunction with himself to investigate the various departments of the city, and ascertain as best they can where retrenchments can be made, thus curtailing the expenses of the city as much as it is possible to do so. Motion carried. The mayor appointed the following members of the committee: Clayton, Pierson, Love and Wayne.' That on the 19th day of December said committee made a report to the mayor and council in compliance with said resolution, a copy of which report is hereto attached, marked 'Exhibit A,' and made a part of this agreed statement of facts: 'Report of Council Ways and Means Committee. To the Mayor and Council of the City of Shawnee—Gentlemen: After a careful investigation into the financial and other conditions of the fire department, police department and street department of the city with a view to bring the cost of their maintenance within the limits of the revenues, your committee recommends as follows: 1st. That one man be cut off from the central fire station force and that for the protection of property the two substations be maintained as at present. 2nd. That the day force of police shall consist of the chief of police, two patrolmen and a desk sergeant. The night force to consist of two patrolmen, one of whom may be designated as assistant chief, the office of which we hereby recommend be abolished; and one to be the merchant's police, and a desk sergeant; we also recommend that the city cannot at present maintain a city detective. This reduction will place the cost of the force \$490.00 per month, a saving of \$315, monthly. We further recommend that the cost of feeding the city prisoners who are used on street work shall be borne by the poll tax and street revenues. 3rd. We further recommend that no horses shall be fed or kept with the city teams at the city's expense. We recommend that these changes take place on January 1st, 1908. R. H. Clayton, Chairman. J. W. Wayne, W. T. Love, Committee. ———, Mayor.' Report of ways and means committee which was appointed by the mayor at the last council meeting to investigate the various departments of the city in regard to curtailing the expenses as much as possible was read. Motion by Lain seconded by Wayne that the report be adopted. Report was adopted. Thereupon the

following action was had: 'Motion by Clayton seconded by Wayne that the mayor and chief of police carry out the recommendation of the ways and means committee report. Motion carried.'

"Third. That thereupon and in compliance with said report and its adoption as aforesaid, and the motion giving the mayor and chief power to carry out said report, the mayor and chief of police removed several of the police officers of the city of Shawnee, among which was the above-named plaintiff, said removal to begin on and from the morning of the 1st day of January, 1908, and has not since acted as assistant chief.

"Fourth. That said plaintiff has ever since been ready and willing to perform the said duties provided he was allowed to do so, and that he tendered his services to the chief of police of the city of Shawnee."

This statement shows that the office of assistant chief of police was in effect abolished, at least temporarily, because of lack of revenues to pay the officer. It was not a removal from office because of misconduct or inefficiency. The office was not one the existence of which was necessary to maintain the city government. It was an inferior, appointive office, and not an organic part of the city. Nothing is better settled than that an office may be abolished unless something in the statute or Constitution forbids, or, in the case of a municipality, something in the statute and Constitution, and, when an office is abolished, the incumbent at the time of its abolition has no claim to further compensation, even though he may have been appointed for a term which had not yet expired. The right to an office is not the right of the incumbent to the place, but the right of the people to the officer. *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199. Supporting the general proposition, see *Oldham v. Mayor of Birmingham*, 102 Ala. 357, 14 South. 793; *Ford v. Harbor Com'rs*, 81 Cal. 19, 22 Pac. 278; *In re Bulger*, 45 Cal. 553; *Koch v. Mayor*, 152 N. Y. 72, 46 N. E. 170; *Porter v. Howland*, 24 Misc. Rep. 434, 53 N. Y. Supp. 683; *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199; *Commonwealth v. Weir*, 165 Pa. 284, 30 Atl. 835; *State v. McDaniel*, 19 S. C. 114. The rule has been applied to officers of a municipality in the following cases: *City Council of Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172; *Phillips v. Mayor, etc., of New York*, 88 N. Y. 245; *Boylan v. Board of Police Com'rs*, 58 N. J. Law, 133, 82 Atl. 78; *Meissner v. Boyle*, 20 Utah, 316, 58 Pac. 1110; *Heath v. Salt Lake City*, 16 Utah, 374, 52 Pac. 602; *State v. Police Com'rs*, 80 Mo. App. 206, affirmed in 184 Mo. 109, 71 S. W. 215, 88 S. W. 27; *Lazenby v. Board of Police of City of Elmira*, 76 App. Div. 171, 78 N. Y. Supp. 302; *Venable v. Police Com'rs*, 40 Or. 458, 67 Pac. 203; *Moores v. State*, 54 Neb. 486, 74 N. W. 823. In the following cases it was held that, where the office was abolished, the provisions of law requiring that the of-

ficer should have a hearing before discharge did not apply: *Oldham v. Mayor of Birmingham*, 102 Ala. 357, 14 South. 793; *Phillips v. Mayor, etc., of N. Y.*, 88 N. Y. 245; *Boylan v. Board of Police Com'rs*, 58 N. J. Law, 133, 32 Atl. 78; *Heath v. Salt Lake City*, 16 Utah, 374, 52 Pac. 602; *Neumeyer v. Krakel*, 110 Ky. 624, 62 S. W. 518; *State v. Police Com'rs*, 80 Mo. App. 206; *Lazenby v. Board of Police*, 76 App. Div. 171, 78 N. Y. Supp. 302; *Venable v. Police Com'rs*, 40 Or. 458, 67 Pac. 203. In *Moores v. State*, 54 Neb. 486, 74 N. W. 823, it was held that, before a member of the police department should be discharged for alleged misconduct, unfitness, dereliction of duty, or other causes affecting his character or standing as a public servant, charges must be filed against him, and he must have an opportunity to be heard, and that the right of an officer of the police force to defend himself against formal charges is a right to vindicate himself from an unjust accusation, and not a right to show that the public welfare requires his retention in the public service, or that the revenues at the disposal of the board are adequate for the payment of his salary. That there is no vested interest or right in an office is well settled. See *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187; *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *Crenshaw v. U. S.*, 134 U. S. 99, 10 Sup. Ct. 431, 33 L. Ed. 825.

In this case the plaintiff was not removed to make way for another to be appointed. Because of the lack of revenues his position was discontinued, as were the services of several other members of the police force. The force was cut down.

The judgment should be reversed and here rendered in favor of the plaintiff in error, the city of Shawnee.

PER CURIAM. Adopted in whole.

(87 Okl. 79)

CITY OF SHAWNEE v. COTTERAL

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 185*)—INSUFFICIENT REVENUE—DISCHARGE OF POLICEMAN.

Where the revenues of a city are not sufficient to pay a policeman, the council has the right to discontinue the office and relieve the incumbent from duty without preferring charges against him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

Commissioners' Opinion, Division No. 2. Error from Pottawatomie County Court; E. D. Reasor, Judge.

Action by D. Cotteral against the City of Shawnee. Judgment for plaintiff, and defendant brings error. Reversed and rendered for defendant.

E. E. Hood and W. M. Engart, both of Shawnee, for plaintiff in error. F. H. Rely, of Shawnee, for defendant in error.

BREWER, C. This action was brought by D. Cotteral against the city of Shawnee to recover an amount alleged to be due him for salary for the month of January, 1908, as a policeman of said city. The case was tried upon an agreed statement of facts, and resulted in a judgment against the city for the amount claimed. The agreed statement of facts in this case is, except as to the name of the party, the position held, and the amount claimed, identical with that in case No. 2532, *City of Shawnee v. John Hewett*, 130 Pac. 546, decided at this term of court, and not yet officially reported. In that case the judgment of the lower court was reversed, and the cause rendered in favor of the plaintiff in error, the city of Shawnee; the syllabus being as follows: "Where the revenues of a city are not sufficient to pay an assistant chief of police, the council has the right to discontinue the office, and to discharge the incumbent of that office without charges being preferred against him." For the reasoning of the court and the authorities relied upon, see the decision referred to. That case controls the case at bar.

The case should be reversed and rendered in favor of the city of Shawnee.

PER CURIAM. Adopted in whole.

(85 Okl. 490)

MEYER et al. v. LYNDE-BOWMAN-DARBY CO. et al

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 38*)—LEVY OF TAX—SPECIFICATION OF PURPOSE.

Section 19 of article 10 of the Constitution (Williams' Constitution and Enabling Act, § 284), which requires that every act of the Legislature, levying a tax, shall specify distinctly the purpose for which the tax is levied, is mandatory, and an act levying an annually recurring tax, which does not specify the purpose for which the tax is levied, is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 67; Dec. Dig. § 38.*]

2. TAXATION (§ 38*)—VALIDITY OF STATUTE—SPECIFICATION OF PURPOSE.

The act of May 26, 1908 (Sess. Laws 1907-8, p. 725; Comp. Laws 1909, §§ 7738-7742), providing for a graduated tax on land holdings, is in conflict with section 19 of article 10 of the Constitution, because it fails to specify the purpose for which the tax is levied.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 67; Dec. Dig. § 38.*]

Error from District Court, Muskogee County; R. F. de Graffenreid, Judge.

Action by the Lynde-Bowman-Darby Company and others against Leo Meyer and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Chas. West, Atty. Gen., for plaintiffs in error. N. A. Gibson and Preston C. West, both of Muskogee, for defendants in error. S. T. Bledsoe, of Oklahoma City, amicus curiae.

AMES, Special Judge. [1, 2] The question involved in this case is the validity of the act of May 28, 1908, entitled: "An act to provide for a graduated tax on land holdings in excess of six hundred forty acres of average taxable lands, and a graduated tax upon the incomes, rents and profits of lands held by lease or rental contract in excess of six hundred and forty acres, and providing procedure for collection thereof." Session Laws 1907-08, p. 725. Many objections are raised to the act and are argued elaborately at the bar; but we find it necessary to pass on only one: Is the act in conflict with section 19 of article 10 of the Constitution (Williams' Constitution & Enabling Act, § 284)? That section is as follows: "Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another." The act under consideration does not specify, distinctly or otherwise, the purpose for which the tax is levied. The only language in the act which is referred to as approximately so stating is that portion of section 2 reading as follows: "All persons owning land in this state of taxable value equivalent to six hundred and forty acres of average taxable value, or less, shall pay the same ad valorem tax rate as is levied and charged for all purposes of government against personal or other property in this state. * * *" It is argued that pursuant to this language the graduated tax is levied "for all purposes of government"; but it is manifest, from reading the language, that the phrase, "for all purposes of government," does not specify the purpose for which the graduated tax is levied, but is merely descriptive of the rate charged against personal or other property. This section of the Constitution is mandatory; and the failure of the act to specify the purpose for which the tax is levied is fatal. *Commonwealth v. U. S. Fidelity & Guaranty Co.*, 121 Ky. 409, 89 S. W. 251; *C. O. & S. W. R. Co. v. Commonwealth*, 129 Ky. 318, 111 S. W. 334, 33 Ky. Law Rep. 882; *Southern Railway Co. v. Hamblen County*, 115 Tenn. 528, 92 S. W. 238.

We are not concerned with the policy or the wisdom of this constitutional requirement. It is sufficient for us that the Constitution so declares. It is apparent, however, that, as taxes are paid by the people, they have required the Legislature, as well as other political subdivisions, in levying a

tax which they are to pay, to inform them by the act of the purpose for which they are to pay the tax; and, in the absence of this information, they have a right to refuse payment. The people who are called upon to pay this tax have no idea why they are thus taxed. They have no idea for what purpose the tax they pay will be applied; and, by their Constitution, they have reserved the right to refuse to pay a tax, unless they are informed of its purpose.

But it is argued that under the decision of this court, in *McGannon v. State*, 124 Pac. 1063 (not yet officially reported), it is unnecessary for an act levying a tax of this nature to specify the purpose for which it is levied. The *McGannon* Case does not so hold. That case involved the inheritance tax. An inheritance tax is only levied once, and the court held that this section of the Constitution did not apply for that reason, but applied only to annually recurring taxes. The tax in the case at bar is an annual tax, and therefore does not come within the reason or the language of the *McGannon* Case.

What we have said disposes of the case, and it is unnecessary for us to consider the other questions involved.

The judgment of the trial court is affirmed.

HAYES, C. J., and DUNN, KANE, and TURNER, JJ., concur. WILLIAMS, J., being disqualified, C. B. AMES, a member of the Supreme Court Commission, was appointed to sit in his stead.

(35 Okl. 506)

FARMERS' & MERCHANTS' NAT. BANK
OF HOBART v. SCHOOL DIST. NO.
56, KIOWA COUNTY.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 82*)—
SCHOOL BUILDINGS—CONTRACT—PUBLIC
POLICY.

A contract, made with a school district board by a county superintendent of the county in which such school district was located, to build a schoolhouse for said district, is void as being against public policy.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 197, 198; Dec. Dig. § 82.*]

2. APPEAL AND ERROR (§ 1011*)—CONFLICT-
ING EVIDENCE.

Where the testimony was oral and conflicting and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Error from District Court, Kiowa County;
J. R. Tolbert, Judge.

Action by the Farmers' & Merchants' National Bank of Hobart, Oklahoma, against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

School District No. 56, Kiowa County. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. L. Zink and J. H. Cline, both of Hobart, for plaintiff in error. C. A. Morris, of Kansas City, Mo., for defendant in error.

WILLIAMS, J. This proceeding in error is to review a judgment wherein the plaintiff in error, as plaintiff, sued the defendant in error, as defendant, on February 7, 1907, to recover (1) the sum of \$400 and interest from December 31, 1902, on a certain school district warrant No. 2, issued by W. T. Keith, director, and F. W. Newman, clerk, of said district, alleged to have been issued when the school board of said district was in legal session and to have been registered by J. W. Clark as treasurer. It was further alleged that (2) said warrant was issued in favor of E. L. Merchant and J. P. Evans and registered by J. W. Clark, treasurer; that at said time the said Merchant and Evans had a claim against said district "for labor and material furnished and moneys advanced in the building and construction of a schoolhouse for said school district"; that said warrant was thereafter and before the commencement of said action sold and transferred to the plaintiff, which was then the owner and holder of the same; that on July 12, 1906, and various other times, plaintiff had presented to the treasurer of said district said warrant and demanded payment thereof, which had been refused; that the material and labor furnished and money advanced were presumably worth the sum of \$400, and the schoolhouse was worth the sum of \$1,200. The defendant answered by general denial, except that it admitted that it was a school district organization, as alleged, and that the warrant was issued, but denied that it was regularly issued, and specially denied liability for the payment of the same or any part thereof, and denied that on December 31, 1902, said Merchant and Evans had a legal claim for material and labor furnished and moneys advanced, and that any claim in writing was presented to the school board as a basis of the issuance of said warrant, or that there was a legal session of the school board held on that day authorizing the issuance of said warrant, or that the treasurer of said school district registered said warrant then or at any other time. It was further alleged that neither at the time of the issuance of said warrant, to wit, December 31, 1902, nor at any time since, had a schoolhouse site been selected for said school district by a vote of the qualified electors thereof; that no election, special or otherwise, has ever been held in said school district at any time for the issuance of bonds to build a schoolhouse or purchase a school site; that J. P. Evans was then superintendent of public instruction for Kiowa county, and E. L. Merchant was a travel-

ing salesman for school furniture; that these two persons conspired together to defraud and cheat said school district, and caused to be irregularly and illegally issued said warrant No. 2, and also warrant No. 3, the last-named one being the one sued on in this cause, for the ostensible purpose of building a schoolhouse in said district; that these two warrants were delivered to Evans and Merchant, and the following year a little schoolhouse was built by contract by a Mr. Haywroth, at a contract price of \$385, which was more than the actual cost or reasonable market value at the time of its construction or at the time of the issuance of said warrants or since; that the issuance of the warrants sued on to J. P. Evans, who was then superintendent of public instruction of said county, was contrary to public policy, and therefore rendered the same void; that the amounts of the warrants and each of them were in excess of the assessed equalized property of said school district at the time of the issuance and ever since.

Section 2408 of Wilson's Revised & Annotated Statutes (section 2528, Compiled Laws of Oklahoma 1909), provides: "That it shall be unlawful for any public officer or deputy or employé of said officer to either directly or indirectly, buy, barter for, or otherwise engage in any manner in the purchase of any bonds, warrants or any other evidence of indebtedness against this state, any subdivision thereof, or municipality therein, of which he is an officer." Section 813 of Wilson's Revised & Annotated Statutes (section 1123, Compiled Laws of Oklahoma 1909) provides: "That is not lawful which is: (1) Contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals."

[1] J. P. Evans, as county superintendent at the time of the issuance of these two warrants to himself to build a schoolhouse, was an advisory public officer of school district No. 56, under section 5751, Statutes of Oklahoma Territory 1893, which prescribes among his duties that he shall "note the character and condition of the schoolhouse, furniture, apparatus and grounds, and make a report in writing to the district board, making such suggestions as in his opinion shall improve the same." A contract by such county superintendent with the officials of said school district is against public policy and void. The court made a general finding of fact in favor of the defendant (school district). See *Ray v. School District*, 21 Okl. 88, 95 Pac. 480; *School District No. 80 v. Brown et al.*, 2 Kan. App. 309, 43 Pac. 102; *Kellogg v. School District*, 13 Okl. 285, 74 Pac. 110; section 6154, Wilson's Revised & Annotated Statutes 1903; section 8056, Compiled Laws of Oklahoma 1909.

[2] It is settled by numerous decisions of this court that where testimony was oral and

conflicting, and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact. *Deming Investment Co. v. Love*, 31 Okl. 146, 120 Pac. 635; *Bohart v. Mathews*, 29 Okl. 315, 116 Pac. 944; *Bretch Bros. v. Winstons & Sons*, 28 Okl. 625, 115 Pac. 795; *Alcorn et al. v. Dennis*, 25 Okl. 135, 105 Pac. 1012; *McCann v. McCann et al.*, 24 Okl. 264, 103 Pac. 694; *Robinson & Co. v. Roberts*, 20 Okl. 787, 95 Pac. 248.

It follows that the judgment of the lower court will be affirmed.

(35 Okl. 652)

INDIAN LAND & TRUST CO. et al. v. WIDNER.

(Supreme Court of Oklahoma. Feb. 11, 1913.
Rehearing Denied Feb. 14, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 758, 774*)—BRIEFS—EFFECT OF DEFECTS.

Where the brief of plaintiffs in error fails to contain specifications of error complained of, separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 of this court (20 Okl. xii, 95 Pac. viii), the appeal will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3093, 3096, 3097; Dec. Dig. §§ 758, 774.*]

Error from District Court, Hughes County; John Caruthers, Judge.

Action between the Indian Land & Trust Company and others and R. W. Widner. From the judgment, the Indian Land & Trust Company and others bring error. Dismissed.

Lewis C. Lawson, of Holdenville, for plaintiffs in error. Mann, Rogers & Harris, of Holdenville, for defendant in error.

WILLIAMS, J. On August 2, 1911, counsel for defendant in error filed a motion in this court to dismiss this proceeding in error for the reason that the brief of plaintiffs in error, filed in this cause, fails to comply with rule 25 of this court. On August 1, 1911, counsel for plaintiffs in error accepted service of this brief, and on September 30, 1911, filed a reply brief to the brief of the defendant in error, but in no way attempted to bring the brief in chief within said rule 25.

In *Arkansas Valley National Bank v. Clark*, 31 Okl. 413, 122 Pac. 135, the syllabus is as follows: "Rule 25 of the Supreme Court (20 Okl. xii, 95 Pac. viii), which provides that in all cases, except felonies, the brief of the plaintiff in error, in substance, shall set forth the material parts of the pleadings, proceedings, and facts upon which reliance is had for reversal, so that no examination of the record itself need be made in said court, and shall also contain specifications

of the errors complained of, separately set forth and numbered, is mandatory; and where it is not observed, and counsel for the defendant in error in his brief insists that such rule has not been complied with, and the plaintiff in error, making no request for permission to amend its brief, permits said cause to be submitted with the briefs in that condition, the alleged errors will not be reviewed."

In *Reynolds v. Phipps et al.*, 31 Okl. 788, 123 Pac. 1125, paragraph 1 of the syllabus is as follows: "Where brief of plaintiff in error fails to contain specifications of error complained of, separately set forth and numbered, and argument and authorities in support thereof stated in the same order, as required by rule 25 of this court (20 Okl. xii, 95 Pac. viii), the appeal may be dismissed." See, also, *Lawless v. Pitchford*, 126 Pac. 782; *Fire Association of Philadelphia v. Bryant & Whistler et al.*, 127 Pac. 699.

The plaintiffs in error in their brief utterly failed to make specifications of error, as required by said rule.

The motion to dismiss must be sustained. All the Justices concur.

(37 Okl. 75)

TURNER v. FLEMING et al.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 570*)—RES JUDICATA—"DISMISSAL ON THE MERITS"—"RETRAXIT."

A dismissal of a suit, based upon an agreement between the parties by which a settlement and adjustment of the subject-matter in dispute is made, is a dismissal on the merits, and is equivalent to a retraxit at common law, and as such is a bar to further litigation on the same subject-matter between the parties.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6198, 6199; vol. 8, p. 7789.]

2. JUDGMENT (§ 956*)—RES JUDICATA—EVIDENCE.

Where the record fails to show the facts of the agreement upon which such dismissal is based, extrinsic evidence may be resorted to.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1822-1825; Dec. Dig. § 956.*]

3. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY OF ATTORNEY—COMPROMISE OF CLAIM.

An attorney, by virtue of his retainer, can do anything fairly pertaining to the prosecution of his client's cause and the protection of his client's interests involved in the suit; but he cannot, under such general authority, surrender or compromise away his client's substantial rights.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 209-216; Dec. Dig. § 101.*]

4. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY OF ATTORNEY—SETTLEMENT OF SUIT—VACATING.

Where an attorney makes a compromise or settlement of a cause, without any authority so to do, and causes an order of dismissal "as per stipulation," based on such settlement to

be entered, such order may be set aside and vacated, upon the application of his aggrieved client promptly presented.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-216; Dec. Dig. § 101.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Pottawatomie County; Roy Hoffman, Judge.

Action by J. B. Turner against M. C. Fleming and At. T. Brown. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Blakeney, Maxey & Miley, of Muskogee, for plaintiff in error.

BREWER, C. The question presented in this case is this: Is an agreement of an attorney in a case to settle by compromise and dismiss the case, as per stipulation, by virtue of his general employment to bring suit, and without special authority or the knowledge or consent of his client, binding on the client, who afterwards learns of the matter and brings a proceeding to set aside the judgment and order of dismissal?

The defendant in error has filed no brief. The facts, briefly stated, are: Plaintiff in error, Turner, a nonresident, owns a building in Shawnee, and defendants in error were occupying it as tenants; no rent had been paid for a long period. It seems a Mr. Douglas had been collecting rents for Turner, and was directed by Turner to collect the back rents. Defendants refused payment, and Douglas employed an attorney, who brought suit for back rents in the sum of \$780 and interest. Defendants answered denying indebtedness and with a cross-petition asking over \$2,000 for various items of damages. A settlement of the suit was agreed upon between Douglas, the attorney, and defendants, whereby Turner's total claim for rents was surrendered and defendants were paid the sum of \$625 out of Turner's funds in the hands of Douglas. When the case was called, upon the suggestion of attorneys, the court made the following order: "Ordered that this cause be and the same is hereby dismissed as per stipulations now on file." While the written stipulations were not filed, the complete settlement and compromise stated above was entered into between the persons as stated.

[1] A dismissal of a suit made after, and based upon, an agreement between the parties by which a compromise settlement and adjustment of the subject-matter in dispute is made, is a dismissal on the merits, and is equivalent to a judgment of retraxit at common law; and as such would be a bar to further litigation on the same subject between the parties. 3 Blackstone, Com. 296; Bank of the Commonwealth v. Hopkins, 2 Dana (Ky.) 395; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Merritt v. Camp-

bell, 47 Cal. 542; Hoover v. Mitchell, 66 Va. 387; Wohlford v. Compton, 79 Va. 333; U. S. v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; Pethel v. McCullough, 49 W. Va. 520, 39 S. E. 199; Wilcher v. Robertson, 78 Va. 602.

[2] If the record fails to show the facts of the agreement for the dismissal, extrinsic evidence may be resorted to. Butchers' Slaughtering, etc., Ass'n v. Boston, 137 Mass. 186; Foye v. Patch, 132 Mass. 105; Cornell v. Hartley et al., 41 W. Va. 493, 23 S. E. 789; 1 Barton, Chancery Practice, 358.

[3, 4] The order in this case being a bar to further litigation over the same subject-matter between the same parties, if made with authority, the decisive question arises: Did the attorney have the power and authority to make the agreement and settlement and consent to the order?

The undisputed facts are that Turner wrote Douglas and asked him to collect these rents. No further or other authority is claimed. An attorney was employed, suit brought, and, after issues were fully joined, Douglas and the attorney he had employed settled the case, surrendering all of Turner's claim for rents in the suit, and paying out of other funds of Turner a large sum of money to defendants.

The general authority and direction to collect the rents was not sufficient authority to do what was done in this case. An attorney by virtue of his retainer can do anything fairly pertaining to the prosecution of his client's cause, and the protection of his client's interest involved in the suit; but he cannot, under such general authority, surrender or compromise away his client's substantial rights. To do so it requires the express authority of the client, or his agreement thereto. Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Derwort v. Loomer, 21 Conn. 245; Jones v. Inness, 32 Kan. 177, 4 Pac. 95; 3 Ency. Law, 358; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238; Waldron v. Angleman, 71 N. J. Law, 166, 58 Atl. 568; Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Rhutasel v. Rule, 97 Iowa, 20, 65 N. W. 1013; Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111; 4 Cyc. 945, and cases cited. The petition to vacate and set aside the order of dismissal in this case should have been granted. Where an attorney makes a compromise or settlement of a case without any authority so to do, it may be set aside and vacated, upon application of his aggrieved client, seasonably presented. Dalton v. West End Street Ry. Co., 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410; North Whitehall T. P. v. Keller, 100 Pa. 105, 45 Am. Rep. 361; Faughnan v. Elizabeth, 58 N. J. Law, 309,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

38 Atl. 212; *Pierce v. Brown*, 8 Biss. 534, Fed. Cas. No. 11,143.

This case should therefore be reversed and remanded, with directions to set aside the order of dismissal as per stipulation filed; the cause be reinstated on the trial docket for trial in course on the issues joined.

PER CURIAM. Adopted in whole.

(36 Okl. 744)

STOUT v. STATE ex rel. CALDWELL.

(Supreme Court of Oklahoma. Jan. 7, 1913.
Rehearing Denied Feb. 14, 1913.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 178*)—ACTION—USE OF PREMISES—PROCEEDING FOR PENALTY—NATURE AND FORM.

Section 4191, Comp. Laws 1909, provides as the punishment of one who uses or permits his premises to be used for violating the prohibition law both fine and imprisonment and a penalty. *Held:*

(a) That the proceeding to recover the penalty is the punishment of an offense.

(b) That while this proceeding punishes an offense, it at the same time is in the nature of a civil action and is governed by the rules of procedure applicable to civil instead of criminal cases.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 197; Dec. Dig. § 178.*]

2. CONSTITUTIONAL LAW (§ 42*)—CONSTRUCTION AND OPERATION OF CONSTITUTION—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTION.

A defendant, sued for the penalty provided by section 4191, Comp. Laws 1909, for unlawfully permitting his premises to be used in violation of the prohibition law, may plead that the statute is invalid because in conflict with the former jeopardy section of the Constitution, although he has not been previously prosecuted for the crime pronounced by the statute.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

3. CRIMINAL LAW (§ 162*) — "JEOPARDY" — SIMILAR EXPRESSIONS.

The terms "jeopardy of life and liberty for the same offense," "jeopardy of life or limb," "jeopardy for the same offense," "twice in jeopardy of punishment," and other similar provisions used in the various Constitutions, are to be construed as meaning substantially the same thing.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 285; Dec. Dig. § 162.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3802-3811; vol. 8, p. 7694.]

4. CRIMINAL LAW (§ 163*)—FORMER JEOPARDY—PROCEEDING FOR PENALTY.

Article 2, § 21, of the Constitution (Williams' Constitution and Enabling Act, § 29), which provides, "Nor shall any person be twice put in jeopardy of life and liberty for the same offense," is not intended to apply to a civil proceeding which affects merely property rights, even though such proceeding is in part a punishment of an offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 288; Dec. Dig. § 163.*]

5. CONSTITUTIONAL LAW (§ 48*)—DETERMINING CONSTITUTIONALITY OF STATUTE—PRESUMPTION.

An act of the Legislature will not be declared unconstitutional unless its conflict with the Constitution is clear and certain.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48.*]

6. CRIMINAL LAW (§ 163*)—FORMER JEOPARDY—PENALTY.

Section 4191, Comp. Laws 1909, imposing, as the penalty for the offense there described, a penalty to be recovered at the suit of the state, and a fine and imprisonment to be administered in a criminal prosecution, is not in conflict with article 2, § 21, of the Constitution, which provides, "Nor shall any person be twice put in jeopardy of life and liberty for the same offense."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 288; Dec. Dig. § 163.*]

7. CRIMINAL LAW (§ 1206*)—CONSTITUTIONAL AND STATUTORY PROVISIONS—PUNISHMENT FOR OFFENSES.

The fact that the Constitution prescribes the punishment for the sale of intoxicating liquors does not prevent the Legislature from imposing other and different or greater punishment for using or permitting one's premises to be used for the sale of intoxicating liquors, as the two offenses are separate and distinct and require different proof to support them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; R. H. Loofbourrow, Judge.

Action by the State, on the relation of Fred S. Caldwell, counsel to the Governor, against D. C. Stout, to recover a penalty for using certain premises in Oklahoma City for the purpose of unlawfully disposing of intoxicating liquors. Judgment for plaintiff for \$500, and defendant brings error. Affirmed.

Kistler, McAdams & Haskell, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Jos. L. Hull, Asst. Atty. Gen., for defendant in error.

AMES, C. On the petition for rehearing our attention was first called to the contention that section 4191, Comp. Laws 1909, is in conflict with article 2, § 21 (Williams' Constitution and Enabling Act, § 29) of the Constitution, prohibiting twice placing any person in jeopardy for the same offense, and we granted the petition in order that this position might be fully examined. We have been assisted in this examination by careful briefs and oral argument, and have given the subject a painstaking investigation, having carefully examined the authorities cited by counsel and many others disclosed by our own researches. Section 4191 is as follows: "It shall be unlawful for the owner or owners of any real estate, building, structure, or room to use, rent, lease, or permit the same to be used for the purpose of violating any provision of this act. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

addition thereto shall be liable to a penalty of not less than one hundred dollars, nor more than one thousand dollars for each offense, to be recovered at the suit of the state. The penalty so recovered shall become a lien on the property and premises so used, leased or rented in violation of this act from and after the date of the filing of the suit to recover such penalty, and the filing of a notice of the pendency of such suit with the register of deeds of the county wherein said property is located, and upon final judgment said property may be sold as upon execution to satisfy the same, together with costs of suit; provided, however, that such lien shall not attach to property under the control of any receiver, trustee, guardian or administrator; but in such case the receiver, trustee, guardian or administrator shall be liable, on his official bond, for the penalty so incurred, and in addition thereto shall be guilty of a misdemeanor. Each day such property is so used, leased or rented for any such unlawful purpose shall constitute a separate offense, and the penalty herein prescribed shall be recovered for each and every such day. All leases between landlords and tenants under which any tenant shall use the leased premises for the purpose of violating any provision of this act, shall be wholly null and void, and the landlord may recover possession thereof as in forcible entry and detainer."

The offense charged against the defendant under this statute is using his premises for the purpose of selling and otherwise illegally furnishing spirituous, vinous, fermented, and malt liquors, and permitting his premises to be used for such purposes. It will be noticed that any person who willfully violates the provisions of this section is guilty of a misdemeanor, and in addition thereto is liable to a penalty of not less than \$100 nor more than \$1,000 for each day during which the property is so used. The punishment for the misdemeanor is a fine of not less than \$50, nor more than \$500, and imprisonment not less than 30 days nor more than six months. Section 4206, Comp. Laws 1909. The punishment therefore, for a violation of the section involved, is fine and imprisonment and penalty. It will be observed that the statute uses the expression, "and in addition thereto," so that the punishments are concurrent, and not severable, and if one can be imposed all must be imposed. The punishment for the misdemeanor is administered in a criminal prosecution, while the penalty is collected in a suit brought by the state. Both sides agree that it requires two proceedings to complete this punishment, one criminal, and one in the nature of a civil action, and we concur in this agreement; so that the question presented is whether or not, for the punishment of a crime, a man may be twice tried. It will also be observed that this statute imposes both punishments for the same offense.

It is not a case of the same acts constituting different offenses, or offenses against different governments. The constitutional provision referred to is as follows (article 2, § 21, of the Constitution; Williams' Constitution and Enabling Act, § 29): "No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life and liberty for the same offense."

[1] First. This proceeding to recover the penalty is the punishment of an offense, or at least a part of it.

On this point the opinion of this court in *C., R. I. & P. Ry. Co. v. Territory of Oklahoma*, 25 Okl. 238, 105 Pac. 677, is conclusive. That was a proceeding in the nature of a civil action, instituted against the railroad to recover the statutory penalty for accepting and receiving quail for the purpose of transportation. The quail were received in Blaine county and transported through Garfield county, where the suit was brought. The organic act of Oklahoma territory provided that "all offenses committed in said territory, if committed within any organized county, shall be prosecuted and tried within said county," and it was argued by the railroad company that the suit should have been brought in Blaine county, as it was the prosecution of an offense, although it was in the form of a civil action. This position was upheld by the court upon the authority of *United States v. Chouteau*, 102 U. S. 603, 26 L. Ed. 246; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *A., T. & S. F. R. Co. v. State*, 22 Kan. 1.

Second. While this is a proceeding to punish an offense, at the same time it possesses many of the attributes of a civil action.

Its ultimate object is the recovery of a money judgment, and it cannot at any time result in depriving the defendant of life or liberty, but merely of property. It is governed by the rules of procedure in civil instead of criminal cases, and would not require evidence beyond a reasonable doubt to support it, or a unanimous verdict, or the other peculiar classes of protection which are thrown around those whose life or liberty is at stake. In *re Seagraves*, 4 Okl. 422, 48 Pac. 272, held that an action to recover a penalty for intruding within the Indian country cannot be enforced by a criminal proceeding. This subject has recently received a careful consideration in *Hepner v. U. S.*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960, which was an action to recover the penalty prescribed by statute for inducing an alien to migrate to the United States for the purpose of performing labor there. The

United States Circuit Court of Appeals for the Second Circuit certified the question to the Supreme Court to determine whether or not in an action to recover this penalty, where the evidence was sufficient, the court should instruct the jury to return a verdict for the United States, and the court held that the action to recover the penalty was not so far criminal in its nature as to prevent the direction of a verdict for the government, citing in support of its conclusion *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491; *Jacobs v. United States*, 1 Brock. 520, Fed. Cas. No. 7,157; *Stearns v. United States*, 2 Paine, 300, Fed. Cas. No. 13,341; *United States v. Mundell*, 1 Hughes, 415, Fed. Cas. No. 15,834; *United States v. Younger* (D. C.) 92 Fed. 672; *United States v. B. & O. S. W. R. Co.*, 86 C. C. A. 223, 159 Fed. 33; *Hawlowetz v. Kass*, 23 Blatchf. 395, 25 Fed. 765; *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777. The cases of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150, are cited and limited in their application to the exact point there decided, namely, that such an action was so far criminal in its nature as to prevent the defendant from being compelled to testify against himself.

The *Zucker Case*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777, was a suit to recover the value of merchandise alleged to have been forfeited to the United States under the Act of June 10, 1890, c. 407, § 9, 26 Stat. at L. 131 (U. S. Comp. St. 1901, p. 1895), which provided for the forfeiture of the merchandise and punishment by fine or imprisonment. This act, therefore, is quite closely related to the one under review, because both involve the penalty plus criminal punishment. It was held that depositions could be used over the objections of the defendants, notwithstanding the sixth amendment, which would have entitled the defendants to have been confronted in court with witnesses against them, if the case had been criminal.

In an extensive note in connection with the report of the *Hepner Case*, 27 L. R. A. (N. S.) 739, the annotator, at page 743, says: "In examining the cases collected in this note, it will be observed that those holding the action to be civil in nature rather than criminal—whether the offense is public or private—largely preponderate, and this would seem to be the better rule. The exceptions to the ordinary rules of procedure in favor of the accused on trial for a crime are believed to have arisen because of the fact that the defendant's life or liberty was at stake. So sacred was this individual right to life and liberty held that it gave rise to the maxim of the English law that it is better that ten guilty persons escape than one innocent suffer. Possibly some of the rules of criminal procedure also arose because, at common law, the accused, singularly enough, was not

allowed counsel. But it can scarcely be doubted that the rules formulated to shield the one innocent person, although ten guilty ones might thereby go free, would not have been adopted had the only inconvenience suffered by a person convicted of crime been a pecuniary loss. The ancient pains and penalties for criminal acts were severe in the extreme, and might well justify a merciful procedure, whereas, had the penalty been a mere loss of property, it would hardly have called for a procedure different from that provided where the penalty would be a loss of property for any other wrong. Nor will the fact that a person's character is involved in a charge of violating a penal statute furnish a sufficient justification for a resort to criminal trial rules; for is not a defendant's character as much involved in a civil action for damages for assault and battery as in a criminal prosecution for the same offense? It would seem, therefore, that no sufficient reason has been shown for adopting rules of criminal procedure in actions to recover statutory penalties. The penalty, broadly speaking, is a pecuniary one, the same as it is in any private action between individuals, and is no more a punishment—except, perhaps, in degree—so far as it bears upon the individual punished, than is the pecuniary loss imposed for any other wrong. The sum of money recovered may go to an individual, as compensation for an injury, or it may go to the state, as a penalty for a public offense; but the result is the same to the defendant—the loss of property to the extent of the penalty. If a preponderance of evidence is enough to establish the wrong in one case, it ought to be sufficient to prove the offense in the other. There would appear to be no more reason why a defendant in an action to recover a statutory penalty should be entitled to the privileges of one accused of crime than would be the defendant in an action for damages for a negligent killing, because the negligence amounted to manslaughter. That the action for a statutory penalty is civil in nature has the support of a large majority of the cases in which the question has been squarely presented."

Third. Having now determined that this proceeding, while designed to punish an offense, has for its object a mere money recovery, and is governed by the rules of procedure affecting civil cases, we now reach the inquiry whether or not the effect of the statute is to twice put the defendant in jeopardy of life and liberty for the same offense.

[2] At the threshold of this inquiry, we are met with the objection that the defendant is not in position to plead former jeopardy, because it does not appear that he has ever been prosecuted criminally, and that therefore there has been no previous jeopardy to plead. In support of this position our attention is called to the case of *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 80

Sup. Ct. 663, 54 L. Ed. 930, where it is said: "Replying to the contention that to sustain this action would subject plaintiffs in error to the jeopardy of a second punishment, the court said that plaintiffs in error were 'probably a little premature in raising the point.' And further said, 'It might come with some force if presented in a criminal prosecution after recovery in a civil action.' In this we concur. In other words, plaintiffs in error cannot base a defense upon an anticipation of what may never occur. To permit this would discharge them from all liability, for the defense, if good at all, would be good against whatever action might be brought. Necessarily there must be a first jeopardy before there can be a second, and only when a second is sought is the constitutional immunity from double punishment threatened to be taken away. An occasion for the defense of double jeopardy may occur if the state of Minnesota should proceed criminally against plaintiffs in error. We do not mean to say, however, that it will be justified. We do not mean to say that the state law subjects an offender against its provisions to a double jeopardy." This argument, however, does not impress us as conclusive, and, as it was not the deciding point in that case, we do not believe it is the expression of the matured opinion of that court. It will be remembered that this is a suit to recover a statutory penalty. The penalty is prescribed by the statute and can be recovered only by virtue of the statute. If the statute is invalid, then no penalty can be recovered. If the statute is valid, then the penalty can be recovered, and the fine and imprisonment not only can, but must, be imposed. So that the question is not whether there has been an actual former jeopardy, but whether there is a valid statute upon which this action can be maintained. If the statute is in conflict with the Constitution, it is invalid. It does not exist. It is as if it were not, and therefore no action can be maintained under it. While, if it is valid, both actions must be maintained. The failure of the public officers to discharge a duty which the statute imposes upon them cannot improve the statute—cannot give life to that which is dead. The statute must, of course, be tested by its own requirements, and not by what public officials have done in the past. *Board of Education v. Aldredge*, 13 Okl. 205, 73 Pac. 1104; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Henderson v. Atlantic City*, 64 N. J. Eq. 583, 54 Atl. 533; *State v. Stark County*, 14 N. D. 369, 103 N. W. 913; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306.

[3] We therefore proceed to an examination of the statute, to ascertain whether it is in conflict with the former jeopardy provision of our Constitution. The particular language which is relied upon as destroying the statute reads as follows: "Nor shall any per-

son be twice put in jeopardy of life and liberty for the same offense."

When our Constitution was adopted, similar provisions had been in the Constitutions of the United States and of the other states for many generations, and various phrases are used to express the same idea. The Constitution of the United States provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Fifth Amendment. Other Constitutions using the expression, "life or limb," are Alabama (the same language being found in its Constitutions of 1819, art. 1, § 13; 1865, art. 1, § 10; 1868, art. 1, § 11; 1875, art. 1, § 10; and 1901, art. 1, § 10); Delaware (article 1, § 8, Const. 1792, the same language being in its Constitutions of 1831 and 1897); Kentucky (Constitutions 1792, art. 12, § 12; 1799, art. 10, § 12; 1850, art. 13, § 14; and 1890, § 12); Maine (Dec. of Rights, § 8, Const. 1819); Pennsylvania (article 1, § 10, Const. 1873, and same in Consts. 1838 and 1790, art. 9, § 10); Tennessee (article 1, § 10, Const. 1870, same in Consts. 1834 and 1796). The following states use the expression, "life or liberty": Georgia (article 1, § 8, Const. 1877, and same in Consts. 1868 and 1865, art. 1, § 9); South Carolina (article 1, § 17, Const. 1895). The following states use the expression, "twice put in jeopardy for the same offense": California (article 1, § 13, Const. 1879, and same in Const. 1849, art. 1, § 8); Colorado (article 2, § 18, Const. 1876); Idaho (article 1, § 13, Const. 1889); Indiana (article 1, § 14, Const. 1851, and same in Const. 1816, art. 1, § 13); Montana (article 3, § 18, Const. 1889); Nevada (article 1, § 8, Const. 1864); North Dakota (article 1, § 13, Const. 1889); Ohio (article 1, § 10, Const. 1851, same in Const. 1802, art. 8, § 11); Oregon (article 1, § 12, Const. 1857); South Dakota (article 6, § 9, Const. 1889); Utah (article 1, § 12, Const. 1895); Virginia (article 1, § 8, Const. 1902); Washington (article 1, § 9, Const. 1889); Wyoming (article 1, § 11, Const. 1889).

Michigan (article 1, § 12, Const. 1835), Minnesota (article 1, § 7, Const. 1857), and Wisconsin (article 1, § 8, Const. 1848) use the expression, "twice in jeopardy of punishment." New Hampshire, in its Constitutions of 1784 (article 1, § 16), 1892 (part 1, art. 16), and 1902, uses the expression, "tried after an acquittal for the same crime or offense," and New Jersey has substantially the same provision (article 1, § 10, Const. 1844). Arkansas first used the expression, "life or limb," and changed to, "life or liberty," in 1868 (article 1, § 9; Const. 1864, art. 2, § 12; Const. 1874, art. 2, § 8); Illinois in 1818, used the term, "life or limb" (article 8, § 11), and in 1870 changed to, "jeopardy for the same offense" (article 2, § 10, Const. 1870). Iowa's provision is substantially the same as that of New Hampshire (article 1, § 12, Consts. 1857 and 1846). In 1855 Kansas used the ex-

pression, "jeopardy for the same offense" (article 1, § 10, Const. 1855). In 1857 it changed to, "jeopardy of life, limb or liberty" (section 10, Bill of Rights, Const. 1857). While in 1859 it returned to the expression, "jeopardy for the same offense" (article 1, § 10, Const. 1859). In 1868 Louisiana had the expression, "for the same offense" (article 6, tit. 1, Const. 1868). While in 1879 it changed to "jeopardy of life or liberty for the same offense," and this was followed in 1879 (article 9, Bill of Rights). In 1817, in Mississippi, the expression, "life or limb," was used (article 1, § 13, Const. 1817), while in 1868 it was changed to, "jeopardy for the same offense" (article 1, § 5), and this was followed in 1890 (article 3, § 22). In 1820 Missouri used the term, "life or limb" (article 13, § 10), while it changed to, "life or liberty," in 1865 (article 1, § 19), and followed this in 1875 (article 2, § 23). Nebraska started, in 1866, with the expression, "jeopardy of punishment" (article 1, § 8), and changed it in 1875 to, "twice put in jeopardy for the same offense" (article 1, § 12). In 1821 New York used the term, "life or limb" (article 7, § 7), and changed in 1846 to, "jeopardy for the same offense" (article 1, § 6), which it followed in 1894 (article 1, § 6). In 1842 Rhode Island used the term, "after an acquittal, be tried for the same offense" (article 1, § 7), while in 1868 it changed it to, "jeopardy of his life or liberty" (article 1, § 18). In 1836 Texas used the term, "jeopardy of life or limbs" (section 9, Bill of Rights), which it subsequently changed to, "jeopardy of life or liberty" (article 1, § 14, Const. 1876). West Virginia started with, "jeopardy for the same offense" (article 2, § 2, Const. 1861), which it subsequently changed to, "jeopardy of life or liberty for the same offense" (article 3, § 5, Const. 1872). Connecticut does not seem to have any constitutional expression on the subject, although it is treated in that state as a fundamental principle of the common law that no person shall be subject for the same offense to be twice put in jeopardy. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202.

These various constitutional provisions apparently are treated by the courts as meaning the same thing; the difference in phraseology not being discussed in the cases which we have examined. Indeed, it is assumed by the Supreme Court of the United States, in the case of *Trono v. United States*, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773, that the term, "life or limb," in the Constitution of the United States, has the same meaning as, "no person for the same offense shall be twice put in jeopardy of punishment," in the Act of July 1, 1902, c. 1369, 32 Stat. 691, providing for the rights of persons accused of crime in the Philippine Islands, and, "jeopardy for the same offense," in the New York Constitution. Dis-

senting opinions were filed in this case by Mr. Justice Harlan and Mr. Justice McKenna, and in neither of them is a distinction drawn between the phrases. The case of *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655, in which dissenting opinions were filed by Mr. Justice Holmes and by Mr. Justice Brown further emphasize the fact that that court treats as identical these various constitutional phrases. We therefore conclude that no particular significance is to be given to the term, "life or liberty," in our Constitution, but that it has substantially the same meaning as the various other forms of expression which are contained in other Constitutions and bills of rights.

In the early English law, it was a very usual form of punishment to take the limb of a defendant and it is doubtless this fact that caused the early expression, "life or limb." Sir James Fitzjames Stephen, in speaking of early English punishments, says (*History of the Criminal Law of England*, vol. 1, pp. 58, 59): "The punishment upon a second conviction for nearly every offense was death or mutilation. In Ethelred's laws it is said of the accused when ultimately convicted, 'Let him be smitten so that his neck break.' The laws of Cnut lay down the principles on which punishment should be administered, and also regulate the practice of the court. The principle is thus stated: 'Though any one sin, and deeply foredo himself, let the correction be regulated so that it be becoming before God and tolerable before the world. And let him who has power of judgment very earnestly bear in mind what he himself desires when he thus says, "et dimittite nobis debita nostra sicut et nos dimittimus." And we command that Christian men be not on any account for altogether too little condemned to death; but rather let the gentle punishments be decreed for the benefit of the people; and let not be destroyed for little God's handiwork, and his own purchase which he dearly bought.' The practice of the courts is regulated by the following enactment: 'That his hands be cut off, or his feet, or both, according as the deed may be. And if he have wrought yet greater wrong, then let his eyes be put out, and his nose, and his ears, and his upper lip be cut off, or let him be scalped; whichever of these those shall counsel whose duty it is to counsel thereupon so that punishment be inflicted, and also the soul be preserved.' In volume 2 of *Pollock & Maitland's History of English Law*, pp. 452, 453, it is said: "When punishment came it was severe. We read of death inflicted by hanging, beheading, burning, drowning, stoning, precipitation from rocks; we read of loss of ears, nose, upper lip, hands and feet; we read of castration and flogging and sale into slavery; but the most gruesome and disgraceful of these torments were reserved for slaves. Germanic

law is fond of 'characteristic' punishments; it likes to take the tongue of the false accuser and the perjurer's right hand. It is humorous; it knows the use of tar and feathers. But the worst cruelties belong to the pollter time." As the methods of punishment grew less cruel with the development of civilization, the deprivation of limb was abandoned; but the phrase continued to live, with its meaning modified according to the refinements of civilization, so that, in broad terms, the doctrine may be said to mean that no man who has once been convicted or acquitted of an offense shall again be tried or punished for the same offense, and the question for our consideration is whether our statute which provides a penalty to be recovered in an action by the state, and fine and imprisonment to be recovered in a criminal prosecution, can both be administered without violating this fundamental doctrine.

[4] It is impossible to trace the doctrine to any distinct origin. It seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed. It seems to us to occupy a similar position in the criminal law to that covered by the doctrine of *res judicata* in the civil law, the one resting on the maxim, "*Nemo debet bis vexari pro una et eadem causa*" (Broom's Legal Maxims [8th Ed.] p. 327), and the other resting upon the maxim "*Nemo debet bis puniri pro uno delicto*" (Broom's Legal Maxims [8th Ed.] p. 348).

Bearing in mind that the maxim has always been recognized, we may throw some light upon its meaning by an examination of the punishment for crime which coexisted with the maxim from the earliest days in England until 1870, and the effect of a conviction upon the defendant's property rights. Broadly stated, the effect of a conviction for felony from the earliest time in England was a forfeiture of all of the defendant's property. The rule is stated by Stephen (volume 1, Hist. of the Criminal Law of Eng., pp. 487, 488) as follows: "One other consequence of treason and felony remains to be noticed. This is corruption of blood and forfeiture of property. The effect of corruption of blood was that descent could not be traced through a person whose blood was corrupted. Also his real property escheated to the lord of the fee or the king. The personal property of a traitor or felon was forfeited, not by his attainder, but by his conviction. These incidents of treason and felony have their source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by the breach of those conditions. They have no history at all, but prevailed from the earliest time till the year

1870, when they were abolished by 33 & 34 Vic. c. 23, § 1, except in the case 'of forfeiture consequent upon outlawry.'"

The theory of the law was that all land is held of some lord; that if the tenant died without heirs the lord should have back again that which he gave to the tenant; that when the tenant committed certain classes of crime, which gradually became known as felonies, his blood was corrupted, the bond between him and his lord was broken, he forfeited the property, and, his blood being corrupt, his heirs could not take through it, and the doctrine of corruption of blood continued in England until the Inheritance Act of 1834, which modified it, and it was abolished in 1870. 3 Holdsworth, History of English Law, pp. 61-64; 2 Pollock & Maitland's History of English Law, p. 466, together with the general discussion of the subject commencing at page 448. We do not know just when this practice originated, but it is apparent from chapter 32 of Magna Charta that it was well established in the law prior to that time, and the only effect of Magna Charta upon the forfeiture was to regulate the division of the real estate as between the king and the feudal lord; that chapter providing: "We will not retain beyond one year and one day the lands of those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs." An excellent historical treatment is contained in McKechnie's Magna Charta discussing this chapter, at pages 394-401. There is no reference in Magna Charta to the subject of former jeopardy.

We have therefore two principles of law standing side by side in the history of English jurisprudence, by one of which a person accused of crime is entitled to the plea of former jeopardy, or, as it was more usually expressed in England, "*autrefois acquit*," or "*autrefois convict*," and the other that the convicted defendant forfeited his entire estate, both real and personal, because of the conviction. As our doctrine is the doctrine of the common law, it is significant, in considering the question before us, that the punishment for the crime in the English law was always accompanied by the destruction of the defendant's real estate and all his property, and its forfeiture to the crown, or the feudal lord, and this is a very persuasive argument that the doctrine of former jeopardy has never had any relation whatever to the protection of a man's property. This position is rendered even stronger by the fact that corruption of blood and forfeiture of estate were abolished by constitutional provisions (article 2, § 15, of Oklahoma Constitution, and similar provisions in the Constitutions of other states), and it has never been thought that the former jeopardy provision had the effect of abolishing these incidents of conviction for felony.

Historically, therefore, and on principle, it

would seem that this doctrine has no relation to a deprivation of property, but only to such a criminal punishment as might result in the deprivation of life or liberty. In other words, one is not placed in "jeopardy" by a proceeding affecting only property rights. Indeed, it seems that at common law, to enforce the forfeiture and recover the property, a second action might be necessary. Sir Matthew Hale, in his Pleas of the Crown (volume 1, p. 242), says: "The king at common law and by virtue of this statute was entitled to a right of entry, where the party was ~~in~~ merely by disseisin or abatement, but not to a right of entry, where the possessor was ~~in~~ by title; but at this day by virtue of the statute of 38 H. 8. above mentioned the king is entitled to a right of entry in both cases, and that without office, *but then there must be an inquisition or seizure to bring the king into the actual possession*; and if he grant it over before such seizure, the grant must be special, not of the land simply, but of the right to the land, otherwise neither land nor the right of entry passeth; it is so adjudged in Dowty's Case, 3 Co. Rep. 10b." And again at page 363: "The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or *upon a conviction of felony* by the petit jury, or the finding of a flight for the same, *to charge the inquest or jury to inquire what goods and chattels he hath, and where they are, and thereupon to charge the Villata where such goods are with the goods to be answerable to the king*. Vide 3 E. 3. Corone 296, & Alibi, vide statute 31 E. 3. cap. 3. But tho the goods of an offender be not forfeited till the conviction or flight found by inquest, yet whether they may be seised upon the offense committed, hath been controverted." See, also, his history of the Freeman Sands Case, at page 250, from which it appears that the king's attorney preferred an information against Sir George Sands, to have a conveyance of the land unto the king; Sir George in that case holding that the land by a title which he claimed superior to that of the king under the forfeiture. It would seem, however, from the Act of 7 and 8 of George IV, c. 28, § 5, which provides "that where any person shall be indicted for treason or felony, the jury impaneled to try such person shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony," that the custom prior to that time was for the same jury which tried the indictment to inquire concerning his real and personal property, in order that forfeiture might be accomplished. 4 Blackstone's Commentaries (Lewis' Ed.) star p. 387, and note 37. The inference from Blackstone's text at this page is that, if the jury under the old practice did not inquire of the lands and chattels, the forfeiture did not take place, as he says: "but the jury very seldom find the flight, for-

feiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty." It seems, however, from the cases referred to by Sir Matthew Hale, supra, and also In re Bateman's Trust, 15 L. R. Eq. Cas. 355, and In re Tyson, 1 Jur. 281, that it was customary for suit to be brought by officers of the crown for the purpose of reaching property forfeited as a result of a conviction, and subjecting it to the forfeiture.

This review of the history of forfeitures, when considered in connection with the history of the doctrine of former jeopardy and that they both grew up and existed side by side for centuries, presents two persuasive reasons supporting the act under consideration. The first is that, notwithstanding the doctrine of former jeopardy, for centuries a convict of felony forfeited all his property, real and personal. The second is that, wherever it was necessary to perfect the forfeiture, a civil action was brought to recover the property. If another and separate proceeding could always be brought to collect the penalty which then followed as an incident of the conviction—and if this additional action bore no relation to the doctrine of former jeopardy—the defendant complains that he is again in jeopardy because he is here given another chance to defend his property rights.

We turn now to an examination of the American cases. There are hundreds dealing with applications of this doctrine which do not concern us, and we therefore lay on one side all of those cases touching upon the question as to when jeopardy attaches, when the discharge of the jury is jeopardy, when a new trial may be granted, and confine our attention in the main to those cases dealing with jeopardy as affecting the right to recover a penalty, or to enforce a forfeiture, and we must confess that it is difficult to reconcile them all, or to ascertain a consistent principle. In People v. Stevens, 13 Wend. (N. Y.) 341, it is said: "It is undoubtedly competent, for the Legislature to subject any particular offense both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice, when he was both fined and imprisoned, which he may be in most misdemeanors." This is the doctrine of the New York courts. Blatchley v. Moser, 15 Wend. 215; People v. Snyder, 90 App. Div. 422, 86 N. Y. Supp. 415. This doctrine was followed by Judge Blatchford, when Circuit Judge of the Southern District of New York, in Leszynsky's Case, 16 Blatchf. 9, Fed. Cas. No. 8,

279, where he quotes the passage from *People v. Stevens*, supra, with approval. In that case, section 3218 of the Rev. St. (U. S. Comp. St. 1901, p. 2085), relating to the internal revenue, was under consideration. That section provides that any person who commits the offense against the internal revenue there specified shall pay a penalty, and also be fined and imprisoned; the penalty to be recovered in a suit by the government, and the fine and imprisonment to be inflicted in a criminal prosecution. It is to be observed that the section, for the purpose under consideration, is substantially identical with the Oklahoma statute. In upholding this statute, Judge Blatchford, referring to the subject of second jeopardy, at page 17, says: "But, even though the spirit of this amendment be to prevent a second punishment, under judicial proceedings, for the same crime, so far as the common law gave that protection (Ex parte Lange, 18 Wall. 163, 170 [21 L. Ed. 872]), yet the relator will not produce a second punishment for the same offense, but will only complete, on conviction, the punishment intended by Congress."

We have grave doubt about the soundness of the reasoning in the New York cases, and in the *Leszynsky Case*. They sustain similar statutes, on the ground that the two proceedings do not inflict two punishments, but merely complete the one punishment for the offense. If this reasoning was sound, then the Legislature might provide for punishment by fine and punishment by imprisonment for the same offense, and for a separate prosecution for the fine, and another prosecution for the imprisonment. It is unquestionably true that two punishments may be inflicted for one crime. Both fine and imprisonment may be, and frequently are, imposed. The historical review which we have given shows that punishment of the severest sort has always been administered in connection with forfeiture of all of one's property. The question is not, therefore, whether two punishments may be inflicted, but whether the suit to recover the penalty and the prosecution of the criminal offense conflict with the former jeopardy provision.

The conclusion is supported by better reasoning in *United States v. Three Copper Stills* (D. C.) 47 Fed. 495, construing sections 3281 and 3296 of the Rev. Stat. (U. S. Comp. St. 1901, pp. 2127, 2136), which provide for a criminal punishment and forfeiture of the property for violations of the internal revenue law there specified, and holding that a conviction under one section was not a bar to proceedings under other sections for the forfeiture of the property. At page 499 of 47 Fed. Judge Barr says: "The Constitution of the United States (amendment 5) declares that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' but this provision is not a limitation upon the kinds of punishment which

may be inflicted for an offense. Hence there may be a fine, an imprisonment, and forfeiture for the same offense, if the law so provides. This provision of the Constitution does not in terms include such a proceeding as this one. It was intended by a constitutional provision to embody the common-law rule, but that rule did not embrace proceedings in rem, such as this one, when the thing was forfeited because of its status, use, or location. The *Palmyra*, 12 Wheat. 12 [6 L. Ed. 531]; *State v. Barrels of Liquor*, 47 N. H. 374; *Sanders v. State*, 2 Iowa, 230; *Wap. Proc. in Rem*, §§ 24, 25; *State v. Inness*, 53 Me. 536. There is no case known to me which decides that this constitutional provision includes a proceeding in rem, which is a civil action, within its inhibition." In *United States v. Olsen* (D. C.) 57 Fed. 579, the owner of a vessel was indicted for aiding and abetting the act of the master in bringing Chinese laborers into the United States in violation of statute. He pleaded in bar a judgment of forfeiture against his vessel on account of the act of the master, and this plea was held bad. The third paragraph of the syllabus is as follows: "A judgment of forfeiture entered against a vessel under Act of July 5, 1884, c. 220, § 10, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1309], for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, in violation of section 2 of the act, cannot be pleaded by the owner of the vessel in bar to an indictment for aiding and abetting the act of the master, as forbidden in section 11 of the act. *United States v. McKee*, 4 Dill. 128 [Fed. Cas. No. 15,688], *Coffey v. U. S.*, 6 Sup. Ct. 437, 116 U. S. 436 [29 L. Ed. 684], and *United States v. One Distillery* [D. C.] 43 Fed. 846, distinguished." In *Sanders v. State*, 2 Iowa, 230 (Cole's Edition), the statute making it a criminal offense to keep liquors in the state, and forfeiting such liquors, was sustained, and it was held that the defendant's conviction for keeping liquors was not a bar to a proceeding to forfeit; also, that if the criminal punishment and the forfeiture could be administered in one proceeding, there was no reason why two proceedings should not be pursued. *Commonwealth v. Prall*, 146 Ky. 109, 142 S. W. 202; *Jones v. State*, 15 Ark. 261; *State v. Czarnikow*, 20 Ark. 160; *State v. Spear*, 6 Mo. 644.

As a penalty for cutting timber on the public lands of a state, in addition to criminal punishment, punitive damages, such as double or treble the value of the timber cut, may be imposed, without infringing the former jeopardy provision. *State v. Shevlin-Carpenter Co.*, 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; *Id.*, 102 Minn. 470, 113 N. W. 634, 114 N. W. 738; *Id.*, 218 U. S. 57, 30 Sup. Ct. 663, 54 L. Ed. 930. A municipal corporation having authority to fix fire limits may provide for the summary abatement of buildings

erected contrary to its ordinance, and may also make such erection a criminal offense. *Micks v. Mason*, 145 Mich. 812, 108 N. W. 707, 11 L. R. A. (N. S.) 653, and note, 9 Ann. Cas. 291. An acquittal upon a criminal charge for violating the liquor law is not a bar to a civil action brought against the defendant by the state to enjoin the maintenance of a place where intoxicating liquors are unlawfully sold. *State v. Roach*, 83 Kan. 606, 112 Pac. 150, 31 L. R. A. (N. S.) 670, note, 21 Ann. Cas. 1182. Some of the courts hold that punitive damages will not be allowed at the suit of an individual for an act which is likewise a criminal offense. *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270. But the weight of authority, it is conceded, is to the contrary. 2 *Sutherland on Damages* (3d Ed.) § 402; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Hauser v. Griffith*, 102 Iowa, 215, 71 N. W. 223.

The cases of *United States v. McKee*, 4 Dill. 128, Fed. Cas. No. 15,688; *United States v. One Distillery* (D. C.) 43 Fed. 846; *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684; *United States v. Chouteau*, 102 U. S. 603, 26 L. Ed. 246; and *United States v. Ulrici*, 102 U. S. 612, 26 L. Ed. 249, note—would seem to reach a different conclusion. In the *McKee* Case, 4 Dill. 128, Fed. Cas. No. 15,688, Justice Miller and Judge Dillon held that in a suit to recover the penalty, under section 3296 of the Rev. Stat. (U. S. Comp. St. 1901, p. 2136), a plea of former conviction and pardon by the President was a bar, on the ground that "our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor," and in *United States v. One Distillery* (D. C.) 43 Fed. 846, it was held that a corporation, when sued for a forfeiture of property, might interpose as a defense the conviction of one of its officers on a criminal charge for the same offense growing out of a violation of the internal revenue laws. This case was taken to the Supreme Court of the United States and is reported under the same name, in 174 U. S. 149, 19 Sup. Ct. 624, 43 L. Ed. 929, where the court affirmed the decision upon a technical ground of pleading, intimating that the ground of the decision in the lower court might be erroneous, saying: "But if, independently of the particular question raised by the amended and supplemental answer, the judgment of the District Court dismissing the information was right upon any ground disclosed upon the record, the judgment of the Circuit Court affirming the judgment of the District Court should not be held to have been erroneous." In the *Coffey* Case, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, it was held that the government could not recover the penalty prescribed by the internal revenue statutes, where it had previously prosecuted the defendant for the crim-

inal offense, and he had been acquitted. In that case the statutes imposed penalty, fine, and imprisonment, just as our statute here does, and a proceeding was instituted by the government to forfeit the brandy, machinery, and stills involved, and was therefore a proceeding affecting only property rights. Coffey's defense was that he had been prosecuted criminally and acquitted, and this defense was held good. In the opinion it is said: "The proceedings to enforce the forfeiture against the res named must be a proceeding in rem and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat. 1, 14 [6 L. Ed. 531]. Yet where an issue raised, as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant." The *Chouteau* Case, 102 U. S. 603, 26 L. Ed. 246, was an action against the principal and sureties on the bond of a distiller, to recover penalties imposed by statute. The defense was that the distiller had been indicted and that the indictment had been compromised and settled by the payment of a fine. The court held that this was a good defense, on the ground that the sureties on the bond shall not be subjected to the penalties connected with the offense, after the principal has effected a full and complete compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty. The *Ulrici* Case, 102 U. S. 612, 26 L. Ed. 249, note, was the same as the *Chouteau* Case, except that the defense was not a compromise, but that the defendant had pleaded guilty and had been fined and imprisoned. It was held

that this verdict prevented recovery of the penalties on the bond.

It will be observed that in the Coffey Case the verdict was "not guilty." In the Chouteau Case the verdict was a compromise, while in the Ulrici Case the verdict was "guilty," and that the court held in each case that the verdict barred the prosecution of the action for the penalty. We confess that these cases seem to us strongly to support the position of the defendant, and yet the fact remains that the sections of the internal revenue laws which are construed in those cases are still the law, and are still in force, and that the court has never held those statutes to be unconstitutional, but has merely held that the criminal prosecution bars the civil remedy. As we have previously held, it seems to us that the statute must stand or fall as a whole, as the penalty is plainly cumulative upon the criminal punishment, and, as any proceeding, must be based upon the statute.

It is worthy of note and entitled to weight that there has been a series of legislation by Congress very similar to the act here under consideration. The provision of the internal revenue laws imposing a penalty or a forfeiture and fine and imprisonment for the same offense illustrate the trend of congressional legislation. These various sections of the internal revenue laws have been previously cited and are referred to in the Leszynsky Case, 16 Blatchf. 9, Fed. Cas. No. 8,279, in the Coffey Case, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, and in other cases herein cited. The act with reference to Chinese laborers (23 Stat. at L. 117) passed in 1884 punishes a violation by fine or imprisonment and forfeiture of the vessel. *United States v. Olsen* (D. C.) 57 Fed. 579. By the act of June 10, 1890, known as the Customs Administrative Act, forfeiture of the merchandise or the value thereof is provided, and also fine and imprisonment. Act June 10, 1890, c. 407, 26 Stat. 131 (U. S. Comp. St. 1901, p. 1886); *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777. The fact that these various statutes have been in force for many years is persuasive of their validity.

[8, 9] It is also a fundamental principle of constitutional law that the courts will not declare an act of the Legislature unconstitutional, unless it is clear that such is the case. Upon the whole, we are inclined to the view that this act of the Legislature is not in conflict with the former jeopardy provision of the Constitution, although some doubt is thrown upon this conclusion by the cases of *McKee*, *Coffey*, *Chouteau*, and *Ulrici*, cited supra. In view of our reluctance to strike down an act of a co-ordinate department of the government, we resolve the doubt in favor of the law, and hold that the act is not subject to the attack here made upon it.

[7] Fourth. It is finally urged that this act is invalid, because it is repugnant to the prohibitory provision of the Constitution, in that it increases the punishment for the sale of liquor. This objection is not well taken. The section under review is imposing a penalty for using or permitting one's building to be used in violation of the prohibitory law, and it is a well-settled rule that the same act may be made separate offenses where the evidence supporting the two offenses must be different. In this case, if the defendant had been indicted for selling liquor, the question of the ownership of the building would be immaterial, while in this proceeding the question of the ownership of the building is fundamental. *Gavieres v. United States*, 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489; *State v. Innes*, 53 Me. 536; *State v. White*, 123 Iowa, 425, 98 N. W. 1027; *Wharton's Criminal Law*, p. 344.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 32)

SKELTON v. STANDARD INV. CO. et al.
(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 960*)—PLEADING (§ 367*)—REVIEW—DISCRETION OF COURT.

"A motion to make more definite and certain is in a large measure addressed to the discretion of the court, and its ruling thereon will be reversed, if at all, only for an abuse of discretion." 6 Pl. & Pr. 280.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3825, 3832-3834; Dec. Dig. § 960; * *Pleading*, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

2. PLEADING (§ 367*)—MOTION TO MAKE MORE DEFINITE AND CERTAIN.

The plaintiff's cause of action and defendant's defense should be stated in the pleadings with such clearness and definiteness as to enable the court to perceive just what issues are to be tried. And an order requiring a petition to be made more definite and certain will not be reversed, where, on the face of the petition, there is a doubt as to the issues presented, or as to whether a cause of action is stated, or whether defendant is charged with notice of what he is required to defend against.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by L. S. Skelton against the Standard Investment Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Stanford & Cochran, of Okmulgee, for plaintiff in error. William M. Matthews, and Ralph H. Ellison, both of Okmulgee, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HARRISON, C. The amended petition in this action was filed November 13, 1909, by L. S. Skelton against the Standard Investment Company, a corporation, and L. L. Sessions and A. A. Vierson, as individuals, for damages for refusing to execute an oil and gas lease on certain tracts of land described in the petition. It is alleged in the petition that the Standard Investment Company is a corporation organized under the laws of the Indian Territory and now existing under the laws of the state of Oklahoma; that the defendants L. L. Sessions and A. A. Vierson were the principal stockholders in said corporation; that about July 14, 1906, the plaintiff entered into a verbal contract with defendant Standard Investment Company, through its agents, Sessions and Vierson, wherein it was agreed on the part of said corporation as such, and on the part of said Sessions and Vierson as individuals, that defendants should convey certain tracts of land to plaintiff and in exchange therefor plaintiff should convey certain tracts of land to defendants; that, in further consideration of the land conveyed to defendants by plaintiffs, defendants verbally agreed to execute commercial oil and gas leases on certain other tracts of land in addition to the tracts conveyed by warranty deed; that, pursuant to such agreement, plaintiff conveyed by warranty deed the tracts of land which he had agreed to convey to defendants, and defendants conveyed by warranty deed the tracts which they had agreed to convey to plaintiff; but that, although the demand had been made for same, defendants had refused to execute the oil and gas leases agreed upon; that said oil and gas leases are of a fluctuating and speculative value; that, at the time that demand was made for their execution and delivery, they had increased in value to an approximate amount of \$50,000; and that, by reason of defendant's refusal to execute such leases, plaintiff had been damaged in the sum of \$50,000, and asked judgment for said amount. On December 6, 1909, defendants filed motion to require plaintiff to make his amended petition more definite and certain in 11 different particulars set out in 11 separate paragraphs. The court overruled the motion as to paragraphs 1, 2, and 5, but sustained it as to the remaining paragraphs. Plaintiff refused to comply with the order of the court by making his petition more definite and certain, and the court dismissed the action. Whereupon plaintiff appealed on the ground that the court erred in sustaining the motion to make the petition more definite and certain.

[1] Plaintiff in error presents several questions of error which arise incidental to the effect of the court's ruling, but upon the entire record the primary question involved is whether the court abused its discretion in sustaining the motion to make the petition

more definite and certain. The rule is that such motions should specifically point out the defects in the petition. This rule was clearly complied within defendant's motion. It is also the general rule that the order granting the motion should direct in what particular the defective pleading is to be amended. This rule was also complied with by the court. "A motion to make more definite and certain is in a large measure addressed to the discretion of the court, and its ruling thereon will be reversed, if at all, only for an abuse of discretion." 6 Pl. & Pr. 280, and authorities cited in notes.

[2] From the above rule, which is practically universal in code states, the ruling of the court in such matters is not, and should not be, disturbed by appellate courts unless there is an apparent abuse of discretion. It is very essential that trial courts be vested with discretion in passing upon such motions, for, owing to the frequent congestion of trial dockets, the fact of new and intricate questions and issues constantly and unexpectedly arising in the trial, and the usual lack of time in which to give such issues due deliberation, it is necessary that the pleader be required to state his cause of action or defense with such clearness and definiteness as to enable the court to perceive just what issues are to be tried. And an order requiring a petition to be made more definite and certain will not be reversed, where, on the face of the petition, there is a doubt as to the issues presented or whether a cause of action is stated or whether the defendant is charged with notice of what he is required to defend against. The petition in the case at bar is not sufficiently clear to enable the court to correctly determine whether plaintiff was entitled to damage, or what the true measure of damage should be. Neither is it clear as to whether there was an improper joinder of two or more causes of action and two or more parties defendant. Nor is it sufficiently clear in the allegations as to the verbal contract sued upon to enable the court to readily and correctly determine whether such contract came within the statute of frauds.

In our opinion the order of the court below sustaining the motion to make the petition more definite and certain was the exercise of a sound discretion, and the judgment is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 32)

TURNER v. KIMBLE.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 404*)—CHECKS—PRESENTMENT FOR PAYMENT.**

The law requires that one holding a check should use reasonable diligence in presenting

same for payment; and, as a general rule, where the holder of a check is in the same place where the bank is located, he must present it for payment before the close of banking hours on the day following the date of its receipt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1091-1099, 1101-1103; Dec. Dig. § 404.*]

2. BILLS AND NOTES (§ 404*)—CHECKS—FAILURE OF DRAWEE BANK.

Between 11 and 12 o'clock a. m. of November 6, 1907, a check was given in payment of a balance due on an account. On that day the bank on which it was drawn was open for business, and the party giving it had a credit balance therein. On the following morning it was presented by the payee at another bank in the same city, and payment refused, because the bank upon which it was drawn had failed, and was never reopened for business. *Held*, that it was presented within reasonable time, and not being paid the drawer of the check was liable for the amount thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1091-1099, 1101-1103; Dec. Dig. § 404.*]

Commissioners' Opinion, Division No. 2. Appeal from Comanche County Court; James H. Wolverton, Judge.

Action by A. P. Kimble against J. W. Turner. Judgment for plaintiff, and defendant appeals. Affirmed.

L. P. Ross, of Lawton, for plaintiff in error. A. E. Hammonds, of Hugo, for defendant in error.

HARRISON, C. This was an action by A. P. Kimble against H. W. Turner on a check for the sum of \$37.25, drawn by Turner on the Merchants' & Planters' Bank of Lawton in favor of A. P. Kimble in payment of an account due Kimble from Turner. The check was drawn between 11 and 12 o'clock of November 6, 1907, during the memorable period of "Banking Holidays." It appears from the evidence that the check was not presented for payment until the following morning, at which time the said Merchants' & Planters' Bank was closed, and was never reopened for banking business. The check not being paid, Kimble notified Turner of its nonpayment, and, upon Turner's refusal to pay same or make the account good in some other manner, this suit was instituted and judgment rendered for plaintiff.

The only question involved is whether the check was presented within reasonable time by the drawee.

Section 3703, Wilson's Rev. & Ann. Stat. of Okla., provides: "A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest."

Section 3685 provides: "When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward

it for acceptance, unless presentment is excused."

Section 3680 provides: "If a bill of exchange, payable at sight, or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused."

These statutes were construed, and the question involved in the case at bar settled, in a well-reasoned opinion by Justice Burwell in the case of School District No. 57 v. Eager, 19 Okl. 235, 91 Pac. 847, wherein it is said: "It will be observed that, on a bill of exchange payable on sight or demand, the payee has 10 days in which to present it for payment. The appellee insists that the law also gives to the holder of a check 10 days in which to present it for payment. We are not willing to give the language of the statute the interpretation contended for. The Legislature have said that the drawers or indorsers of a check are exonerated by delay in presentment only to the extent of injury occasioned thereby; and, with this and certain other exceptions, a check is subject to all of the provisions of the Code concerning bills of exchange. Checks, as a rule, are used in paying obligations that are due, and take the place of the cash itself; and, while a check is not an assignment of the fund against which it is drawn until accepted by the drawee, still the law recognizes that the funds are placed in bank for the purpose of paying checks drawn by the depositor on the bank. Hence the law requires one holding a check to use reasonable diligence in presenting it for payment. By the weight of authority, where the holder of a check is in the same place where the bank is located, it must be presented before the close of the banking hours of the bank on the day following the day of its receipt. California has the same statute as this territory regarding checks, and the Supreme Court of that state have adopted the rule stated herein. In the case of Ritchie, Osgood & Co. v. Bradshaw & Co., 5 Cal. 228, it is said: 'The payee of a check, in presenting it for payment, in order to hold the drawer, is bound to the exercise of reasonable diligence. That reasonable diligence in the presentation of a check drawn upon a banker has, by the uniform current of authority, been held to have been sufficiently exercised by the presentation for payment upon the next day during the usual banking hours.' To the same effect are the following cases: *Himmelmänn v. Hotelling*, 40 Cal. 111 [6 Am. Rep. 600], *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139; *Holmes v. Roe* [62 Mich. 199], 28 N. W. 864 [4 Am. St. Rep. 844], and *Tiedeman on Commercial Paper*, p. 725, § 443. See, also, *Cyc.* vol. 5,

p. 531. The statute expressly excepts checks from the operation of this law on bills of exchange, in that a check must be presented without delay; but, if the holder delays beyond a reasonable time for presentment, the drawer is exonerated only to the extent of his injury. The check was properly signed, as stated before, on April 2d, and the appellee should have presented it for payment on the 3d of April but for the fact that that day was Sunday. Therefore he had all of the banking hours of the 4th of April in which to present it."

[1, 2] The facts in the case at bar are: That plaintiff received the check between 11 and 12 o'clock on November 6th. That at that time, under an agreement among the banks of the city of Lawton, depositors were not being paid but \$5 a day; that is, no depositor could draw out in cash more than \$5 in one day. That the balance of any deposit, if paid at all, was paid in what was termed clearing house certificates. The plaintiff was not a depositor of the Merchants' & Planters' Bank, but did his banking business with another bank. He testified that it was his custom to deposit all checks received on one day early the next morning, and that on the morning following the date of the check he presented it at the bank at which he did business, but was refused credit for same, because the Merchants' & Planters' Bank, on which the check was drawn, was closed, and paid no checks thereafter. These facts being so similar to those involved in the School District Case, supra, at least the law being so similarly applicable to the facts in the two cases, the application in School District No. 57 v. Eager is followed, and the judgment of the county court is affirmed.

PER CURIAM. Adopted in whole.

(35 OKL. 626)

IN RE ASSESSMENT OF WESTERN UNION TELEGRAPH CO., 1911, 1912.

(Supreme Court of Oklahoma. Oct. 29, 1912. Rehearing Denied March 10, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 493*)—ASSESSMENT—BOARD OF EQUALIZATION—REVIEW OF DECISIONS.

In a case pending in the Supreme Court on an appeal from the action of the state board of equalization in assessing the property of an interstate corporation for taxation, wherein a referee is appointed to take the evidence and make findings of fact and conclusions of law, the court, after the referee makes his report containing the evidence taken before him, in which there is no conflict on any material point, is at liberty to set aside the findings and conclusions of the referee, if erroneous, and substitute therefor findings and conclusions of its own based on the same evidence.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 876-888; Dec. Dig. § 493.*]

2. TAXATION (§ 896*)—ASSESSMENT—PROPERTY OF CORPORATION—TELEGRAPH COMPANY.

In a proceeding for the purpose of ascertaining the value of the property of an inter-

state telegraph company for the purpose of taxation, in the absence of evidence to the contrary, the presumption is that any natural depreciations in the value of its instrumentalities are provided for by replacements paid for out of the net earnings of the company, and that the plant of the company as a whole is always kept in an ordinary state of efficiency.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 670; Dec. Dig. § 396.*]

3. TAXATION (§ 185*)—ASSESSMENT—PROPERTY OF CORPORATION—TELEGRAPH COMPANY.

In estimating, for purposes of taxation, the value of the property of an interstate telegraph company situate within a state, it may be regarded not abstractly or strictly locally, but as a part of a system operated in other states, and the taxing state is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or privileges under an act of Congress, or because it is engaged in interstate commerce.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 275; Dec. Dig. § 155.*]

4. TAXATION (§ 396*)—ASSESSMENT—PROPERTY OF CORPORATION—TELEGRAPH COMPANY.

In the absence of evidence to the contrary, the presumption is that all the property of an interstate telegraph company is part of its corporate plant, and that its tangible and intangible property are equally distributed throughout its mileage.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 670; Dec. Dig. § 396.*]

5. TAXATION (§ 375*)—ASSESSMENT—NATURE OF PROCEEDING.

The valuation of property for taxation is in its nature a judicial act, and, in a proceeding for that purpose wherein the value of corporate property is in dispute, the judgment rendered must be based upon competent evidence, weighed in a judicial manner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 624, 631, 671; Dec. Dig. § 375.*]

Appeal from State Board of Equalization.

Assessment of the property of the Western Union Telegraph Company for the fiscal years ending June 30, 1911, and June 30, 1912, respectively. From the assessment levied by the state board of equalization, the Telegraph Company appeals. Affirmed.

Cottingham & Bledsoe, of Oklahoma City (Geo. H. Fearons and Francis N. Whitney, both of New York City, of counsel), for appellant. Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for the State.

KANE, J. The foregoing proceedings are appeals by the Western Union Telegraph Company from the action of the state board of equalization in assessing its property for taxation for the fiscal years ending June 30, 1911, and June 30, 1912, respectively. In a former opinion upon a motion to dismiss these proceedings, the jurisdiction of this court to entertain appeals from the action of the state board of equalization in assessing for taxation the property of corporations was upheld, and a motion for the appointment of a referee to take evidence on the trial in the Supreme Court was sustained. In re Assessment of Western Union Telegraph Co., 29 Okl. 483, 118 Pac. 376.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

The cases now come on to be heard upon exceptions to the report of the referee filed by the Attorney General on behalf of the state. In appointing the referee, the court directed him to make findings of fact and conclusions of law upon all the issues involved. The only question involved relates to the valuation placed upon the property of the company by the board of equalization for the purpose of taxation. Section 8, art. 10, of the Constitution, provides that all property which may be taxed ad valorem shall be assessed at a price it would bring at a fair, voluntary sale; and section 7585, Comp. Laws 1909, provides that the property of all public service corporations shall be assessed annually by the state board of equalization in the manner prescribed in this act. The state board found the cash value of the company's property to be \$1,235,730 for the year ending June 30, 1911, and \$1,450,684 for the year ending June 30, 1912, instead of the much lower valuations shown by returns made by the company. The referee "recommends that the assessed valuation of the Western Union Telegraph Company for the fiscal year ending June 30, 1911, should be \$411,910.05, and for the fiscal year ending June 30, 1912, should be \$414,481.25." The valuations found by the referee approximate those returned by the company, and are based upon "the price the physical property of the company would bring at a fair, voluntary sale, aside from any intangible value gained by its being a part of a system extending into and through other states and countries." The items making up these aggregates are so many miles of pole lines, worth so much; so many miles of iron wire, worth so much; so many miles of copper wire, worth so much; instruments valued at so much, and office furniture, valued at so much, from which total 50 per cent. of the original cost was deducted for depreciation. The referee seems also to have been influenced in reaching his conclusion by the fact that the corporation commission in a controversy between the Western Union Telegraph Company and the state with respect to the rates charged by it for transmitting messages fixed the value of its property for the year 1908 for rate making purposes at approximately the same figure. In one of his findings he "concludes as a matter of law that the valuation of property for the purpose of rate making within the state, and the valuation of property for the purposes of taxation should be one and the same." There is no conflict in the evidence on any material point, the only controversy arising out of the method of computation adopted by the referee in reaching his conclusion.

The Attorney General denies that the state in exercising its taxing power is limited to assessing the material things used by the Western Union Telegraph Company, or that it is required to regard them as of no greater value than they had when re-

posing in the lumber yards and factories with cost added for putting them in place. He contends that the property of the company within this state ought to be assessed for taxation at such value as it has as an organic portion of a larger whole regarded not abstractly or locally, but as part of a system operating in practically every state in the Union; that it was error to value the property of the company merely as a congeries of unrelated items, without augmentation of value from the business in which it is employed, and to refuse to value it in its organic relations, "that is to say, not as so many poles, so much wire, so many instruments, or so much other property in the abstract, but valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation to each other, into a system, located partly in this state and partly in other states, giving each part a concrete value, which is much greater than its abstract value."

[1, 2] The court is of the opinion that the conclusions of the referee cannot be sustained, and they are, therefore, set aside, and, as there is no conflict in the evidence adduced before him, the court examines the same, and bases its findings and conclusion herein thereon. In the first place, it was error to base the value of the company's property within the state upon what it would bring at a fair, voluntary sale, aside from any intangible value gained by its being part of a system extending into and through other states and countries; and in the second place, we can find no evidence to justify the conclusion that the physical property of the company has depreciated 50 per cent. of its original cost, and is therefore at this time to be valued at half that figure. The Western Union Telegraph Company pretends to be, and is, a great and highly efficient transmission company, with offices in practically every city, town, or village in every state of the Union. There is nothing to indicate that any part of its property is in a state of decay, or that the efficiency of the company is not as great at the present time as it has been at any time since its organization. It is probably true that its physical instrumentalities depreciate in value from use and the ravages of time, but such depreciations are always provided for by replacements paid for out of net earnings, so that the plant of the company as a whole is always kept up to the ordinary standard of efficiency. In the absence of evidence to the contrary, we think this is the correct status to give to a company of this kind in attempting to determine the value of its property for the purpose of taxation.

[3] It has been many times held that, "as to railroad, telegraph, express, and sleeping car companies engaged in interstate commerce, their property, in the several states through which their lines or business extend,

may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put, and all the elements making up aggregate value; and a proportion of the whole, fairly and properly ascertained, as by taking that part of the value of the entire road which is measured by the ratio of its length in the state to its total length, or by taking as the basis of assessment such proportion of the value of the company's entire capital stock as the length of its line in the state bears to the whole length of its lines, may be taxed by the state without violating any federal restrictions." 1 Cooley on Taxation (3d Ed.) 163; *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961; 81 L. Ed. 790; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Attorney General v. Western Union Telegraph Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; *Pittsburg, O., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1064, 41 L. Ed. 49; *Adams Express Co. v. Ohio St. Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Id.*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; *Pullman's Palace Car Co. v. Twombly (C. C.)* 29 Fed. 658; *Attorney General v. Western Union Telegraph Co. (C. C.)* 33 Fed. 129; *Pullman's Palace Car Co. v. Board of Assessors (C. C.)* 55 Fed. 206; *Board of Assessors v. Pullman's Palace Car Co.*, 60 Fed. 37, 8 C. C. A. 490; *Reinhart v. McDonald (C. C.)* 76 Fed. 403; *Wells Fargo & Co. Express Co. v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; *Pittsburgh, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Evansville & I. R. Co. v. West*, 138 Ind. 697, 37 N. E. 1012; *Western Union Tel. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671; *State v. Adams Express Co.*, 144 Ind. 549, 42 N. E. 483; *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Pullman's Palace Car Co. v. Commonwealth*, 107 Pa. 156.

[4] Indeed, the method outlined by Mr. Cooley seems to be the plan generally adopted by the states for the ascertainment of the value of corporate property for the purpose of taxation, and from the numerous authorities we have had occasion to examine we find no precedent supporting the method adopted by the referee in the instant cases. The case of *Western Union Tel. Co. v. Taggart*, supra, was appealed to the Supreme Court of the United States. *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup.

Ct. 1054, 41 L. Ed. 49. In that court Mr. Justice Gray, after quoting exhaustively from *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, which involved the taxation of the property of an interstate railroad running through two or more states, says: "All that is thus forcibly and convincingly said as to the taxation of interstate railroad property is equally applicable to the taxation of interstate property. It is not easy to see how one mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out one mile, even though it be through a swamp or under a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole and by reason of its several connections, and not by virtue of any part taken by itself. No way, therefore, by which the value of the lines in this state can be determined, seems so just and equitable as to take that proportion of the whole value which the mileage in this state bears to the whole mileage." *Western Union Telegraph Co. v. Gettelleh*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116, is another case where in the proper method of determining the value of the property of the same telegraph company for the purpose of taxation was under discussion. The case originated in the circuit court of Jackson county, Mo., and the trial court followed the same plan followed by the referee in this case in that it regarded the poles, wires, and other physical property of the company in Missouri as though it was in no way used in the business of the company as part of a unit. Criticising this method, Mr. Justice McKenna, says: "The necessary consequence was and is to destroy the relations between that franchise and other properties of the plaintiff in error, regarding them not as parts of the system, but abstractly regarding the poles not differently from other poles, the wire not differently from other wire." Speaking of the action of the Supreme Court of the state which reversed the trial court, the learned justice says: "The Supreme Court, on the contrary, regarded the properties as related and as constituting a system, and because of this relation having a value greater than the sum of values of the individual things regarded merely as such. Viewing the order of the board of equalization as the Supreme Court viewed it, was it valid? In other words, is the state in exercising its taxing power limited to assessing the mere material things used by the plaintiff in error, and must it regard them of no greater value than they had when they reposed in lumber yards and factories, with cost added for putting them in place? Or the proposition may be stated another way, which better expresses the ultimate contention of the plaintiff in error. Conceding that the tangible property of the telegraph company derives value from its

use in a system, does the company do business in the state in pursuance of the Constitution of the United States and the act of July 24, 1866 [c. 230, 14 Stat. 221 (U. S. Comp. St. 1901, p. 3579)], and become thereby an instrument of interstate commerce and a government agent, and as such exempt from the taxation contested in this case?" The conclusion of the court is stated in the syllabus as follows: "In estimating, for purposes of taxation, the value of the property of a telegraph company situate within a state, it may be regarded not abstractly or strictly locally, but as a part of a system operated in other states, and the taxing state is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or privileges under the act of Congress of 1866, or because it is engaged in interstate commerce."

This mode of division has been recognized by the Supreme Court of the United States several times as eminently fair. And the same great court is authority for the statement that a division of the values of the entire property upon a mileage basis is the general answer to the question, How can equity be secured between the states in the matter of taxation of the property of transportation and transmission companies engaged in interstate commerce? And that, taxing a mileage share of such property lying within the control or jurisdiction of each state, is not taxing property outside of the state. *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031. The case of *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, has sometimes been erroneously regarded as containing a complete reversal of this rule. Counsel for appellant cite it to support their contention that inasmuch as the evidence shows that certain property of the company, such as real estate, personal property, etc., which goes to make up the aggregate assets of the company, has a situs outside the state, that the aggregate of this sum should be deducted from the total assets, and not considered in determining the value of the property of the company within the state. We do not believe that this contention is correct, or that it is supported by the case cited. As was said by Mr. Justice Jaggard in *State v. Western Union Tel. Co.*, 96 Minn. 13, 104 N. W. 567: "The limitation that case contains is that a tax on an express company of another state proportioned to mileage is bad when it appears that the total valuation is made up principally from real and personal property not necessarily used in the actual business of the company, and which is permanently located in the state where the company is incorporated. The general principle remains untouched and unassailed, namely, that 'a state may tax property, not the privilege of doing business, so as to reach the intangible value

due to . . . the organic relation of the property in the state to the whole system.'"

[5] While it may be fairly inferred from the evidence that the specific property mentioned above is not actually within the state of Oklahoma, there is no evidence tending to show that it is of exceptional value, or that it and all the other property of the company having a situs outside this state are not necessary for the transaction of its business, or that it is not used in connection with and in relation to its property in Oklahoma for the main or general purpose of carrying on such business. It has been held, and correctly we think, that: "Evidence of the value of property not necessary for railroad purposes, and that parts of the corporate plant of a railroad company, including its various terminals, are of exceptional value, is competent, and, when offered, must be given effect by the assessing board and by the court in ascertaining the value of its corporate plant in the state. But, in the absence of such evidence, the presumption is that all its property is part of its corporate plant, and that its tangible and intangible property are equally distributed throughout its mileage." *A. T. & S. F. Ry. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1.

In another case wherein the question of valuing corporate property for rate making purposes was under discussion, the same court, speaking through Hook, Circuit Judge, says: "Distant connections with important commercial centers, an outlet to tidewater and the like, may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole which the part within the state, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the state, the influence upon that value of things external is to be considered; and in the common judgment of men it is to some extent reflected in the amount and value of the stocks and bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company with which the state is not concerned in making local rates. There is too intimate a relation between commerce within the state and that among the states, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit and is generally so regarded. For instance, the part within the state may be assessed for local taxation at its value as an organic portion of a larger whole." There is nothing in the record to indicate that the state board attempted to tax the property of the company outside the state, and this court gives weight to the evidence tending to show the value of its tangible or intangible property without the state, only in so far as it may have a bearing upon the ascertainment of

the value of that part of its corporate plant which lies within the state.

If we adopt then the unit system as a guide in determining the value of the company's property within the state, we find from the evidence that its cash value is much greater than that placed upon it by the state board of equalization. The record, however, discloses some facts which may be properly taken into consideration that reasonably tend to show that the property of the company in Oklahoma is not of a fair average value. For instance: The evidence shows that the receipts of the company in Oklahoma constitute .89 per cent. of the entire receipts of the whole system. If the property of the company is divided upon the basis of its ability to produce income from business properly attributable to this state, we find that 89 per cent. of the whole receipts produces a value of the property within the state slightly in excess of that found by the state board. Looking at the evidence from another viewpoint, we find that the average earnings per mile of wire for the entire system is \$23.71; while the Oklahoma wire mileage is only \$16.63 per mile. The receipts for Oklahoma per mile are therefore only 70 per cent. of the average receipts of the whole system. The evidence shows that the property in Oklahoma is 1.26 per cent. of the entire wire mileage. As stated before, upon a strictly unit basis, this would make a value much in excess of that placed upon it by the state board. But, as it is also disclosed by the evidence that the Oklahoma mileage produces only 70 per cent. of the average receipts per mile, based upon a wire mileage basis, the state board may have properly concluded that the property of the company in this state should only be assessed in the proportion that the receipts per mile in Oklahoma bear to the average receipts of the entire system. Figuring upon that basis, we find that the actual value of the property is still slightly in excess of that found by the state board. The foregoing and other facts of the same nature have been considered and given weight by the court, and no doubt the state board was also influenced by them. On the whole we are convinced that the state board valued the property of the company according to its best judgment, with honest purpose, and that it reached as near a correct conclusion as it is possible to attain in matters of this kind. At any rate, applying any of the methods approved by the courts for determining the value of property of this class for the purpose of taxation, the evidence before us shows that the values found by the board for the respective years are approximately correct. We therefore adopt their findings in each case, and make them a part of the judgment of this court.

[5] The referee made findings based upon the unit system which do not substantially

differ from the values found by the court, but he also found that such values "are arrived at by an arbitrary distribution of values upon the proportionate wire mileage basis without regard to the actual value of the property other than the wires; without regard to its location, whether within or without the state, and without regard to the fact that the business in the state is conducted at a loss, and the business as a whole is conducted at a profit." It is apparent that the findings made under such circumstances do not form a sufficient basis to support a judicial determination, and they are therefore set aside, and the findings and conclusions of the court substituted therefor. The valuation of property for taxation is in its nature a judicial act. 2 Cooley on Taxation (3d Ed.) 751. And in a proceeding for that purpose wherein the value of corporate property is in dispute the judgment rendered must be based upon competent evidence, weighed in a judicial manner. There is nothing in the record tending to show that the part of this system situated in Oklahoma is not of a fair average value, or that the line is not substantially of the same value throughout, except the circumstances hereinbefore mentioned, and to which we have given due weight in reaching our conclusion.

On the question of the weight to be given to the findings of the corporation commission in fixing the value of the property of this company for rate making purposes, we cannot agree with the referee. Without noticing important distinctions between the two classes of proceedings which appear to us, it is sufficient to say that the valuation fixed by the commission was for the year 1908, whilst the valuations involved herein are for the years 1911 and 1912, respectively. "As a general rule, each annual assessment of property for taxation is a separate entity, distinct from the assessment for the next and subsequent years. What may be a proper valuation one year may not be the next year, and thus a judgment decreeing at what figure a piece of property should be assessed for purposes of taxation is not res adjudicata as against another valuation placed thereon by the proper authorities this year." 1 Cooley on Taxation (3d Ed.) 758.

The point is made by counsel for appellant that inasmuch as the officers of the company testified, without contradiction, that the value of the property of the company within the state taken as a part of a unit, with all of the advantages, if any, that attach thereto, was not and is not worth in excess of the amount at which it was returned to the state board for the purpose of taxation, the court should give to this evidence the full credence to which unimpeached evidence is entitled. It is apparent that what the officers say on this point is merely a conclusion drawn from identically the

same facts which were laid before the court and the referee. We are satisfied that the referee and the officers of the company were too much influenced by the fundamentally erroneous theory that the physical valuation plan adopted by them is the correct way to ascertain the value of the property of the company in the state, and that they gave undue weight to the evidence touching the earning capacity of the company within the state, and the valuation placed upon its property for rate making purposes. While we are of the opinion that those are matters which properly may be taken into consideration, the court, after giving them due weight in connection with all the other pertinent facts and circumstances disclosed by the evidence, has reached a different conclusion, and, of course, the court is not permitted to yield its own judgment.

The findings of the state board are therefore affirmed. All the Justices concur.

(39 Okl. 12)

LINDSAY et ux. v. CHICKASHA BUILDING & LOAN ASS'N.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

**1. BUILDING AND LOAN ASSOCIATIONS (§ 33*)
—LOANS—USURY.**

Under the laws in force in the Indian Territory prior to statehood, "in a loan made by a building association to a shareholder in the usual form, there can be no usury, because the rate of interest paid by him is contingent upon the length of time required to pay out his shares."

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 43, 47, 49-59; Dec. Dig. § 33.*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 36*)
—FORFEITURES—PREMIUM NOTE.**

Where a building and loan association, organized under the laws in force in the Indian Territory prior to statehood, and where, prior to statehood, a mortgage is given to such association to secure a loan of \$400, and where the by-laws of such association provide that, in case of default in any payment when it becomes due, the entire debt shall at once become due, and that the stock assigned as collateral, together with all payments made thereon, shall become forfeited to the association, and that the association shall have the election to foreclose, not only for the amount of the loan and interest, but also for a premium note of \$540 bid by the borrower for the loan, equity will not decree for the premium in addition to the loan and interest, as to do so would be tantamount to enforcing a penalty for a breach of contract.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 69; Dec. Dig. § 36.*]

**3. BUILDING AND LOAN ASSOCIATIONS (§ 22*)
—STOCKHOLDERS—FORFEITURES.**

Forfeitures are not favored by law, but building and loan associations are permitted to forfeit shareholder's stock for nonpayment of dues, where the by-laws specifically provide for such forfeiture, and where such provision is not in conflict with statutes. In case of forfeiture for default in payments due and foreclosure proceedings by the association, where

the borrower is not seeking to redeem the stock and to continue his relations as a member, but seeks merely to liquidate the debt, he may elect to have the stock payments applied on the loan, and will be allowed credit for same.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 26; Dec. Dig. § 22.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by the Chickasha Building & Loan Association against J. D. Lindsay and wife to foreclose a mortgage and lien on stock. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

John H. Venable, of Chickasha, for plaintiffs in error. Wm. Stacey, of Chickasha, for defendant in error.

HARRISON, C. In November, 1905, J. D. Lindsay, then a stockholder and member of the board of directors of the Chickasha Building & Loan Association, obtained a loan of \$400 from said association and executed a note therefor, bearing 6 per cent. per annum, and as a bid for said loan executed a premium note for \$540, bearing 8 per cent. per annum, and to secure the payment of said notes, and as part of the same transaction, executed a mortgage on certain lots in the city of Chickasha, and as additional security assigned a certain certificate of stock in said association for \$1,000; the same being 40 shares. The mortgage and both notes were also signed by Mary E. Lindsay, his wife. The loan was made under the rules and regulations and by-laws of said association, and the payments of both principal and interest were regulated by such rules and by-laws.

Under the terms of said notes and mortgage, and under the rules and by-laws of said association, the interest accruing on said notes was to be paid monthly on or before the Monday preceding the first Tuesday of each month. The notes became payable in five years after November 24, 1905. Some payments had already been made on the stock assigned before the date of the loan. After the loan was obtained, Lindsay continued to make the monthly payments for a few months and then defaulted in further payments. The by-laws of the association and the notes and mortgage provided that, upon default of payment of the interest on the loan and premium note when same became due, the stock assigned, together with all payments which had been made thereon, should become forfeited to the association. In March, 1909, neither the interest nor stock payments having been made for several months, and defendant refusing to make further payments, the association brought suit to foreclose the lien on the stock and the mortgage on the real estate and prayed judgment for \$940, the sum of the two notes

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the interest due thereon. Defendant answered that the contract, being made in the Indian Territory prior to statehood, was in violation of the Arkansas statute on usury, and void.

At the trial of the cause the court rendered judgment for the amount of the loan, \$400, with interest from date at the rate of 6 per cent, less the sum of \$22.66 found by the court to have been paid on same, and judgment foreclosing the mortgage on the real estate, and decreeing the stock forfeited to the association, together with the sum of \$90 paid on the stock before the loan, and \$113.34 found to have been paid on same after the loan had been made, and decreed the cancellation of the premium note for \$540.

Defendants, Lindsay and his wife, appealed from this judgment, claiming that the entire contract was usurious and void, and that the court erred in not rendering judgment in favor of defendants, and further claiming as an alternative that if judgment be rendered against defendants for the amount of the loan, \$400, and also judgment forfeiting the stock which defendants had assigned as collateral, that in such event defendants should have been allowed a credit on the loan note for the amount, \$113.34, which had been paid on the stock after the loan had been obtained, and \$90 paid on same previous to the loan.

[1] As to whether defendants are entitled to judgment annulling the entire contract because of the usurious features involved depends upon the statutes relied upon, and upon the construction placed upon such statutes by the courts of Arkansas. In *Reeve v. Ladies' Bldg. & Loan Ass'n*, 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129, the court held: "In a loan made by a building association to a shareholder, in the usual form, there can be no usury, because the rate of interest paid by him is contingent upon the length of time required to pay out his shares." This decision is followed in *Taylor v. Van Buren Bldg. Ass'n*, 56 Ark. 340, 19 S. W. 918; *Roberts v. Am. Bldg. & L. Ass'n*, 62 Ark. 572, 36 S. W. 1085, 33 L. R. A. 744, 54 Am. St. Rep. 309; *Black v. Tompkins*, 63 Ark. 502, 39 S. W. 553.

In the foregoing decisions the courts of Arkansas have held that the usury statutes are not applicable to building and loan contracts. Hence the defendant could not escape liability for the amount of his loan, nor annul the mortgage given to secure such loan, under the defense of usury.

[2] In view of these decisions, there was no error in the court's holding defendant liable for the amount of the loan and interest; nor is there any question but what, under *Roberts v. American Bldg. Ass'n*, supra, the court below was correct in decreeing the cancellation of the \$540 premium note. In the above case it was held that, where a

mortgage, given to secure a loan by a building association for \$1,000, provides that, "in case of default, the association shall have the election to foreclose, not only for the amount so loaned with interest, but also for a 'premium' of \$1,000 bid by the borrower for the loan," equity will not decree for the premium in addition to the loan and interest, as to do so would be tantamount to enforcing a penalty for a breach of contract. Besides, in the case at bar, the defendant having forfeited his stock and his rights under the contract, it would be wholly unconscionable to require him to pay, in addition to the loan and interest, the further sum of \$540 as premium.

[3] The next question, then, is whether the provisions in the by-laws and the contract under which the loan was obtained, which provided for a forfeiture of the stock, together with the amount paid thereon, are valid under the law. The general rule as to forfeitures in such cases is stated in 4 Am. & Eng. (2d Ed.) 1044, thus: "Forfeitures are not favored, and by-laws creating them are construed strictly and against the association; but, if fair and reasonable, they are valid, and equity will not relieve against them." See, also, decisions cited in notes, especially *Occidental Bldg. & Loan Ass'n v. Sullivan*, 62 Cal. 394; *Southern Bldg. Ass'n v. Anniston L. & T. Co.*, 101 Ala. 582, 15 South. 123, 29 L. R. A. 120, 46 Am. St. Rep. 138; *Freeman v. Ottawa Bldg. Ass'n*, 114 Ill. 182, 28 N. E. 611.

In 6 Cyc. 138, the rule is stated thus: "In general. It is competent for building and loan associations, in the absence of statutory or charter inhibitions, to provide in their by-laws for a forfeiture of stock of members who fail for a specified period to pay dues, fines, and assessments. Forfeitures, however, are not favored, and must be created by unambiguous language. * * *" See, also, decisions cited in notes. Also *Thompson on Bldg. & Loan Ass'ns* (2d Ed.) 322; *Endlich, Bldg. Ass'ns*, § 74.

There seems to be no very serious conflict in the authorities as to the rights of building and loan associations to forfeit a shareholder's stock for nonpayment of dues, where the by-laws specifically provide for such forfeiture, and where such provision is not in conflict with statutes. But they are very much in conflict as to whether, in case of forfeiture of stock, the amount paid on same should also be forfeited, or whether, especially in case of loan to such stockholder, he should be allowed credit on his loan for the amount paid on his stock.

Most of this conflict, however, arises from a difference in provisions of statutes, or difference in powers of the association under its charter, and a difference in the provisions in the by-laws. Some confusion is due also to the failure of the courts, in applying an equitable rule of accounting, to distin-

guish between the rights involved in cases where the stockholder seeks to redeem his forfeited stock and cases where the association seeks to foreclose for the amount due, and the borrower seeks merely to extinguish the debt. Some states, however, hold that all payments made by borrowing shareholders to the society should be credited on the loan. Others hold that the payments of stock are not ipso facto payments on the loan, and do not operate, of themselves, to extinguish it pro tanto. Also the federal courts, in *Tilley v. American Bldg. Ass'n* (C. C.) 52 Fed. 618, *Andruss v. People's Bldg. Ass'n*, 94 Fed. 575, 36 C. C. A. 336, follow this doctrine. But, under the weight of authority, in case of forfeiture for default and foreclosure proceedings by the association, where the borrower is not seeking to redeem the stock, but to liquidate the debt, he may elect to have the stock payments applied on the loan, and will be allowed credit for same. 6 Cyc. 153, 154, and notes; 4 Am. & Eng. 1045; *Thompson on Building Associations* (2d Ed.) 325, 326; *Endlich on Building Associations* (2d Ed.) 349, 482-484.

This is the real question involved in the case at bar. The record shows that \$80 had been paid on the stock before the loan, and the court found that \$113.34 had been paid on the stock after the loan, and also found that \$22.66, interest, had been paid on the loan, and allowed credit for the interest, but refused to allow credit for the \$80 and \$113.34, and forfeited said amounts, together with the stock, to the company. This question was not involved in *Roberts v. Am. Bldg. Ass'n*, supra; nor is this feature in the case at bar controlled by that case. The association, in the *Roberts* Case, was a Minnesota corporation, organized under the laws of said state, and under a statute which prohibited forfeitures of stock and provided, in case of default, for a sale of the stock to meet such arrearage as might be found due. The by-laws of the association were made to conform to the statutes; but in the case at bar the by-laws provide specifically, not only for the forfeiture of the stock, but also for the payments made thereon. Under the general current of authorities, where it is so provided in the by-laws, stock may be forfeited for nonpayment of dues, and where so forfeited the borrower, so far as that particular transaction is concerned, is no longer a member of the association, bearing the relation and vested with the interests of a stockholder, but occupies the single relation of debtor; and under the weight of authorities in cases of forfeiture and foreclosure, where the borrower seeks, not to redeem his stock and continue his membership, but seeks only the liquidation of the debt, thereby terminating the dual relation of member and borrower, he is entitled to credits for the amount actually paid. Hence the judgment

should be so modified as to credit the loan with the amounts found to have been paid.

With this modification, the judgment is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 85)

COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, ENGLAND, v. SHULTS.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

INSURANCE (§ 612*)—ACTIONS—PROOFS OF LOSS—NECESSITY.

Where a fire insurance policy contains the provision that, in case of loss by fire, the insured shall give notice of such loss and shall within 60 days make verified proof of loss in writing, and where the policy makes a compliance with such provision a condition precedent to an action, *held*, the right of action does not mature until such provision has been complied with or waived; and, where under all the proof it appears that such provision has neither been complied with nor waived, the insured cannot recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

Commissioners' Opinion, Division No. 2. Error from District Court, McCurtain County; James R. Armstrong, Judge.

Action by G. W. Shults against the Commercial Union Assurance Company, Limited, of London, England. Judgment for plaintiff, and defendant brings error. Reversed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiff in error.

HARRISON, C. This action was upon a fire insurance policy for \$1,090. The policy covered a small store building, together with the stock of merchandise and fixtures which were destroyed by fire in January, 1909. The cause was tried in September, 1910, resulting in a verdict in favor of plaintiff for the sum of \$1,040. Plaintiff thereupon filed a remittitur of \$90, which was allowed by the court and judgment rendered for \$950. From this judgment the insurance company appealed.

A number of errors are assigned by plaintiff in error as grounds for reversal, among which are: That the plaintiff was not the sole and unconditional owner of the property in question, and that he failed to comply with the "iron-safe" and "inventory" clauses in the policy. But at the very threshold of the case the question arises, which, under the decisions of this court as well as under the great weight of authority, disposes of the case without the necessity of going into the other errors assigned, viz., that the plaintiff failed to make proof of loss as provided in the policy. The policy sued upon contains this provision: "If fire occur the insured shall give immediate notice of any loss there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, making a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon; and within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the assured as to the time and origin of the fire; the interest of the insured and all others in the property, the cash value of each item thereof, and the amount of loss thereon. * * *

It is contended by plaintiff in error that this provision of the policy was not complied with; that no proof of loss was furnished. From an examination of the record we find that this contention is sustained. The record discloses that no proof of loss was made or attempted to be made. The record shows that one Temple was the agent who issued the policy; that Temple was also the proprietor of a hotel; that on the night of the fire the insured stayed at Temple's hotel; that early on the following morning the insured's son brought in the word that the building and stock had burned on the night before (the store in question being some miles out in the country); that the insured told the agent Temple that his store had burned; that thereafter the insured brought in a book which he claimed to contain an inventory of his stock of goods. The agent told him to deposit the book in the bank, which he did. The agent informed the company of the fire, and the company sent an adjuster to investigate; but the insured did not see the adjuster nor file any statement of loss with him. After the adjuster had gone, the insured saw Temple and asked him why the adjuster had not come and was informed that the adjuster had said nothing was due him. Plaintiff's own language is as follows: "Q. To whom did you make the demand? A. Well, I don't remember. I notified Temple of my burn and asked him then what would I do next to get the money. He says, 'The adjuster will be here pretty soon and I will notify him.' He come; I heard he come, and went back and asked Temple why he didn't come, and he said, 'He don't owe you anything,' and that's all I could get out of Temple." This is all, in substance, that was done toward making proof of loss.

In *Nance v. Oklahoma Fire Ins. Co.*, reported 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426, decided by this court January 9, 1912, and since the filing of this case, in an action involving the identical question, the court, in an opinion by Justice Hays, held: "The evidence without conflict establishes that no proof of loss as required by the policy has ever been furnished by plaintiff to the company either within the 60 days after

the fire or before the trial of this cause in the court below. The policy contains other requirements, failure to comply with which the insured it is provided shall forfeit the policy; but the policy contains no stipulation of forfeiture for failure to furnish the proof of loss within the 60 days prescribed by the policy. The effect of provisions in insurance policies similar to the one here involved is declared in *Joyce on Insurance*, § 3282, to be: 'If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy. And this has been held to be true, even though the policy provides that no action can be maintained until after a full compliance with all the requirements thereof.' The rule of this text is supported by many well-reasoned cases. *Northern Assurance Co. v. Hanna*, 60 Neb. 29, 82 N. W. 97; *Kenton Insurance Co. v. Downs & Co.*, 90 Ky. 236, 13 S. W. 882, 12 Ky. Law Rep. 115; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Rhinelms v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773; *Hartford Fire Ins. Co. v. Redding et al.*, 47 Fla. 228, 37 South. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118; *Southern Fire Ins. Co. v. Knight et al.*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; *Kahnweiler et al. v. Phoenix Ins. Co. (C. C.)* 57 Fed. 562. Plaintiff's failure to render proof of loss within the 60 days provided by the policy did not operate to forfeit his policy; but his right of action did not mature thereunder until such condition was complied with; and, since under all the proof in this case that requirement had never been complied with, he cannot recover in this action." To the same effect are the following cases: *Gauche et al. v. London & Lancashire Ins. Co. (C. C.)* 10 Fed. 347; *Home Ins. Co. N. Y. v. Duke*, 43 Ind. 418; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285; *Mitchell v. Home Ins. Co.*, 32 Iowa, 421; *Flanagan v. Phoenix Ins.*, 42 W. Va. 426, 26 S. E. 513; *McCormack v. N. British Ins. Co.*, 78 Cal. 468, 21 Pac. 14; *Western Home Ins. Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *State Ins. Co. v. Belford*, 2 Kan. App. 280, 42 Pac. 409; *Shawmut Sugar Refining Co. v. People's Mut. Fire Ins. Co.*, 12 Gray (Mass.) 535; *Boruszweski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589, 72 N. E. 250; *Don-*

ahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374; Dixon v. State Mut. Ins. Co., 128 Pac. 794.

The record in the case at bar brings the question clearly within the rule of the foregoing line of authorities, and especially within the rule in Nance v. Oklahoma Fire Ins. Co., supra, where the identical question was settled and has become the law of this state.

The question of waiver of the conditions of the policy was neither raised in the pleadings nor developed in evidence. The plaintiff specifically alleged that he had complied with all the conditions precedent. The burden, therefore, was upon him to prove these allegations in order to recover, and, failing to prove a compliance with such provision, the question of his rights in the premises is decided in the Nance Case, supra, which is followed herein.

It follows therefore that the judgment of the court below must be reversed.

PER CURIAM. Adopted in whole.

(37 Okl. 74)

MILLER LUMBER CO. v. SWINK MERCANTILE CO.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*) — DISMISSAL — FAILURE TO FILE BRIEFS.

Where plaintiff in error fails to file briefs, as required by rule 7 (95 Pac. vi) of this court, the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 2. Error from McCurtain County Court; T. J. Barnes, Judge.

Action between the Miller Lumber Company and the Swink Mercantile Company. From the judgment, the lumber company brings error. Dismissed.

Foster & Stephenson, of Hugo, for plaintiff in error. Spriggs & Hardison, of Hugo, for defendant in error.

BREWER, C. The petition in error and transcript of the record in this case was filed in this court January 23, 1911. The plaintiff in error has failed to file any brief in the cause, as required by rule 7 (95 Pac. vi) of this court. The petition in error should therefore be dismissed for want of prosecution. Hass et al. v. McCampbell, 27 Okl. 290, 111 Pac. 543; Maddin v. McCormick et al., 27 Okl. 778, 117 Pac. 200; McClelland v. Witherall, 30 Okl. 287, 119 Pac. 205.

PER CURIAM. Adopted in whole.

(37 Okl. 80)

GULF, C. & S. F. RY. CO. v. TAYLOR.
(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Under section 36, art. 9, of the Constitution (section 254, Williams' Ann. Const.), "the common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employé of every railroad company and every street railway company or interurban railway company, and of every person, firm or corporation engaged in mining in this state; and every such employé shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employé or employées of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty." And in an action by an employé of a railroad company for personal injuries caused by the negligent acts of a fellow servant, where the plaintiff shows in his petition that he was acting within the scope of his employment, and in a careful and prudent manner and wholly without fault in the premises, and that the injuries complained of were the direct and proximate result of the negligent acts of a fellow servant, showing clearly of what the acts consisted, and alleging that such acts were recklessly, carelessly, and negligently done, such allegations are sufficient to bring plaintiff within, and to state a cause of action under, the foregoing section of the Constitution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*]

2. TRIAL (§ 295*)—REVIEW—INSUFFICIENT INSTRUCTION.

Where the instructions of the court when taken as a whole and construed as one entire charge correctly state the law applicable to all the material issues involved in the case, a judgment will not be reversed, although some paragraph of the instructions standing alone may not fully state the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

3. TRIAL (§ 280*)—REVIEW—REFUSAL OF INSTRUCTIONS.

A judgment will not be reversed for refusal to give a requested instruction, although such requested instruction may correctly state the law, if the law applicable to the facts involved is correctly covered by the court's charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.*]

4. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONFLICTING TESTIMONY.

A verdict based upon conflicting testimony will not be set aside where the evidence reasonably tends to support such verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Commissioners' Opinion, Division No. 2. Error from District Court, McClain County; R. McMillan, Judge.

Action by L. B. Taylor against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

Cottingham & Bledsoe, of Oklahoma City, J. W. Hocker, of Purcell, and George M. Green, of Oklahoma City, for plaintiff in error. Wadlington & Wadlington, of Purcell, for defendant in error.

HARRISON, C. This action was begun July 22, 1909, by L. R. Taylor against the Gulf, Colorado & Santa Fé Railway Company for damages in the sum of \$1,900 alleged to have been caused by the carelessness and negligence of defendant through its agents. At the time of the alleged injury the plaintiff was in the employ of defendant in the capacity of an ordinary section hand, and as such was under the authority and direction of a section foreman or boss. He alleged in his petition that his duties as such section hand consisted in repairing the road, leveling the track, and keeping it in perfect condition under the supervision of the section boss; that on the day of the injury he and another section hand were directed to remove some railroad ties; that, in order to put them where they were directed to be placed, it was necessary to carry them up an embankment and load them on a push car; that in carrying them it was necessary for one man to take hold of one end and the other man to take hold of the other end of the tie; that the particular tie, in the handling of which plaintiff received the alleged injury, was a very heavy tie; that plaintiff was directed to take hold of one end and his coemployee directed to take hold of the other; that he picked up one end, the heavy end of the tie, and his coemployee picked up the other; that in starting up the embankment the coemployee recklessly, carelessly, and negligently shoved and pushed such tie toward plaintiff with such force as to cause plaintiff to fall, thereby bruising his groins and straining and disabling him in the back and causing the injuries complained of, which injuries, it was alleged, were the proximate result of the carelessness and negligence of said coemployee in thus shoving the tie while it was in their arms and being carried up the embankment; that by reason of such injuries he was so disabled that he was unable to labor for a long period of time and was permanently injured to the extent that his earning capacity was reduced to one-half of what it was prior to the injury; that before the injury he was earning \$40 per month; that since such injury he could only earn about half such sum; that the aggregate of the different items of damage amounted to \$1,900. Defendant answered by general denial and for further defense alleged that, if plaintiff was injured to the extent alleged in his petition, such injuries were the result of his own contributory negligence, and further alleged that plaintiff was an experienced man in the line of work in which he was employed, and that as such knew the dangers incident to such employment and assumed

the ordinary risks thereof. Plaintiff replied denying generally the allegations in the answer, and specifically denying the allegations as to contributory negligence and assumption of risk. The cause was tried and submitted to the jury October 20, 1910, and a verdict returned in favor of plaintiff in the sum of \$200. Upon which judgment was rendered, and, from which judgment and order overruling motion for new trial, the railroad company appeals upon six specifications of error. These specifications of error, however, are all disposed of under three propositions, viz.: First, whether the issues of law and fact involved were sufficiently covered by the court's charge. Second, whether the court erred in refusing certain instructions offered by defendant. Third, was the evidence sufficient to support the verdict of the jury?

Plaintiff in error contends that the alleged injuries, if received at all, were caused by the acts of a fellow servant, and that the defendant could not be held liable for such injuries because plaintiff had failed to allege that such fellow servant was inexperienced and incompetent and that the company was liable by reason of its negligence in keeping such incompetent fellow servants and employes in its employment, and cites a number of decisions in support of such contention. These decisions, however, are not in point here, nor can such contentions be sustained for two reasons: First, because such defense was not made an issue by the pleading. Such fact was not made a defense in the answer. Second, because the plaintiff did not base his right of recovery on the theory that the injuries were the result of defendant's negligence in keeping incompetent employes and fellow servants, but based his cause of action upon the negligent acts of a fellow servant and sought recovery under section 36, art. 9, of the Constitution, which reads: "The common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employe of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employe shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employe or employes of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of any nonassignable duty. * * *

[1] We think the plaintiff brought himself clearly within the right of recovery given by the foregoing section of the Constitution by the allegation that after they had picked up the tie in question and started up the embankment towards the truck, "and while

plaintiff was exercising ordinary care, and while acting in a careful and prudent manner as a prudent man should act, plaintiff, in obedience to the instruction of said foreman, took hold of said railroad tie and lifted the same from the ground and had same in his arms, while plaintiff was thus situated and holding said tie and attempting to load same on said car, one — (Dove Stump), a fellow servant of plaintiff, immediately took hold of the other end of the tie plaintiff was holding and recklessly, carelessly, and negligently pushed said tie heavily against plaintiff, throwing plaintiff heavily against the ground and violently pitching plaintiff upon the ground, thereby dangerously wounding and bruising plaintiff about the legs, hip, groins, and small of plaintiff's back. Plaintiff alleges that his injuries were caused by the negligent and careless acts of, and was the result of the careless acts of, a fellow servant of the defendant railway company and the agent and servant of said defendant." This allegation, in connection with other allegations in the petition, states a cause of action under this section of the Constitution. See section 254, Williams' Ann. Const., and authorities cited in notes; also, Coalgate v. Bross, 25 Okl. 244, 107 Pac. 425, 138 Am. St. Rep. 915, wherein the foregoing section of the Constitution is construed.

As to the alleged errors in the instructions, we have closely examined the court's charge, and, considering it as one entire charge, find that it contains no reversible error. The court states the issues to the jury with reasonable fairness and fullness. It presents the issue of negligence and places the burden upon the plaintiff to prove same by a preponderance of the evidence, defining what is meant by "preponderance." It also presents the issue of contributory negligence and places the burden of proving same upon the defendant. Likewise the doctrine of the assumption of risk is presented in a manner altogether fair to defendant. Considerable stress is laid upon paragraph 3 of the court's charge, as well as upon other paragraphs embodying the same thought. Paragraph 3 is as follows: "If, however, you find in this case that the plaintiff was hurt and the hurt complained of was brought on or contributed to by a fellow servant, Dove Stump, and was not such a hurt as would occur in the ordinary discharge of his duties, then I instruct you that the master is responsible for the result of such hurt or injury and the damages arising therefrom, whatever they may be. This instruction, standing alone, might be too limiting in its scope, and to that extent prejudicial, but, read in connection with the entire charge, it clearly means that, if the injury complained of was brought on by the negligent acts of a fellow servant, in such case the master would be responsible, and considering the charge as a whole, construing all the paragraphs thereof in con-

nection with each other and as one entire charge, we believe the law was fairly stated. Snyder v. Stribling, 18 Okl. 168, 89 Pac. 222; Grant v. Milam, 20 Okl. 672, 95 Pac. 424; Enid City Ry. Co. v. Addie Reynolds, 126 Pac. 193.

[2, 3] Nor can the judgment be reversed because of the court's refusal to give the instructions requested by defendant. The law applicable to the material issues involved was presented to the jury with reasonable fullness and fairness in the court's charge. In such cases the judgment will not be reversed for refusal to give a requested instruction, although the instruction requested may correctly state the law. Enid City Ry. Co. v. Addie Reynolds, 126 Pac. 193; McMaster v. Bank, 23 Okl. 550, 101 Pac. 1103, 138 Am. St. Rep. 831; Finch v. Brown, 27 Okl. 217, 111 Pac. 391; Ellett-Kendall Shoe Co. v. Ross, 28 Okl. 697, 115 Pac. 892; Pioneer Tel. & Tel. Co. v. Davis' Adm'r, 28 Okl. 783, 116 Pac. 432.

[4] The remaining proposition is whether the verdict is supported by the evidence. There is some irreconcilable conflict in the testimony of the plaintiff and the witness Dove Stump, who was assisting plaintiff in carrying the tie, as to whether Stump was in fact guilty of the negligent acts relied upon and testified to by plaintiff. Plaintiff testified that Stump pushed the tie against him and threw him down. Stump denied this. This was a material fact in determining the liability of the company and one which rested upon the credibility of the witnesses. The jury heard the testimony and saw the witnesses while testifying. They were the exclusive judges of the testimony, the credibility of the witnesses, and the weight to be given to their testimony, and were so charged by the court, and having heard such testimony and determined the credibility of the witnesses and expressed their conclusion therefrom in their verdict, inasmuch as the evidence reasonably tends to support such verdict, it will not be set aside by this court. Covington v. Fisher, 22 Okl. 207, 97 Pac. 615; C., R. I. & P. Ry. Co. v. Mitchell, 19 Okl. 579, 101 Pac. 850; Loeb v. Loeb, 24 Okl. 384, 103 Pac. 570; Bird v. Webber, 23 Okl. 583, 101 Pac. 1052; C., R. I. & P. Ry. Co. v. Broe, 23 Okl. 396, 100 Pac. 523; Armstrong, Byrd & Co. v. Crump, 25 Okl. 452, 106 Pac. 855; Kaufman v. Bolsmier, 25 Okl. 252, 105 Pac. 326.

From an examination of the record we believe the plaintiff brought himself within the provisions of section 36, art. 9, of the Constitution; that the law applicable to the issues involved in the case was given to the jury with reasonable correctness by the court; and that the evidence reasonably tends to support the verdict.

The judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 48)

ATCHISON, T. & S. F. RY. CO. v. BAKER.
(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 255*)—RECEPTION OF EVIDENCE—
WAIVER OF OBJECTIONS.

Where evidence incompetent in chief is erroneously admitted, but later the same evidence becomes competent for the purpose of contradicting the witness, and is properly admitted for that purpose, it would have been the duty of the court, upon request so to do, to have limited the effect of the evidence within its proper scope; but if no such request is made, nor is the court's attention called to this phase of the matter, it will be considered as waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

2. EVIDENCE (§ 577*)—EVIDENCE AT FORMER TRIAL.

The testimony of a witness given at a former trial between the same parties involving the same subject-matter with the opportunity for cross-examination, and taken down by the official stenographer and preserved by bill of exceptions on appeal, is admissible, if otherwise unobjectionable, in a second trial of the same cause, where the witness resides in another state and is not present at the second trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2408; Dec. Dig. § 577.*]

3. APPEAL AND ERROR (§ 971*)—EVIDENCE (§ 546*)—REVIEW—COMPETENCY OF EXPERT.

The amount of knowledge which a witness must possess before a party is entitled to his opinion as an expert is a matter which must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed on appeal unless clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.* Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

4. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—QUESTION FOR JURY.

Where the evidence shows that a railway engineer discovered a man driving a wagon across a railway track at a crossing in front of an on-coming train, apparently unconscious of the approaching train, it was the duty of the engineer to use ordinary care to prevent injuring the man, after his presence and peril became known; and, where there is conflicting evidence as to whether such care was used, it was proper to submit the question to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Nowata County; T. L. Brown, Judge.

Action by Ed Baker against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cottingham & Bledsoe, of Oklahoma City, for plaintiff in error. W. H. Kornegay, of Vinita, for defendant in error.

BREWER, C. This suit for personal injuries was originally filed and tried in the United States Court for the Northern District of Indian Territory resulting in a judgment for the plaintiff. An appeal was prose-

cutted to the Court of Appeals of Indian Territory; an opinion being rendered by the said court reversing the judgment of the trial court on the ground that the defendant railway company should have had an instructed verdict in its favor. This opinion is voluminous, states a greater part of the material evidence, and is reported in 104 S. W. beginning at page 1182 and concluding on page 1197. A petition for rehearing was filed in the case in the court rendering the decision and was pending undisposed of at the time of the erection of the state of Oklahoma. This court, as successor to the Court of Appeals of Indian Territory, passed upon the petition for rehearing, concurring in most of the views of the Court of Appeals and deciding that the case should be reversed, but held that the defendant railway company was not entitled, under the evidence disclosed in the record, to an instructed verdict in its favor, upon one particular phase of the case, which will fully appear herein in a quotation from the opinion which is reported in 21 Okl. commencing at page 51, 95 Pac. 433, 16 L. R. A. (N. S.) 825. After stating that under the evidence the case should have been submitted to the jury under the doctrine of "the last clear chance," the court proceeds as follows: "The Court of Appeals and all parties to this suit concede that the above doctrine was in force in the Indian Territory at the time this cause was tried; but counsel for plaintiff in error and the Court of Appeals in its opinion insist that there was no evidence reasonably tending to show a want of ordinary care on the part of the plaintiff in error after the dangerous situation of defendant in error was discovered. Mr. Justice Townsend in his opinion, supra, says: 'There was not a particle of evidence to support the theory that the train could have been stopped before reaching the crossing and the accident avoided, and to submit to the jury a theory not supported by any evidence was error.' The evidence of the engineer is to the effect that when he was 300 or 400 feet from the crossing he saw the defendant in error acting as though he was deliberately approaching the crossing. The following is taken from his evidence as it appears in the record: 'Q. Where were you with reference to this crossing—about how far were you north of the crossing when you first discovered Mr. Baker's team, according to your best judgment? A. We must have been 300 or 400 feet. Q. Where was Baker and his team with reference to the crossing when you discovered him? A. Him and his team and wagon and all was inside of the right of way. Q. Well, where did Mr. Baker seem to be going, driving along? A. He seemed to be deliberately driving over the crossing.' There is no room to doubt that the engineer, when he first discovered the defendant in error, got the impression from his conduct that he was going

to drive upon the railroad track ahead of his train. The engineer does not pretend that he was in any way deceived by appearances, but testified that he acted upon the impression that the defendant in error was deliberately crossing the track, and he testified that he acted on this impression and did all he reasonably could to stop his train and avoid the injury. If this evidence was uncontradicted, the Court of Appeals would have been right in its conclusion that a verdict should have been directed. But to our mind there was evidence reasonably tending to contradict the evidence of the engineer on this point. This being so, it was proper to submit to the jury the question as to whether the plaintiff in error, after discovering the dangerous situation of the defendant in error, exercised reasonable care and prudence to avoid the injury. The engineer further testified on cross-examination that the train was made up of one combined coach and baggage car and one day coach; that the coaches were probably 70 feet long. Mr. T. C. Connor, express messenger and baggageman on the train, called as a witness on behalf of plaintiff in error, testified, in part, as follows: 'Q. Now, when the engineer put on the emergency brakes or the air, how long was that before he stopped? A. That puts on all the brakes, and the train slacks. I judge it would stop within the length of the train. There were only two coaches on. Q. That is your best judgment? A. Yes, sir.' The answer to the first question may not be entirely responsive; but it was evidently given with deliberation after making a mental calculation to determine how quickly this train could, under the circumstances, be stopped, and his best judgment was that it could be stopped within the length of the train, which would not exceed 250 feet at the most. The witness was testifying in behalf of the railway company, and was telling of the effort the engineer made to stop the train. This evidence is not mentioned by counsel for defendant in error in his brief; but it was earnestly urged upon the attention of the court by oral argument. We believe it was sufficient to send the case to the jury on the question of the exercise of reasonable care on the part of plaintiff in error after it discovered the dangerous situation of defendant in error. Admitting the contributory negligence of the defendant in error may have had something to do in causing the injury, yet it would have been error for the court below to have directed a verdict for the plaintiff in error with this evidence in the record."

The opinion concludes: "With the foregoing modifications, we believe the opinion of the learned Court of Appeals states the law of the case." A reversal and remand for a new trial was ordered. If the evidence at the last trial was, in all substantial respects, the same as at the first trial, then the law of the case is settled in the former opinions.

In *Metropolitan Ry. Co. v. Fonville*, 125 Pac. 1125, it is said: "It is well settled by both reason and authority that a decision of an appellate court upon questions of law must control the case, as to points decided, at all subsequent stages. And a decision of the Supreme Court of the territory of Oklahoma is the law of the case at subsequent stages, even after statehood. *Oklahoma City Electric Gas & Power Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758; *Harding v. Gillett*, 25 Okl. 190, 107 Pac. 665, and authorities cited in these cases. This rule is subject to the qualification that an appellate court may review and reverse a former decision in the same case, where adherence to the former decision would result in gross and manifest injustice. *Oklahoma City Electric Gas & Power Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758."

Three propositions need consideration in this case: (1) Alleged error in the admission of certain testimony. (2) The sufficiency of the evidence to take the case to the jury. (3) Alleged error in giving certain instructions and in refusing others.

[1] 1. At the trial the plaintiff was allowed to introduce from the record of the former trial the testimony of defendant's engineer in charge of the train that struck plaintiff at the crossing, on the points of how far the train was away when the engineer first saw plaintiff, and that plaintiff was very close to the track and appeared to be "deliberately driving over the crossing." This was objected to on the ground that the witness (engineer) was present and could be called as a witness. The plaintiff contends, and the trial court was evidently of the opinion, that, these statements being the details of certain specific vital facts regarding the situation of the parties at the time of the injury, brought out by the railway company intentionally and designedly for the purpose of proving the contributory negligence of plaintiff, they stood in the nature of admissions—the assertion of specific facts—by defendant, thus making the evidence competent on that theory. Some authority is cited to support this view (2 Wigmore on Evidence, § 1075, and note); but inasmuch as the engineer was later called as a witness by the defendant, and this same evidence was later properly introduced to contradict the witness, the question of whether it was competent in the first instance loses much of its importance. It may be admitted that the evidence was incompetent in chief, yet it was competent for impeaching purposes, and was properly introduced without objection for that purpose. This, of course, does not make the evidence competent as substantive proof in the case, and the jury could not so consider it; if the defendant had asked an instruction limiting the effect of this evidence and it had been refused, a very serious question would have been presented, but such in-

struction was not requested, and we think that the error, if error it was, should be held to have been waived.

[2] Complaint is also made because of the admission in evidence of the testimony given at the former trial by the witness Connor. The objection urged seems to go to the point that there was not shown sufficient diligence in procuring the attendance of the witness to justify the use of his former testimony. This witness was an express messenger on defendant's train at the time of the injury. He was produced at the first trial by defendant and testified in its defense. This testimony shows that he resided at Baxter Springs, Kan. The testimony was taken in shorthand, transcribed into longhand, and printed in the certified record, made in the former appeal of this case; and certain parts of his testimony, and that of defendant's engineer, were specifically set out in the former opinion of this court, as raising, when considered together, a question for the jury to pass upon. So far as the record shows, this witness is a nonresident of the state, and not subject to the court's process. He was produced by defendant at the first trial, although he lived in another state at the time. He was not present at this trial. His deposition could have been taken perhaps, but he had been before the court once and had been fully examined by both sides. If he was a credible man, and defendant had vouched for this when it used him, he would have testified a second time substantially as he did before. His evidence was highly material; considering the law of the case as having been settled in the former opinions, this evidence was pivotal; without it, plaintiff's case failed. The evidence was admissible under the rule announced by the Supreme Court of Arkansas.

In *Clinton v. Estes*, 20 Ark. 216, a civil case, the court say: "Proof of what a witness swore upon a former trial is admissible in evidence on a subsequent trial of the same cause, if he be a nonresident, and out of the jurisdiction of the court; but if his place of residence be known, and his testimony can be taken under a commission, it is within the discretion of the court to issue a commission to take his testimony, or admit proof of what he formerly testified, and the decision of the court admitting the proof must be regarded as conclusive unless there be shown gross abuse of such discretion."

In *Vaughan v. State*, 58 Ark. 370, 24 S. W. 889, which was a capital criminal case, it is said: "The settled law of this state is that where the adverse witness is dead, beyond the jurisdiction of the court, or, upon diligent inquiry, cannot be found, what such witness testified on a former occasion on the same issue, and between the same parties, may be given in evidence, provided the accused was present having the right of cross-examination." To sustain the text the court

cites *Pope v. State*, 22 Ark. 372; *Hurley v. State*, 29 Ark. 17; *Shackelford v. State*, 33 Ark. 539; *Green v. State*, 38 Ark. 304; *Dolan v. State*, 40 Ark. 461; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; 1 *Greenleaf on Evidence*, § 163.

In 16 Cyc. p. 1088, the rule is stated thus: "Facts may be established by evidence thereof given on a former trial, provided the court is satisfied: (1) That the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced. The first three of these conditions render the reported evidence relevant; the fourth is necessary to justify the court in receiving it. Under these conditions the evidence is admissible from necessity even if there is other evidence to the same effect; and the admission of the evidence in criminal cases does not contravene a code provision that on a new trial in such cases 'all the testimony must be produced anew.'"

In *A., T. & S. F. Ry. Co. v. Osborn*, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189, the syllabus prepared by the Supreme Court of Kansas is: "The testimony of a witness given at a former trial, and which was taken and preserved by an official stenographer of the court as the law directs, is admissible in evidence where it appears that the witness is out of the jurisdiction of the court and beyond the reach of its process."

In the case of *Omaha St. Ry. Co. v. Elkins*, reported in 39 Neb. 480, 58 N. W. 164, the syllabus prepared by the court is as follows: "Where a witness is shown to be absent from the state, his testimony given at a former trial of the case is admissible in the evidence if otherwise unobjectionable."

See, also, *Oklahoma Ry. Co. v. Boles*, 30 Okl. 764, 120 Pac. 1104. For a full discussion of this subject, see the numerous authorities cited in the cases quoted from. It has been held by the Supreme Court of the state of Arkansas that the question of whether a proper showing has been made, as to the absence of the witness, rests largely within the discretion of the trial court, and his action in the exercise of such discretion will not be reversed on appeal unless a gross abuse thereof is shown. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Clinton v. Estes*, 20 Ark. 216.

[3] The objection is also made to the testimony of the witness Connor that his evidence as to how quick and how short a distance the train would stop in was not competent, because it did not appear that he was qualified to give an opinion on the matter. The evidence shows that this man was running on the train as an express messenger;

it is fairly inferable that he had been running as such on this road for some time, because he speaks of the engineer having "always whistled for that crossing," he was so familiar with the road that he "could tell where he was without looking out of the car," etc. He states what would happen when "the emergency brakes" and "when the air" was put on, etc.; says the train would slide, etc. Then makes the statement as to stopping of the train of two coaches in its length. When this testimony was given at the first trial no objection was made that the witness was not qualified to give an opinion—he was defendant's witness then—and at the last trial the court, on the objection being made, held that sufficient knowledge had been shown to admit the evidence. This question, under the rule of decision in the federal courts, is left largely to the discretion of the trial court. In *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510, it is said: "The amount of knowledge which a witness must possess before a party is entitled to his opinion as an expert is a matter which must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous." The same rule is stated in many other federal decisions. *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487; *Stillwell, etc., Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035; *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Erhardt v. Ballin*, 55 Fed. 968, 5 C. C. A. 363; 8 Ency. P. & P. 750. Taking all the testimony of this witness, his line of work, his evident familiarity with train service and the movement of trains, we cannot say that the decision of the trial court to admit the evidence "was clearly wrong as a matter of law."

[4] This brings us to consider whether, under the evidence as it now stands, the case should have been submitted to the jury. If the evidence of the engineer and Connor at this trial was identical with that given at the former trial, it would need no consideration, because it was held to raise a legitimate jury question in the former opinion. The evidence of Connor is the same. The evidence of the engineer is not in exact accord with his former testimony. Asked on the first trial how far he was away from the crossing when he discovered plaintiff, he replied: "We must have been 300 or 400 feet. His team could not have been more than 20 feet from the track." Then, after stating that plaintiff was inside the right of way, he was asked what plaintiff appeared to be doing, and replied, "He seemed to be deliberately driving over the crossing." At the first trial, this evidence was introduced to show clearly and beyond the peradventure of a doubt that plaintiff was guilty of contributory negligence. At the last trial, perhaps because of the form of the questions, or the

lapse of time, the testimony appears considerably diluted. The evidence on this point given at the last trial follows: "Q. About how far were you from the crossing, Mr. Baker, when you first noticed some one approaching the track? A. Well, I would imagine, from the looks of things, I was about 300 or 400 feet, possibly that; somewhere along in the neighborhood of 300 or 400 feet. Q. When you first saw the object approaching the track, where was it with reference to the track? A. Well, he was on the west side approaching the track, I could not say how far, the team seemed to be pretty close in, and I thought it was the right of way fence, you know. * * * Q. Did you know that Mr. Baker, the plaintiff, was going to drive upon the track when you first saw him? A. I didn't know whether he was going to or not. Q. What would be your guess? A. It would be a natural presumption that he was not going to." The cross-examination on this point is reproduced, as follows: "Q. Mr. Baker, how far were you from the crossing when you first noticed Mr. Baker's team? A. I must have been about 400 feet. Q. Did you make that answer before? A. I don't remember now what I did answer. * * * A. Well, I must have answered it that way at that time. Q. Then wasn't this question put to you by the plaintiff's attorney at the other trial: 'Q. How far were they from the railroad when you first noticed them? A. Well, his team couldn't have been over 20 feet from the track.' Did you answer that? (Showing to witness the record.) A. Why, it's here; I must have answered it that way. Q. That is true, ain't it; ain't that so? A. Well, I expect it is. Q. And wasn't this question also put to you then: 'Q. You knew they were coming towards the railroad and would probably come on it? A. Yes, sir.' (Showing to witness the record.) A. Yes, sir; I answered it that way, I reckon."

This testimony, when analyzed, amounts to this: The engineer saw the plaintiff inside the right of way, near the track, apparently driving across the crossing, when the train was 300 or 400 feet away; the train consisted of two coaches and an engine; its entire length is estimated at from 170 to 190 feet. Connor testified the train could be brought to a stop in its length (170 to 190) feet. In fact, the train did not stop until the rear end was a considerable distance past the crossing. The engineer testified that, upon seeing the plaintiff approaching the crossing, he immediately did everything possible to bring the train to a stop. This conflicts with the evidence of Connor. If the train could have been stopped in 170 to 190 feet, this fact discredits the statement that all was immediately done, after discovering the plaintiff's peril, that could have been done. In the first trial the engineer had no doubt but that plaintiff was deliberately driving across the track in front of the

approaching train. He does not deny this at the last trial, and admits he so testified at the first. At the last trial counsel refrained from asking the engineer "what plaintiff appeared to be doing," but asked him, "Did you know * * * plaintiff was going to drive on the track?" The answer was that the witness "did not know." Of course, he did not know. He was then asked, "what would be his guess." This gave the witness the chance to have answered as in the first trial, but the witness irresponsibly answers that the presumption would be that he was not going to drive on the track. But when confronted with his former statements he takes nothing back, denies nothing, nor does he attempt to explain anything away. He in a way adopts his former answers. Taking all his testimony including the statement that when he saw plaintiff he immediately did all he could to bring his train to a stop, it seems clear that at the time the engineer thought from actions of plaintiff that he was, heedless of his danger, "deliberately driving across the track in front of" the on-coming train. If so, regardless of plaintiff's contributory negligence, it became the duty of defendant, upon this situation presenting itself, to use ordinary care to prevent injuring plaintiff after his peril became known, as formerly held in this case. See former opinion, this case supra, and Oklahoma City Ry. Co. v. Barkett, 30 Okl. 28, 118 Pac. 350, and cases cited.

It only remains to examine the instruction submitting this question to the jury. On this phase of the case the jury was instructed as follows: "The court instructs the jury that the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. Defendant claims that plaintiff in driving on the track was guilty of negligence which was the proximate cause of the injury, and evidence has been introduced showing that the engineer saw the plaintiff driving onto the track before the collision occurred. You are instructed that, even though you should find that plaintiff in driving on the track was guilty of negligence which contributed to his injury, this fact would not bar his recovery, if the engineer discovered his position and that he was in peril in time to avoid the collision, and after such discovery neglected to exercise reasonable care to avoid this collision and as result of his failure to exercise such care the collision occurred." It ap-

pears to us that this instruction substantially states the law applicable to the facts.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 378)

JOHNSON et al. v. CRAIG et al. †

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 56*) — DELIVERY — PAROL EVIDENCE.

Where there is a question as to whether there had been a delivery of a deed of conveyance, the real test is the intention of the grantor, which intention may be manifested by mere acts or by words or both combined, and such acts and words and the circumstances relevant thereto are susceptible of parol proof. [Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

2. DEEDS (§§ 200, 208*) — "DELIVERY" — EVIDENCE.

In an action to cancel a deed on the ground of nondelivery, where it appears that the grantor had previously declared on different occasions, his intention to leave all his property to grantee, a girl whom he had reared and cared for as his daughter from infancy, and, realizing his failing health and approaching dissolution, sent for an attorney to draft the papers necessary to convey his property to grantee, and, after counseling with the attorney as to the best means of doing so, made a will bequeathing his personal property to her, and a deed conveying all his real property to her, and, after signing the will and acknowledging the deed, requests that they both be given to grantee, and thereafter stated that he had done so and had left all his property to grantee, such acts show a manifest intention to vest title in grantee, and constitute a delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 601, 625-632; Dec. Dig. §§ 200, 208.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

3. NEW TRIAL (§ 177*) — EJECTMENT — NEW TRIAL AS OF RIGHT.

Section 4792, Wilson's Rev. & Ann. Stat. of Okla. 1903, which gave the party against whom judgment was rendered in an action to recover real estate a second trial as a matter of right, was repealed by an act of the Legislature approved February 9, 1909 (Laws 1909, c. 29). On February 15, 1909, a suit was filed to recover possession of certain real estate, and cancel a deed thereto. In April, 1910, the cause was tried and judgment rendered against plaintiff. On April 30, 1910, plaintiff demanded a second trial as a matter of right, and was refused. Held, that a second trial as a matter of right was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 344; Dec. Dig. § 177.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Kingfisher County; A. H. Houston, Judge.

Action by John H. Johnson and others against W. C. and Etta Craig and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

F. L. Boynton, of Kingfisher, for plaintiffs in error. D. K. Cunningham and L. R. Weiss, both of Kingfisher, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† Rehearing denied May 13, 1913.

HARRISON, C. This action was instituted by John H. Johnson and other brothers and sisters, collateral heirs of James Johnson, deceased, to set aside a deed and recover possession of a certain tract of land situated in Kingfisher county and certain town lots in the city of Kingfisher, deeded to defendant Etta Craig by deceased during his lifetime. The cause was tried at the April term, 1910, resulting in a verdict and judgment for defendants. From this judgment plaintiffs appealed upon 15 assignments of error. But the decisive question involved is whether, under the evidence, the deed was in fact delivered to defendant Etta Craig by deceased during his lifetime.

The facts are: That Etta Craig and her sister while they were mere babies were taken to be reared by deceased and his wife. That after being so taken they had lived with, made their home with, and had been cared for and provided for by, deceased and his wife during their lifetime. At the time of taking the children deceased lived in Freemont county, Iowa. Some years later he moved to Nebraska, taking the children with him. While living in Nebraska his wife died. Thereafter he removed to Oklahoma, and purchased the property in question. The older of the two girls, Etta, had married William C. Craig, one of the defendants herein. Craig and his wife, at the request of deceased, came to Oklahoma to live with him, and were living with him at the time of his death. It appears that, before deceased came to Oklahoma, he had made a will bequeathing his property to the two girls, but that such will had been left with some depository in the state of Nebraska. Hence the provisions of this will do not appear in the record. But a short time prior to his death, the younger girl having married somewhat against his wishes, he made a new will, bequeathing all of his personal property to the older girl, Etta Craig, and on the same day executed a deed conveying all of his real estate to her; W. C. Craig, her husband, being named as executor in the last will, which, after the death of deceased, was duly probated, and the deed recorded. It is claimed by plaintiffs that the deed in question, though executed on the day the will was made, was not in fact delivered until after the death of deceased, and was therefore insufficient to convey title either as a will or as a deed. The facts as to delivery being controverted, the whole case, therefore, rests upon the question of fact whether the deed was delivered before or after the death of deceased.

[1] That such question is one of fact to be determined by the circumstances, actions, statements, and intention of the grantor is the consensus of authorities. 14 Ballard on Real Property, §§ 146, 152; 3 Devlin on Deeds (3d Ed.) § 265; 9 Am. & Eng. (2d Ed.) 154; 13 Cyc. 750, and authorities cited by the foregoing text-writers. And that such fact is susceptible of parol proof is also well set-

tled by the same authorities. 13 Ballard on Real Property, § 140; Price v. Hudson, 123 Ill. 284, 17 N. E. 817; Reichart v. Wilhelm, 83 Iowa, 510, 50 N. W. 19; 3 Devlin on Deeds (3d Ed.) 266. See, also, notes and authorities cited by each of the above text-writers.

[2] It is urged by plaintiff in error that the court erred in divers instances in the reception and rejection of testimony, but from an examination of the record we find no material error in this regard. Nor do we find any materially prejudicial error in the court's charge. The decisive fact to be determined by the jury from the evidence was whether the deed had been delivered before or after the death of the grantor. The two phases of the question were fairly submitted to the jury in the court's charge. The jury heard the testimony as to the statements of the grantor, his declarations as to what he desired to do with his property, and what he intended to do with it, as to just what his acts and statements were at the time of the execution and delivery of the deed, and as to what were his acts and statements in reference thereto after the execution of the deed, and from a consideration of all these facts and circumstances they said by their verdict that the deed was delivered prior to the death of the grantor. This verdict is reasonably supported by the evidence, and is in harmony with the law. The record shows: That deceased had stated to divers persons that the two girls were his adopted daughters (however, owing to the alleged loss of some of the adoption papers, the proof failed to sustain this contention, and the court eliminated the adoption feature from the case in his instructions), and that it had always been his intention to leave all his property to them at his death. That, owing to his failing health, he foresaw his impending dissolution and sent for an attorney, Mr. McNaught, to come out and draw his will. That McNaught and his wife came out to Johnson's house, and that on that and on previous occasions he had stated to McNaught what his intentions were as to the disposition of his property, and that he intended that it should go to the girls. That on the occasion of the drawing of the will he stated to McNaught, in the presence and hearing of several others, that it had been his intention to bequeath his property to the two girls, but that Lovina, the younger, having married against his wishes, and not being mentally bright, he would give it all to Etta, the older, as she had always been a good girl, and he felt sure that she would properly take care of Lovina. That he consulted with McNaught as to whether it would be better to make a deed in fee simple to the real estate and to bequeath the personal property by will. That, after consulting and talking over this matter, he made a will bequeathing all of his personal property, and executed a deed conveying all his real prop-

erty to Etta Craig. That after the will had been duly signed and witnessed, and the deed signed and acknowledged, he put them in a tin box, with instructions that it be given to Etta to take care of. That Etta, Mrs. Craig, being sick and in bed at the time, did not take the papers into her own hands, but told her husband to put them away in the drawer. This is the substance of the testimony of attorney McNaught and his wife and of the defendant Craig and his wife and others present at the time.

It is contended by plaintiff in error: That these acts on the part of the grantor were not sufficient to show an intention to relinquish all control over the deed at that time, and were not sufficient to constitute a delivery of the deed. That it was intended by the grantor to give the box containing the papers into Mrs. Craig's hands merely to be taken care of by her for him, and that delivery would take place after his death. It must be observed, however, that the acts of the grantor relevant to his intention in the matter are not limited solely to what took place on the day of the execution of the instruments. But the testimony of Mr. and Mrs. Craig, which was not denied and which is corroborated by subsequent events, is that the next day or two after the deed and will had been made and given to her she and deceased had a conversation in reference to the papers and in reference to whether the deed was in proper shape. That he asked her to get it for him and let him examine it. That he did so, and they discussed its provisions. That he suggested that it might be taken to town and submitted to another lawyer for examination, and that, if it were not all right, he would make it all right. That, pursuant to this conversation, she took the deed to town and submitted it to attorneys, who pronounced it all right. That she returned with it and informed him what the lawyers had said. That he gave it back to her and told her to keep it. That she thereafter took it to town and deposited it in a safe for safe-keeping. That, after the conversation above, no further mention was ever made of the deed, nor any further expression of any desire to exercise any control over it was ever made to grantee by deceased. Now, under the overwhelming weight of authority, from the decisions of the courts of nearly every state in the Union as well as from the Supreme Court of the United States, the real test of delivery is the intention of the grantor.

In 9 Am. & Eng. (2d Ed.) 154, appears the following text: "The real test of delivery is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered"—citing a long list of authorities. The same doctrine is announced in 13 Cyc., also Devlin on Deeds and Ballard on Real Property. "What amounts to a final delivery and acceptance of a deed

is a question of law, as is also the weight of uncorroborated evidence. But whether facts exist which constitute a delivery is a question for the jury, to be determined, under a proper charge of the court, from all the evidence on that point, where there is conflicting testimony. The rule applies to an acceptance or dissent of the grantee, and likewise to the question of the time of delivery." 13 Cyc. 750. In 9 Am. & Eng. 153: "Delivery is a word, act, or both combined, by which a grantor expresses a present intention to divest himself of title to property described in an appropriate deed. No particular form of delivery is required. * * * This definition in substance is adopted by practically all modern text-writers on the subject. "The question of whether or not there has been a delivery of a deed is one largely of intent, which intent is to be gathered from the facts and circumstances surrounding the transaction in connection with positive proof." 14 Ballard on Real Property, 146, citing Brown v. North, 141 Iowa, 215, 119 N. W. 629; Riegel v. Riegel, 243 Ill. 628, 90 N. E. 1108; Glade Coal Mining Co. v. Harris, 65 W. Va. 152, 63 S. E. 873; Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028; Ackman v. Porter, 239 Ill. 578 [88 N. E. 231]; Flynn v. Flynn, 17 Idaho, 147, 104 Pac. 1030; and 9 Am. & Eng. 154. Also section 147, 14 Ballard. "If there exists an intention on the part of the grantor to convey the land to another and he executes a deed to carry that intention into effect, the deed is delivered whenever the grantee obtains possession of it and accepts it." 1 Devlin on Deeds (3d Ed.) § 260a. Id. 261: "It is not necessary to pursue any particular course to effect a valid delivery of a deed. It is sufficient that a grantor intends when executing a deed, to be understood as delivering it. * * * Like any other fact, proof of which is required, the delivery of a deed may be established by circumstantial evidence." Id. 266: "Where there is positive evidence that a deed was delivered at its date and it is shown in addition to this that the deed was ready for delivery at that time, and that its delivery was practicable, evidence consisting of verbal admissions and the testimony of prejudiced parties, to establish a delivery at a different time, cannot be regarded as convincing in a proceeding in equity. * * * Declarations of a grantor that he had given his boys the land are admissible as against interest on an issue as to delivery * * *"—citing Chew v. Jackson, 45 Tex. Civ. App. 656, 102 S. W. 427. Id. 269: "The law does not prescribe any particular form of words or actions as necessary to consummate a delivery. Anything done by the grantor from which it is apparent that a delivery was thereby intended either by words or by acts or both combined is sufficient."

In Martin v. Flaherty, 13 Mont. 96, 32 Pac.

287, 19 L. R. A. 242, 40 Am. St. Rep 415, is an exhaustive discussion and citation of authorities on the question what constitutes delivery, in which case the intention of the grantor was the decisive question involved. In this case Pemberton, C. J., quoting from other authorities, says: "In *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, a Connecticut case, depending on this statement of facts: 'Delivery of deed. When takes effect. A grantor, having signed, sealed, and, acknowledged a deed, took it up, in the absence of the grantee, and said to another: "Take this deed and keep it. If I never call for it, deliver it to B. after my death. If I call for it, deliver it to me." The party then took the deed, and, the grantor dying soon afterwards, and never having called for it, it was delivered to the grantee.' Upon these facts the court say and hold: 'The grantor delivered the deed to Wright with a reservation of a power to countermand it, but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery.' In *Newton v. Bealer*, 41 Iowa, 334, in a case nearly on all fours with the case at bar, Day, J., delivering the opinion of the court, on page 339, says: 'Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because, during life, he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect because the intention might have been changed. Applying this doctrine to the deed in question, there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make. When, within a very few days of his death, and evidently, as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be found, which, as he supposed, had the effect to fix his property

so that there would be no "fussing" about it when he was gone. He thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property, and any construction of the law which ignores this intention and defeats this purpose prefers shadow to substance.' See cases cited. In *Hathaway v. Payne*, 34 N. Y. 92, a case wherein the facts are as nearly like the facts in the case at bar as usually happens, the court hold that: 'Where a deed is to be delivered to the grantee on the death of the grantor, the title, by relation, passes at the time the deed was left for delivery.' Potter, J., delivered the opinion in this case, and, after viewing at great length the facts, in stating the law and citing the authorities, says: 'Looking to the language of the agreement itself, for the purpose and intent of this conveyance, it left no condition to be performed before delivery. It required nothing but the lapse of time, to wit, the death of both grantors, when Herrendeen, the agent, trustee, or depository of the deed (by whatever name he may be called), by mutual direction of the parties, not alone that of the grantor, who alone could not revoke a mutual agreement, immediately to deliver it, as a good and valid conveyance of all the lands therein contained. If we look at the intent of the parties to the deed, as manifested by their acts, independent of the language of their agreement—the one granting, the other accepting, the grant of this part of the same premises—it is equally apparent that the parties intended the first deed as a present conveyance.' In *Ruggles v. Lawson*, 13 Johns. [N. Y.] 285, 7 Am. Dec. 375, A. executed a deed of lands, in consideration of natural love and affection, to his two sons, and delivered it to C., to be delivered to his sons in case A. should die without making a will; and, A. having died without a will, C. delivered the deed to the sons. It was held that this was a valid deed, and took effect from the first delivery; that this was not an escrow. In *Tooley v. Dibble*, 2 Hill [N. Y.] 641, a father signed and sealed a deed purporting to convey to his son a farm, placing the deed in the hands of B. with instructions to deliver it after the father's death, but not before, unless both parties called for it; and, after the father died, B. delivered the deed accordingly. It was held that the title of the son took effect, by relation, from the time the deed was left with B., and that the son's quitclaim, executed intermediate the leaving the deed with B. and the father's death, though importing a mere conveyance of the son's 'right in expectancy' in the land, would pass his title. The cases of *Goodell v. Pierce*, 2 Hill [N. Y.] 659, and *Hunter v. Hunter*, 17 Barb. [N. Y.] 25, are but confirmations of this view of the title taking effect from the first delivery of the deed. In the case of *Belden v. Carter*, re-

ported in 4 Day, '06, 4 Am. Dec. 185, a deed was delivered to a third person to keep, and, if not called for, to deliver it after the death of the grantor. It was held that by legal operation it became the deed of the grantor presently, and that the depository held it as a trustee for the use of the grantee, and that the title became consummate in the grantee by the death of the grantor, and the deed took effect, by relation, from the time of the first delivery."

Now that the jury has heard all of the testimony in the case at bar pertaining to the declarations and acts of the grantor at the time of the execution of the deed, together with the testimony of a number of neighbors and friends of his who testified to having heard him repeatedly say before the deed was executed that he intended to leave all of his property to the girls, and the testimony of others that after the date of the deed he had stated that he had left it to them, and having from such testimony and from all the facts and circumstances relevant to the matter concluded that it was the intention of the grantor to pass title to grantee, and that by such acts he did pass such title and divested himself thereof, the question then arises, Is such verdict so manifestly erroneous that we should say as a matter of law it should be set aside? In view of the authorities herein cited and in the light of the testimony in the case, we must answer in the negative. In so answering, it is but just to say that, under the law and the facts in this case, there was a delivery, and that the verdict of the jury was correct. We have not overlooked the testimony submitted in behalf of the plaintiff, nor the argument and authorities cited by plaintiff for the purpose of disproving delivery. We think upon the whole, from a careful examination of the record and of the authorities, that the judgment of the court below should stand.

[3] There is one other question urged by plaintiff in error which should be determined. After the trial, which was in April, 1910, defendant filed motion for a new trial based upon alleged errors occurring during the trial. Hearing was had and the motion overruled. Thereupon, on April 30th, and at the same term of court, defendant made demand for a second trial as a matter of right under section 4792, Wilson's Rev. & Ann. Stat. of Okl. The court overruled this motion, and denied defendant the right of a second trial. It is urged by plaintiff in error that the court denied defendant this right on the ground that it had been waived by presenting a motion for a new trial for cause. However, the record is not clear as to whether this right was denied defendant upon this ground or upon the ground that the statute giving such right had been repealed, and, inasmuch as the statute in ques-

tion had been repealed before this action was filed, it is not necessary to say whether or not the court erred in denying a second trial on the ground that the same had been waived by presenting a motion for new trial for cause, as the ruling of the court is clearly sustained upon the latter ground. The statute relied upon is as follows: "Sec. 4792. In an action for the recovery of real property, the party against whom the judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term." This statute was repealed February 9, 1909. Sess. Laws 1909 (Laws 1909, c. 29). This suit was not filed until February 15, 1909, and not tried until April, 1910. Therefore defendant was not entitled to a second trial as a matter of right at the time the motion was filed. It is true the repealing act, although approved February 9, 1909, did not become effective until May 10, 1909, but this fact does not alter the status of defendant's right at the time the motion was filed. The right to a second trial while section 4792 was in force was not an inherent substantive right which was mandatory on the court to grant in all cases whether demanded or not, but was merely a right of procedure, available only upon the express demand of the party against whom judgment had been rendered—a right which never matured until after one trial had been had, and then only when demanded by the losing party. Therefore the right to a second trial would not have matured to defendant had the statute been in force until after the first trial had been had and at that time, and at the time the demand was made such right had been taken away by the aforesaid act of the Legislature. Hence the court did not err in refusing a second trial.

The judgment of the court below is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 117)

BERRY v. SECOND BAPTIST CHURCH
OF STILLWATER.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. RELIGIOUS SOCIETIES (§ 31*)—ACTIONS BY TRUSTEE.

The trustees of a church brought a suit for specific performance, and afterwards two of them filed a motion to dismiss the suit, contrary to the wishes of and interest of the members of the church, and without acting upon the matter as a board. *Held*, that the court did not err in overruling the motion and permitting the suit to proceed under the direction of the other trustees elected to take the place of the two who attempted to dismiss the suit.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 199-207; Dec. Dig. § 31.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. SPECIFIC PERFORMANCE (§ 4*)—CONTRACT TO CONVEY LANDS—ACTION FOR DAMAGES.

An action for damages is not an adequate remedy for a breach of a contract to convey land and the vendee in such a contract is entitled to specific performance, although he could recover in an action for damages for the breach.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. SPECIFIC PERFORMANCE (§ 101*)—WAIVER OF FORFEITURE.

A vendor may waive the provisions of a contract for the sale of real estate making the time of payment of the consideration of the essence of the contract, and where he receives payments on the purchase price after the time when the contract was forfeited according to its terms, without objection and without claiming a forfeiture, he waives the forfeiture, and though he afterwards claims a forfeiture, specific performance should be decreed where the vendee promptly tenders the full consideration upon notice of his intention to claim the forfeiture.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311-317; Dec. Dig. § 101.*]

4. SPECIFIC PERFORMANCE (§ 110*)—PAYMENT INTO COURT—NECESSITY.

It is not necessary in a suit to require a vendee to convey land to pay the purchase price into court. It is sufficient to pay it at the trial or when ordered by the court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 354; Dec. Dig. § 110.*]

5. SPECIFIC PERFORMANCE (§ 128*)—CLAIM FOR DAMAGES—WAIVER.

Where the petition alleged all the facts with reference to a contract of sale of real estate and prayed for specific performance, and also for the amount named in the contract as a penalty for failure to convey, it was not error to permit the plaintiff at the close of the testimony to waive the claim for damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Payne County; A. H. Huston, Judge.

Action by the Second Baptist Church of Stillwater against W. E. Berry. Judgment for plaintiff, and defendant appeals. Affirmed.

Burdick & Grubbs, of Stillwater, for plaintiff in error. Freeman E. Miller, of Stillwater, for defendant in error.

ROSSER, C. This was a suit for specific performance brought by the Second Baptist Church of Stillwater against W. E. Berry to compel him to convey certain lots in Stillwater.

The Second Baptist Church is composed of colored people. In August, 1903, the defendant, Berry, agreed to sell this church certain lots in Stillwater for the sum of \$200. Under their agreement the church was to pay \$25 in cash, \$87.50 August 3, 1904, and \$87.50 August 3, 1905. The payment due in 1904 was to bear interest at the rate of 12 per cent. per annum. The church made the payment of \$25, took possession of the lots, built a church building, and used it as a

place of worship, but failed to pay the other two payments according to the agreement. It paid, however, from \$19 to \$25 per year until 1906. At the time the payment was paid in 1907 defendant agreed that, if the church would pay during that year the amount due according to the first agreement, he would execute a deed. The church failed to pay the balance due. In March, 1908, it paid defendant \$21 and defendant gave a receipt which showed it was "to apply as payment on church." In 1909, when the church officials offered to make another payment, the defendant claimed a forfeiture of the contract and tried to collect rent. The church officials then tendered him the amount due. He refused to accept it, and this suit was brought. After the suit was brought, two of the trustees of the church filed a motion to dismiss the case. The motion was filed in vacation. The church deposed the trustees who joined in the motion, and elected others and through them protested against the dismissal. The court heard and overruled the motion. The case was then heard and a decree entered requiring the defendant to convey the property to the church upon payment of the balance due.

[1] Defendant assigns as error the action of the court in overruling the motion of the deposed trustees "to dismiss the action. No authorities are cited in the support of this assignment. The trustees were not acting in the interest of the church when they filed the motion, but in their private interests. The court was entirely right in overruling the motion. A nominal party, who is acting merely in a representative capacity, has no right to dismiss an action to the prejudice of the real party in interest without his consent. *Hanchett v. Ives*, 133 Ill. 332, 24 N. E. 396; *Steeple v. Downing*, 60 Ind. 478. There is another reason why the attempted dismissal was without effect. The suit was brought by the board as such. The evidence shows that no action was taken by the board authorizing the dismissal. The two who attempted to dismiss the case acted in the matter as individuals. Of course, the two could have controlled the action of the board, but they should have called it together and taken action as a body. The third member had a right to take part in a meeting where the matter was under consideration. The record shows that the two who attempted to dismiss the case did so without any notice to the other member and without authority from the congregation. The action of the two members in attempting to dismiss the action which was brought by them as a board was without authority. See *Thompson v. West*, 59 Neb. 677, 82 N. W. 13, 49 L. R. A. 337; *Thomasson v. Grace M. E. Church*, 113 Cal. 558, 45 Pac. 838; *St. Patrick's Roman Catholic Church v. Gavalon*, 82 Ill. 170, 25 Am. Rep. 805; *United Brethren*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

Church v. Vandusen, 37 Wis. 54; Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408.

[2] Defendant contends that an action on the bond for damages would have afforded the church an adequate remedy for breach of the contract to convey, and that for that reason specific performance should be denied. It is well settled that specific performance of a contract to convey land will be decreed, notwithstanding the vendee has a cause of action for damages for breach of the contract. Money damages is considered inadequate compensation for a breach of a contract to convey lands. 2 Minor's Inst. (3d Ed.) 870; 2 Story's Eq. Juris. (13th Ed.) § 751; Kelly v. Mosby, 124 Pac. 984. Especially is this true where as in this case the vendee has taken possession and made permanent and valuable improvements exceeding in value the penalty of the bond. It is not necessary to cite authorities in support of a proposition so well settled.

Defendant's next and principal contention is that, because the church had not complied with its contract as to time of payment, it is not entitled to specific performance. This proposition must also be resolved against the defendant. The church did not pay at the time it agreed to, but the defendant continued to accept payments under the original contract and the renewed contract. Even when time is made the essence of a contract, a party may waive a strict compliance with the stipulations with regard to time. "If the court finds that, although time was of the essence of the contract, yet the defendant has waived his right to insist upon strict performance either expressly or by acquiescence in plaintiff's laches, as where his conduct after failure to perform on the day, indicated that he would accept a delayed performance, a decree of specific performance will be granted the plaintiff as if time had not been of the essence." 6 Pom. Eq. Juris. § 813. In this case the circumstances clearly show a waiver.

[3] In this case the circumstances clearly show a waiver by the defendant of a strict compliance with the terms of the contract as to time. The church went into possession of the contract and built a house. After the deferred payments were due, the defendant continued to receive partial payments without any intimation that he considered the contract forfeited. He even renewed the original contract in writing, and on the expiration of the year for which the contract was renewed he accepted a partial payment on the contract without claiming a forfeiture. The next year, when the representative of the church offered to make another payment, the defendant for the first time claimed a forfeiture of the contract. The

church then tendered the full amount due, and it was refused. To refuse a specific performance would be inequitable. It has often been decided that a party may waive a strict compliance with the provisions of a contract as to the time of performance. See Brown v. Guarantee Trust & Safe Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; Thayer v. Star Mining Co., 105 Ill. 540. It is held in North Dakota that, in order to avail himself of a forfeiture clause in a contract, the party must promptly declare the contract forfeited when the other party fails to perform at the stipulated time. Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088, and authorities therein cited. And the same rule obtains in South Dakota. Pier v. Lee, 14 S. D. 600, 86 N. W. 642. In the case of Kansas Lumber Co. v. Horrigan, 86 Kan. 387, 13 Pac. 564, the facts before the court were very similar to the facts of this case and the court decreed specific performance in favor of the purchaser.

[4] It is further contended that the judgment should be reversed because the tender of the balance of the purchase price was not kept good. When the suit was brought, the church paid \$200 to its attorney, and he kept it in a bank until the first trustee attempted to dismiss the suit. He then paid it back to the one of them who claimed to have advanced it (deducting his fee), and for some time the amount due was not in the hands of the attorney for the church. This is not material. The defendant had refused the tender. There is no proof that he could not have had the money at any time he signified his willingness to receive it. Section 5671, Comp. L. 1909, is as follows: "When a tender of money is alleged in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at trial, or when ordered by the court." A compliance with this statute is all that is necessary.

[5] Lastly, it is contended that the court erred in permitting the plaintiff at the close of the testimony to elect to stand upon the count in its petition under which it claimed specific performance. An examination of the petition shows that the church pleaded the bond for title and set out all the facts and prayed for specific performance, and also for \$500 which was the penalty named in the bond for failure to convey. Its election was merely to waive any claim for damages. There was no error in permitting it to waive this claim. It was not entitled to both, and an examination of the records shows that its principal object all the way through was to obtain title to the lots.

The judgment should be affirmed.

PER OURIAM. Adopted in whole.

(55 Okl. 405)

BLOCK et al. v. PATRICK, County Treasurer.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS (§ 407*)—LOCAL IMPROVEMENTS—ASSESSMENTS.**

The provisions of section 6 of the organic act of the territory of Oklahoma (Act May 2, 1890, c. 182, 26 Stat. 84), providing that all property subject to taxation shall be taxed in proportion to its value, does not apply to assessments made against lots for the purpose of covering the cost of local improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.*]

2. CONSTITUTIONAL LAW (§ 290*)—MUNICIPAL CORPORATIONS (§ 407*)—"DUE PROCESS OF LAW"—SPECIAL ASSESSMENTS.

A statute that authorizes the trustees of an incorporated town, after notice to abutting property owners to construct sidewalks and guttering in front of their property, and, upon failure of such property owners to construct same, to construct such improvements and assess the cost thereof to the abutting property upon a frontage basis, and to issue a tax warrant for the actual cost of labor and material obtained at the market price and used for such improvements, and making such tax warrant a lien against the property therein described, does not take property without due process of law, and should not, upon that ground, be declared invalid.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290;* *Municipal Corporations*, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

Error from District Court, Kingfisher County; A. H. Huston, Judge.

Action by G. H. Block and others against James S. Patrick, County Treasurer of Kingfisher County. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. A. McCartney, of Kingfisher, for plaintiffs in error. R. W. Wylie, of Hennessey, F. L. Boynton, of Kingfisher, and Burwell, Crockett & Johnson, of Oklahoma City, for defendant in error.

HAYES, C. J. Plaintiffs in error commenced this suit in the district court of Kingfisher county against defendant in error, as treasurer of that county, to enjoin the collection of certain special assessments of taxes made against plaintiffs' property to pay for the construction of guttering and sidewalks. The judgment in the court below, denying to plaintiffs the relief they prayed for, was rendered upon their petition and the answer of defendant thereto. As there is no controversy about the facts, it will be unnecessary to set out the pleadings in *hac verba*.

In the month of November, 1902, the board of trustees of the town of Hennessey passed an ordinance authorizing and directing the construction of certain brick gutters and sidewalks in said town. On January 14, 1903, the board passed a second ordinance requiring the construction of sidewalks upon an-

other street in said town. Plaintiffs own property abutting upon one or the other of the streets upon which the improvements were ordered to be made. After personal notice served upon them, plaintiffs failed to make the improvements provided for by the ordinances, and thereupon the city let the contract for their construction, and the construction of the improvements were made without objection on the part of plaintiffs, until the city made and presented its tax bill for the cost of such improvements. It is conceded that the statute authorizes the board of trustees, after notice to the abutting property owners, to make such improvements, and, upon their refusal to do so, to contract for the construction of the improvements and to tax the cost thereof against the abutting property in proportion to the frontage of each piece of property.

[1] The first proposition of law urged by plaintiffs in error is that the statute is void, because in violation of section 6 of the organic act of the territory, which, in part, provides that: "No tax shall be imposed upon the property of the United States, nor shall the lands or property of nonresidents, * * * nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." It is urged that the statute violates this provision of the organic act, because the apportionment of the taxes for the cost of the improvements upon the abutting property is upon another basis than upon the value of the property. No lengthy consideration of this proposition is required. It has been determined against the contention of plaintiffs in *Jones et al. v. Holzapfel et al.*, 11 Okl. 405, 68 Pac. 511, and *Riley v. Carico*, 27 Okl. 33, 110 Pac. 738.

[2] One of the sections of the statute under which the town authorities proceeded provides that, when a special assessment shall be ordered against the lots of the abutting owners, 10 days' written or printed notice shall be given by personal service to the owner or agent of each lot included. If, at the expiration of this notice, the improvements required to be made are not made, then the municipal authorities may issue tax warrants for the actual cost of labor and material obtained at the market price and used for such improvements. Such tax warrants shall be a lien against the property therein described. Section 535, *Wilson's Rev. & Ann. Stat.* The notice required by this section was given; but the statute does not provide for any notice or hearing upon the benefits that the abutting property owners will receive from the improvements, or upon proportion of cost thereof that shall be taxed against such piece of property. It is contended by counsel for plaintiffs that, on account of the failure of the statute to provide notice to the property owners and an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

opportunity for hearing upon the assessment which shall be made against their property, plaintiffs are denied the due process of law guaranteed by the fourteenth amendment to the federal Constitution.

We think it is clear that the notice prescribed by the statute is only for the purpose of giving to the abutting property owners the option of constructing the proposed improvements themselves, rather than to leave it to be done by the municipality and the same be taxed up against their property. The statute provides for and contemplates no hearing upon the question of benefits to the abutting property that will result from the construction of the proposed improvements, or what proportion of the same shall be taxed against each piece of property; but we think the contention that the statute and the taxes assessed against plaintiffs' property thereunder are for these reasons invalid has been determined against plaintiffs by different decisions of the federal Supreme Court.

In *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, the tax in question was levied against the property owners in a sewer district to pay for the construction of a district sewer. The charter of St. Louis, under which the sewer was constructed and the tax levied, provided that the district sewer might be established within the limits of any district to be prescribed by ordinance, as approved by the board of public improvements, so as to connect with a public sewer or some natural course of drainage; that the city assembly shall cause sewers to be constructed in the district whenever a majority of the property holders, residents therein, shall petition therefor, or whenever the board of public improvements shall recommend it necessary for sanitary or for other purposes. The charter neither provided for nor required that any notice or opportunity to be heard should be given to the property owners to determine the necessity of the construction of any such sewer; and, when the sewer is completed, the assembly is authorized to compute the whole cost thereof, and to assess it as a special tax against all lots of ground in the district, without regard to improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the public highway; and such tax, when proportioned and assessed against the property, constitutes a lien thereon. The property owners contended that the assessment of tax under that procedure took their property without due process of law in that it afforded them no opportunity to be heard upon the question of benefits received by their property, or upon the assessment of tax made against it. The judgment of the Supreme Court of the state, sustaining the validity of the tax, was affirmed on appeal by the Supreme Court of the United States. *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 922. The decision

in the federal Supreme Court was based upon *French v. Barber Asphalt & Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, which also originated in the courts of Missouri, and involved the validity of a paving tax.

In the last-mentioned case the court at considerable length, and with thoroughness, reviews all its former cases that shed light upon what constitutes due process of law, as involved in the levying of taxes against property for the payment of local or special improvements. The tax levied in that case, the validity of which was attacked by the property owners, had been levied against the abutting property upon a front foot basis to pay for paving a street. The charter of the city authorized the common council to declare the work of paving any street with a pavement of defined character to be necessary, whereupon such resolution was required to be published for 10 days. Thereafter the owners of a majority of front feet on that part of the street to be improved had the right, within 30 days to file a remonstrance with the city clerk against the proposed improvements and thereby divest the common council of the power to make the improvements. But the charter provided for no notice of any hearing upon the necessity of the improvements or of the benefits that might result therefrom to the abutting property. Plenary power was vested in the council to order the pavement of the street, unless that power was taken from the council by petition of opposition signed by the owners of a majority of front feet. The minority property owner had no opportunity for a hearing, either as to the benefits the proposed improvement would result in to his property, or what proportion of the cost of the improvements should be taxed against his property. Whether the improvements should or should not be constructed under the charter of the city was determined either by the council or a majority of the property owners, without any hearing. What property was benefited, and the proportion of the cost that such property should pay, was determined, by the provisions of the charter, to be the property abutting upon the portion of the street paved, and that the cost should be apportioned in the same ratio as the frontage of any piece of property was to the total frontage upon the improvement. The court held that a tax levied under this procedure did not take property without due process of law. In the opinion the court quoted, with approval from one of its former decisions the following: "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed,

either like other taxes upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited, and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and, if it does so, its determination is conclusive upon the owners, and the courts and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the Legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction." In the same opinion the court also said: "It was also said that the class of lands to be assessed for the purpose may be either determined by the Legislature itself, by defining a territorial district, or by other designation, or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the Legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits, as estimated by commissioners."

In the case last cited it was held that the due process of law guaranteed by the fourteenth amendment to the federal Constitution imposes upon the states, when exercising their powers of taxation, no more rigid or stricter curb than is imposed upon the federal government by the fifth amendment in a similar exercise of power.

Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, involves the application of the phrase "due process of law," as used in the fifth amendment to an assessment levied for laying water mains in the District of Columbia. Under the act of Congress that fixed the rate of assessment at \$1.25 per lineal front foot against all lots or lands abutting upon the street in which

the water main was laid. The act invested the commissioners of the city with power to lay water mains and water pipes whenever the same, in their judgment, should be necessary for public safety, comfort, or health, and provided for no notice to the property owners or a hearing upon the necessity of the construction of any water main or upon the benefits that would result therefrom to the adjacent property. The court stated its conclusion in the following language: "Our conclusion is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the district, and to prescribe the amount of the assessment and the method of its collection, and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was not to take assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants; and their bona fide exercise of such a power cannot be reviewed by the courts." Another case in point is *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912.

The Legislature, by the statute here involved, has itself determined and designated what property will be benefited by the construction of sidewalks and guttering in incorporated towns and villages. It is the property abutting on such improvements; and, in fixing the proportion of the cost of the improvements that such property shall pay, the Legislature may be presumed to have determined to what extent, at least, such property will be benefited. It is not left to the discretion of the local officers to determine what property will be benefited or the extent thereof; and a notice to the property owners and a hearing thereon could avail nothing in determining the amount of the assessment that should be levied against the property of each, except to see that a correct application of the basis prescribed by the statute is made. It is not contended here that any fraud was practiced by the board of trustees, or that any mistake was committed in the assessment levied. The sole contention is that the assessment is void.

In *City of Perry v. Davis et al.*, 18 Okl. 427, 90 Pac. 865, the Supreme Court of the territory, speaking through Mr. Justice Garber, upon a similar question, said: "At this juncture it is contended that the above notice afforded the owners of property no opportunity to appear and be heard in the matter of fixing the amount of their individual assessments. This was not necessary. Section 7 of the act provides: 'As soon as any

district sewer shall have been completed, the city engineer or other officer having charge of the work shall compute the whole cost thereof, which shall also include all other expense incurred by the city in addition to the contract price of the work, and shall apportion the same against all the lots or pieces of ground in such district, exclusive of improvements in proportion to the area of the whole district exclusive of public highways; and such officer shall report the same to the commissioner and councilmen, and the mayor and councilmen shall thereupon levy and assess a special tax by ordinance against each lot or piece of ground within the district.' Of what avail would such an opportunity be where the Legislature has already fixed a mode of assessment which adjusts itself automatically, and where, after the cost of construction has been ascertained, the amount of the individual assessment is determined, not by a discretionary power, but by a mathematical calculation? In what way could a hearing affect the amount of the assessment, when the Legislature has said that the whole cost shall be apportioned against the lots in said district, exclusive of improvements in proportion to the area? There is no valuation of property or of benefits; no exercise of discretionary power; no equalizing board, or board of appraisers, or commissioners—nothing but a mathematical calculation."

It follows from these views that the judgment of the trial court should be affirmed. All the Justices concur.

(35 Okl. 432)

HUGHES v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF COURTS—NEW TRIAL.

Trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever in the opinion of the trial court the party asking for the new trial has not probably had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult in many instances for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them. Following *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. APPEAL AND ERROR (§ 978*)—REVIEW—DISCRETION OF COURT—GRANT OF NEW TRIAL.

At the request of the plaintiff in error, over the objection and exception of the defendant in error, the following instruction was given:

"You are instructed that the proximate cause, or causes, of an injury is that efficient and moving cause or causes, without which cause, or causes, the injury would not have happened.

And in this case, if you find from the evidence before you that the plaintiff's injuries, if you find that he was injured, was the proximate result of the negligence of the defendant, in permitting these fire grates to become and remain defective, or that his injuries were the result of a condition brought about by a combination of both of said alleged causes, then you should find for the plaintiff."

The defendant in error requested the following instruction, which was refused and exception saved:

"You are instructed that, although you may believe from the evidence that the injury complained of was occasioned by the act of the defendant, still if you further believe from the evidence that such injury was not the natural result of the acts of the defendant, and could not have been foreseen, or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable."

A verdict having been returned in favor of the plaintiff in error, a motion for a new trial was, in due time, presented and sustained by the trial court on the ground that the instruction given did not sufficiently apply the definition of "proximate cause." Held, that the action of the trial court in granting a new trial did not constitute reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

Error from Superior Court, Pottawatomie County; Geo. C. Abernathy, Judge.

Action by J. L. Hughes against the Chicago, Rock Island & Pacific Railway Company. From an order granting a new trial after verdict for plaintiff, he brings error. Affirmed.

H. H. Smith and W. T. Williams, both of Shawnee, for plaintiff in error. C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to have reviewed the action of the trial court in sustaining a motion by the defendant in error for a new trial.

[1, 2] Instruction No. 9, given at the request of the plaintiff (plaintiff in error), is as follows: "You are instructed that the proximate cause, or causes, of an injury, is that efficient and moving cause, or causes, without which cause, or causes, the injury would not have happened. And in this case, if you find from the evidence before you that the plaintiff's injuries, if you find that he was injured, was the proximate result of the negligence of the defendant, in permitting these fire grates to become and remain defective, or that his injuries were the result of a condition brought about by a combination of both of said alleged causes, then you should find for the plaintiff."

The defendant (defendant in error) excepted to the giving of this instruction and requested the following instruction, which was refused; exceptions being saved: "You are instructed that although you may believe from the evidence that the injury complained of was occasioned by the act of the defendant, still if you further believe from the evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence that such injury was not the natural result of the acts of the defendant, and could not have been foreseen, or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable."

The trial court in passing on the motion for a new trial held this instruction (given) improper "(1) for the reason that it invades the province of the jury, and (2) that it does not apply the definition of 'proximate cause,' and it does not state the proper rule for determining the liability of the defendant," quoting from Thompson on Negligence, vol. 1, § 60, as follows: "The law does not impute negligence to an injury that could not have been foreseen or reasonably anticipated, as the probable result of a given act or omission. It follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The greatest test as to whether negligence is the proximate cause of an accident is said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby."

In *Solts v. Southwestern Cotton Oil Co.*, 28 Okl. 706, 115 Pac. 776, it is said: " * * * The burden is on plaintiff to prove negligence; to convict the master of negligence, plaintiff must not only prove the injury, but must go further and prove that the failure of the master to use the cover as used the previous season was the proximate cause of his injury, and that the master, by the exercise of such care and foresight as a man of ordinary prudence should have exercised under like circumstances, should have reasonably anticipated that his failure so to do would result in plaintiff being injured as he was. Coupled with proof of the physical fact of injury, proof of the latter is indispensable to a recovery, for the reason that the master is entitled to the presumption that he has done his duty, and therefore not negligent, and further proof is necessary to overcome this presumption."

In *Chicago, Rock Island & Pacific Ry. Co. v. Ashlock* (No. 1,208) 129 Pac. 726, decided by Brewer, Commissioner, not yet officially reported, it is said: "This reduces the whole matter to the single question of 'proximate cause.' This question was for the jury if there was any evidence, or inferences to be legitimately drawn from the evidence, viewed in the light of the situation and circumstances of the parties and the work, tending to show that defendant's failure to perform its duty produced the injury, and that such a result might have been reasonably anticipated."

In *Chicago, R. I. & P. Ry. Co. v. Beatty*, 27 Okl. 844, 116 Pac. 171, it is said: "The

correct rule seems to be that a person guilty of negligence or an omission of duty should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind. *Shearman & Redfield on Negligence* (4th Ed.) § 29. The weight of authority seems to be that a party is liable only for such extension of a fire, negligently kindled by him, as a prudent person would have regarded as reasonably possible, under the state of wind and weather existing at the time of the fire. *Shearman & Redfield on Negligence* (4th Ed.) § 666."

In *Stephens et al. v. Oklahoma City Ry. Co.*, 28 Okl. 340, 114 Pac. 611, 33 L. R. A. (N. S.) 1007, it is said: " * * * But we are of the opinion that in the instant case, at least, the rule invoked is subject to the limitation pointed in *Clark v. Chambers*, 3 Q. B. Div. 327, 7 Cent. L. J. 11, that the intervening agency must have been one which the first actor was bound to anticipate. The rule seems to be that where the negligent act causes consequences such as in the ordinary course of things were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties must arise, liability follows; otherwise not. *Clark v. Chambers*, supra. In *Sharp v. Powell*, 20 W. R. 584, L. R. 7 C. P. 253, one of the cases cited by Cockrum, C. J., in *Clark v. Chambers*, it was held that 'the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it.' In that case Lord Chief Justice Bovill says: 'No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequences of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action.' Mr. Justice Strong, discussing this question in *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, said: 'But it is generally held that, in order to warrant a finding that negligence or an act not amount-

ing to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' Even the severe rule of care and diligence which the law imposes upon carriers of passengers does not extend so far as to make one liable for an injury to a passenger from an accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier in the exercise of that degree of care which the law demands of him. 3 Thompson's Commentaries on the Law of Negligence, § 2778. The reason of the rule is that the law holds a person liable for those consequences only which were the natural and probable result of his negligence, and which therefore ought to have been foreseen and anticipated."

In view of the instruction given at the request of the plaintiff (plaintiff in error), said instruction refused by the court, asked by the defendant (defendant in error) to be given, was error. *St. Louis & San Francisco R. Co. v. Crowell*, 127 Pac. 1063.

In *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113, it is said: "Now, if the action of the court upon either of these two motions was correct, this case must be affirmed, and we take the rule to be well established that trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever in the opinion of the trial court the party asking for the new trial has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult for the trial court, or the parties, to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them. The Supreme Court will not reverse the order of the trial court granting a new trial, unless said court can see beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some simple, pure, and unmixt question of law, and that, except for such error, the ruling of the trial court would not have been made as it was so made, and that it ought not to have been so made. As the granting of a new trial simply places the parties in a position to have the issues between them again submitted to a jury or the court, the showing for reversal should be much stronger where the error assigned is the granting of a new trial, than where it is the refusal of it. *City of Sedan v. Susan B. Church*, 29 Kan. 190."

In *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890, it is said: "The trial court has a

higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause and to have the facts weighed in the light of proper instructions declaring the law relative thereto, but it is the imperative, abiding duty of the court after the jury has returned its verdict and awarded to one or the other success in the controversy, where the justness of the same is challenged as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court, it should not, where challenged, be permitted to stand."

See, also, *Citizens' State Bank of Lawton v. Chattanooga State Bank et al.*, 23 Okl. 767, 101 Pac. 1118; *Davis v. Stillwell*, 32 Okl. 757, 124 Pac. 74; *Jamieson v. Classen Co.*, 124 Pac. 67; *Ardmore Lodge No. 9, I. O. O. F., v. Dawson*, 124 Pac. 66; *Stapleton v. O'Hara*, 124 Pac. 55; *Chapman v. Mason*, 30 Okl. 500, 120 Pac. 250; *National R. & B. Supply Co. v. Elsing*, 29 Okl. 334, 116 Pac. 790; *Jacobs v. City of Perry*, 29 Okl. 743, 119 Pac. 243; *Exchange Bank of Wewoka et al. v. Bailey*, 29 Okl. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1032; *Hobbs v. Smith et al.*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Duncan v. McAlester-Choc-taw Coal Co.*, 27 Okl. 427, 112 Pac. 982.

Under the foregoing authorities, it is not essential to determine whether the error committed in refusing said instruction could work a reversal on review in this court had the trial court overruled the motion for a new trial. Not being justified in holding that the court abused its discretion in awarding a new trial, under this record and said authorities, it is our duty to affirm his action in awarding a new trial.

The other grounds upon which he sustained the motion for a new trial not being likely to arise upon another trial, the same are not passed upon.

The judgment of the lower court is affirmed. All the Justices concur.

(39 Okl. 4)

BELL-WAYLAND CO. v. MILLER-MITSCHER CO.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 26*)—CONDITIONS AGAINST SALE—VALIDITY.

A mortgage on a stock of merchandise, which provides that the mortgagor shall not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—38

sell or dispose of any of the property covered thereby without the written consent of the mortgagee, is valid. And, where such mortgage is duly filed for record, then, in the absence of fraud, it constitutes a prior lien to that of subsequent attaching creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 72, 73; Dec. Dig. § 26.*]

2. CHATTEL MORTGAGES (§ 50*)—DESCRIPTION OF MORTGAGED GOODS—SUFFICIENCY.

Where a chattel mortgage on a stock of merchandise describes it as "one stock of goods consisting of dry goods, groceries, canned goods, racket goods, flour, and feed," and gives the number of the lot and block and name of the town, county, and state in which it is located, such description, the mortgage being filed for record, is a sufficient identification to put subsequent creditors on inquiry as to what articles are covered by the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 89; Dec. Dig. § 50.*]

3. SUBROGATION (§ 17*) — ATTACHMENT OF MORTGAGED PERSONALTY — PAYMENT OF MORTGAGE DEBT.

Where property is covered by a valid chattel mortgage, subsequent creditors of the mortgagor cannot proceed by attachment against such mortgaged property until the mortgage is paid or the mortgagee satisfied. And where a creditor is confronted in his attachment proceedings by a mortgagee in possession of the property, under a prior mortgage, and pays the mortgagee the amount due thereunder, such attaching creditor is subrogated to the rights of the mortgagee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 44-46; Dec. Dig. § 17.*]

4. CHATTEL MORTGAGES (§ 201*)—MORTGAGEE IN POSSESSION—ATTACHMENT—BURDEN OF PROOF.

Where a mortgagee is in full possession of the mortgaged property by consent of the mortgagor, and a creditor of the mortgagor seeks possession of the mortgaged property, under a junior attachment lien, on the ground that part of the property in the mortgagee's possession is not covered by the mortgage, the burden is not on the mortgagee to prove that all the property in his possession is included in the mortgage, but is upon the attaching creditor to show such fact. But the rule is otherwise where the attaching creditor is in possession under an attachment lien, and a mortgagee seeks possession of the property on the ground that the property is covered by his mortgage, which is prior to the attachment lien. In such case the burden is on the mortgagee to identify and prove what property is covered by the mortgage. This rule is based upon the fundamental principle that one who alleges a cause of action must prove it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 860; Dec. Dig. § 201.*]

Commissioners' Opinion, Division No. 2. Error from Pottawatomie County Court; A. M. Baldwin, Special Judge.

Action by the Bell-Wayland Company against G. P. Wilson. The Miller-Mitscher Company intervenes. Judgment for intervener, and plaintiff brings error. Reversed and remanded.

Edward Howell, of Shawnee, for plaintiff in error. Lydick and Eggerman, of Shawnee, for defendant in error.

HARRISON, C. This action grew out of conflicting claims against a stock of mer-

chandise owned by one G. P. Wilson. Wilson was indebted to one W. F. Caudle on promissory notes aggregating \$185 secured by chattel mortgage on his stock of merchandise. He also owed \$101.98 to the Bell-Wayland and \$226 to the Miller-Mitscher Company on accounts. The mortgage was executed on the 26th, and filed on the 27th, day of January, 1909. On May 5, 1909, the Bell-Wayland Company brought suit in the justice court and attached Wilson's stock of goods. But, before the order of attachment was served, Wilson had turned over his entire stock of merchandise to the mortgagee, Caudle, in satisfaction of the mortgage, and Caudle had possession of same when the constable attempted to levy the order of attachment. Thereupon a controversy arose between Caudle, the mortgagee, and the Bell-Wayland Company, the attaching creditor; and, in order to avoid a replevin action by the mortgagee, the Bell-Wayland Company paid Caudle the amount due under the mortgage, with a view thereby of subrogating itself to the rights of the mortgagee. Thereafter the goods were sold under the order of attachment for \$500. After rendering judgment on the account, the justice of the peace paid to the Bell-Wayland Company the amount recovered, and also the amount due on the mortgage. There was a balance still left in the hands of the justice of the peace, which was paid over to another creditor; but there is no controversy as to that balance by either party to this action. But, about the time that the Bell-Wayland Company began its attachment proceedings in the justice court, the Miller-Mitscher Company, intervener herein, began attachment proceedings in the county court for the amount due on its account. When the sheriff attempted to serve the order from the county court, he found that the constable had already served the order from the justice court, and was informed that the Bell-Wayland Company had paid off the mortgage and subrogated itself to the rights of the mortgagee. He thereupon executed the order from the county court and made his return to show, "Served subject to the mortgage and other attachment lien." After the money had been paid to the Bell-Wayland Company in satisfaction of the mortgage, the Miller-Mitscher Company intervened in the justice court against the Bell-Wayland Company for the amount of the mortgage, claiming that its attachment lien was prior to the mortgage. The justice court rendered judgment against the intervener, whereupon the intervener, Miller-Mitscher Company, appealed to the county court. After the appeal to the county court, it appears that the county judge made a finding wherein he held that the mortgage was invalid, and permitted the sheriff's return to be amended so as to strike out the portion which showed that the order had been levied

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

subject to the mortgage. The sheriff's return, however, could not change the legal rights of the parties. It does not appear, from the record, whether this was an ex parte hearing, or how the matter was brought up; but thereafter the special judge, who tried the case, rendered judgment in favor of intervener and against the Bell-Wayland Company for the amount received under the mortgage, and from this judgment the Bell-Wayland Company appeals the case here. The record shows some discrepancies as to dates; but the material question involved is whether the mortgage constituted a prior lien to the Miller-Mitscher Company's attachment, and whether the Bell-Wayland Company was in law subrogated to the rights of the mortgagee.

[1] The issue between the parties appears to be whether the Bell-Wayland Company had in law subrogated itself to the rights of the mortgagee. That the Bell-Wayland Company had paid Caudle the amount due on the mortgage is not questioned; but the Miller-Mitscher Company maintains that the Bell-Wayland Company did not pay off and satisfy the mortgage, as required by law, in order to legally subrogate itself to the rights of the mortgagee, but merely purchased the mortgage and had the notes assigned to it, and bases its right of recovery on this distinction.

Section 3455, Wilson's Rev. & Ann. Stat. (section 4129, Comp. Laws 1909), provides: "Every person having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed."

Section 3456, Id. (section 4130, Comp. Laws 1909), provides: "One who has a lien, inferior to another upon the same property, has a right: (1) To redeem the property in the same manner as its owner might, from the superior lien; (2) to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby."

Section 3457, Id. (section 4131, Comp. Laws 1909), provides: "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

Section 3587, Id. (section 4431, Comp. Laws 1909), provides: "Personal property mortgaged may be taken under attachment or execution issued at the suit of the creditor of a mortgagor."

Section 3588, Id. (section 4432, Comp. Laws 1909), provides: "Before the property is so taken the officer, on execution, or attachment creditor, must pay or tender to the mortgagee, the amount of the mortgage debt and interest, or must deposit the amount

thereof with the county treasurer, payable to the order of the mortgagee. * * *

Under the provisions of these statutes, we can see no merit in the distinction upon which appellee bases its right of recovery. Under the circumstances of this case, the Bell-Wayland Company could not be placed in the position of a mere purchaser of the mortgaged notes, or a speculator in mortgages. He was an attaching creditor; and, when he undertook to satisfy his debt by attaching the property, he was confronted by the mortgagee with a prior lien, and was forced to either abandon his attachment proceedings or satisfy the mortgage; and we are aware of no statute or decision which specifically prescribes the manner in which the mortgage may be satisfied other than the statute above quoted.

In *Dodder v. Moberly*, 28 Okl. 334, 114 Pac. 714, wherein an interpleader sought to dissolve an attachment on the ground that the attaching creditor had not paid, or offered to pay, a mortgage which the interpleader held, this court, through Chief Justice Turner, held: "On the part of Shive, the interpleader, it is contended that the court erred in overruling his motion to dissolve the attachment, made after the jury had by their verdict sustained his interplea. In this we concur. On the coming in of the verdict, the jury, in effect, having found that the attached property was covered by the prior mortgage of Shive, that neither plaintiffs nor the sheriff, before levying the writ, had paid or tendered to him the amount of the debt and interest thereby secured, or deposited said money with the county treasurer to his order, as provided by Snyder's Stats. of Okl. of 1909, §§ 4431, 4432, it was the duty of the court, sua sponte (18 En. Pl. & Pr. 431), to dissolve the attachment, order the property returned, and tax plaintiffs with the cost of the attachment and the cost of the interplea. This for the reason that, as Shive had a prior lien on the property, the plain letter of the statute was violated by the levy. *Ellis v. Smith*, 25 Okl. 234, 105 Pac. 653; *Moore v. Calvert et al.*, 8 Okl. 358, 58 Pac. 627."

It is very clear from the above decision and the authorities therein cited that it is mandatory, upon the part of the attaching creditor, to pay off and satisfy a prior mortgage before he can proceed under the attachment. Now the primary purpose of this law, as intended by the statutes and observed by the above authorities, is not so much to detach the lien created by a mortgage or remove the burden from the property which the mortgage places thereon, but to satisfy the mortgagee's claim—to protect him in his claim and secure him against loss. Hence it could not be material, under the circumstances of this case, whether the Bell-Wayland Company satisfied the mortgage debt one way or another; the purpose of the stat-

ute being to protect the mortgagee and to give to the party who satisfies the mortgage lien the same rights which would have accrued to the mortgagee.

[4] Now the validity of the mortgage was not seriously questioned in the trial. In fact, the special judge who tried the case seems, without objection by either party, to have disregarded the finding of the regular judge that the mortgage was invalid, and to have rendered judgment for intervener, not upon the ground of the invalidity of the mortgage, but upon the ground that the evidence failed to show that the property covered by the mortgage was the same property that was attached. But the record shows clearly that the Wilson "stock of merchandise" was covered by the mortgage in question, and that he so treated it and turned it over to the mortgagee; that, when the constable went to levy the attachment, he found the mortgagee in possession of the entire stock, found the building closed, and the door locked, and the key in the possession of the mortgagee—in fact, found the mortgagee in complete possession of the entire stock—and that he had already advertised it for sale, to satisfy his mortgage, by posting notices as required by law. It had already been turned over to him as the property covered by the mortgage. This, in the absence of fraud, would raise a presumption in favor of the mortgagee's right to the property; at least, it should put an attaching creditor upon inquiry; and, if there were any articles in the stock not covered by the mortgage, the burden was upon the attaching creditor to allege and show such fact. It must be observed that the mortgagee had no title to the property, although in possession. He merely had a lien to secure his debt, and a right to sell the property in satisfaction of the debt.

In *Moore v. Calvert*, 8 Okl. 358, 58 Pac. 627, this court held: "A chattel mortgagee has no title to the mortgaged property, even after he has taken possession for condition broken, but merely a lien thereon, and his possession is that of a trustee for the sale of the property and the proper application of the proceeds." Also *Hixon v. Hubbell*, 4 Okl. 224, 44 Pac. 222.

In *Nichols v. Bishop*, 12 Okl. 250, 70 Pac. 188, it was held: "A defective description in a chattel mortgage is cured by taking possession of the mortgaged property before other rights attach thereto, and no particular mode of taking possession is required; but there must be an actual transfer of possession, in so far as the same is subject to possession and control."

It is seen from the foregoing decisions: First, that the mortgagee, being in possession and control of the property, has only a trustee's right beyond the lien created by his mortgage; second, that any defective description of the property (such as is urged here as to the failure of the mortgagee to show whether there was any property other

than that covered by the mortgage included in the stock of goods) is cured by taking possession of the mortgaged property before other rights attach thereto.

[2] Hence, when the intervener asserted that the property was not accurately described in the mortgage, and that the mortgagee had possession of property not included in the mortgage, the burden was upon him to prove such assertion. The rule would be otherwise, however, if the attaching creditor were in possession and the mortgagee should bring an action for possession. This rule is based upon the never-questioned principle that he who alleges a cause of action must prove it. The court, therefore, was in error in placing the burden of proof upon the mortgagee, or upon the party subrogated to his rights. The record shows clearly that the mortgaged property was taken possession of before any rights accrued under the attachment proceedings, but does not show whether the accounts claimed by either of the two creditors were made before or after the execution of the mortgage. It is silent as to when the debts were created. The reasonable inference is that the mortgage was executed and on file before such debts were created, having been of record since January 27th, and the proceedings not begun until May 5th. In further considering the validity of the mortgage, it must be observed that this mortgage does not come within the rule applied to mortgages on stocks of merchandise which give the right to sell and replenish the stock, as this mortgage specifically provides that the mortgagor shall not sell or dispose of any of the property without written consent of the mortgagee, and that, if any of the property is sold or disposed of without such written consent, the mortgagee shall have the right to take immediate possession of the property covered. The mortgage appears to be valid on its face. It described the property as one stock of goods consisting of dry goods, groceries, canned goods, racket goods, flour, and feed, free and clear of any lien or incumbrance of any kind, located on lot 4, block 3, in the town of Maud, Okl.

[3] Under the weight of authorities, such a description of a stock of goods is sufficient. *Nichols v. Bishop*, supra; *Cobbey on Chattel Mortgages*, §§ 155-188; *Jones on Chattel Mortgages*, § 65, and authorities cited. The mortgagee being in possession of the property under a valid mortgage and under circumstances which raised no legal presumption of fraud, the Bell-Wayland Company, being an attaching creditor, had a perfect right to subrogate itself to the rights of the mortgagee; and, having done so by satisfying the mortgage, the burden was not upon it to prove its right to the property.

The judgment is therefore reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(37 OKL. 43)

FOOTE et al. v. TOWN OF WATONGA.

(Supreme Court of Oklahoma. Feb. 18, 1918.)

*(Syllabus by the Court.)***1. PUBLIC LANDS (§ 39*)—TOWN SITES—STATUTORY PROVISIONS.**

The devolution of title to lots on town sites in the Cheyenne and Arapaho country reserved for county seat purposes by the Secretary of the Interior is governed by sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the town site laws of the state of Kansas as modified by Act Cong. March 3, 1891, c. 543, 26 Stat. 1026.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-99; Dec. Dig. § 39.*]

2. CONSTITUTIONAL LAW (§ 19*)—STATUTES (§ 218*)—CONSTRUCTION—PRACTICAL CONSTRUCTION BY OFFICERS.

The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 19; * Statutes, Cent. Dig. §§ 294, 295; Dec. Dig. § 218.*]

3. PUBLIC LANDS (§ 39*)—RESERVATION FOR COUNTY SEAT.

The authority to reserve not to exceed one-half section of land in each county in the Cheyenne and Arapaho country for county seat purposes conferred upon the Secretary of the Interior by section 17 of the act of March 3, 1891 (chapter 543, 26 Stat. 1026), supra, embraced the power to set aside for public purposes such lots or parcels of ground situated upon such townsite as, in the judgment of the Secretary, would be necessary for the municipal needs and conveniences of a county seat town.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-99; Dec. Dig. § 39.*]

4. LIMITATION OF ACTIONS (§ 11*)—AGAINST WHOM AVAILABLE—MUNICIPAL CORPORATIONS.

The generally accepted doctrine is that the maxim, "Nullum tempus occurrit regi," is not restricted in its application to sovereign states or governments, but that its application extends to and includes public rights of all kinds, and that it applies to municipal corporations as trustees of the rights of the public, and protects from invasion and encroachment the property of the municipality which is held for and devoted to public use, no matter how lax the municipal authorities may have been in asserting the rights of the public.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

5. ESTOPPEL (§ 62*)—EQUITABLE ESTOPPEL—PERSONS ESTOPPED—MUNICIPALITY.

Where a municipality holds title to a town lot for the use of the general public, an estoppel in pais, based on a failure of its officers to do their duty, cannot ordinarily be asserted against it to defeat the rights of the public in the property.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151-153; Dec. Dig. § 62.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Blaine County; James R. Tolbert, Judge.

Suit by H. A. Foote against W. B. Piper,

and the town of Watonga, Blaine county, was made a party defendant, and filed an answer and cross-petition. From a judgment in favor of the town, the plaintiff and original defendant bring error. Affirmed.

Seymour Foose and I. H. Lookabaugh, both of Watonga, for plaintiffs in error. Baker & Bloss, of Watonga, for defendant in error.

BREWER, C. This suit involves the title to lot 1, block 48, in the town of Watonga, Blaine county, Okl.

On March 1, 1906, H. A. Foote filed his petition against W. B. Piper in the district court of Blaine county, asserting ownership to the lot in question, and asking that a quitclaim deed to the property be declared a mortgage, tendering payment, and for cancellation. Later the town of Watonga came into the case with leave of court as a party defendant, and filed an answer and cross-petition asserting title, both legal and equitable, to the lot in question as against both Foote and Piper, each of whom filed answer to the cross-petition; and the case was tried on the issues raised thereon; the controversy between Foote and Piper not being developed. Each of these original parties appear to have made common their cause against the town of Watonga. A jury was waived, and the case was submitted to the court upon the evidence, and a finding made and judgment entered in favor of the town, from which both Foote and Piper join in an appeal as plaintiffs in error. The lot in controversy is a part of the government town site of Watonga, which town site was reserved for county seat purposes by the Secretary of the Interior, in pursuance of the act of Congress of March 3, 1891, which, among other things, provided for the opening to settlement of the Cheyenne and Arapaho country. It seems that the Secretary of the Interior, in carrying out the duty cast upon him by the foregoing act of Congress, caused the land set apart for county seat purposes to be surveyed and platted into streets, alleys, and lots; that on this plat various lots or parcels of ground were shown to be reserved for public uses by marking upon such lots as they appeared upon the plat the purpose for which the reservations were intended; thus the reservation for high school building was marked on the plat "H. S. B." The lot intended for a post office was marked, "U. S. P." Other tracts, "For Parks," etc. The lot in controversy was marked "Town Bldg." This plat, after being approved by the Governor of the territory, was attached to the townsite application for entry, and filed with the Register of the General Land Office, who caused a copy thereof to be filed in the office of the register of deeds of the county of which the town site became the county seat.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The contention of plaintiff in error is (1) that the attempted reservation is absolutely void and of no force and effect, for the reason that the patent issued by the United States conveyed title to the entire town site to the probate judge, "in trust for the several use and benefit of the occupants" thereof, and that neither the Secretary of the Interior nor the town site commissioners had any authority to set aside any part thereof for the public use; and, further, that, if such authority existed, the marking on the plat, and the action of the commissioners as shown in this case, was not sufficient to constitute a reservation or dedication to public use.

(2) Plaintiffs in error further contend that even if the authority existed to make the reservation, and if what was done was sufficient to constitute a reservation or dedication, that the town is estopped from asserting its rights because of certain conduct of its agents and officers.

[1-3] The first contention of plaintiffs in error cannot be sustained. The identical question presented was raised in the case of *Mary E. League v. Town of Taloga*, 129 Pac. 702, decided by this court on _____ day of _____, 1912, and not yet officially reported. That case was in the same Indian country, the town site was reserved about the same time under the same laws, rules, and regulations, and the lot in question was reserved as in the instant case by marking thereon "Town Bldg.," so that on this branch of the case the former opinion is controlling. The syllabus is as follows: "The devolution of title to lots on townsites in the Cheyenne and Arapaho country reserved for county seat purposes by the Secretary of the Interior is governed by sections 2387 and 2388, Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1457, 1458), and the townsite laws of the state of Kansas as modified by the act of Congress of March 3, 1891 (26 Stat. 1026). The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for their judicial interpretation. The authority to reserve not to exceed one-half section of land in each county in the Cheyenne and Arapaho country for county seat purposes conferred upon the Secretary of the Interior by section 17 of the act of March 3d, supra, embraced the power to set aside for public purposes such lots or parcels of ground situated upon such townsites as, in the judgment of the Secretary, would be necessary for the municipal needs and conveniences of a county seat town."

[4, 5] This lot in question was reserved and dedicated to the use of the public in 1892. The plaintiff Foote went on the lot about the year 1900, and built a stable, and kept some animals on it. He states his

labor to have been of the value of \$15, and that he used \$5 worth of material. Thereafter, about March 11, 1901, about the time a railroad came through the town, he leased the lot to a lumber company for \$5 a month, and this company erected some sheds and a small building for an office. The lot was assessed and taxes collected for the years 1901-1906. The \$20 for material and labor represents plaintiff's expenditure on the lot. These sums were expended and the possession taken before there had been any taxes assessed and collected, so that fact did not influence him to take possession of the lot and improve it. His possession was wrongful, and the facts disclosed do not operate as an estoppel against the municipality, holding the lot for the use of the public. The general rule is stated thus by Judge Dillon, in his work on *Municipal Corporations* (5th Ed.) Vol. 3, § 1193: "A careful examination of the decisions shows that the generally accepted doctrine is that the maxim, 'Nullum tempus occurrit regi,' is not restricted in its application to sovereign states or governments, but that its application extends to and includes public rights of all kinds, and that it applies to municipal corporations as trustees of the rights of the public, and protects from invasion and encroachment the property of the municipality which is held for and devoted to public use, no matter how lax the municipal authorities may have been in asserting the rights of the public." There are a number of cases recognizing the principal of an estoppel in pais as applicable to municipalities in their public character, but an examination will show that they are exceptional cases resting upon such a state of facts, that to do justice requires that an equitable estoppel shall be asserted even against the public. Judge Dillon thinks such cases form a law unto themselves. *Dillon, Municipal Corporations*, 1194. It is not necessary to review those decisions, nor to consider how far, if at all, this court would follow them. The facts of this case do not justify the application of the principles they involve. Indeed, in this case, there is no legitimate element of an estoppel. The taxing of the lot was after the plaintiff had taken possession, and put the small improvements on it. There was no authority in law to levy and collect the tax against the public property. The fact that it was done had no influence on plaintiff in going upon it. Nor could it under the circumstances work to his advantage. *Town of San Leandro v. Le Breton*, etc., 72 Cal. 170, 18 Pac. 405; *Philadelphia Mfg. & T. Co. v. City of Omaha*, 63 Neb. 280, 88 N. W. 523, 93 Am. St. Rep. 442; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; 8 *Dillon, Municipal Corp.* (5th Ed.) § 1194; citation of authorities and note.

PER OURIAM. Adopted in whole.

(37 Okl. 60)

LYNCH et al. v. FRANKLIN.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 116*)—INDIANS (§ 15*)—INDIAN LANDS—CONVEYANCE—AFTER-ACQUIRED TITLE.

On October 16, 1905, Emmer Sisney made and entered into a contract with A. & F., a firm of lawyers, whereby she agreed to pay them the sum of \$1,500 for their services in prosecuting her claim for enrollment by intermarriage in the Choctaw Tribe of Indians. She also on the same date made them a warranty deed to "all of my alienable land, commonly known as surplus lands, being the entire amount of land to which I am entitled in the Choctaw and Chickasaw Nations, as a member of the Choctaw Tribe of Indians, by intermarriage, exclusive of homestead." She also at the same time contracted to make them a subsequent deed, in lieu of and as a complement to said deed, as soon as she was enrolled, no matter when, or where, said land should be allotted. At the time she was not a member of said tribe, her claims to citizenship having been repudiated. She was not in possession of any land, nor had she selected any as an allotment. On November 26, 1906, she was enrolled as a citizen of said nation by intermarriage, and on December 12th she was allotted certain lands which on December 14th she conveyed by warranty deed to plaintiffs in error. F., having purchased A.'s interest in the contract, and the land conveyed by the first deed, brings suit to quiet title against Sisney's last grantees. *Held:*

(a) She not having been enrolled as a member of the tribe, and not being in possession of any land, and not having selected any allotment, the contract and deed of October 16, 1905, were void, and operated to pass no title whatever to the grantees therein named.

(b) The act of Congress of April 21, 1904 (chapter 1402, 33 Stat. 204), removing restrictions of allottees in the Five Civilized Tribes, did not apply to the grantor named in said deed for that she was not an allottee, nor had the land at that time been allotted.

(c) Said contract and deed being prohibited by the laws of the tribe, the treaties and the laws of the United States were therefore insufficient to pass the subsequently acquired title to said property.

(d) The "doctrine of relation" as found in section 642, Mansf. Dig. of Arkansas, cannot be invoked in this case, for it was not only necessary to pass title to subsequently acquired property that the contract at the time of its execution must be valid, but also the property sought to be conveyed must be alienable, and the grantor must have the right to execute the same, none of which conditions existed in this case.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330; Dec. Dig. § 116; * Indians, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—"ALLOTTEE"—"ALLOTMENT."

An "allottee," as the word is used in the act of April 21, 1904 (chapter 1402, 33 Stat. 199-204), is one, generally an Indian, freedman, or adopted citizen of a tribe of Indians, to whom a tract of land out of a common holding has been given by, or under the supervision of, the United States, while an "allotment," is the tract of land thus set aside for and awarded to an allottee.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 1, pp. 343, 344; vol. 8, p. 7573.]

Commissioners' Opinion, Division No. 1. Error from District Court, McClain County; R. McMillan, Judge.

Action by Wirt Franklin against C. S. Lynch and another to cancel a deed and quiet title. Judgment for plaintiff, and defendants bring error. Reversed, and cause dismissed.

This controversy involves the title to 110 acres of land located in section 34, township 9 N., range 4 W., in McClain county, Okl.

The facts, as stated in the petition, are as follows: On October 16, 1905, Emmer Sisney was asserting her right to membership in the Choctaw Tribe of Indians by intermarriage. This right was denied by the Choctaw Nation, and her citizenship claim was repudiated. She was not in possession of any lands in either the Choctaw or Chickasaw Nations. On the date above named she entered into a contract with Apple & Franklin, a firm of lawyers, by which she employed them to represent her in her application for enrollment as a citizen of the Choctaw Nation, and agreed to pay them \$1,500 for their services, and as a part of the contract of said employment she agreed to execute a good and sufficient warranty deed to her entire surplus or alienable portion of her allotment in case she was allotted, wherever selected, or filed upon, and as soon as the selection was made after final enrollment. She also at the same time executed an instrument purporting to be a warranty deed to S. A. Apple and Wirt Franklin to lands described as follows: "All of my alienable land, commonly known as surplus lands, being the entire amount of land to which I am entitled in the Choctaw and Chickasaw Nations, as a member of the Choctaw Tribe of Indians by intermarriage, exclusive of homestead." She also promised at the same time to make and deliver a good and sufficient warranty deed to the said Apple & Franklin in lieu of and as a complement to this deed. Thereafter Apple and his wife, by warranty deed, conveyed whatever interest they may have had in said land to Wirt Franklin, and the contract of employment and this purported deed constitutes the title of the plaintiff in error. This deed from Sisney to Apple & Franklin was filed for record December 13, 1906.

Emmer Sisney was enrolled as a member of the Choctaw Tribe of Indians by intermarriage, and such enrollment approved by the Secretary of Interior on November 26, 1906, and the land in controversy allotted to her on December 12, 1906, and certificate and patent were thereafter issued to her. On December 14, 1906, she conveyed said lands to C. S. Lynch and O. A. Simmons, the plaintiffs in error, by warranty deed, for a consideration of \$1,500, which deed was recorded on December 19, 1906. The orig-

inal contract of employment, the various deeds, hereinabove mentioned, together with an affidavit by S. A. Apple that Emmer Sisney selected the lands in controversy as her surplus allotment on December 12, 1906, are all attached to and made a part of the petition. Defendants filed a general and special demurrer to the petition on the grounds that, first, said petition does not state facts sufficient to constitute a cause of action; second, said petition discloses upon the face thereof that the conveyance under which plaintiff claims was made prior to the enrollment of Emmer Sisney and prior to the selection of said land in allotment and at a time when said lands were not alienable, and at a time when the contract to convey the same was void, as being a violation of the Choctaw-Chickasaw Supplemental Agreement, and previous treaties and agreements between the said Nations and the United States; and, third, because it appears from said petition and the exhibits thereto attached and made a part thereof that said pretended conveyance was made prior to the selection of said land in allotment, and could amount to nothing more than a selling of an individual interest in tribal lands, the making of which was prohibited by the laws of the United States and the treaties and agreements of said tribes. The demurrer was overruled, and the defendants elected to stand upon the same. Judgment was rendered in favor of the plaintiff, and cancelling the deed to the defendants, as a cloud upon the title of the plaintiff Franklin. Exception was duly taken to the ruling and judgment of the court, and time allowed in which to prepare and serve a case-made.

Cottingham & Bledsoe, of Oklahoma City, for plaintiffs in error. Hugh A. Ledbetter, of Ardmore, for defendant in error.

ROBERTSON, C. (after stating the facts as above). [1] Plaintiffs in error rely upon the following assignment of error, viz.: "The lands in controversy not being in possession of Emmer Sisney; and she not having been enrolled as a member of the tribe, and not having selected the lands in allotment at the time of the execution of the contract of employment, and purported conveyance, on October 16, 1905, the same is void, and operated to pass no title whatever to the grantees therein, and judgment therefore should have been for defendants below." If this contention is correct, the judgment of the trial court is wrong, and must be reversed. Defendant in error insists, however, that this conveyance made on October 16, 1905, was valid, and cites Act Cong. April 21, 1904, c. 1402, 33 Stat. 204, which, among other things, provides: "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized

Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed; * * *" and that this conveyance was made under and by virtue of chapter 27, Mansf. Dig. Ark., which was put in force in the Indian Territory February 19, 1903 (Act Feb. 19, 1903, c. 707, 32 Stat. 841; 10 Fed. Stat. Ann. 130). Plaintiffs in error, however, contend that this provision is not applicable to the case at bar, for that such statute had reference only to "allottees," and that Emmer Sisney was not an "allottee" at that time, and that, therefore, such provision does not apply to her, and also that said statute applied only to lands that had in fact been "allotted," neither of which conditions existed in this case at that time.

[2] An "allottee," as the word is used in the statute above quoted, is one, generally an Indian, freedman, or adopted citizen of a tribe of Indians, to whom a tract of land, out of a common holding, has been given by, or under the supervision of, the United States; while an "allotment" is the tract of land thus set aside for, and awarded to, an allottee. It is and has been during all the time allotments of land in severalty to Indians have been made the policy of the government to place the individual Indian or allottee in possession of an allotment free of deeds, liens, or other incumbrances, and all attempts at alienation, before restrictions have been removed and especially before allotment, have been frowned upon and uniformly denied by the government. In this case no allotment had been selected by Emmer Sisney at the time the contract and deed were executed, nor was she an allottee. She was, in fact, not even a member of the tribe, and therefore she had no legal or equitable estate in and to any of the land in said Nations, which she could then convey. *Goat v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841; *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; *McLaughlin v. Ardmore Loan & Trust Co.*, 21 Okl. 173, 95 Pac. 779; *Smith & Steele v. Martin*, 28 Okl. 836, 115 Pac. 866; *Howard v. Farrar*, 28 Okl. 490, 114 Pac. 605; *Combs et al. v. Miller*, 24 Okl. 576, 103 Pac. 590; *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041.

Section 11 of the Choctaw-Chickasaw Agreement (Act July 1, 1902, c. 1362, 32 Stat. 641) reads as follows: "There shall be allotted to each member of the Choctaw and Chickasaw Tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment provided herein, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary

of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations; to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements." It was held by the court in *McLaughlin v. Ardmore Loan & Trust Co.*, 21 Okl. 173, 95 Pac. 779, that section 2118, Revised Statutes of the United States, which provides a penalty for "every person who makes settlement on any lands belonging, secured or granted by treaty with the United States to any Indian Tribe," etc., applied, and that a sale of such land by a member of the Choctaw Tribe of Indians, holding possession of the same in excess of that permitted by section 16, c. 1362, Act Cong. July 1, 1902, 32 Stat. 643, to a person not a member of the tribe, was absolutely void. See, also, *Combs et al. v. Miller*, supra; *Howard et al. v. Farrar*, 28 Okl. 490, 114 Pac. 695.

The Choctaw-Chickasaw Treaty of July 1, 1902 (32 Stat. L. 641), provides:

"(15) Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

"(16) All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent," etc.

"(19) It shall be unlawful after ninety days after the date of the final ratification of this agreement for any member of the Choctaw or Chickasaw Tribes to enclose or hold possession in any manner, by himself or through another, directly or indirectly, more lands in value than that of three hundred and twenty acres of average allottable lands of the Choctaw and Chickasaw Nations, as provided by the terms of this agreement, either for himself or for his wife, or for each of his minor children, if members of said tribes; and any member of said tribes found in such possession of lands, or having the same in any manner enclosed after the expiration of ninety days after the date of the final ratification of this agreement, shall be deemed guilty of a misdemeanor."

In *Bledsoe v. Wortman et al.*, 129 Pac. 841, decided at the December, 1912, term of this court, not yet officially reported, Mr. Justice Williams, speaking for the court, says: "Said sections 14 and 15 were construed by this court in *Allen v. Oliver*, 31 Okl. 356, 121 Pac. 226, wherein it was held that: 'Under sections 14 and 15 of the Cherokee Agreement, approved July 1, 1902 (Act July 1, 1902, c.

1375, 32 Stat. 717), all lands allotted to members of the said tribe, except homesteads, were alienable in five years after issuance of patent, and not prior thereto.' This holding by this court was approved by the Eighth Circuit Court of Appeals in *Truskett et al. v. Closser*, 198 Fed. 835. Not only were non-citizens and corporations prohibited by said section 2118 of the Revised Statutes of the United States from making a settlement on any lands belonging to the Cherokee Tribe, or from surveying or attempting to survey such lands or designating any of the boundaries by marking trees or otherwise, independent of the performance of official duties under direction of the United States government or tribal government, but also after the passage of the act of July 1, 1902 (32 Stat. c. 1375, p. 716), and the expiration of 90 days from said date, it was not permissible for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself, or through another, directly or indirectly, more lands in value than that of 110 acres of average allottable lands of the Cherokee Nation, either for himself or his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of 90 days after the date of ratification of said act, he was to be deemed guilty of a misdemeanor. Obviously *Jess Fulsom*, a Cherokee citizen, to whom the land in controversy was allotted, had no authority to alienate said land, except by virtue of said act of April 21, 1904, removing the restrictions upon the alienation of the lands of all allottees of either of the Five Civilized Tribes, who are not of Indian blood, except minors and except as to homesteads. The limitation or prohibition under said section 14 is that lands allotted to citizens shall not be alienated by the allottee or his heirs, and under said section 15 the grant, which also operated as a limitation or restriction against alienation to such date, is that lands allotted to members of said tribe shall be alienable in five years after issuance of patent. The restriction removal provision of said Act April 21, 1904, c. 1402, 33 U. S. Stat. 189, harmonizes with said sections 14 and 15, as restrictions upon the alienation of the lands of allottees and of the Five Civilized Tribes, who are not of Indian blood, except minors and as to homesteads, are removed. Prior to April 21, 1904, the lands of the Cherokee Nation were absolutely inalienable until allotted to members of said tribe. Said act of April 21, 1904, sought to take off this restriction as to certain lands of allottees not to remove restrictions upon the distributive share of any members of the tribe, even prior to allotment. The restriction which had been imposed upon the allottees by said sections 14 and 15 was only in part removed. Such parties became allottees

only after the land had been allotted to them. In *McKee v. Henry*, 201 Fed. 74, decided by the United States Circuit Court of Appeals, Eighth Circuit, at its September, 1912, term, that court said: "The Muskogee or Creek Tribe was in the nature of a dependent nation, and, as our national public buildings belong to the nation, the citizen, while he has an interest in them, has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever severally, or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe through its members would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts v. Fisher*, 224 U. S. 640 [32 Sup. Ct. 580, 56 L. Ed. 928], that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress. The enrolling primarily established the right of citizenship and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in the individual Indian. * * *

In the opinion it is further said: "When the allotment was made for the first time, the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided." If no such interest had vested that could be inherited until after the allotment, certainly no equitable title to the land in controversy vested until allotment. It was upon the theory that an equitable estate had vested before the issuance of patent that conveyances prior to the issuance of patent were sustained. *Goat et al. v. United States*, supra; *Godfrey v. Iowa Land & Trust Co.*, supra [21 Okl. 293, 95 Pac. 792]; *McWilliams Inv. Co. v. Livingston et al.*, supra [22 Okl. 884, 98 Pac. 914]. This holding confirms our construction of the provision from the act of April 21, 1904, above set out. If prior to allotment the members of the tribe had no such vested interest as could be inherited, obviously Congress did not remove the restrictions against alienation so as to permit such member to alienate his land before it was allotted to him; for in the exercise of its guardianship over the Indians, it was certainly the contemplation of the federal government that in the alienation of his land he should receive a consideration therefor commensu-

rate with its reasonable value. If by removal of restrictions he were permitted to sell his prospective allotment when it was a mere float * * * giving him the right to no specific property, such a policy would not be conducive to bring about salutary results in favor of the member of the tribe. To the end that he should receive his equal share in the allotment of lands, and the same be alienated under conditions that would reasonably bring him a consideration commensurate to its reasonable value."

These cases answer fully the questions presented by the record here, for at the time the original deed was executed, to wit, October 16, 1905, *Emmer Sisney* had not been enrolled as a member of the tribe of Indians, and was not in possession of, nor had she selected, any land as her allotment, and for the further reason that said lands, the description of which was afterwards ascertained, had not at that time been allotted, but were owned by the tribes as common property, and the still further reason that the attempted conveyance was void because prohibited, not only by the laws of the Choctaw and Chickasaw Nations, but also by the treaties made by the United States with said Nations, as well as the laws of the United States then in force. These facts being true, and they are not denied, it follows that the attempted conveyance of October 16, 1905, was void, and the purported conveyance to *Apple & Franklin* cannot be validated, ratified, or given any force or virtue by reason of "the doctrine of relation" as provided for by chapter 27, Mansf. Dig. Ark., supra, for that, before such doctrine can be made to operate, it must appear that the original contract was valid or of such validity as to have conveyed the title at the time it was made, neither of which conditions, as has been seen, existed. We have carefully read the case of *Sup. Oil & Gas Co. v. Meahlin*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942, also the case of *Gann v. Ball*, 26 Okl. 28, 110 Pac. 1067, cited by counsel for defendants in error in support of his contentions, but find that in the first the allotment was selected as provided in the Cherokee allotment agreement more than one year prior to the making of the contract sued on, and in the *Gann-Ball* Case the validity of the contract was asserted and urged by both parties, and was not questioned in any way before the court, and that neither case, therefore, is of any value to us in the matter under consideration.

In view of the foregoing, it is apparent that the court erred in overruling the demurrer interposed in the court below. Therefore the judgment of the district court of McClain county should be reversed, and the cause dismissed.

PER CURIAM. Adopted in whole.

(36 Okl. 622)

SHIPMAN v. BROWN et al.

(Supreme Court of Oklahoma. Jan. 7, 1913.)

*(Syllabus by the Court.)*1. EXECUTORS AND ADMINISTRATORS (§ 537*)
—ACTION AGAINST PRECEDING ADMINISTRATOR—RECOVERY OF ASSETS.

Under section 100, Indian Territory Statutes 1899 (section 43, Manst. Dig. Ark.), an administrator de bonis non may proceed at law against his delinquent predecessor, and his sureties, or either of them, to recover any part of the estate the preceding administrator may have in his possession.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2453, 2485-2581; Dec. Dig. § 537.*]

2. EXECUTORS AND ADMINISTRATORS (§ 535*)
—RES JUDICATA—ACCOUNTING BY EXECUTOR.

A decree, duly entered on a final accounting by a county court, in the absence of mistake or fraud, and from which no appeal has been taken, is conclusive on the administrator and the sureties on his bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2462-2475, 2503; Dec. Dig. § 535.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Washington County; T. L. Brown, Judge.

Action by J. T. Shipman, administrator, against Georgia A. Brown and the United States Fidelity & Guaranty Company. Judgment for defendants, and plaintiff brings error. Reversed, and judgment entered for plaintiff in error.

In the year 1905 Georgia A. Brown, née Stokes, was appointed administratrix of the estate of her deceased husband, James H. Stokes, by the United States Court for the Northern District of the Indian Territory. She qualified according to law, giving bond in the sum of \$4,000, for the faithful performance of her duties as such administratrix, with the United States Fidelity & Guaranty Company as surety. On January 31, 1908, said administratrix filed her resignation in the county court of Washington county, and at the same time filed her final report as such administratrix, which report, after a hearing thereon, was taken under advisement by the court until March 18, 1908, when a decree was entered accepting her resignation and appointing plaintiff in error as her successor, and also adjudging said Georgia A. Brown, née Stokes, to be indebted to the estate of said James H. Stokes, deceased, on said final accounting in the sum of \$4,016.54, and ordering her to pay the said amount to plaintiff in error, her successor, and also directing plaintiff in error to bring suit against her and the surety company, on the official bond of the said administratrix, on account of breach of duty and noncompliance with the terms and conditions of said bond. Suit accordingly was instituted in the district court of Washington county by plaintiff in error against de-

fendants in error on April 27, 1908. On May 26, 1908, defendants filed an answer denying liability. On May 27, 1908, plaintiff filed a general demurrer to the answer of defendants, which was overruled by the court, to which ruling plaintiff excepted. On July 13, 1908, plaintiff replied, and thereafter, on February 19, 1909, the cause came on for trial. After the evidence had all been introduced, and before any decision had been reached as to the merits of the controversy, the defendants asked leave to file an amended answer, which leave was granted, over objections of plaintiff, and the amended answer filed on February 20, 1909. The cause was tried to the court, without a jury; and after the filing of the amended answer on February 20, 1909, as aforesaid, the matter was taken under advisement by the court until February 4, 1910, nearly a year from the date of the filing of the amended answer, at which time defendants, by leave of court, without withdrawing their answer, filed a demurrer to plaintiff's petition, setting up as grounds thereof: First, that the court had no jurisdiction of the subject-matter of this action; second, that the petition did not state a cause of action; third, that there was a defect of parties plaintiff; fourth, that the plaintiff had no legal capacity to sue. To the filing of this demurrer at the time and under the circumstances, the plaintiff objected, which objections were overruled by the court, and an order was thereupon entered sustaining said demurrer and dismissing plaintiff's petition, from which order and judgment of the court the plaintiff appeals.

W. A. Chase, of Nowata, W. A. Sipe, of Tulsa, and Veasey & Rowland, of Bartlesville, for plaintiff in error. Dennis H. Wilson, of Tulsa, John H. Kane, of Bartlesville, and Frank B. Burford, of Guthrie, for defendants in error.

ROBERTSON, C. (after stating the facts as above). Plaintiff contends that the court erred in permitting defendants' demurrer to be filed: First, because it was not filed within the time required by statute; second, because it was filed after issues of fact were joined by defendants' answer to the plaintiff's petition and plaintiff's reply, and after trial of those issues, and without the answer having been withdrawn. Plaintiff also contends that the court erred in sustaining defendants' demurrer, and further that the court erred in refusing to sustain plaintiff's demurrer to defendants' answer, and that the court also erred in refusing to sustain the objection of plaintiff to the introduction of testimony under the answer.

From a consideration of the record, and the questions raised in the petition in error, it becomes unnecessary to discuss the vari-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ous assignments of error urged by plaintiff in error, in the order stated above; and, without deciding the questions of practice raised in the assignment, we will take the case on its merits without reference to the minor questions involved, inasmuch as the result will be the same in either event, and the consideration of the questions of procedure, under the peculiar facts of the case, will add no value to the opinion, and will have no weight or influence with us in reaching our conclusion.

The first question to be disposed of is the sufficiency of the petition, as challenged by defendants' demurrer on several grounds, all of which, however, have been waived, except that of the incapacity of the plaintiff to sue; and in support of this objection they rely upon the theory that, under the laws of Arkansas, an administrator de bonis non has no authority to sue his predecessor's bondsmen. Defendants urge, in support of this contention, that the bond in this case, having been executed under the laws in force in the Indian Territory prior to statehood, must be construed and the rights of the parties fixed by those laws, which, so far as this case is concerned, will be conceded, and, if that be true, then that the question of the power of an administrator de bonis non to sue the sureties on his predecessor's bond has been fully defined and denied by the statutes in force in the Indian Territory at the time the bond in this case was executed, and cites, in support of such contention, section 99, Ind. Terr. Stat. 1899 (section 42, c. 1, Mansf. Dig. Ark.), which reads as follows: "If any executor or administrator die or resign, or his letters be revoked, he, or his legal representatives shall account for, pay and deliver to his successor, or the surviving or remaining executor, all money and personal property, and all the rights, credits, deeds, evidences of debt and papers of any kind belonging to the estate of the deceased, at such time and in such manner as the court shall order; and such court, in case of a refusal to comply with such order shall have power to enforce the same by attachment." Also section 199 (Ind. Ann. St. 1899, § 256): "The bond of any executor or administrator may be sued on at the instance of any legatee, distributee, creditor or other person interested, in the name of the state, to the use of such legatee, distributee, creditor or other person interested, for any mismanagement, waste or other breach of the condition of such bond; and the party to whose use suit is brought shall have judgment against the executor or administrator, and his securities, for the whole value of the estate mismanaged or wasted, with costs of suit; and the amount so recovered shall be distributed by the court in the same manner as if the same had been accounted for by the executor or administrator."

In addition to the above sections of the

statute, reference is made to the cases of Williams v. Cubage, 36 Ark. 307, Finn v. Hempstead, 24 Ark. 112, and State v. Rottaken, 34 Ark. 144, as supporting their contention. The foregoing are all the authorities cited in the brief; and it is evident to our minds, after a careful consideration of the subject, that these authorities not only do not support that idea, but, on the contrary, support the very opposite view.

[1] Counsel have also evidently overlooked section 100, Ind. Terr. Stat. 1899 (section 43, c. 1, Mansf. Dig. Ark.), which reads as follows: "The succeeding administrator or the remaining executor may proceed at law against the delinquent and his securities, or either of them, or any other person having in his possession any part of the estate." This section furnishes specific authority, in itself, to warrant plaintiff in bringing and maintaining this action. Besides, the cases cited in our opinion sustain this view. Thus in Williams v. Cubage, supra, the suit was to recover the value of assets belonging to the estate which plaintiff's predecessor had wasted, not to recover the value of assets in his predecessor's hands, such as this action was brought for. In that case the rule announced is that an administrator de bonis non cannot sue his predecessor for waste. In Finn v. Hempstead, supra, the identical rule was announced and followed, and in addition the right of an administrator de bonis non to sue the predecessor's bondsmen was recognized by the court in the following language, found on page 118 of 24 Ark.: "By statute, an administrator de bonis non may invoke the aid of the probate court against his predecessor, or his legal representatives, to obtain possession of effects unadministered, or he may bring suit upon the bond of the delinquent predecessor." While in State v. Rottaken, supra, the same rule was followed, and in addition it was specifically held that, under the sections above quoted (42 and 43, Mansf. Dig. Ark.), an administrator de bonis non could maintain an action on his predecessor's bond for the value of the assets remaining in the latter's hands. On this point the court says: "Section 42 (Mansf. Dig.) (section 99, Ind. Terr. Stat.), cited above, makes it the duty of the executor or administrator, when his administration terminates in his lifetime, to account for, pay, and deliver the assets remaining in specie, under the order of the probate court, to his successor; and, in the event he dies before he is discharged or removed, it makes it the duty of his legal representative to account for, pay, and deliver so much of the assets as remain in specie and were capable of being identified and ascertained, in like manner, to such successor. His legal representative is required to give bond for the faithful discharge of his duties, one of which, nominated in the bond, is: He shall 'well and truly do and perform all other matters and things

touching' his administration, 'that are or may be prescribed by law, or enjoined' on him 'by the lawful order, sentence, or decree of any court having competent jurisdiction.' One of the duties appertaining to his administration, prescribed by law, is to account for, pay, and deliver to such successor the assets belonging to the estate of the deceased, represented by his testator or intestate, in his lifetime, and remaining in specie, when thereunto required by the probate court. If he fails to do so, he is liable to a suit on his executorial or administration bond. *On the other hand, if the administration of the first executor or administrator terminates in his lifetime, it is his duty to account for, pay, and deliver to his successor such assets under order of the court, and, if he fails to do so, is liable to an action on his bond.*" (Italics ours.)

This being an action by Shipman, plaintiff in error, to recover from his predecessor and her surety the value of the assets found to be in her hands by the decree of the county court of Washington county entered on March 18, 1908, and from which no appeal was prosecuted, and which has become conclusive on the defendants in error and each of them (Greer v. McNeal, 11 Okl. 519, 69 Pac. 891; Southern Surety Co. v. Burney et al., 126 Pac. 748), it therefore follows that the court erred in sustaining defendants' demurrer to the petition. It will be remembered that the above-mentioned demurrer was filed and presented to the court after the testimony was all in, and after the issues had been joined by the filing of an answer by the defendants, and while the same was yet pending and had not been withdrawn. We have treated it herein as though it had been filed in due time, and have purposely ignored the gross irregularities attending its filing and consideration by the court in order that no question concerning the sufficiency of the allegations of the petition might be hereafter urged.

[2] The next and only other question presented, deserving consideration, is the alleged error of the court in overruling plaintiff's demurrer to defendants' answer; and for this purpose we will consider the objection as to the legal sufficiency as going to the amended, as well as to the original, answer. It will be remembered that this was a suit to recover from a preceding administratrix and her surety a sum found to be due and owing the estate from the administratrix on a final accounting in the county court. The answer admitted all the allegations of plaintiff's petition, except only the conclusion of defendants' liability. As an affirmative defense, it was sought to show that the decree of the county court (a certified copy of which was attached to and formed a part of plaintiff's petition) was false. It attempts to show that the money, found by the county

court to be due the estate, belonged to the administratrix individually, and not to the estate; that it was derived from the sale of her own property; and that she did not know, when she executed her petition to the county (probate) court to sell said property, that the price therein named was \$6,000, but thought it was \$300 only. The answer does not attempt to show that there was any mistake on the part of the county court in determining the balance due from her to the estate. She did not ask that the decree be corrected in that respect; neither did the answer allege that the decree was entered as a result of a mistake in entering and including, in the final account as administratrix, money belonging to her individually. The decree, therefore, not having been entered against her on account of fraud or mistake, and no appeal ever having been taken from the judgment of the county court fixing the amount due the estate, the same has become final and conclusive, not only as to the administratrix, but also as to her surety. Greer v. McNeal, supra; Southern Surety Co. v. Burney, supra, and the authorities therein cited.

It thus appears that the action of the court in overruling the demurrer to the answer was error, and the same objection being later urged by plaintiff in objecting to the introduction of evidence under said answer, and which was also overruled by the court, was also error. From a careful consideration of the entire case, it appears that plaintiff was entitled to judgment which he was prevented from obtaining on account of the errors hereinbefore noticed.

Therefore the judgment of the district court of Washington county should be reversed, set aside, and held for naught, and a judgment should be entered here in favor of the plaintiff in error and against the defendant in error, Georgia A. Brown, née Stokes, in the sum of \$4,016.54, and against the defendant in error the United States Fidelity & Guaranty Company in the sum of \$4,000, with interest thereon at 6 per cent. per annum from March 18, 1908, and for all costs, and that execution issue thereon as soon as the mandate herein be received by the clerk of the district court of Washington county.

PER CURIAM. Adopted in whole.

(14 Aria. 410)

MIAMI COPPER CO. v. STROHL

(Supreme Court of Arizona. March 6, 1913.)

1. APPEAL AND ERROR (§ 732*)—ASSIGNMENT OF ERROR—SUFFICIENCY—RULES.

Under Supreme Court Rule 8 (126 Pac. xi), requiring all assignments of error to distinctly specify each ground of error relied upon and the particular ruling complained of, and providing that an assignment of error to the overruling of a motion for a new trial based

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon more than one ground will not be considered specific unless each ground is separately stated, assignments of error as to the grounds submitted in a motion for a new trial, separately stated and with such particularity as to apprise the court of the precise error complained of, but without an assignment of error to the overruling of the motion itself, were sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3022-3024; Dec. Dig. § 732.*]

2. APPEAL AND ERROR (§ 864*)—SCOPE OF REVIEW—APPEAL FROM JUDGMENT ONLY—ORDER DENYING NEW TRIAL—"INTERMEDIATE ORDER."

Civ. Code 1901, par. 1493, gives an appeal to the Supreme Court from any final judgment of the district court in civil cases; paragraph 1214 gives it appellate jurisdiction of orders refusing a new trial; paragraph 1213 provides that upon appeal it may review any intermediate order involving the merits and necessarily affecting the judgment; and paragraph 1443, declares that, in case the complaint is not answered, the summons with the return of service, the complaint with an indorsed memorandum of default, and a copy of the judgment shall constitute the judgment roll, and that in other cases it shall be constituted by the summons, pleading, copy of the judgment, and orders relating to a change of parties. *Held*, that an order overruling a motion for a new trial was not an "intermediate" order, such order being one made between the commencement of the action and its final determination, incident to and during its progress, which does not determine the cause but only some intervening matter relating thereto; that orders involving the merits and necessarily affecting the judgment, but not expressly made appealable, might be reviewed on appeal from the judgment alone, when they form no part of the judgment roll but are made a part of the record by filing therein either a statement of facts or a transcript of the court reporter's notes as provided by Laws 1907, No. 74; but that, on appeal from the judgment alone without error assigned appearing in the judgment roll or in the intermediate orders, the court could not review an order denying the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3716, 3717.]

3. APPEAL AND ERROR (§ 2*) — CONTROL OF LEGISLATURE.

While the Legislature cannot enlarge or circumscribe the constitutional jurisdiction of the Supreme Court, the manner of taking and perfecting appeals and presenting questions for review are proper matters of statutory regulation, and there must be a substantial compliance with the statute to give jurisdiction to the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-7, 1882, 2421; Dec. Dig. § 2.*]

4. COSTS (§ 105*) — SECURITY — GROUNDS OF RIGHT.

An application for security for costs, being dilatory, is looked upon with disfavor by the courts.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 400, 403-417; Dec. Dig. § 105.*]

5. COSTS (§ 112*) — RIGHT TO SECURITY — WAIVER—"TRIAL."

Security for costs is a personal privilege which may be waived; and a motion for security not made until after one trial of the cause is had—using the word "trial" to mean the judicial examination of the issues between the

parties, whether issues of law or fact—is too late.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 463-468; Dec. Dig. § 112.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7095-7103.]

Appeal from District Court, Gila County; Ernest W. Lewis, Judge.

Action by Cloyd Strohl against the Miami Copper Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Alderman & Elliott, of Globe, for appellant. Geo. B. Hill and Norman J. Johnson, both of Globe, for appellee.

FRANKLIN, C. J. The appellee, as plaintiff, commenced an action in the court below to recover damages for personal injuries sustained by him while in the employment of appellant, the defendant. The defendant was, at the time of the injury, engaged in the operation of a mine, and the plaintiff was employed as a pumpman, whose duties required him to descend in the shaft of defendant's mine by means of a cage furnished by defendant. The gravamen of the plaintiff's complaint is that defendant failed in its duty as an employer to furnish him with safe appliances and a safe place by which to enter those parts of the mine where his duties as a pumpman required him to go. The defendant provided a cage for sending its employees down to the different levels of the mine, and, when the shifts were ended, the cage was used for bringing them to the surface. At other times this cage was used by the defendant in hoisting and lowering the steel drills used by the men in their mining operations. These drills were of varying lengths, ranging from two to six feet long and from one inch to nearly three inches thick, sharpened to a fine point at one end. When lowered into the mine the drills were placed upright in the cage, the unsharpened end resting on the floor thereof. On May 17, 1910, while the plaintiff was in the cage being lowered in the shaft to his place of work, he was injured quite severely by means of one of these steel drills having fallen through a hole in the floor of the cage; the sharp end of the drill projecting upwards and into the shaft; the plaintiff being injured by this drill piercing through the floor of the cage and going through his leg. The defendant denied the allegations of the complaint and alleged affirmatively the defense of assumption of risk and contributory negligence. There were two trials before a jury. On the first trial the jury disagreed, and on the second trial the jury returned a verdict in favor of the plaintiff for \$1,000. After the first trial, but before the second, the defendant made application that plaintiff give security for costs, and the court made an order requiring such security, but plaintiff filed an affidavit alleging his inability to do so. The defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes;

ant questioned the sufficiency of the showing made by plaintiff, and moved to dismiss the suit for failure to comply with the order of the court. The motion to dismiss was denied. After judgment the defendant moved for a new trial; the motion being overruled. This appeal is taken from the judgment alone. There is no appeal from the order overruling the motion for a new trial.

The grounds of the motion embraced alleged errors of the trial court occurring during the progress of the trial in admitting and rejecting evidence; in giving and refusing instructions; the insufficiency of the evidence; that the verdict is contrary to law and was given under the influence of passion and prejudice.

[1] The appellant makes 12 assignments of error in this court. The first error assigned involves the denial of the defendant's motion to dismiss the case based on the defendant's failure to give the security for costs. The other 11 assignments go to the insufficiency of the evidence to support the verdict, errors of the trial court committed during the progress of the trial in the admission and rejection of evidence, and the giving and refusing instructions to the jury. The appellant does not—*ipse dixit*—assign as error the action of the court in overruling the motion for a new trial, and for this reason the appellee insists that, with the exception of the first assignment, the other alleged errors are insufficiently assigned and this court may not consider them; the reason advanced being that, as these assignments present errors which are good grounds for a new trial, if the ruling of the court denying the motion is not in the very words assigned as error, the error of the court, if any, is waived by the failure to so assign.

In support of this contention appellee cites the following cases: *Turner v. Franklin*, 10 Ariz. 188, 85 Pac. 1070; *Putnam v. Putnam*, 8 Ariz. 182, 24 Pac. 320; *Greer v. Richards*, 8 Ariz. 227, 32 Pac. 266; *Tietjen v. Sneed*, 3 Ariz. 195, 24 Pac. 324; *Lemon v. Ward*, 3 Ariz. 219, 73 Pac. 448; *County of Maricopa v. Osborn*, 4 Ariz. 331, 40 Pac. 318. An examination of these cases will show that they are not exactly in point on the question now before the court. In the first three cases there was no motion for a new trial made in the lower court, and the Supreme Court decided that the remedy appellants sought in the appellate court may have been awarded to them in the court below on motion for a new trial, and until appellant has exhausted his remedies in the lower court he will not be heard to complain on appeal. No such motion having been made, the alleged errors could not be considered. In the last three cases the motion for a new trial, and the ruling thereon, were not preserved in a bill of exceptions or statement of the case as required by the statute;

hence the appellate court could not consider the error in the ruling upon the motion as the matter was not before them.

The rules of this court, in substance, provide that all assignments of errors must distinctly specify each ground of error relied upon and the particular ruling complained of. If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered distinct and specific by this court unless each ground is separately and distinctly stated in the assignment of errors. Rule 8 (126 Pac. xl), Assignments of Errors.

While appellant did not assign that the court erred in overruling defendant's motion for a new trial, it did assign as error such grounds embraced in the motion which it relies upon for a reversal of the judgment. These grounds are separately and distinctly stated in the assignment, and with such definiteness and particularity as to fully apprise this court and the opposing counsel of the precise error of the lower court of which complaint is made. While it would, perhaps, be more logical procedure and better practice to assign specifically error upon the action of the court in overruling the motion for a new trial, and then follow with each ground of the motion relied upon being separately and distinctly stated, we think a phrasing of the assignment omitting the first requirement, but complying with the latter, is sufficient. It would be a somewhat harsh and technical rule to hold that, where the appellate court and the opposing counsel are fully advised of the errors relied upon for a reversal by a separate, specific, and distinct statement of each ground of the motion for a new trial relied upon in the assignment, the failure to formally make the general assignment that the court erred in overruling the motion for new trial precludes this court from a consideration of such alleged errors. This is emphasized by the rules of practice prescribed by the court providing that, if the assignment of error be that the court erred in overruling a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors.

In speaking of the rules with reference to assignments of error, the Supreme Court of Texas has said: "It is to be borne in mind that the statute and rules which require errors to be assigned were intended primarily for the relief of the appellate courts, and to secure a prompt dispatch of the business that should be brought before them. They should be given a reasonable and practicable construction, and not one calculated to embarrass suitors in the appellate tribunals by unnecessary restrictions."

Land Co. v. McClelland Bros., 86 Tex. 191, 23 S. W. 1103, 22 L. R. A. 105.

The object sought by the statute and rules is to clearly apprise the appellate court and the opposite party of the specific error of which complaint is made. *S. L. S. W. Ry. Co. v. McArthur*, 96 Tex. 65, 70 S. W. 317.

We think the assignments before us meet the requirements.

[2] The appellee next contends that the appeal being prosecuted from the judgment only, and there being no appeal from the order of the court overruling the motion for a new trial, this court is precluded from reviewing any of the appellant's assignments of error, except the first, for the reason that such alleged errors are properly embraced in and presented to the trial court in the motion for a new trial, and unless the order of the court in overruling the motion is appealed from this court has no jurisdiction to consider the same. This contention is sound.

[3] While it would not be competent for the Legislature to enlarge or circumscribe the appellate jurisdiction of this court as prescribed by the Constitution, the method and manner of taking and perfecting appeals and presenting questions for review are, however, peculiarly matters of statutory regulation, and there must be a substantial compliance with the statute provided in order to confer jurisdiction upon the appellate court.

The appellant is charged with the duty of taking his appeal and presenting his case for review in the manner provided by law, and error in this regard affects the jurisdiction of this court.

The question is presented: Can this court on an appeal from the judgment alone review an order denying a motion for a new trial on any of the grounds properly embraced in such motion?

In the Compiled Laws of Arizona, 1864-1871, p. 438, embodying what is known as the Howell Code, it was provided:

"Sec. 349. An appeal may be taken to the Supreme Court from the district courts in the following cases: (1) From the final judgment rendered in an action or special proceeding commenced in those courts or brought into those courts from another court; (2) from an order made granting or refusing a new trial or which affects a substantial right in an action or proceeding."

"Sec. 346. Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment."

These provisions were carried into the Compiled Laws of 1877 (sections 2785, 2782).

The Supreme Court of Arizona, in the case of *Grounds v. Ralph*, 1 Ariz. 227, 25 Pac. 648, having the foregoing provisions of the statute in force, said: "There is no appeal here from the order denying a new tri-

al. The appeal is from the judgment only. In such cases the only thing before this court is the judgment roll, as defined by statute, and, no matter how many other papers the clerk may choose to embody in the transcript, this court cannot act upon anything but the judgment roll." While in this case the appeal was dismissed because the amount of the judgment was not sufficient to give the appellate court jurisdiction, and the language used was perhaps not necessary to a decision of the cause, nevertheless it is a strong intimation of what the construction of that statute would have been had the appeal been properly before the court.

Coming to the Revised Statutes of 1897 (Civ. Code), we find the law regulating appeals materially changed. Paragraph 846 provides: "An appeal or writ of error may be taken to the Supreme Court from any final judgment of the district court rendered in civil cases." Paragraph 593: "The Supreme Court shall have jurisdiction to review upon appeal, or other proceedings provided by law: (1) A judgment in an action or proceeding commenced in the district courts, when the matter in dispute exceeds two hundred dollars, or when the possession of land or tenements is in controversy, or brought into that court from another court, and to review, upon the appeal from such judgment, any intermediate order involving the merits and necessarily affecting the judgment. (2) An order, granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding."

It is clear from the foregoing provisions that the Supreme Court had appellate jurisdiction from final judgments only. *Bogan v. Pignataro*, 3 Ariz. 383, 29 Pac. 652. And it is equally clear that on an appeal from a final judgment the Supreme Court had jurisdiction, under this statute, to review an order of the lower court overruling a motion for a new trial, for the statute made provision therefor. Paragraph 846, above quoted, gave the right of appeal from a final judgment, and paragraph 593 provided what the court had jurisdiction to review upon an appeal from such final judgment, which included a review of the order overruling the motion for a new trial.

In *Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499, the court, having the Revised Statutes, 1887, before it, said: "Whether paragraph 593 is to be construed as giving the right of appeal directly from an order overruling a motion for a new trial or not, we think there can be no question but that the appeal from the judgment carries with it jurisdiction to review all orders affecting the judgment, including an order refusing a new trial, and that until final judgment is entered the aggrieved party is not required to take his appeal."

The present appeal is governed by Revis-

ed Statutes of Arizona, 1901, and material changes from the Revised Statutes, 1887, will be noticed.

"Par. 1493. An appeal or writ of error may be taken to the Supreme Court from any final judgment of the district court rendered in civil cases, and from any of the orders mentioned in section 1214, which the Supreme Court has jurisdiction to review."

"Par. 1214. The Supreme Court shall also have jurisdiction to review upon appeal or other proceedings provided by law the following orders of the district court: (1) An order refusing a new trial or granting a motion in arrest of judgment. (2) Any order affecting a substantial right, made in any action when such order in effect determines the actions and prevents judgment from which an appeal might be taken. (3) A final order affecting a substantial right made in special proceedings or upon summary application in any action after judgment. (4) An order or judgment in habeas corpus cases. If any of the above orders or judgments are made or rendered by a judge, the same are reviewable as if made by a court."

"Par. 1213. Upon the appeal or writ of error the Supreme Court may review any intermediate order involving the merits and necessarily affecting the judgment."

An order overruling a motion for a new trial is not an intermediate order such as is mentioned in paragraph 1213. An order made before judgment in a cause is intermediate; that is to say, it is an order made between the commencement of the action and its final determination, incident to and during the progress of the action, which determines, not the cause, but only some intervening matter relating to the cause.

"Intermediate" is defined in Cyc. vol. 22, p. 1588, as follows: "Lying or being in the middle place or degree or between two extremes; coming or done between; intervening; interposed; interjacent."

Proceedings on motion for a new trial are independent of the judgment and collateral thereto, and an appeal from the order on the motion is independent of appeal from the judgment. Haynes, New Trial & Appeal, § 2; Molt. v. Northern Pac. Ry. Co., 44 Mont. 471, 120 Pac. 809; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468.

All orders made in cases before judgment, other than those enumerated, are therefore unappealable, for, as the manner of taking an appeal is purely statutory, the right cannot be extended to cases not included within the statute. And it follows that such non-appealable orders involving the merits and necessarily affecting the judgment may, under the terms of the statute, be reviewed on appeal from the judgment alone when properly presented in the record.

In the Penal Code of Montana, § 2321 (Rev. Codes, § 9416) it is provided: "Upon an appeal taken by the defendant from a judg-

ment, the court may review any intermediate order, or ruling involving the merits, or which may have affected the judgment"—this section being identical with section 1259 of the Penal Code of California. In construing the scope of review by the appellate court under this statute, the Montana court said: "Under the old Code, the appellate court was limited in its review to any decision of the court or any intermediate order made in the progress of the case; under the new Code, upon appeal from a judgment, the court may review not only an intermediate order, but likewise a ruling involving the merits, or which may have affected the judgment. In the use of the word 'ruling' the Legislature evidently intended to permit a review of the actions of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case on an appeal from the judgment only. Such rulings had not been included in the interpretation of the words 'decision or intermediate order' in the older statute; that is, a distinction has been recognized between a decision and a ruling. The older statute is therefore to be distinguished from the new. In the one, a decision or order was regarded as a determination by the court in the settlement of the controversy or matter before it; while in the new Code a ruling means generally a settlement or decision of a point of law arising upon the trial of the case, without necessarily the force or solemnity of a judgment or order. Black, Law Dict.; Cent. Dict. We do not hold that under section 2321, above cited, matters may be reviewed on appeal from a judgment only when they are embraced within any of the provisions of the law made for granting new trials (section 2192), except errors in the decision of questions of law arising during the course of the trial. The latter errors can, however, be reviewed either upon appeal from the judgment, or from an order overruling a motion for a new trial." State v. O'Brien, 18 Mont. at page 5, 43 Pac. at page 1091; State v. Black, 15 Mont. 143, 38 Pac. 674.

In other jurisdictions, under statutes regulating appeals similar to those of Arizona, notably Wisconsin, it has been many times held that on appeal from the judgment rendered in the court below the record presented does not authorize the appellate court to review the order denying the motion for a new trial. Allport v. Kelley, 2 Mont. 343; Latimer v. Morrain, 43 Wis. 107; Weis v. Schoerner, 53 Wis. 72, 9 N. W. 794; Morris v. Niles, 67 Wis. 341, 30 N. W. 353; Guetzkow v. Smith et al., 105 Wis. 94, 80 N. W. 1109; Gade v. Collins et al., 8 S. D. 322, 66 N. W. 466. Subsequent to the construction of the statute by the Wisconsin court the laws were revised. In the revision of 1911 in that state, the appeal from the order on motion for a new trial was abolished, mat-

ters embraced in the judgment roll enlarged, and the scope of review on an appeal from the judgment alone greatly extended, and in many ways the appellate procedure in that jurisdiction has been simplified.

Our conclusion is that, on an appeal from the judgment alone, the judgment roll as constituted by the statute is brought before the court for review, and, also, any nonappealable intermediate order involving the merits and necessarily affecting the judgment. If such order forms no part of the judgment roll, it must be made a part of the record in the case by filing therein either a statement of facts or a transcript of the court reporter's notes as provided by chapter 74 of the laws of Arizona, 1907.

Paragraph 1443, R. S. Arizona 1901, provides what constitutes the judgment roll: "(1) In case the complaint be not answered by any defendant, the summons, with the return of service, and the complaint, with a memorandum indorsed on the complaint that the default of the defendant in not answering was entered, and a copy of the judgment. (2) In all other cases the summons, pleading and a copy of the judgment, and any orders relating to a change of the parties."

As we have observed, what shall constitute the record on appeal and what method shall be pursued to present matters for review is wholly within the field of the law making power to provide. A right denied by the statute this court cannot grant. If the policy of the law may seem to dignify mere formality as a matter of substance, bear in mind that we are not the framers of the law; but it remains the plain duty of this court to administer with fidelity the law as it is written.

In the revision of the Code now in progress, it would be well for the Legislature to consider a phrasing of the appellate procedure to the end that suitors may not be embarrassed in presenting their causes to this court upon considerations which may appear somewhat trifling. But whatever of technicality there may appear to be under such circumstances is in the law, and not in its administration.

[4] We have considered the assignment on the ruling of the court denying the defendant's motion to dismiss the case and find no reversible error. An application for security for costs, being dilatory, is looked upon with disfavor by the courts.

[5] It is a personal privilege which may be waived, and, unless the defendant insists upon the security promptly and adheres to it persistently, he will be held to have lost it. *Muldoon v. Place*, 2 Ariz. 4, 6 Pac. 479; 6 Enc. Plead. & Practice, 686; *Sciutti v. Union Pac. Coal Co.*, 30 Utah, 462, 85 Pac. 1011, 8 Ann. Cas. 942; *St. L. Alton & T. R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103.

Under the view we take of it, the sufficiency of the showing for and against the giving of the security may not be determined. On the proper showing the defendant may require the security at any time before trial. Paragraph 1551, R. S. Ariz. 1901. The motion for the security was not made until one trial of the cause was had. This we think was too late. We have not in mind the meaning of the word "trial" as used in the statute with reference to the giving of security for costs, as it is not necessary to interpret its meaning on this appeal; that is to say, whether the motion to be in time must be made before the trial of an issue of law or before the trial of an issue of fact. But the general definition is: "A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact." 38 Cyc. 1267.

In view of such an application being considered a personal privilege, and being looked upon with disfavor as dilatory, it behooves the defendant who requires the security to bring his application clearly within the terms of the statute. The appellant has not done so in this case.

The appeal being from the judgment alone, and no error assigned being apparent in the judgment roll or in the intermediate order presented for review, the judgment of the lower court is affirmed.

CUNNINGHAM and ROSS, JJ., concur.

(14 Ariz. 427)

OCHOA v. TERRITORY.

(Supreme Court of Arizona. March 12, 1913.)

CRIMINAL LAW (§ 1159*)—REVIEW—CONFLICTING EVIDENCE—VERDICT.

Where the evidence is conflicting, even though the Supreme Court entertains a doubt of defendant's guilt, the verdict of the jury will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8074-3083; Dec. Dig. § 1159.*]

Appeal from District Court, Maricopa County, before Justice Kent.

Epifanio Ochoa was convicted of rape, and he appeals. Affirmed.

Alexander & Christy, of Phoenix, for appellant. G. P. Bullard, Atty. Gen., for the Territory.

ROSS, J. The appellant appeals from a judgment of conviction of the crime of a statutory rape. The reporter's transcript of the testimony was filed in this court on February 27, 1911, and the record on appeal was filed on March 17, 1911.

Nothing has been done by the appellant towards calling the attention of the court to any errors in his trial. We have ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amined the testimony and the record, and are unable to discover that the rights of appellant were in any way prejudiced. While there is a sharp conflict in the evidence, the matter was passed upon by a jury, and, even though we may entertain a doubt of the defendant's guilt from reading the cold record, we are precluded from reversing the judgment of the trial court on that ground. The jury saw the witnesses, and heard them testify and their opportunities of arriving at a just verdict were better than ours.

The judgment of the lower court is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(14 Ariz. 429)

STATE ex rel. GILMORE, County Atty., v. HIGH.

(Supreme Court of Arizona. March 12, 1913.)

1. JUSTICES OF THE PEACE (§ 8*)—CONSTITUTIONAL PROVISIONS—TERM OF OFFICE.

Under Const. art. 6, § 1, making justices of the peace judicial officers, and article 7, § 11, fixing their term at two years, such term cannot be changed by the Legislature.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 11-14, 56; Dec. Dig. § 8.*]

2. OFFICERS (§ 2*)—STATUTORY PROVISIONS—APPOINTMENT AND TENURE.

An office created by statute is wholly within the control of the Legislature, and the term, method of appointment, and compensation may be altered at pleasure, and the compensation may be taken away without abolishing the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. JUSTICES OF THE PEACE (§ 2*)—CONSTITUTIONAL AND STATUTORY PROVISIONS—NUMBER.

Under Const. art. 6, § 9, providing that the number of justices of the peace to be elected in precincts shall be provided by law. Laws 1912, c. 42, § 1, approved May 16, 1912, amending Civ. Code 1901, par. 948, and paragraph 1051, so as to direct the board of supervisors of the several counties to redistrict their counties into precincts, and to provide one justice of the peace for each precinct, is valid.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

4. OFFICERS (§ 54*)—HOLDING OVER—GENERAL ELECTIONS—PRECINCT OFFICERS—CONSTITUTIONAL PROVISIONS.

The Constitution having made no provision for the election of precinct officers until the first general state election, November, 1914, under Const. art. 22, § 6, providing that all * * * precinct officers shall hold office until their successors qualify, justices of the peace in office at the admission of the state into the Union hold their offices till the qualification of their successors elected at the general election in November, 1914, in spite of Laws 1912, c. 42, legislating them out of office on January 1, 1913.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 74, 75; Dec. Dig. § 54.*]

5. CONSTITUTIONAL LAW (§ 24*)—CONSTITUTIONAL PROVISIONS—OPERATION AS TO LAWS PREVIOUSLY IN FORCE.

All territorial laws not repugnant to the Constitution are expressly kept in force until altered or repealed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.*]

6. STATUTES (§ 101*)—GENERAL AND SPECIAL LAWS—JUSTICES OF THE PEACE.

Const. art. 6, § 1, makes a justice of the peace a judicial officer, and article 7, § 11, fixes two years as his term of office. Article 22, § 8, provides that all precinct officers at the time of admission into the Union shall hold their respective offices until their successors have qualified; and article 6, § 9, provides that the number of justices to be elected in the precincts shall be provided by law. The territorial laws (Civ. Code 1901) in force in the absence of constitutional or statutory provision as to the method of choosing the successors of precinct officers provide by paragraph 973, subd. 2, that county supervisors may divide counties into such precincts as may be required by law, and change and create others as required, and by subdivision 17, that they may fill by appointment all vacancies in precinct offices. Laws 1912, c. 42, § 1, approved May 16, 1912, amending Civ. Code 1901, par. 948, directed supervisors to redistrict their counties into precincts, abolished all existing justice precincts, and terminated the offices of all existing justices of the peace. Held that, as Laws 1912, c. 42, § 1, was not a general law delegating power to the boards of supervisors, it was unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 118; Dec. Dig. § 101.*]

7. JUSTICES OF THE PEACE (§ 2*)—APPOINTMENT—POWER OF BOARD OF SUPERVISORS.

Boards of supervisors, as the chief legislative body of their respective counties, may, under the express provisions of Civ. Code 1901, par. 973, subd. 2, and in the exercise of a proper discretion, change the precincts of their counties or create others as convenience requires, such changes to be made so as not to remove present incumbents, and in contemplation of an election when successors will be chosen.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

8. STATUTES (§ 64*)—PARTIAL INVALIDITY—EFFECT.

The unconstitutionality of Laws 1912, c. 42, § 1, approved May 16, 1912, amending Civ. Code 1901, par. 948, so as to direct county supervisors to redistrict their counties into precincts, does not render unconstitutional section 2, amending Civ. Code 1901, par. 1051, providing one justice of the peace for each precinct, since they are not dependent upon each other for validity, but treat of distinct and separable subjects.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

Appeal from Superior Court, Cochise County; Fred Sutter, Judge.

Quo warranto by the State of Arizona, on the relation of W. G. Gilmore, County Attorney, against M. C. High. Judgment for relator, and defendant appeals. Reversed.

J. W. Ross and W. B. Cleary, both of Bisbee, for appellant. W. G. Gilmore, Co. Atty., of Tombstone, and Alexander Murry, Deputy Co. Atty., of Bisbee, for appellee. Alexander & Christy, of Phoenix, amici curiae.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ROSS, J. This is an action in the nature of a writ of quo warranto instituted, on the relation of W. G. Gilmore, county attorney for Cochise county, against appellant, M. C. High. It is alleged that High was elected, at the regular November, 1908, election, justice of the peace of precinct No. 2 of Cochise county for the term of two years from January 1, 1909; that he qualified as such justice of the peace, and performed the duties thereof until January 1, 1913; that on September 3, 1912, the board of supervisors of Cochise county re-districted said county into justice precincts to take effect and be in force on the 1st day of January, 1913; that in the re-districting of said county precinct No. 2 was created with boundaries very much extended and enlarged over what was formerly known as "Precinct No. 2"; that precinct No. 2, as it existed at the time of appellant's election, was abolished by chapter 42, Laws 1st Legislature of Arizona, on August 15, 1912, to take effect on the 1st day of January, 1913, and that the term of office of appellant expired by law on the same date; that on January 3, 1913, Walter Thomas was appointed by the said board of supervisors to fill the vacancy in the office of justice of the peace in and for said precinct No. 2 so created by said board on September 3, 1912; that Thomas duly qualified and made demand of appellant for the possession of said office, which was refused; that appellant continues to usurp, hold, and exercise the said office to the exclusion of said Thomas.

The appellant interposed a general demurrer to the complaint. He also challenges the constitutionality of chapter 42, supra, and the action of the board of supervisors in its proceedings thereunder.

[1, 2] By our Constitution (article 6, § 1) the judicial power of the state is vested in a Supreme Court, superior courts, justices of the peace and such courts inferior to the superior courts as may be provided by law.

The office of the justice of the peace is one of great antiquity, and because of its ready accessibility to all of the people and its expeditious dispatch of business and the informality of its proceedings many of the states of the Union have made it a constitutional office. It is made so by our Constitution.

The law is well settled that when the term, qualifications, salary, or method of election of a judicial officer is prescribed by the Constitution the Legislature is incompetent to change, modify, or in any manner interfere with such requirements in the organic law, except as that instrument may allow. Cooley, Const. Lim. 388, and note. The same author lays down another equally well-settled rule that: "Where an office is created by statute, it is wholly within the control of the Legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be

even taken away without abolishing the office." Id.

Section 11, art. 7, of the Constitution, provides for biennial elections of state, county, and precinct officers. This section, when construed in connection with the other provisions of that instrument, we think definitely fixes the term of office of justice of the peace to two years. This term of office is constitutional, and cannot be changed by the Legislature.

[3] Section 9, art. 6, of the Constitution, provides that "the number of justices of the peace to be elected in incorporated cities, towns and precincts * * * shall be provided by law." It was in pursuance of this power conferred on the Legislature to provide by law the number of justices of the peace that chapter 42, as an amendment of paragraph 948 of chapter 1 and paragraph 1051 of chapter 3, tit. 14, R. S. Arizona 1901, was enacted. The amended sections read as follows:

"948. (Sec. 21.) On the first Monday in September, 1912, the board of supervisors of the several counties of the state shall re-district their counties into justice precincts; such re-districting of counties shall take effect and be in force on the first day of January, 1913, and all justice precincts, now in existence, are hereby declared abolished on and after the first day of January, 1913; and the terms of justices of the peace and constables now in office are hereby terminated on the first day of January, 1913."

"1051. (Sec. 124.) The officers of justices' precincts are one justice of the peace and one constable."

By this act the Legislature has undertaken to prescribe the number of justices of the peace "to be elected in incorporated cities, towns and precincts" (1) by directing the boards of supervisors of the several counties to re-district their counties into precincts, and (2) by providing one justice of the peace for each precinct. The Legislature in doing this acted within the powers granted it by the Constitution. But the act goes further and abolishes all justice precincts and terminates the terms of office of all justices and constables in the state. All these officers had been chosen under the laws of the territory of Arizona, and in the transition from the territorial government to the state government no provision for the election of precinct officers was contained in the Enabling Act and ordinance No. 2; and hence none were elected in December, 1911, at the time state and county officers were chosen.

[4] In *State v. Osborne*, 125 Pac. 888, 891, it was held that the Constitution made no provision for the election of precinct officers until the first general state election; and that they would hold office until their successors are elected at that time and qualify.

The framers of the Constitution, in order that the change of government might be effected without a suspension of any of its

functions, provided, in section 6, art. 22, that "all territorial, district, county and precinct officers who may be in office at the time of the admission of the state into the Union shall hold their respective offices until their successors shall have qualified."

[5, 6] As above stated, all state and county officers were elected in December, 1911, but not so as to precinct officers; they, having their offices by virtue of section 6, art. 22, supra, will hold until their "successors" qualify. The question is, How may these "successors" be chosen? Chapter 42 does not attempt to provide the method of filling the newly created precincts. We must therefore look to the territorial laws, for all of such laws, where not repugnant to the Constitution, are kept in force until altered or repealed, and to the Constitution itself.

Under the territorial laws (R. S. 1901, par. 973, subd. 2) boards of supervisors had power "to divide the counties into such districts or precincts as may be required by law, change the same and create others as convenience requires." Subdivision 17: "To fill by appointment all vacancies that may occur in county or precinct offices, except that of probate judge and supervisors."

Under statutes very much the same as ours, the courts of California have decided that boards of supervisors may alter, change, and erect new precincts, when "the growth of population of different parts of the state and the constant changes therein make necessary frequent changes in the size of townships," and in doing so may abolish townships altogether. But the laws of California, like the laws of the territory of Arizona, empowering the boards of supervisors to do these things were general laws, and left the duty of altering or erecting townships in the discretion of the boards of supervisors or local legislative body, as the necessities of the case arose. The right of the Legislature to provide for such changes, the California courts say, is unlimited, except that it must be done through "the medium of general law, the practical result of which is that it cannot make these changes directly, but must do so by general laws delegating the power to the boards of supervisors or local legislative bodies of the respective counties." *Proulx v. Graves*, 143 Cal. 243, 76 Pac. 1025.

Chapter 42 requires the boards of supervisors to redistrict their respective counties on the first Monday of September, 1912. It may not be done at any other time. The boards of supervisors can exercise no discretion as to the necessity for redistricting their counties; and, unless authorized to do so by other provisions of the law, they will be powerless to readjust the precincts of their counties to meet demands of increased or changed populations.

Nor had the boards of supervisors the power or right to retain intact any precinct, however well suited to the conditions of population and business of their county. Re-

gardless of all existent conditions of convenience and necessity, the Legislature, in chapter 42, blotted out of existence every precinct in the state. It did not "provide for doing so through the medium of general laws," but did it directly. This, as we understand the California decisions, it could not do. It not only abolishes all the precincts in the state, but cancels the commission of every precinct officer of the state. These officers were chosen by the electorate, and the manner of their removal from office is provided by general law; but chapter 42 ignores the usual and regular procedure and attempts by this act to perform functions that properly belonged to the local legislative body.

[7] Our conclusion is that section 948 of chapter 42 is violative of the Constitution, and therefore null and void. Nevertheless, boards of supervisors, as the chief legislative body of their respective counties, under paragraph 973, subd. 2, R. S. 1901, may, in the exercise of a proper discretion, change precincts of their counties or create others, as convenience requires. Section 948 of chapter 42, in so far as it attempts to confer this power, adds nothing to the law as it already existed. The changes in precincts should be made, however, so as not to effect the removal of the present incumbents, but in contemplation of an election when successors may be elected.

Paragraph 1051, c. 42, is not violative of our Constitution; but it cannot have immediate force and effect, for the reason that section 9, art. 6, grants power to the Legislature to prescribe by law "the number of justices of the peace to be elected," and not appointed. As we have already shown, justices of the peace cannot be elected until the general state election. It follows that those precincts with two justices of the peace will retain such officers until an election is had, at which time only one justice of the peace will be elected for each precinct.

[8] Paragraphs 948 and 1051 of chapter 42 are not dependent upon each other for validity. They treat of subjects distinct and separable. The unconstitutionality of the one does not affect the other in any substantial degree. *Cooley on Const. Lim.*, at page 247, says: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." *Price v. Anderson*, 65 Miss. 410, 420, 4 South. 96.

By the mere efflux of time all obstacles to the complete operation of paragraph 1051 will be removed, and until then its terms are suspended. *Price v. Anderson*, supra.

We feel that we ought to suggest that the scheme adopted in chapter 42 contemplates the obliteration of all precinct and township organizations heretofore existing in the territory and state and their complete reor-

ganization. All precincts are abolished, and new ones are to be formed. This act makes no provision for the preservation of the files and records and property of the old precincts. Nor is there any general law covering the case. It is true the general law provides that outgoing officers shall turn over the records and files of their offices to their "successors," and provides that the "successor" shall take jurisdiction of and dispose of unfinished business of his predecessor. But these new precincts and the officers thereof do not succeed any old precinct and its officers, and therefore are not entitled to the records and files of the abolished offices, nor to take jurisdiction of unfinished business.

Another infirmity in chapter 42, not, however, affecting its constitutionality, but exposing its impracticability, is this: Some of the boards of supervisors did not redistrict their counties on the first Monday of September, 1912, and did not take any steps whatever to comply with the terms of chapter 42. If, therefore, paragraph 948 is effective, such counties are without precincts, and without precinct officers to perform governmental duties and functions indispensable to the protection of society. Besides, every official act of such officers since the 1st day of January, 1913, has been without legal effect or force.

The judgment of the trial court is reversed, and the case is remanded, with directions to sustain demurrer to complaint.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (concurring specially). I concur in reversing the judgment in this cause. My reasons therefor I wish to state briefly.

Section 1 of chapter 42 of the regular First Session of the First State Legislature, approved May 16, 1912, is attacked as in violation of the Constitution. Said section 1 has for its purpose the amendment of paragraph 948, Rev. St. of Arizona 1901, and reads as follows: "948. (Sec. 21.) On the first Monday in September, 1912, the board of supervisors of the several counties of the state shall re-district their counties into justice precincts; such re-districting of the counties shall take effect and be in force on the first day of January, 1913, and all justice precincts, now in existence, are hereby declared abolished on and after the first day of January, 1913; and the terms of justices of the peace and constables now in office are hereby terminated on the first day of January, 1913."

Paragraph 948, which the above purports to amend, reads as follows: "948. (Sec. 21.) It shall be the duty of the boards of supervisors, when not already done, to divide their counties into justice precincts, and name the same."

Section 1 of chapter 42 recognizes that the counties are divided into precincts, and commands the boards of supervisors to redistrict their counties. This must be done by

the boards on the first Monday in September, 1912, and the order so redistricting shall take effect on January 1, 1913. That far the language of the statute is clear, and the duty to be performed is unambiguous. The dates upon which the order of redistricting shall be made, and the date upon which the new districts shall become effective, are fixed and definite. Neither the order can be made nor become operative upon any other dates. All other dates not mentioned are excluded. 36 Cyc. 1122.

The section specifically abolishes all justices' precincts in existence at the date of the act, to take effect on the 1st day of January, 1913; and the terms of the precinct officers in office at the date of the passage of the law are declared abolished, to take effect on the 1st day of January, 1913.

We have held, in *State v. Osborne*, 125 Pac. 884, that the precinct officers were elected to hold their offices until their successors are elected and qualify, and that such successors cannot be elected until the first election held under and fixed by the Constitution, viz., Tuesday after the first Monday in November, 1914, which holding we reaffirm.

The effort of the Legislature, then, in the light of the *Osborne Case*, supra, to abolish the precincts and to shorten the terms of precinct officers creates an ambiguity in section 1. A necessity therefore arises for a construction of the section.

"By the construction of a statute is meant the process of ascertaining its true meaning and application. For this purpose resort must be had not only to the language and arrangement of the statute, but also to the intention of the Legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws." 36 Cyc. 1102.

It is the duty of the court to endeavor to carry out the intention and policy of the Legislature. *Best v. Gholson*, 89 Ill. 465.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature (36 Cyc. 1106, and cases cited in note 29) and the object intended to be accomplished by it. 36 Cyc. 1110.

In applying these rules to section 1 of chapter 42, supra, the clear intention of the Legislature in passing the act was to provide new justice precincts in September that could be filed by an election held for such officers before the succeeding 1st of January. This is more evident in view of the subsequent enactment of same Legislature, passed at a subsequent session, calling and providing for an election for state, county, and precinct officers to be held on the first Tuesday after the first Monday of November, 1912. Chapter 24 of the Special Session, approved June 14, 1912. Had an election been legal if

held in November, 1912, then the precinct officers holding office at the date of admission, and at the date chapter 42 was enacted, could have no complaint that their constitutional rights to hold office until their successors should have been elected and qualified have been violated. The process of redistricting the several counties would in no manner affect their rights nor territorial jurisdiction. In view of the subsequent enactment of chapter 20, supra, it is clear that the construction placed upon section 6 of article 22 of the Constitution by the Legislature was the correct construction, viz., that the precinct officers in office at the date the state was admitted into the Union were entitled to hold their offices until their successors were elected at an election legally held under the Constitution and qualified under the laws. It is clear that the Legislature had no intention, when chapter 42, supra, was enacted, to shorten the terms of such officers, nor provide for the appointment of their successors. It is equally clear that the Legislature had no intention of redistricting any county, so that any precinct officer would be removed thereby from his office before his term expired. The difficulty arises from the fact that no election could legally be held in November, 1912; and to give effect to chapter 42, supra, would be holding that the Legislature had intentionally created vacancies in the precincts, to be filled by appointment, which is the reverse of the clear intention of the statute. We would be legislating into this section of chapter 42 words to this effect: "Justices of the peace and constables shall be appointed by the boards of supervisors of the several counties to fill such offices in the several precincts created and effective on the first day of January, 1913."

Section 9 of article 6 of the Constitution commands the Legislature to provide the number of justices of the peace "to be elected in incorporated cities and towns and in precincts, * * *" which is done by section 2 of chapter 42, supra. The Legislature has no power to provide the number of such officers to be appointed for each precinct. If the terms of precinct officers are made to commence on January 1, 1913, the next election could not be held for the election of their successors until November, 1914; thus a full term of two years is provided for to be filled, not by an election, but by an appointment. Such procedure would clearly be antagonistic to the policy of our laws and the evident intention of the Legislature.

However, section 1 of chapter 42 is silent on the subject of the manner in which the precinct officers are to become entitled to qualify to fill the offices of the new precincts, whether by election or appointment; and as the Constitution requires them to be elected to fill the precinct offices, when the Legislature has prescribed the number for the pre-

cincts, we are not authorized to presume the Legislature intended to violate the constitutional provisions and provide such a plan that would require their appointment, and not their election.

Section 1 of chapter 42 cannot hereafter become effective, as we have seen, because the time limit placed upon it by the Legislature has expired, and we cannot fix another date by construction for evident reasons. It could not become effective upon the dates fixed, because by so doing the clear intention of the Legislature would be thereby violated, and the clear terms of the Constitution, as applied in the Osborne Case, supra, would be nullified.

The judgment should be reversed and the cause remanded, with instructions to sustain the demurrer.

(23 Colo. App. 476)

EMPIRE RANCH & CATTLE CO. v. GIBSON.

(Court of Appeals of Colorado. Jan. 13, 1913.)

1. JUDGMENT (§ 497*)—COLLATERAL ATTACK—RECITALS—PRESUMPTION.

On collateral attack in ejectment, upon the judgment under which the sheriff's deed under which plaintiff claims was issued, recitals of the judgment that jurisdiction was obtained by service will be taken as true, at least to the extent of constructive service, in the absence of proof to the contrary, though the manner of service is not stated, and no service is shown by the files of the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

2. MORTGAGES (§ 427*)—FORECLOSURE—NECESSARY PARTIES.

Mortgagors, who had parted with all their interest in the mortgaged property, were not necessary parties to the foreclosure proceedings.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. § 427.*]

3. TAXATION (§ 761*)—TAX DEEDS—VALIDITY.

A tax deed, which shows upon its face a sale of several noncontiguous tracts of land in mass for a gross sum, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Charles E. Gibson against the Empire Ranch & Cattle Company. From judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

KING, J. This is an action in the nature of ejectment, brought by the appellee October 18, 1907, to recover possession of the southwest quarter of section 1, township 5 north, range 46 west, alleging ownership in fee simple and right to immediate possession. The answer is a general denial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Plaintiff's title depends upon the sufficiency of a sheriff's deed, regular in form and fair on its face. No objection was made to this deed as prima facie evidence of title. Defendant sought to impeach the sufficiency and validity of this deed by the introduction of the judgment roll of the cause in which the decree was rendered, authorizing the sale pursuant to which said sheriff's deed was executed. By this roll it appeared that the action was brought for the foreclosure of a mortgage deed executed by Sherman M. Hollenbeck and Ella Hollenbeck. The said Hollenbecks and three others were made defendants. From the files of the case, it appeared that two summonses were issued and returned not served, the last of which returns was made July 21, 1893. Three of the defendants made voluntary appearance; but no appearance was made for the Hollenbecks. Decree of foreclosure was rendered November 3, 1893, and recited that service of summons had been duly and regularly made upon the defendants, and each of them, but does not state the manner of service, whether personal or by publication. Appellant contends that the judgment was void for want of jurisdiction.

This is a collateral attack upon the said judgment. There is an entire absence of showing as to service by publication of summons or foundation for such service, aside from the issuance and return of the summonses non est inventus. It is not shown that personal service was not made after July 21st, nor that proper affidavit, order for, and publication of, summons were not regularly and duly made; therefore there is no affirmative proof to dispute the recitals of the decree. For this reason it will be presumed, in favor of the judgment, that what ought to have been done was done, and properly done. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac. 698; *Union Ditch Co. v. Rio Grande Canal Co.*, 37 Colo. 512, 86 Pac. 1042; *Trowbridge v. Allen*, 48 Colo. 419, 110 Pac. 193; *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005.

[2] Moreover, it does not conclusively appear that the Hollenbecks were necessary parties to the foreclosure. Although proper parties, they were not necessary parties, if they had parted with all interests held by them in the property covered by the mortgage, by a sale to their codefendants. *De Cunto v. Johnson*, 18 Colo. App. 220, 70 Pac. 955; 27 Cyc. 1572c. We do not decide that a presumption obtains that personal service was made upon the defendants, or any of them, as a decision of that question is unnecessary. The Hollenbecks, against whom personal judgment appears to have been rendered, are not in this court objecting; and, as to appellant, the personal judgment is immaterial, and was not necessary to a decree of foreclosure of the mortgage lien.

[3] Defendant offered, as evidence of its own title to said premises, two treasurer's deeds for the land in controversy, issued upon a sale for delinquent taxes. Both said tax deeds were issued upon the same sale, for the same property, the second as a correction deed of the first. Both showed upon the face thereof a sale of several noncontiguous tracts of land en masse for a gross sum, and were therefore void. *Page v. Gillett*, 47 Colo. 289, 107 Pac. 290; *Foster v. Clark*, 21 Colo. App. 192, 121 Pac. 130; *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232. Upon the authority of repeated rulings of this court, and of the Supreme Court, a treasurer's deed which shows that several noncontiguous tracts were sold at the same time, and does not show that they were severally exposed and sold, nor the amount of tax for which each separate and distinct tract was sold, particularly the tract in question, but instead gives the aggregate amount for which the several tracts were sold, is void on its face as showing a sale of such noncontiguous tracts en masse for a gross sum. *Whitehead v. Callahan*, 44 Colo. 396, 99 Pac. 57; *Kit Carson Land Co. v. Rosenberry*, 21 Colo. App. 439, 122 Pac. 72; *Foster v. Clark*, supra. And while these later authorities are in conflict with *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177, they must be regarded as controlling in the construction of such tax deeds.

The judgment is affirmed.

(23 Colo. App. 415)

HARRINGTON v. ANDERSON et al.

(Court of Appeals of Colorado. Jan. 13, 1913. On Petition for Rehearing, March 10, 1913.)

1. LIMITATION OF ACTIONS (§ 6*)—EXTENT OF PERIOD OF LIMITATION—EFFECT ON EXISTING DEFENSES.

Judgments were rendered in 1895, at which time the 10-year limitation act (Laws 1891, p. 246) was in full force and effect; but an amendment thereto in 1901 (Laws 1901, p. 231; Rev. St. 1903, § 3609) fixed the life of such judgments at 20 years. In 1911 the judgment creditor caused executions to be issued thereon. *Held*, in an action to restrain the collection of such judgments, that the amendatory act, having been passed less than 10 years after the entry of the judgment, and before the period of the statute had attached, became at once applicable to such judgments; and that executions might issue thereon.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. § 6.*]

2. LIMITATION OF ACTIONS (§ 5*)—CONSTRUCTION OF LIMITATION LAWS.

The statute of limitation is not such a meritorious defense that either the law or the facts should be constrained in aid of it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 13-15; Dec. Dig. § 5.*]

3. LIMITATION OF ACTIONS (§ 1*)—EFFECT OF BAR BY LIMITATIONS—BAR OF REMEDY.

Statutes of limitation are designed to affect the remedy, and not the right or contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

On Petition for Rehearing.

4. APPEAL AND ERROR (§ 173*)—REVIEW—THEORY OF CASE.

Where plaintiff, in his action to restrain the collection of certain judgments, based his right to relief upon the statute of limitation, approved April 18, 1891 (Laws 1891, p. 246), as amended in 1901 (Laws 1901, p. 231; Rev. St. 1908, § 3609), he cannot, for the first time on appeal, raise the question that the judgments were entered before a justice of the peace, and for that reason were not governed by such statutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

Error to District Court, Larimer County; Neil Graham, Judge.

Action by Fred M. Harrington against Peter Anderson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

M. H. Aylesworth, of Ft. Collins, and John R. Smith, of Denver, for plaintiff in error. L. D. Thomason, of Ft. Collins, for defendants in error.

CUNNINGHAM, J. On March 24, 1911, Harrington, the plaintiff in error, filed his action in the district court to restrain the defendants in error from collecting certain judgments which the latter had obtained against him, basing his action for relief as against said judgments upon the statute of limitation, approved April 18, 1891, which statute was set up by plaintiff in his complaint. The defendants each filed general demurrers to the plaintiff's complaint. The trial court, upon hearing duly had, sustained the demurrers of the defendants. Plaintiff electing to stand upon his complaint and declining to plead further, judgment of dismissal was entered against him.

[1] It is only necessary for us to determine on this appeal whether the statute of limitations of 1891, pertaining to judgments, or the amendment of that statute in 1901, governs the rights of the parties to this lawsuit. It is conceded by counsel for both parties that the earlier statute, although it contained an irreconcilable conflict, fixed the life of an unrevived judgment at 10 years; while the later act, passed in 1901, being section 3609, R. S., fixes the life of such judgment at 20 years. The judgments which Harrington, the plaintiff in error, seeks to restrain the collection of were rendered in 1895. At that time the 10-year limitations act was in full force and effect, and had it not been repealed or amended the bar of the statute as to the judgments against Harrington would have attached in 1905, 10 years later. In 1911, 16 years after the rendition of the judgments, the defendants in error caused executions to be issued thereon. Succinctly stated, the contention of the parties to this appeal is, on the part of Harrington, that the statute of 1901 applies to and can affect no judgment which had been rendered

prior to its enactment. In other words, that the later statute, not having in express terms provided that it should apply retrospectively and affect all judgments theretofore as well as thereafter rendered, it could only apply prospectively; hence could not affect the judgments against him here under consideration. The defendants in error insist that, since statutes of limitation are remedial in their character and deal with procedure only, *prima facie* they apply to all judgments, those which have been rendered, as well as to future judgments; that a judgment debtor has no vested right in the running of the statute of limitations until it has completely run and barred action. Hence it is their contention that the new act, i. e., the act of 1901, having passed less than 10 years after the rendition of the judgments against plaintiff in error, and before the bar of the statute of limitations had attached to said judgments, that the new act became at once applicable to these judgments, and that executions might issue on the same.

Plaintiff in error has called our attention to *Jones v. Stock Growers' National Bank*, 17 Colo. App. 79, 67 Pac. 177, and we have given that case careful consideration. It must be conceded that there is language in the opinion in the *Jones Case* which supports the contention made in the instant case by the plaintiff in error, but it will be observed by a reading of the *Jones Case* that the court there had before it for construction a new statute which *shortened* the limitation period; whereas we are here considering the effect of a new act, or amendment, which is said to *extend* the limitation period. Or, stated otherwise, the later legislative act before the court in the *Jones Case*, if given a retrospective application, would have retarded or interfered with the remedy; whereas the amended legislative act which it becomes our duty to construe extends or promotes the remedy. It may well be that a proper conclusion was reached in the *Jones Case*, but it is not necessary for us to, and we do not, decide whether this is true or not. We are persuaded that the overwhelming weight of authority in this country supports the contention made by the defendants in error in this case; and that the act of 1901, having been adopted less than 10 years after the rendition of the judgments against plaintiff in error, and before the statute of limitations had attached to said judgments, is applicable to them. There is no occasion for us to discuss this question at length. The interest of the profession will be better promoted by the citation of the following authorities supporting the conclusion at which we have arrived: 26 Am. & Eng. Enc. Law, 676; Sutherland on Statutory Construction, § 482; Denver, etc., R. R. Co. v. Woodward, 4 Colo. 162; Fisher v. Hervey, 6 Colo. 17; O'Connor v. State (Tex. Civ. App.) 71 S. W.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

409; *Honore v. Wilshire*, 109 Ill. 103; *Billings v. Hall*, 7 Cal. 3; *Watson v. Railroad Co.*, 93 N. Y. 522; *Clark v. Clark*, 10 N. H. 380, 84 Am. Dec. 165; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Warner v. Bartle*, 39 App. Div. 91, 56 N. Y. Supp. 585; *Fish v. Genett* (Ky.) 56 S. W. 813; *Gillette v. Hibbard*, 3 Mont. 412; *Buckmaster v. McElroy*, 20 Neb. 557, 31 N. W. 76, 57 Am. Rep. 843; *City of Montpelier v. Senter*, 72 Vt. 112, 47 Atl. 392; *Haskel v. City of Burlington*, 30 Iowa, 232; *Keagy v. Wellington Bank*, 12 Okl. 83, 69 Pac. 811; *Nickles v. Haskins*, 15 Ala. 619, 50 Am. Dec. 154; *Bowman v. City of Colfax*, 17 Wash. 344, 49 Pac. 551.

[2, 3] We quite agree with the following statement made by the Supreme Court of Washington in *Bowman v. City of Colfax*, supra: "The statutes of limitation is not such a meritorious defense that either the law or the facts should be constrained in aid of it." Also with the views expressed by the Supreme Court of California in *Billings v. Hall*, supra: "The statutes of limitation are designed to effect the remedy, and not the right or contract; that they do not enter into the contract as a part of the law thereof; and that it would be inconsistent with sound morality and wise legislation to suppose that it was ever intended that, when a party gave his obligation to pay a particular debt, he was presumed to have within his mind a particular period of time, beyond which, if he protracted his obligation, his liability would cease." In *Denver, etc., R. R. Co. v. Woodward*, supra, our Supreme Court quotes with approval from *Clark v. Clark*, supra, the following: "The statutes of limitation may be changed by an extension of the time, or of an entire repeal, and affect existing causes of action which, by the existing law, would soon be barred."

The judgment of the district court is affirmed.

On Petition for Rehearing.

CUNNINGHAM, P. J. [4] Plaintiff in error, in his petition on rehearing, raises, for the first time, the question that the judgments which form the basis of this action were taken before a justice of the peace, and for that reason, he insists, were not governed by the statutes of limitation construed and applied in the original opinion. Whether this contention is sound or not we shall not now stop to inquire, for the reason that the case was tried below, and argued in the briefs here, upon the theory that these statutes did apply, and that their construction was the only matter before this court. Plaintiff in error, as plaintiff below, after pleading the statute of 1891, in paragraph 4 of his complaint, alleged: "That under and by virtue of the provisions of said law [referring to the act of 1891] any final judgment rendered in any court in the state of Colorado was satisfied in full at the expira-

tion of 10 years from the entry of said judgment, unless revived according to law." In his brief plaintiff in error, after succinctly summarizing the issues, says: "The contention of the plaintiff in error is that the 10-year clause of the statute of 1891 (Session Laws of 1891, p. 246) operates as a satisfaction of the above judgment." The defendants in error, in their brief, thus state the issues: "Plaintiff in error contends that, a period of 16 years having elapsed since said judgments were obtained, the same were satisfied in full by the Laws of 1901; while defendants in error assert that execution may issue on said judgments at any time within 20 years from the date of their rendition, by virtue of the Laws of 1901."

To this statement of the issues by defendants in error, plaintiff in error made no objection, indeed, could make no objection, since it is practically a reiteration of his own summing up of the issues as stated in the brief, which, as we have pointed out, was in entire accord with the averments of his complaint.

We therefore deny the petition for rehearing, for the reasons just stated, without determining whether the two statutes considered in the original opinion do or do not apply to judgments of a justice of the peace court.

Rehearing denied.

(23 Colo. App. 479)

PATTERSON, Mayor, et al. v. PEOPLE ex rel. PARR et al.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. APPEAL AND ERROR (§ 644*) — STRIKING OUT BILL OF EXCEPTIONS — WAIVER OF RIGHT.

Where appellees, 20 months after filing the transcript, moved to strike the bill of exceptions, after they had filed two motions in the Supreme Court, both of which were heard and determined therein, and neither of such motions, or the arguments thereon, suggested that the bill of exceptions was not properly a part of the record, whatever right they had to have it stricken from the record was waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795-2798; Dec. Dig. § 644.*]

2. EQUITY (§ 55*) — MAXIMS — NO WRONG WITHOUT REMEDY—WHEN APPLICABLE.

The doctrine that a court of equity will not permit a wrong without providing a remedy does not apply, unless the court has jurisdiction to hear and determine the subject-matter submitted to it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 177; Dec. Dig. § 55.*]

3. PLEADING (§ 214*) — DEMURRER — ADMISSION OF FACTS WELL PLEADED.

A demurrer admits the facts well pleaded in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

4. EQUITY (§ 11*) — JURISDICTION — FRAUD.

Courts of equity have always assumed jurisdiction over all questions grounded in fraud, and have gone to the extreme limit of their jurisdiction in granting relief therefrom, and

particularly in cases of fraud injuriously affecting property rights as to which the law was inadequate to give relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24; Dec. Dig. § 11.*]

5. ELECTIONS (§ 269*)—CONTESTS—JURISDICTION.

Courts of law have no inherent jurisdiction of election contests.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.*]

6. EQUITY (§ 30*)—INJUNCTION (§ 80*)—JURISDICTION—POLITICAL QUESTIONS.

Questions purely political in their nature cannot be determined by a court of equity, because the person invoking its jurisdiction has in most cases a plain remedy at law, usually by proceeding in the nature of quo warranto, and also because statutes generally provide a method by which and a tribunal in which the validity of local elections can be determined, and hence they have no jurisdiction to enjoin the holding or canvassing of an election, a return, or the publication of the result thereof.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 30;* Injunction, Cent. Dig. § 151; Dec. Dig. § 80.*]

7. COURTS (§ 128*) — RELIEF FROM FRAUDULENT ELECTION — EQUITY JURISDICTION OF DISTRICT COURT — CONSTITUTIONAL PROVISIONS—"CAUSE"—"CASE."

Under Const. art. 6, § 11, fixing the jurisdiction of the district courts, providing that such courts shall have original jurisdiction of all causes both at law and in equity, and, in the absence of any provision therefor in the local option law, Laws 1907, p. 495, or any statute, the district court has jurisdiction of an action to purge a completed local option election of fraud and illegal voting, whereby the result was changed, to afford such relief as the case requires, to enjoin the issue of any saloon license, and to compel the revocation of those issued subsequent to the election, although elections submitting propositions to voters were unknown at common law, either in courts of law or equity; the word "cause" meaning in practice any suit or action or any question, civil or criminal, contested before a court of justice, and being synonymous with the word "case" (citing 2 Words & Phrases, p. 1013).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 375, 380; Dec. Dig. § 128.*]

For other definitions, see Words and Phrases, vol. 1, pp. 985-991.]

8. ELECTIONS (§ 270*)—CONTESTS—EQUITY JURISDICTION OF DISTRICT COURT—FRAUDULENT ELECTIONS—CONSTITUTIONAL PROVISIONS.

Const. art. 7, § 12, which provides that the General Assembly shall, by a general law, designate the courts by which the several classes of election contests not therein provided for shall be tried, was adopted in 1876, when local option laws were little known, and when the only election contests referred to in the Constitution were in article 4, § 3, referring to contests by opposing candidates for the same state office, to be determined by the Legislature; article 5, § 10, referring to election contests of the members of the house and senate, each body being made the judge of the election and qualification of its respective members, and Schedule, § 13, referring to contested elections of the offices of judges and district attorneys, to be decided by the Governor and Attorney General. *Held*, that the phrase "the several classes of election contests not herein provided for" referred only to contests for public office, and was not a limitation upon the power of the General Assembly to pass any act concerning other election contests, and that the provision

did not in any way qualify article 6, § 11, defining the equity jurisdiction of the district courts.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 247; Dec. Dig. § 270.*]

9. APPEAL AND ERROR (§ 679*)—RECORD—QUESTIONS PRESENTED.

The failure to include a copy of the petition in the abstract of record is ground for passing an objection to its sufficiency without notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878-2879; Dec. Dig. § 679.*]

10. INTOXICATING LIQUORS (§ 32*)—ELECTION—PETITION—VERIFICATION—SUFFICIENCY.

Laws 1907, p. 495, prescribed a form of petition for a local option election, without requiring that it show upon its face more than enough names of qualified electors to conform to the statutes, and made such petition, duly verified, prima facie evidence that the signatures, statement of residence, and dates upon the petition were genuine, and that all signers were qualified electors. A petition for a local option election substantially followed the form prescribed by the statute, and contained more than enough names to conform thereto, and was verified in part as follows: "I, the undersigned elector of the town of Pagosa Springs, do solemnly swear," etc.—and showed that they signed more than 90 days preceding its filing. *Held*, that the verification sufficiently stated the residence address of affiants, and implied that they were qualified electors residing in the town.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 38, 39; Dec. Dig. § 32.*]

11. INTOXICATING LIQUORS (§ 37*) — LOCAL OPTION ELECTION—FRAUDULENT ELECTION—SUFFICIENCY OF COMPLAINT.

A complaint alleging a town election at which there was submitted to the qualified voters thereof the question whether the town should become anti-saloon territory, that the votes thereon were duly counted, canvassed, and returned, and that it appeared that it was carried in the negative, that illegal votes were cast in the negative without which the returns would have shown that the affirmative of the proposition had carried, that all the votes in the affirmative were legal, that two of the judges of election fraudulently conspired to prevent, and did prevent, certain qualified electors from voting, stated facts sufficient to constitute a cause of action for an injunction, and such relief as equity might require.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

12. APPEAL AND ERROR (§ 994*)—FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

The credibility of witnesses is for the trial judge, who heard them and observed their manner of testifying, and the Court of Appeals may not substitute its own judgment therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

13. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for relief against an alleged fraudulent local option election, and for an injunction against the issue of saloon licenses, where part of those whose votes were excluded testified at the trial, and had an opportunity to dispute the testimony concerning their alleged declarations, the admission of such declarations tending to disqualify them as legal voters was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

14. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE — FACTS OTHERWISE ESTABLISHED.

Error, if any, in admitting declarations of a voter, was immaterial, where there was other evidence before the court which would warrant it in determining his qualifications.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

15. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS—WEIGHT GIVEN TO INADMISSIBLE EVIDENCE.

In an action for relief against an alleged fraudulent local option election and to enjoin the issuance of saloon licenses, tried to the court without a jury, it will not be presumed that the court gave any weight to testimony not lawfully admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

16. WITNESSES (§§ 292, 305*)—PRIVILEGE—HOW WITNESS VOTED—WAIVER.

A voter cannot be compelled to testify against his will as to how he voted; but this is a personal privilege which he may waive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1008, 1053-1057; Dec. Dig. §§ 292, 305.*]

Appeal from District Court, Archuleta County; Charles A. Pike, Judge.

Suit by the People of the State of Colorado, on the relation of Estle M. Parr, for himself and all others similarly situated, against J. B. Patterson, as mayor, Charles A. Day and others, constituting the board of trustees, and A. M. Emigh, town clerk and recorder, of the town, of Pagosa Springs, Colo. Judgment for relator, and defendants appeal. Affirmed.

Reese McCloskey, of Durango, and A. M. Emigh, of Pagosa Springs, for appellants. George W. Lane and Charles A. Johnson, both of Durango, for appellees.

HURLBUT, J. [1] May 16, 1912, appellees filed motion in this court to strike the bill of exceptions. This motion was filed 20 months after the filing of the transcript of record, and after two motions had been filed by appellees in the Supreme Court, both of which were heard and determined by that court; but in neither of said motions, or arguments therein, was any suggestion made as to the bill of exceptions not being properly a part of the record. Under these circumstances, whatever rights appellees had to have the bill of exceptions stricken from the record were waived by them. *Murphy v. Cunningham*, 1 Colo. 487; *City of Central v. Wilcoxon*, 3 Colo. 566; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612; *Greig v. Clement et al.*, 20 Colo. 167, 37 Pac. 980; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384. In the last case cited it was held that after a delay of four months after filing transcript, and where two motions had been filed in the interim without suggesting in either the absence of a proper bill of exceptions, a motion to strike bill of exceptions came too

late. Nothing appears in the record before us to excuse so long a delay in filing the motion to strike. The same will be denied.

[2-7] We will now consider the case as presented by the record. May 9, 1910, in the district court of Archuleta county, appellees (plaintiffs below) filed their complaint against appellants (defendants), therein alleging that on April 5, 1910, an election for municipal officers was held in the town of Pagosa Springs in said county, at which there was submitted to the qualified voters thereof the question as to whether or not said town should become anti-saloon territory; that the votes upon said question were duly counted, canvassed, and returned by the proper authorities; that by such returns it appeared that 148 votes were cast in the affirmative of such proposition, and 154 votes in the negative. It was further alleged that about 20 people, naming them, voted at said election in the negative upon said proposition, all of whom were illegal voters, and that, had it not been for such illegal votes, the returns would have shown the affirmative of the proposition to have been duly carried; that all the votes cast in the affirmative were legal; that two of the judges of election fraudulently conspired together to prevent, and did prevent, certain qualified electors from voting, closing with a prayer that defendants be enjoined from issuing any saloon licenses in said town, or any licenses for the sale of intoxicating liquors; and that all such licenses issued subsequent to the election be revoked by the city council. To this complaint defendants filed a demurrer, challenging the jurisdiction of the court over the subject-matter, alleging that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect or misjoinder of parties defendant. The demurrer was overruled, after which answer and replication were duly filed.

The question as to whether or not the district court had jurisdiction to hear and determine the issues formed by the pleadings is squarely presented to us for determination, and must be disposed of before considering the merits. It is noticeable that there is no constitutional or statutory provision of this state which provides a method or procedure for testing the validity of an election held under the local option statute. The Session Laws of 1907, p. 495, known as the "Local Option Law," while providing the manner of holding an election and voting upon the question, prescribes no method for testing the validity thereof. Appellants' position is that no provision of the Constitution nor any legislative enactment confers jurisdiction upon the district court under its legal or equitable powers to hear and determine this cause; that if appellee, relator, had any remedy, it was only through a proceeding in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

the nature of quo warranto; and that the local option act of 1907 is silent upon the question. On the other hand, appellees, while admitting the absence of statutory authority, contend that, under section 11, art. 6, of the Constitution, the district court had plenary power and jurisdiction to hear and determine this cause. Obviously the question presented is of grave importance.

The two sections of the Constitution which bear directly upon the discussion read as follows: (1) Article 6, § 11: "The district courts shall have original jurisdiction of all causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law. They shall have original jurisdiction to determine all controversies upon relation of any person on behalf of the people, concerning the rights, duties and liabilities of railroad, telegraph or toll road companies or corporations." (2) Article 7, § 12: "The General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests not herein provided for shall be tried, and regulate the manner of trial and all matters incident thereto, but no such law shall apply to any contest arising out of an election held before its passage." It has been held by the Supreme Court that section 11, art. 6, is the only provision of the Constitution which fixes the jurisdiction of the district court. *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714. The proceedings below were clearly of an equitable nature. The ultimate object sought was to purge the ballot of fraud, enjoin the city council from issuing any further liquor licenses, and to compel the council to revoke any such licenses issued subsequent to the election. Section 11, art. 6, quoted, purports to define the jurisdiction of district courts. It is sweeping in its terms, and the language used suggests nothing of ambiguity as to its meaning. We find nothing elsewhere in the Constitution which appears to limit or qualify its jurisdiction as therein granted. Our attention had not been called to any decision in the appellate courts of this state in which the jurisdictional powers of the district court under this section were challenged in a case of this kind; hence, no assistance can be obtained from our own courts in determining the proposition. Many states, however, have constitutional provisions similar to section 11, and almost identical with it in phraseology, and many decisions therein have been rendered involving questions growing out of local option and other similar elections, in which such constitutional provisions have been interpreted and the law as applicable thereto construed to a greater or less extent.

By reason of the absence of a provision of the Constitution or statute designating a forum or tribunal with power to investigate and determine frauds and mistakes in an election of this kind, the question is narrow-

ed to the one proposition: Did the district court, under its equity powers as granted by section 11, have jurisdiction and power to entertain this cause and grant the relief prayed for? We think the equity doctrine upon which appellees so strongly rely should be qualified in this: that, while admitting the maxim that "a court of equity will not permit a wrong without providing a remedy," the doctrine does not apply unless the court of equity has jurisdiction to hear and determine the subject-matter submitted to it. Jurisdiction is the very question now before us. If it be conceded that the district court, under its equity powers, has jurisdiction of this case, then there is no question but what it can grant full relief from the alleged wrong as stated in the complaint. Courts of equity, the same as courts of law, from the earliest times to the present, have been limited in their jurisdictional powers. When such courts were first recognized in the remote past, there was an apparent disposition on their part to intrench upon the jurisdiction of courts of law in proceedings wherein the subject-matter had been previously cognizable only by the latter courts, and for many years there was constant friction between the two courts as to their respective jurisdiction over the various causes of action which arose for determination. In modern times, however, such controversies have rarely arisen, as the highest judicial tribunals of England and the United States have defined the status of the respective courts as to their jurisdictions and powers.

Another question here arises, namely: Is the district court, under section 11, restricted in the exercise of its equity powers to such cases or causes only as were cognizable in courts of equity prior to the adoption of our Constitution? This inquiry is important in the light of decisions hereinafter cited. States having substantially the same constitutional provision have recognized the jurisdiction of the courts, under their equitable powers, to entertain and decide cases similar to the one at bar, although it was conceded that election contests between individuals for an office, and elections where propositions were submitted to the electors to be voted on, were unknown at common law, either in the courts of law or equity. From a careful review of those decisions, in the light of the record before us, we think we may well sustain the jurisdiction of the district court in the proceedings below. Every consideration of justice, fairness, and duty to the majority of the legal voters of the town impels us to this conclusion. The demurrer having admitted the facts well pleaded in the complaint, the charges therein contained show that ever since the election the governmental functions of the town, with reference to the liquor question, have been administered in direct opposition to the declared will of the majority of the legal vot-

ers thereof. We think a plain, natural interpretation of the language of section 11 supports the fullest exercise of the equity powers of the district court in this proceeding. It is clear from the allegations of the complaint that, if jurisdiction of the district court be denied, the election was a fraud and a sham as to the majority of the legal voters of the town, as well as to all law-abiding citizens therein; and if, in the future, similar elections should be held under the local option law in other communities, and the will of the majority of the legal voters therein be nullified by fraud and unlawful acts, such as claimed here, the same condition will exist there as here, and no relief can be obtained. In other words, as to whether or not this condition shall obtain indefinitely in this state depends entirely upon future action of the Legislature. If the Legislature refuses to act, the people are without remedy. We do not think the framers of the Constitution ever intended such a condition to prevail. It may go without saying that the average voter and citizen has always entertained a belief that if at any time following an election it could be shown that frauds were perpetrated therein, and by reason thereof a proposition in which they were vitally interested had been carried or defeated by a majority of the legal voters, but the result had been declared against the vote of the lawful majority, there was always a door open to some judicial tribunal created and maintained by them, to which they could appeal with perfect confidence that such tribunal would give ear to their complaint and right the wrong without unreasonable delay. If we were to hold that no court exists in this state which has power to give relief against the result of a fraudulent election under the local option act, then, indeed, a most unfortunate condition prevails. Suppose at an election a question should be submitted to the electors for their determination; that an affirmative vote thereon would mean ruin and bankruptcy to the property of the electors; that a decisive majority of the legal voters should vote in the negative, but fraudulent votes were cast in the affirmative sufficient in number to show, on the face of the returns, the question carried, and the result so declared—can it be that upon proper application being made by the aggrieved voters no court could be found within the state with power to prevent the consummation of the fraud, and the destruction of their property rights, simply because no statute could be found which in terms authorized some court to give relief? We are pleased to know that many courts of acknowledged celebrity lend ready ear to petitions in such cases, and extend the benign arm of equity to shield the injured community from the effects of such frauds.

It may be well again to briefly call attention to these facts, viz.: This election was

authorized by statute. It was petitioned for, called, conducted, ballots canvassed, returns made, and result declared—all in accordance therewith. It had been held and entirely completed. After the election the council issued licenses, and otherwise recognized the town as "wet" territory. The complaint charges that two of the judges of election fraudulently conspired together to prevent certain qualified electors from voting, and did fraudulently and wrongfully prevent them from casting their ballots at such election. Other fraudulent acts are charged against some of the voters, and many illegal votes are alleged to have been cast, counted, and returned. The proceeding below in no way sought to enjoin, or otherwise control, the action of any official or canvassing board connected with the election. In this respect this case can be readily distinguished from the great majority of decisions cited in the briefs. In fact, there is but a small percentage of the decisions cited that did not have to do with controlling or enjoining election officials in the performance of their duties. From the earliest times courts of equity have assumed jurisdiction over all questions grounded in fraud, and have proceeded to the extreme limit of their jurisdictional powers in granting relief from the injurious consequences thereof. As equity continued to expand with the growth of civilization, it unhesitatingly took cognizance of every new situation wherein the law was inadequate to give relief, and particularly in cases of fraud which injuriously affected property rights. Then why should not this benign power of equity be broadened and extended so as to protect the purity of elections and the sacred rights of the elective franchise? Surely the rights of franchise are tantamount to those affecting property.

The multitude of decisions of the courts of last resort of this country almost without exception declare that election contests strictly speaking were unknown to the courts of common law or equity, and, further, that the latter courts have no inherent power to try such contests. During the early days of equity jurisprudence in England, questions of public importance such as local option, bond issues, etc., were never submitted to the citizens of a municipality for their approval. Such matters were within the exclusive jurisdiction of Parliament. This fact accounts for the absence of early judicial opinions involving such subjects. For the same reason, the early text-writers make no mention of such elections. The practice of submitting such questions to the ballot seems to be of modern origin, and sanctioned only under a republican form of government. If, under the early practice of courts of equity, they assumed the right to meet every new situation wherein the law was inadequate, and extend their jurisdiction to new subjects or

controversies not previously known to have been of equitable cognizance, what good reason can be given why modern courts of equity may not follow the same practice? The very gravamen of the case at bar is fraud. The court is appealed to to determine the facts in issue, and, if the evidence sustains the charges made, it is asked to declare the truth and issue any writ or command within its power which may be necessary to right the wrong and give effect to the will of the majority of the legal voters as expressed by their ballots. This being then a proceeding to test the validity of an election upon a question of local option, and such proceeding being heretofore unknown to the courts of common law or equity, the law providing no remedy, why should not a court of equity entertain the same and give whatever relief the exigencies of the case require? And particularly so as fraud is the controlling question for investigation by the court, and is a subject which has always been of equitable cognizance. There is nothing in the Constitution or statutes which directly or by implication prohibits the court from assuming such jurisdiction when no special proceeding has been provided. On the contrary, the jurisdiction conferred on the district courts by section 11 should be construed as all-embracing, as its terms are unrestricted.

We do not see that the questions involved in this case are wholly political. It is settled by the great weight of authority that questions purely political in their nature cannot be heard or determined by a court exercising equity powers. Hence courts of equity have been denied jurisdiction or power to restrain by injunction the holding of an election, or to enjoin an election official or board from counting or canvassing the ballots, making returns, or declaring or publishing the result thereof. *Vickery v. Wilson*, 40 Colo. 490, 90 Pac. 1034; *McCrary on Elections* (4th Ed.) §§ 387, 389; *Dillon, Municipal Corporations* (5th Ed.) §§ 379, 1552 (note); 22 Cyc. p. 886. The reasons generally given are that an election is a political matter, and that in most every case of a contested election for office the contending person has a plain remedy at law, usually by a proceeding in the nature of quo warranto, and that, where questions local to the community are submitted to the electors there are generally statutes providing a method by which, and a court or tribunal in which, the validity of such elections can be determined. In the case at bar, there being no provision in the statute providing a forum or procedure for testing the validity of this election, any relief obtainable must emanate from the general equity powers granted by section 11, art. 6, of the Constitution. The authorities upon that point will now be considered.

In *Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851, the court, in construing a provision of the Constitution of the United States similar

to the one found in section 11, art. 6, of the Constitution of Colorado, used the following language: "The Constitution provides that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish,' and that this power 'shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States.' * * *

The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. None are excluded." To the same effect is *Osborn v. Bank of the United States*, 9 Wheat. 821, 6 L. Ed. 204. There are many decisions defining the words "case," "cause," and "suit." In 2 Words & Phrases, p. 1013, we find the following: "'Cause' is defined to be, in practice, any suit or action, or any question, civil or criminal, contested before a court of justice. * * *

'Cause' and 'case' are used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, an action. * * *

The term 'cause in law,' as used in Const. Ill. 1870, art. 6, § 12, providing that the circuit courts shall have original jurisdiction in all causes in law and equity, should be construed to include an action in mandamus." In *People ex rel. Dean v. County Commissioners*, 6 Colo. 202, an alternative writ of mandamus was issued by the Supreme Court, to which answer was filed. Demurrer was interposed. The demurrer raised the question as to whether or not the matters alleged in the answer were issuable in mandamus proceedings. The demurrer was overruled. This was a controversy growing out of a county seat location. The answer to the alternative writ alleged that some 62 votes had been rejected from the count by the board of canvassers, which left the result of the election on its face as favorable to Hot Sulphur Springs as the county seat, but denied that the votes so discarded were illegal. The issue was sharply defined, and the court asked to determine the true result of the election. The court rendered final judgment on the law and facts in the case. Chapter 32 of the Code of Civil Procedure of 1877 was devoted to the subject of mandamus. The Supreme Court held that a proper issue was presented by the pleadings under this chapter of the Code. The following excerpts are taken from the opinion: "The presumption which the law indulges in favor of the conduct of public officers is always liable to be rebutted in a proper proceeding. Whether this be a proper proceeding to test the validity of the election may, perhaps, depend upon the question whether the laws of the state afforded a plain and ample remedy for contesting the election. Code of Civil Procedure, § 302. * * *

Our statute makes no provision for a contest of an election of this character. No tribunal is provided,

and no mention is made of the subject. The only election contests authorized in counties are those of officers. General Laws, secs. 1013, 1034. It is also clear that there is no remedy by quo warranto, for that remedy is only employed to test the right to an office or franchise. High, Ex. Leg. Rem. § 618; *People ex rel. v. Whitcomb*, 55 Ill. 172. Unless, therefore, the functions of the canvassing officers were of a judicial nature, and their determination as to the result of the vote partakes of the nature of a judgment, there remains no doubt of the right to inquire into the regularity and validity of their acts in this proceeding. What, then, were the powers conferred by law upon the board of canvassers? The general rule is that the powers of canvassers are ministerial, involving simply the labor of counting the votes returned, and determining who has received the highest number. They have a quasi judicial power to determine whether the papers transmitted to them are genuine election returns, but they have no judicial power to reject votes polled. High, Ex. Leg. Rem. § 56; *McCrary on Elections*, §§ 81, 85, and authorities cited. Of course, the rule is subject to modification by statute. No statutory modification, however, existed which in any manner changed the rule in the case at bar. The conclusion at which we arrive is that the regularity of the proceeding of the board of canvassers may be inquired into in this proceeding, and, if the result of the election was in fact as alleged in the answer of the respondents, justice and law alike require that the peremptory writ be denied." In that case there was no statute prescribing a forum or method for testing the validity of an election held to locate or remove a county seat, hence no remedy in law to inquire into the validity thereof, but the court clearly held that the charges of fraud and illegal voting alleged in the petition could be determined in a mandamus proceeding, and cites with approval the case of *Calaveras County v. Brockway*, 30 Cal. 336. The latter case is also founded upon mandamus proceedings, and the facts therein and in the case of *Dean v. County Commissioners*, supra, are noticeably similar. Identical questions of law seem to have been raised in both cases, and the courts' rulings were the same. While nothing was said in the California case as to whether or not the statutes of that state provide a tribunal or proceeding for determining the validity of the election, it can be fairly presumed that no such statute then existed. That opinion sustained the right of the lower court to thoroughly investigate the frauds alleged to have been committed at the election through mandamus proceedings. The court says: "Assuming, as we think may properly be done, that the board of supervisors was the proper authority to canvass the votes cast at the special election respecting the location and

establishment of the county seat, and to declare the result of such election, it does not therefore follow that their determination was conclusive, though in the first instance it stands as prima facie evidence that the result was as declared. The determination of the board of supervisors that the town of San Andreas had received a majority of all the votes cast is prima facie evidence of the fact so determined, but, like all other prima facie evidence, it must be regarded as open to contradiction; and, if the fact be otherwise than as determined by the board, it would be an unjust denial of the rights of the electors of the county to shut the door against all remedy for the redress of the wrong. If San Andreas was elected, and thereby established as the county seat of Calaveras county, it was by the expressed will of a majority of the electors who voted, and not by the determination or certificate of the board of supervisors. If a false estimate of the number of votes cast for the respective places was made and announced by the board, whether intentionally or otherwise, justice demands that the injured party or portion of the citizens of the county should have the opportunity of making it manifest, and of having the true result ascertained and determined." The following citation is a part of section 389, *McCrary on Elections*, viz.: "An adequate remedy will always be found either at law or in equity, for frauds perpetrated against the purity of elections. If the result has been secured by fraud, and the statute has provided no mode of redress, it by no means follows that no redress can be had." Paragraph 9, p. 392, 6 A. & E. Enc. of Law (1st Ed.), reads as follows: "While the court will not enjoin the holding of an election, or the canvass of the vote, yet when the election is held to determine questions such as the removal of the county seats, or subscribing to capital stock of corporations, and there is no provision for contesting the election, it has been held that an injunction may be granted to prevent the officer from doing the act authorized by the election, where it is alleged that the majority was caused by fraudulent or illegal voting."

Boren v. Smith et al., 47 Ill. 482, was a suit in equity over a county seat location; it being alleged that sufficient fraudulent votes had been cast to change the result of the election as announced. It was sought to enjoin the removal of the county seat as it then existed. The court ruled that the circuit court had jurisdiction under its equity powers to entertain and determine the suit. The court said: "It was urged that the court below had no jurisdiction to entertain the bill. It is, no doubt, true that a court of equity will never interfere to determine which of two persons has been elected to an office, or to try the rights of parties to hold an office, as in such cases the law has afforded adequate and appropriate remedies, still this

is not a mere contested election. It is to determine where the citizens of a county have the legal right to transact public business. It is true it may incidentally involve the question whether the vote has been fairly taken, and, if fraud has been committed, to purge the polls. * * * And, as the Constitution and the law have failed to afford a specific remedy to prevent this provision from being defeated, it is eminently proper that equity should afford the requisite relief in such cases." *People v. Wiant*, 48 Ill. 263, was another county seat case, in which the Supreme Court held that a court of equity had jurisdiction over the case. The basis of the proceeding was fraud and illegal voting. The court said: "This is a case unlike a mere contest of two individuals as to which shall exercise the powers and perform the duties of an office. In that case the individuals are immediately interested, and the public remotely; but in this case it is a matter of public concern to the people of the county. In that, the law has afforded an ample remedy by conforming to the statute authorizing them to contest the election to determine which is entitled to the office, while in this no means are provided by the statute for carrying into effect the will of the majority under the law, when, apparently, thwarted by fraud, accident, or mistake; hence the necessity of equity to entertain jurisdiction and afford relief." To the same effect: *Simpson County v. Buckley*, 85 Miss. 713, 38 South. 104; *Cerini v. DeLong et al.*, 7 Cal. App. 398, 94 Pac. 582; *Maxey v. Mack*, 30 Ark. 473.

Appellants place great reliance on the case of *Dickey v. Reed*, 78 Ill. 262. That case does seem to limit the jurisdiction of courts of equity under their former decisions strictly to county seat cases, and appears to sustain such jurisdiction only because of a constitutional provision of that state. However, it is well to notice that the only issue before the court in that case was as to the power of a court of equity, under a constitutional provision like ours, to restrain the council from canvassing the returns made to them by the judges and clerks of election. The court denied the jurisdiction, which ruling is in harmony with *Vickery v. Wilson*, *supra*, and the great weight of authority in this country. Another important and distinguishing feature of that case from the one at bar is that at the time the proceedings were begun in that case there was a statute of Illinois which provided for contesting the validity of the election under consideration. The following language appears in the opinion: "Thus it is seen there was complete, and, in every way, an ample, remedy expressly provided for contesting this election under the statute, but it was not invoked. Hence there could be no pretense of jurisdiction from necessity. The remedy was obvious, plain, and simple in its application, and, being ample and complete, there is not

the slightest reason why equity should interpose and perform the functions of the county court, where the statute had placed it." On this point this case is in harmony with *People v. Londoner*, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444. The case of *Gibson v. Board of Supervisors*, 80 Cal. 359, 22 Pac. 225, arose over an election held at which was submitted the question of issuing bonds to build bridges. The action was in equity, and the jurisdiction of the court was challenged. It was charged that the returning board failed to count a large number of lawful votes, thereby making it appear that a constitutional two-thirds majority had not voted in favor of the issue, while in truth and fact, as alleged, more than a two-thirds lawful majority had voted in favor of issuing the bonds. The court tried the issues, and entered its decree setting aside the order of the returning board, and declaring the question of issuing bonds had been duly carried. The Supreme Court sustained the equity jurisdiction of the superior court, and in the opinion we find this language: "But the main defense set up by appellant is that no court by any form of action or proceeding, legal or equitable, has any jurisdiction or authority to inquire into the result of an election on a question of the issuance of bonds; that the whole matter is beyond the scope of judicial investigation. It is said that there can be a contest in a court over the election to an office simply because the statute provides a procedure for such a contest; but that as there is no such procedure provided for a contest about any other kind of election, and, as the subject is in its nature beyond the cognizance of courts, therefore there is no judicial jurisdiction of any kind to determine any question rising out of such election. If that position be correct, then its consequences are far-reaching and alarming." The reasoning in this case was largely based upon the court's construction of a constitutional provision concerning the creation of indebtedness by counties only upon the assent of two-thirds of the qualified electors, which provision is quite similar to that of the Constitution of Illinois, in force when the opinion was rendered in *Dickey v. Reed*, *supra*.

Kennedy v. Warner et al., 51 Misc. Rep. 362, 100 N. Y. Supp. 616, was a proceeding wherein one Kennedy sought to restrain the town clerk and others from proceeding under a local option election, claiming that the election was illegal by reason of the absence of a lawful petition preceding the election as required by law. The Supreme Court of New York (corresponding to our district court) granted the writ of injunction after determining the issues. The court says: "If I am correct in this conclusion, it would seem that the plaintiff is entitled to relief in some form. The remedy, however, is not a resubmission at a special town meeting, neither is it mandamus, as that issues to

compel the performance of duties which should have been performed but which have been neglected. It is equally clear that the validity of an election as to local option cannot be inquired into upon a writ of certiorari. Notwithstanding the plaintiff did not bring this action in behalf of himself and all others interested, I think this court had jurisdiction to restrain the defendants from proceeding in violation of law and to the prejudice of the individual rights of the plaintiff." The same court last mentioned in *Raymond v. Clement*, 118 App. Div. 528, 102 N. Y. Supp. 1070, decided that, in the absence of a statute providing a method and forum for testing the validity of an election held under a local option statute, the Supreme Court had jurisdiction under its equity powers granted by the Constitution to hear and determine a cause involving the validity of such election. In the case there considered there was a statute providing for the resubmission of the question, in case it had been improperly submitted at the former election. The following excerpt is found in the opinion: "The only question presented by this appeal is whether the plaintiffs can obtain relief in an action in equity, or must they seek redress in the manner provided by section 16 of the liquor tax law. * * * Unless the statutory provisions furnish not only a remedy, but the exclusive means of righting the wrong complained of, unquestionably a court of equity would have jurisdiction in the premises." In the same court may be found another case involving questions arising under a local option election: *Ulrich v. Clement* (Sup.) 124 N. Y. Supp. 133. In that case certain propositions were submitted under the liquor tax law to the voters. It was claimed in the petition that the board of inspectors erroneously and falsely certified the result of the vote, and equitable relief was asked for. The Supreme Court again ruled that under its constitutional power it had full jurisdiction in equity to hear and determine the case and grant the relief prayed for. The following excerpts are taken from the opinion: "The defendants * * * contend that plaintiffs have adopted the wrong remedy, that a court of equity has no jurisdiction in the matter, and that even though proposition No. 4 was carried at the town meeting in question, and that the votes properly counted showed that fact, if the inspectors made a false certificate as to the result, certifying that it had been lost, whereas the ballots showed it had been carried, a court of equity has no power to right this wrong, and that the only remedy that the plaintiffs have is to apply for a resubmission of the question at another town meeting. I cannot agree with the learned counsel for defendants in this proposition. If questions under the liquor tax law are properly submitted to the voters at a town meeting and the propositions are carried by a majority of the legal votes cast on those

questions, and the inspectors make a false certificate certifying that the propositions were lost, when the votes showed that they were carried, if there is no law to give an aggrieved party relief without going through the expensive and uncertain process of re-submitting the questions at another town meeting, it is time there was some authority to correct such a wrong, and the Supreme Court exercising its equity jurisdiction has authority to afford equitable relief in a case of this character if the facts warrant it. N. Y. Const. art. 6, § 1. * * * What is wanted in this matter, as in all other similar controversies, is an honest election and an honest canvass of the vote, and then have the result correctly and honestly certified. * * * For the time has not yet come when the Supreme Court is without power to right a wrong if the facts show that a wrong has been committed." Article 6, § 1, of the New York Constitution, above referred to, reads partly as follows: "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this article." Our section 11 of the Constitution is fully as broad and far-reaching in conferring jurisdiction on the district court as that of New York which confers jurisdiction on the supreme court. While the case of *Innes v. Lansing*, 7 Paige (N. Y.) 583, involved matters growing out of a partnership, wherein it appeared that there was some doubt of the jurisdiction of a court of equity, the chancellor used this language: "I regret that I am obliged to extend the jurisdiction of this court to this new class of cases. But whenever the Legislature creates new rights in parties, for the protection and enforcement of which rights the common law affords no effectual remedy, and the statute itself does not prescribe the mode in which such rights are to be protected, this court, in the exercise of its acknowledged jurisdiction, is bound to give to a party the relief to which he is equitably entitled under the statute."

The case of *Shaw et al. v. Circuit Court*, 27 S. D. 49, 129 N. W. 907, is a recent and well-reasoned case, wherein the authorities both pro and con were reviewed at considerable length. This case was an original proceeding in the Supreme Court for a writ of prohibition against the circuit court to prohibit it from continuing an injunction theretofore granted by said court against the removal of the county records, until the merits of the contest could be decided. Illegal voting and various acts of fraud on the part of election officials was the basis of the suit. The equity jurisdiction of the circuit court was challenged by petitioner, but the Supreme Court sustained the circuit court. It seems there was a statute providing for contesting a county seat election. The following excerpts are taken from the

opinion, to wit: "The precise questions under consideration by the court in that case are not disclosed by the record, and, if the case be considered as holding that a proper and legitimate exercise of purely political power cannot be controlled or interfered with by the courts, it must be conceded that the conclusion reached is sustained by an overwhelming weight of authority. But, where fraud or a total want of power on the part of the political agency employed is involved, the question is an entirely different one, and, where either fraud or want of power appears, judicial decisions are not wanting which hold that courts may interfere with the results of such elections where they may involve the wrongful expenditure of public moneys to the injury of the voters and taxpayers. And authorities even go beyond this, where through fraud constitutional provisions may be rendered inoperative or defeated." After commenting on cases cited from Washington and Michigan, apparently against the power of equity to give relief in those cases, the court continues: "Apparently the Legislature has made no provision for contesting such elections in those states, and the courts there follow the well-settled rule that courts of equity will not review the action of boards or officers where they are wholly political in character. But the reasons given for these decisions are not controlling here, where the Legislature has made election proceedings reviewable by the courts in contest actions. But, even if these decisions may be interpreted as holding that because the acts involved are political in character the courts shall not interfere to prevent the consummation of fraud which may result in defeating the law and the will of the people, we do not wish to be understood as concurring in such views." Section 14, art. 5, of the Constitution of South Dakota, reads partly as follows: "The circuit courts shall have original jurisdiction of all actions and causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law and consistent with this Constitution."

In *Lanier et al. v. Padgett et al.*, 18 Fla. 842, another county seat proceeding, an injunction to restrain the county officials from removing the records from the existing county seat was denied by the circuit court, and appeal taken to the Supreme Court. The petition alleged that the election to determine the location of the county seat was illegal for the want of a sufficient petition. The court said: "Under the general prayer of the bill that the members of the board of county commissioners be enjoined from making any order or doing any act in the direction of effecting a change of the location of the county seat and the removal of the county offices and records by reason of the result of the election, an injunction should have been granted. The injunction prayed was not to restrain the members of the

board as canvassers of the result of an election, but to restrain them from acting upon the result of an unauthorized election. They would, therefore, be not enjoined from doing what the laws required them to do, but from doing an unlawful act." A portion of section 11, art. 5, of the Constitution of Florida, reads as follows: "The circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law," etc.

Many other cases might be cited holding to the views expressed in the decisions hereinbefore mentioned, but the list need not be extended. After a careful review of the authorities on both sides of the question, we conclude that sounder logic and more persuasive reasoning predominates in favor of those authorities which sustain the jurisdiction of courts of equity in cases of this character, and that such rulings tend to promote honest elections, discountenance fraud, and better protect the general public interests. We therefore hold that in the case at bar, there being no statutory provision for contesting the validity of an election under the local option statute, and it appearing from the record that the election had been entirely completed, and the object of the suit brought was not to restrain or enjoin any official from performing prescribed duties in and about said election, and it further appearing that illegal voting and frauds occurred at said election, whereby the result was changed, the district court, under its general equity powers granted by section 11, article 6, of the Constitution, had power to entertain said action, purge the election of frauds, and afford such relief as the exigencies of the case seemed to require, and had power to issue the writ of injunction if supported by the evidence and proofs adduced at the trial. In reaching the conclusions above expressed, we by no means overlook the fact that many courts of enviable standing in other states have given this subject serious consideration and arrived at conclusions directly opposed to those we have announced. We will not, however, attempt to declare where the weight of authority rests. Notwithstanding many of the opposing authorities are supported by cogent and forceful reasoning, we feel better content with the reasoning and results of the authorities we have decided to follow. This opinion having been already extended to a greater length than desired, we will not attempt a discussion of the opposing authorities, but append a list of those which seem to be strongest in support of the opposite side of this issue, viz.: *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757; *State v. Police Jury*, 41 La. Ann. 846, 6 South. 777; *State v. Judge*, 13 La. Ann. 89; *Hagens v. Police Jury*, 121 La. 634, 46 South. 676; *Caldwell et al. v. Barrett et al.*, 73 Ga. 604; *Skrine et al. v. Jackson et al.*, 73 Ga. 377; *Sanders v. Metcalf et al.*, 1 Tenn. Ch. 419;

Harrell et al. v. Lynch et al., 65 Tex. 146; *Attorney General v. Supervisors*, 33 Mich. 289; *Hipp v. Supervisors*, 62 Mich. 456, 29 N. W. 77; 10 Am. & Eng. Enc. of Law, 816.

[8] We will now give consideration to section 12, art. 7, of the Constitution. This section in its present wording was incorporated in the Constitution at the time of its adoption in 1876. There were only three classes of election contests referred to therein when adopted, namely: (a) Section 3, art. 4, refers to contested elections of certain state officers, wherein opposing candidates were contending for the same office, such contests to be determined by the two houses of the Legislature. (b) Section 10, art. 5, refers to election contests of the members of the house and senate, each body being made the judge of the election and qualification of its respective members. (c) Schedule of the Constitution, section 13, refers to contested elections of the offices of judges of the supreme, district, and county courts, and district attorney, these contests to be decided by the Governor and Attorney General, who determine who is entitled to election certificates. These three classes of election contests refer exclusively to disputes between contending candidates for the various offices. We think the framers of the Constitution, in using the words "the several classes of election contests not herein provided for," had in mind similar classes of election contests elsewhere mentioned in the Constitution, which only referred to contests for public office. We find no mention in the original Constitution of any "election contest" wherein a question is to be submitted to the voters at an election for their approval or disapproval. In 1876 local option laws were but little known, if at all, and it is a fair presumption that the phrase "classes of election contests not herein provided for" had reference only to classes of election contests growing out of a dispute concerning some public office, and could not have referred to or contemplated such an election as we are now considering. Be that as it may, there is nothing in section 12 which in any way qualifies section 11, art. 6; hence the power of the district court to exercise its equity jurisdiction granted by section 11 would still remain, regardless of section 12. The General Assembly under its plenary power would have authority to enact legislation commanded by that section, even if it were wholly absent from the Constitution. The section can only be considered as a constitutional mandate to the General Assembly to do the thing therein commanded, and, if the latter body should decline or neglect to act in pursuance of the mandate, there is no way known to coerce the Legislature into obedience. It cannot be said that section 12 is a limitation upon the power of the General Assembly to pass any act concerning other "election contests" than those mentioned therein. *Cooley's*

Constitutional Limitations (6th Ed.) p. 104, reads as follows: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is intrusted with the general authority to make laws at discretion."

[9, 10] Appellants claim that the petition for submitting the anti-saloon territory question to the voters was fatally defective. The court would be well justified in passing this objection by unnoticed, for the reason that a copy of the petition does not appear in the abstract of record. This omission is a clear violation of rule 14 (80 Pac. vii) of the Supreme Court, to which court this case was originally appealed. However, we will determine the objection on its merits. The first objection to the petition is that it does not appear on its face to have been signed by 40 per cent. of the qualified electors voting at the last general election in the town of Pagosa Springs. We see no merit in this contention. The evidence clearly shows that at the last general election of the said town of Pagosa Springs, in 1909, the total vote cast was 113. The petition contains more than enough names purporting to be qualified electors to conform to the statute. There is nothing in the local option act of 1907, supra, which requires the petition to show this fact on its face. Moreover, a form of petition is prescribed in the act, which form is substantially followed by the petition. It was verified and was in substantial conformity with the statute respecting such verification. The statute reads: "Such petition so verified, or a copy thereof, duly certified as hereinafter provided, shall be prima facie evidence that the signatures, statement of residence, and dates upon such petition, are genuine and true, and that the persons signing same are qualified electors of the political subdivision named."

[11] Appellants further question the sufficiency of the petition upon the ground that the verification does not state "the residence address of the persons signing said affidavit, or that such person or persons is or are qualified electors" of the town. This objection has some merit, but we believe the verification substantially conforms to the statute in this respect. A part of the verification reads as follows: "I, the undersigned elector of the town of Pagosa Springs, do solemnly swear," etc. It is true this part of the verification does not use the words "qualified elector," and does not state in terms the "residence address" of affiant is

Pagosa Springs, but we think the phrase just quoted implies by fair inference that affiant was a qualified elector and that his residence was in that town. No street number or other specific designation of affiant's domicile is required by the statute to be stated, as would be the case if the town contained a population of over ten thousand people. Appellants further assert that the petition is fatal, in that the signers thereof have not therein stated their residence address, and it is not shown therein that they signed the petition not more than 90 days preceding the date of filing the same. The petition was filed March 4, 1910. It contained three columns, the first headed by the word "name." In this column all the signatures appeared. The second column was headed by the word "residence," under which appeared, after each name, the words "Pagosa Springs." The third column was headed by the word "date," under which was written, after each name, either a certain date in January or a certain date in February, but in some instances the year was omitted. As 46 names were all that was required by the statute to appear on the petition, if those names after which the year was not written be eliminated, there still remain 54 names after which the year 1910 is written; therefore the petition is not open to the objection raised. It is obvious from an inspection of the petition that none of the signatures were written thereon more than 90 days prior to its filing. As to the complaint stating facts sufficient to constitute a cause of action, we think there can be no question that it does.

Proceeding now to a consideration of the evidence, 21 persons are charged in the complaint as having illegally voted at said election against the town becoming anti-saloon territory. A large number of witnesses gave testimony at the trial on behalf of both parties, and the court in its decree found that at the election 154 votes were claimed to have been cast and counted against the town becoming anti-saloon territory, and 148 votes in favor of the proposition; but in truth and fact only 142 legal electors voted "no" upon the proposition submitted, while 145 such electors voted "yes," and by reason of such vote the town lawfully became anti-saloon territory. The decree further found that 12 persons, naming them, had voted at said election against the proposition, who were not qualified electors, and the court eliminated them from the count. It also found that three persons, naming them, had voted at said election in favor of the proposition, who were not qualified electors, and their votes were eliminated by the court from the count. We have carefully read all the evidence, and find that in every instance where votes were rejected by the court, as above shown, there was conflict of testimony as to

the persons who cast these votes being qualified electors.

[12] We may not substitute our judgment as to credibility for that of the trial judge who heard the witnesses and observed their manner and actions while testifying. However, the further lengthening of this opinion by detailed consideration of the evidence and rulings of the court as to each voter whose ballot was rejected would be unwarranted.

[13] The trial court, against appellants' objections, admitted in evidence certain declarations of voters made before and after election tending to disqualify them as legal voters. Of the 12 whose votes were eliminated from the count, no serious objections to the court's action were made as to Martine Vargas, Marion Ford, and Violet Gordon. Eight of the remainder whose votes were excluded were present and testified at the trial and had an opportunity to dispute the testimony concerning their alleged declarations, and we think under such circumstances the admission of such declarations has not been held prejudicial. *People ex rel. v. Commissioners*, 7 Colo. 190, 2 Pac. 912, 15 Cyc. 422.

[14, 15] As to the voter Swan Larson who was not present as a witness, we think it not necessary to determine the doubtful question of the admissibility of his declarations, for two reasons: (a) There was other evidence before the court besides the declarations of Larson, testified to by the witnesses, which would warrant the court in determining his qualifications as a voter; (b) the case was tried to the court without the intervention of a jury, and it will not be presumed that the court gave any weight to testimony not lawfully admissible.

[16] As to whether or not the voter, on the witness stand, who has cast his vote at an election, may testify as to how he voted, the great weight of authority is that it is a personal privilege which he may waive at his option; but he cannot be compelled to testify against his will. All the facts concerning the qualifications of the voters whose ballots were excluded by the court were earnestly contested at the trial. The court having resolved such facts in favor of appellees, and there appearing to be sufficient evidence to support the decree, the judgment will be affirmed.

Judgment affirmed.

CUNNINGHAM, P. J., not participating.

(55 Or. 149)

WALKER et al. v. WARRING et al.

(Supreme Court of Oregon. March 11, 1913.)

1. APPEAL AND ERROR (§ 1010*)—TRIAL BY COURT—FINDING—EVIDENCE.

On appeal, in an action at law tried before the court without a jury, the Supreme Court will examine the evidence only to ascer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes

tain if there is any competent evidence to support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

2. APPEAL AND ERROR (§ 1010*)—FINDINGS—EVIDENCE.

Where, in an action for the price of nursery stock sold under a contract which did not fix the price of plum trees, various lists of prices of trees of exactly the same size and similarly named were put in evidence as having been furnished with the stock, a finding fixing the price of the plum trees at the same rate as mentioned in the contract for prune trees could not be disturbed on appeal, on the ground that it was sustained by no evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

3. SALES (§ 194*)—CONTRACT—DELAY IN MAKING PAYMENTS—FORFEITURE OF PAYMENTS.

A contract for the sale of nursery trees provided that the buyer should, in the fall, advance so much per thousand buds, and in the next spring advance a like amount for grafting all trees not previously budded, the amount so paid "to be deducted from the bill at the last delivery of stock," and also provided that if the payments therein provided for were not made payments theretofore made could be forfeited. *Held* that, the contract being an entirety, a mere delay by the buyer in making payments, without any conduct indicating an intent to abandon the contract, did not authorize the seller to declare a forfeiture of the advance payments and to refuse to credit such payments on the account for the trees delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 508; Dec. Dig. § 194.*]

Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by W. W. Walker and others against J. D. Warring and another. From judgment for plaintiffs, defendants appeal. Modified and affirmed.

This is an action for money. The cause was tried before the court without a jury. From a judgment in favor of plaintiffs, defendants appeal.

The first cause of action is for the recovery of \$3,262.26 on a contract entered into between plaintiffs and defendant J. D. Warring, on October 30, 1909, the payments to become due on the contract being guaranteed by the defendant Capital City Nursery Company, a corporation. The contract provided, among other things, for the sale and delivery by plaintiffs, doing business under the firm name of Marion County Nurseries, W. W. Walker & Co., Proprietors, to J. D. Warring, or his order, of all trees that might be grown from all seedlings then in the nurseries of Walker & Co., the parties of the first part, which were budded during the season of 1909, or to be grafted in the spring of 1910. It was stipulated by the contract that the trees should be carefully cultivated and grown; and that they should be dug and graded at such times and in such quantities as the second party might direct during the

fall of 1910 and the spring of 1911. The contract also made provisions for the manner of preparation for shipment, and for the delivery of the trees at the city of Salem, Or. It was agreed that Walker & Co. should grow such varieties of stock as the purchaser might direct, provided that such scions or buds could be procured. The party of the second part promised to advance \$4 per thousand buds on November 6, 1909, less \$300 advanced on the contract at the time of its execution. The prices to be paid for the trees known as the 1910 crop were as follows:

Apples, 4 to 6 ft., 7 ct. each; 3 to 4 ft., $3\frac{1}{2}$ ct. each.
Cherry, 4 to 6 ft., 10 ct. each; 3 to 4 ft., 5 ct. each.
Pear, 4 to 6 ft., 9 ct. each; 3 to 4 ft., $4\frac{1}{2}$ ct. each.
Peach, 4 to 6 ft., 8 ct. each; 3 to 4 ft., 4 ct. each.
Apricot, 4 to 6 ft., 9 ct. each; 3 to 4 ft., $4\frac{1}{2}$ ct. each.
Almond, 4 to 6 ft., 9 ct. each; 3 to 4 ft., $4\frac{1}{2}$ ct. each.
Prune, 4 to 6 ft., 6 ct. each; 3 to 4 ft., 3 ct. each.
Gooseberry and currants No. 1, $2\frac{1}{2}$ ct. each.

The party of the second part further agreed to pay \$4 per thousand for grafting (during the spring of 1910) of all trees not previously budded, payment to be made on April 1, 1910. The balance of the contract price for trees was to be paid one-half in cash at the time of delivery, and one-half thereof on or before 60 days after such delivery of each shipment as ordered during the life of the contract.

The contract contained the following clause: "It is further agreed and understood by and between the parties hereto that time shall be of the essence of this contract, and if the payments herein provided for are not made in accordance with this agreement, that said agreement shall be null and void and the payments theretofore made be forfeited at the option of the parties of the first part." And also: "It is further agreed and understood by and between the parties hereto that in the event of loss or damage to the stock herein contracted through causes beyond the control of the parties of the first part, and they are unable to deliver the stock as herein set forth to the said second party, then and in that case the amount advanced by the said second party as advance payment shall be refunded to said second party by said first parties hereto."

Plaintiffs allege that, pursuant to the terms of the contract, plaintiffs on and between October 18, 1910, and December 10, 1910, delivered to the defendants nursery stock of the total agreed value of the sum of \$4,918.41; that no part thereof has ever been paid, except the sum of \$900.65, paid on October 21, 1910, and the further sum of \$755.50, paid on October 28, 1910, these payments being the first payments on the stock delivered in October, 1910, under the terms of the contract; that there is now due, unpaid, and owing to the plaintiffs from the defendants the full sum of \$3,262.26; that the defendants have made only the first payment pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vided for by the contract on certain nursery stock delivered on October 18, 20, and 27, 1910, but have not made the second payment thereon as provided in the contract; that they have made no payment on the nursery stock delivered on December 9 and 10, 1910, although long since due, and payment thereof has been duly demanded; and plaintiffs hereby exercise their option under the contract to rescind the agreement as to further deliveries thereunder.

The second cause of action is for the reasonable value of 2,275 plum trees, four to six feet in height, of the reasonable value of \$136.50, and 28 plum trees from three to four feet in height, of the reasonable value of 84 cents, delivered December 10, 1910.

The several exhibits attached to the complaint contain itemized bills of the trees delivered in October and December, 1910, with the size, price, and amount stated. The dispute arose as to the December delivery. Defendants by their answer deny the second cause of action, and for answer to the first cause of action aver that defendants have kept and performed all the terms and conditions of the contract on their part; that they have paid \$2,587.11, and have offered to pay the additional sum of \$665.50; that plaintiffs have failed to perform all the terms and conditions of the contract on their part, specifying that the trees were not properly cultivated and cared for, and that they were not delivered as directed by defendants or according to the contract, to defendants' damage in the sum of \$3,263; that the trees shipped during the month of December were shipped upon the express request of plaintiffs to store the trees with the defendants until required by the latter for the deliveries in the spring of 1911, claiming that payment therefor was not due under the contract until the spring of 1911.

A. O. Condit, of Salem, for appellants. M. E. Pogue and W. T. Slater, both of Salem, for respondents.

BEAN, J. (after stating the facts as above). It appears that plaintiffs, upon this claim being made, informed defendant Warring that he thereby forfeited the remainder of the contract. Plaintiffs then commenced this suit, alleging that they exercised their option to rescind their agreement as to further deliveries thereunder, claiming a forfeiture of advances for budding and grafting to the amount of \$930.66. Defendants contend that this amount should be credited as payment for the trees delivered. Evidence was introduced by the respective parties tending to support their respective claims.

[1] It is urged by defendants that this court should re-examine the facts, the cause having been tried by the court without a jury, because of the lengthy accounts of the various shipments of trees.

In the trial of a cause by the court without a jury, the judge acts as a jury, and the findings of fact take the place, and are to the same effect, as the verdict of a jury. Under section 3 of article 7, of the Constitution, as amended November 8, 1910 (Laws 1911, p. 7), no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. In an action at law tried before the court without a jury, the findings will not be disturbed if there is any competent evidence to support them. *Flegel v. Koss*, 47 Or. 366, 83 Pac. 847; *Astoria Railroad Co. v. Kern*, 44 Or. 538, 76 Pac. 14; *Courtney v. Bridal Veil Box Factory*, 55 Or. 210, 105 Pac. 896.

It is contended by counsel for defendants that these authorities have no application to this case, for the reason that the opinions were rendered under the law as it stood before the constitutional amendment of 1910. The same rule has been applied since the constitutional amendment. See *Sun Dial Ranch v. May Land Co.*, 61 Or. 205, 119 Pac. 758, 763.

Upon an appeal to this court in a case so tried, the court will examine the evidence only to the extent of determining if there is any competent evidence to support the findings, and will not review the weight or sufficiency of the evidence. *Seffert v. Northern Pac. Ry. Co.*, 49 Or. 95, 88 Pac. 962, 13 Ann. Cas. 883.

[2] It is urged by counsel for defendants that there is no evidence tending to show the reasonable value of the trees mentioned in the second cause of action. It seems that this claim was pleaded separately, for the reason that the exact kind of trees was not described in the contract, nor the price fixed. The contract, however, did provide that the plaintiffs should grow such trees as the defendants desired; therefore the only controversy that can possibly arise is as to the price. At the time of the delivery plaintiffs furnished defendants with a statement of the trees, containing description and price, to which no objection appears to have been made. The court had before it various lists of prices of trees of exactly the same size, similarly named, and it apparently found that the plum trees were charged at the same rate as the prune trees mentioned in the contract. The price charged seems to have been the wholesale price. We cannot say that there was no evidence before the court showing the reasonable value of these trees.

The contention of the defendants is that the December shipments of trees were made by plaintiffs for storage, and that it was agreed that they should not be paid for until the spring of 1911. The trial court found, and the evidence strongly tends to show, that no such agreement was made. The contract itself controverts this proposition. It does

not contemplate that the plaintiffs were to ship these trees. They were to be delivered at Salem, and there is testimony to show that they were so delivered and accepted by the defendants. It appears that in the evening after shipping one of the car loads the plaintiffs requested payment for one-half of the shipment, and defendant Warring informed them that it was too late to make the payment that evening, as the banks were closed. On the following morning Warring claimed that the payment should not be made until the time for the deliveries in the spring of 1911.

The controversy is partially due to the fact that as soon as the contract was executed defendant Warring sold the trees described in the contract to the Oregon Nursery Company. He states in his testimony that the business was all to be done through the Capital Nursery Company and himself. He repudiates the authority for making the shipments in December and denies the authority of one Frederick, who received the trees that were shipped in December, together with those that had theretofore been shipped. It does appear, however, that he knew of the delivery after the trees had been received by Frederick for the defendants, and after the shipments had been made, and offered no objection to the same. It appears that Frederick was authorized to act for defendants, and was paid for this service by the Capital City Nursery Company.

[3] It is further claimed by defendants that the advances made should be credited in payment for the trees, and that the same were not forfeited under the terms of the contract. It is contended by counsel for plaintiffs that, under the authority (*Lachmund v. Lope Sing*, 54 Or. 106, 102 Pac. 598), all of the advancements made pursuant to the contract were forfeited. This is the main question in the case.

When payment of the price is to be made in advance of or concurrent with delivery, it is of the essence of the contract; and a failure to pay is such a breach of the contract as will justify a rescission. Where delivery is made in installments, a failure to pay for an installment delivered within the time specified in the contract is ground for rescission. But the conduct of the purchaser must in all such cases be such as to show an intent to abandon the contract. *Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 105 Fed. 324, 44 C. O. A. 523; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. And especially is this true when the contract of sale is entire. 35 Cyc. 133, 134.

There can be no question but that the contract in the case at bar is entire. In the case of *Lachmund v. Lope Sing*, supra, it will be noticed that there was an entire failure to perform the contract on the part of the buyer, differing from the case at bar.

As will be noticed by the pleadings, the

advances were made for budding and grafting trees to be raised for the crop of 1910. Several shipments of the trees were delivered to defendants under the contract. These advances were made for the purpose of enabling the plaintiffs to properly propagate the trees. During the fall of 1910 the defendants were urging rapid delivery of the trees, presumably for sale that season, which request, was perhaps, impossible for plaintiffs to comply with. There was a rise in the price of fruit trees after the contract was made. The controversy arose in regard to the time of making the payments for trees shipped at a different time than that specified in the contract, pursuant to an arrangement between the parties wherein the misunderstanding as to the time of payment arose. The conduct of the defendants was not such as to show an intent to abandon the contract. There was no declaration made by defendants to that effect. There was merely delay in making payments.

In the case of *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 569, 12 C. C. A. 306, the facts were very similar to the case under consideration. In that case the defendant contracted to sell 10,000 tons of ore to plaintiff, to be delivered in seven equal parts in each of seven months, the price to be also paid in equal installments in the same months, for the sum of \$37,500. The contract contained a stipulation that, if plaintiff failed to make any payment for 10 days after it was due, defendant should have the right to cancel the contract as to all ore not delivered at the time of such default. Plaintiff failed to make the fourth payment, and defendant refused to ship more ore until the same was made. No more payments were made, and no more ore shipped. Judge Severens, in delivering the opinion, as to the construction of this agreement, calling attention to the right of cancellation for nonpayment for partial deliveries, said: "The contract being entire, as soon as the parties had entered upon its performance by partial delivery and payment the mere failure of the vendee to make the subsequent payments would not, of itself, absolve the vendor from proceeding with the deliveries. It may be that a downright refusal to make payment, or other equivalent conduct evincing a purpose to renounce the contract, would entitle the other party to treat the contract as abandoned, and relieve him from the obligation to proceed further in its execution."

Mr. Justice Boyce, in the case of *Johnson Forge Co. v. Leonard*, 3 Pennewill (Del.) 342, at page 349, 51 Atl. 305, at page 308, 57 L. R. A. 225, at page 228, 94 Am. St. Rep. 86, at page 92, of the opinion, said: "While it is quite impossible to lay down any absolute rule for guidance in all cases of this character, under the varying facts and circumstances of the particular case, yet, in our

opinion, the rule that will best promote the important commercial interests involved in contracts of this nature, and one that will work out the most beneficial results in accordance with reason and justice, is that if a default by one party in making particular payments or deliveries, except in cases of neglect, omission, or inadvertence, is accompanied with an announcement of intention not to perform the contract upon the agreed terms, or if, in the language of the court below, the default is accompanied with a deliberate demand, 'insisting upon new terms different from the original agreement,' the other party may treat the contract as being at an end"—citing many authorities.

Under a contract for the sale of personal property, the nonpayment of the price or nondelivery will not, of itself, ordinarily be sufficient to warrant a rescission, yet, under the particular facts and circumstances of the case, such a default may be evidence of an intention to no longer be bound by the agreed terms of the contract.

A careful consideration of the whole contract and the circumstances connected therewith leads us to believe that the clause as to the forfeiture of the payments, above quoted, refers particularly to a default in the advancements for budding and grafting. The stipulation that "the balance contract price for trees, to be paid one-half in cash at time of delivery, and one-half thereof on or before 60 days after such delivery," indicates that the \$4 per thousand to be advanced should be credited on the price of each delivery. *Balance* of the contract price does not mean the whole price. The following clause, "the amount so paid is to be deducted from the bill at the last delivery of stock," which was inserted in the contract immediately after the reference to the \$300 advancement, must have been intended to refer to that amount. This is the only construction that would give any effect to both clauses. The contract is somewhat ambiguous in this respect. We think, however, that, within the meaning of the contract, the last delivery was the last one made in December.

While the trial court did not make any specific finding as to the advancement made pursuant to the contract, there is no dispute in regard to the fact relating thereto. We think that, under the terms of the contract, there was error in not crediting the advancements made by defendants, amounting to \$930.66. There was no competent evidence to support a finding to the contrary.

The cause will therefore, under the provisions of section 3, art. 7, of the Constitution, be remanded to the lower court, with directions to credit defendants with that amount and enter judgment for the balance. With this modification, the judgment is affirmed.

(84 Or. 356)

BOARD OF TRUSTEES OF ALBANY COLLEGE v. MONTEITH et al.

(Supreme Court of Oregon. March 11, 1913.)

1. CHARITIES (§ 12*)—GIFTS—SCHOOLS.

A conveyance of land in consideration that a certain church had formed a private corporation, that such corporation had built a school on the land, that the teachers should be always selected from such church, etc., was a charitable gift.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 36; Dec. Dig. § 12.*]

2. CHARITIES (§ 48*)—GIFTS—CONSTRUCTION—"INSTITUTION"—COLLEGE.

A conveyance of land to a corporation, on which such corporation had built a college in consideration that the institution, so erected and situated, should be forever maintained, does not require that the college shall forever remain upon the premises described, but the premises may be sold as long as the proceeds are used for the purpose of maintaining the college on any site; the "institution" not consisting of the premises and buildings, but of the association organized for the purpose of maintaining a college.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 78, 81, 104, 106; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 2, pp. 3661-3663.]

3. DEEDS (§ 134*)—CONDITIONS AND LIMITATIONS—CONSTRUCTION.

A provision in a deed of land to a religious corporation, on which such corporation had built a college, that it was expressly "conditioned" that, if such corporation was dissolved, the conveyance should cease, and the premises, with the appurtenances, shall go to the general assembly of the church, is not good as a condition, because not reserved to the grantor or his heirs; and, where the rest of the conveyance shows an intent that the premises might some time be sold, such provision will not be held to operate as a conditional limitation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 448, 449; Dec. Dig. § 134.*]

4. CHARITIES (§ 38*)—"AT"—CONSTRUCTION.

A gift of property to be used in the maintenance of an institution of learning "at" Albany does not mean that such institution shall be located within the limits of Albany, but may be located "near" such place (citing 1 Words and Phrases, 595).

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 66; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 8, p. 7585.]

Appeal from Circuit Court, Linn County; William Galloway, Judge.

Suit to quiet title by the Board of Trustees of Albany College against C. M. Monteith and others. Decree for plaintiff, and defendants appeal. Affirmed.

In August, 1869, Thomas Monteith and Christine Monteith executed and delivered to the plaintiff corporation a deed intended to convey four blocks of land in the city of Albany, of which deed the following, omitting the description, is a copy: "This indenture witnesseth: That we, Thomas Monteith and Christine M. Monteith, his wife, for and in consideration that 'the board of trustees of the "Albany Collegiate Institute,"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

duly nominated and appointed for that purpose by the presbytery of Oregon in connection with "the general assembly of the Presbyterian Church in the United States of America," have associated themselves as a private corporation under the provisions of the general incorporation laws of Oregon by articles of incorporation filed in the clerk's office in Linn county, in said state, on the 31st day of January, 1867, under the name and style above written; and in further consideration that the said corporation have pursuant to said articles of incorporation erected on the premises hereinafter described an edifice for educational purposes valued at eight thousand dollars, and in further consideration that said collegiate institute or seminary of learning mentioned in said articles of incorporation, situated on the premises hereinafter described, is, and shall be forever hereafter, under the supervision and control of the religious denomination aforesaid, according to the meaning and intent of said articles of incorporation and the by-laws made pursuant thereto, and in the further consideration that the president of said board of trustees and the president of the faculty of said collegiate institute shall always be chosen from the members of said church in connection with the general assembly of said Presbyterian Church in the United States of America, have donated, bargained, and sold and by these presents do donate, grant, bargain, sell and convey unto the board of trustees of the Albany Collegiate Institute, and their successors in office for the use and benefit of said corporation, for the uses and purposes expressed in said articles of incorporation, the premises and appurtenances described as follows. * * *

To have and to hold said premises with their appurtenances unto the said board of trustees of the Albany Collegiate Institute and their successors in office for the use and benefit of said corporation, for the uses and purposes mentioned in said articles of incorporation forever. Provided always and expressly conditioned that if at any time, the said corporation shall be dissolved through default of said presbytery of Oregon for any cause whatsoever, or the said institution of learning shall cease to be under the supervision and control of the presbytery of Oregon, in connection with the general assembly of the Presbyterian Church in the United States of America according to the true intent and meaning of said articles of incorporation, then and in that case, this conveyance shall cease and determine as to the board of trustees aforesaid, and the said described premises with the appurtenances shall become the property of the 'general assembly of the Presbyterian Church of the United States of America' for the uses and purposes herein set forth and no other. Provided always, that the premises herein described and conveyed shall never be sold and conveyed to any religious denomination not

herein named without the written consent of the grantors herein." By mistake two of the blocks were omitted from the description; but the plaintiff took possession of the land, and used the same for purposes connected with the institution until the commencement of this suit; and the intent, on the part of the grantors, to convey by the deed all the land now occupied and claimed by the plaintiff is not questioned by defendants in this suit.

Shortly before the commencement of this suit, the plaintiff purchased a larger tract of land, situated adjacent to some recently platted additions to the city of Albany, and about a mile from the premises in controversy, evidently with a view of securing more commodious grounds for their college, and, contemplating the possible sale of the lands in controversy, brought this suit to quiet title to the property. The defendants answered, admitting plaintiff's possession of the premises, the making of the deed, and the intent of the grantors to convey the four blocks of land described in the complaint, but deny that such conveyance was for a valuable or other consideration, except as further alleged in the answer, and deny that plaintiff was the owner in fee simple of the premises. By way of affirmative defense, it was alleged that the plaintiff was incorporated in 1867 for the purpose of establishing and maintaining a college at Albany, Linn county, Or.; that the corporation was organized and the college founded with the intention of establishing a college upon the real property described in the complaint. The answer set up the deed in full, alleging the mistake in the description, which defendants asked to have corrected, and that defendants were the widow and heirs at law of Thomas Monteith; that said deed was executed by the grantors and accepted by the plaintiff upon the trust to use the property as a site for a college, the board of trustees of which should always be nominated and appointed for that purpose by the presbytery of Oregon in connection with the general assembly of the Presbyterian Church in the United States; and that the title to the property is held by plaintiff in trust for the charitable uses expressed in the deed and in plaintiff's articles of incorporation, and not as a title absolute in fee.

The defendants asked for a decree declaring plaintiff to be trustees of the property, and for a dismissal. The answer is too lengthy to be stated in full in this opinion. There was a reply, and upon the trial there was a decree for plaintiff that it was the owner in fee of the property, with full power to sell and dispose of the same to any person, firm, or corporation, except a religious denomination other than the Presbyterian Church. It was further decreed that, in case of sale of the premises, then and in that case the trust created by virtue of the deed and articles of incorporation should be

impressed upon the proceeds of the sale; the same to be used for the objects and purposes set out in the deed and articles of incorporation. The defendants appeal.

Gale S. Hill and L. M. Curl, both of Albany, for appellants. H. H. Hewitt, of Albany (Hewitt & Sox, of Albany, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] The deed in question was evidently a gift for charitable uses. There is nothing to indicate that any consideration beyond the desire to aid in the maintenance of an institution of learning, moved the grantors to execute the conveyance. A conveyance for such purpose is a charitable gift. *Miller v. Porter*, 53 Pa. 292; *Alfred University v. Hancock*, 69 N. J. Eq. 470, 46 Atl. 178; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

[2] We will now consider the extent and nature of the estate conveyed to the plaintiff. It is admitted that the name of the plaintiff corporation has been changed since the original deed was made, in which plaintiff was described as "the Board of Trustees of the Albany Collegiate Institute," but that it is in fact, as we have already considered it, identical with the present corporation, the plaintiff in this suit. The additional description in the conveyance, "duly nominated and appointed for that purpose by the presbytery of Oregon in connection with 'the general assembly of the Presbyterian Church in the United States of America,'" was used merely to further describe and identify the corporation, and to distinguish it from any other corporation which might be identified with any other branch of that denomination; there being at that time several synods or associations of Presbyterians, chief among which were "the Presbyterian Church in the United States of America," "the Presbyterian Church in the United States," "the United Presbyterian Church of North America," "the Cumberland Presbyterian Church," and others. The conveyance, therefore, vested the title to the property in fee in the corporation, subject to the limitations hereinafter mentioned. The consideration of the deed was the fact that the corporation had already erected on the premises, at a cost of \$8,000, a building for educational purposes, and the additional consideration that the institution so erected and situated should be forever maintained by, and forever afterwards be under the control of, the religious denomination, according to the meaning and intent of the articles of incorporation. It is now claimed by the defendants that this language limits the power of the trustees to remove the buildings and college from the premises described in the deed, but requires that the college shall forever remain upon the premises described, and that they are precluded from selling the premises and

using the funds derived therefrom in the maintenance of the college upon other premises. We do not so interpret the conveyance. It is true the buildings of the institution are described as being situated and maintained on the conveyed premises; and the fact that they had been so constructed, and that \$8,000 had been expended upon them, is mentioned as a part of the consideration of the conveyance; but the buildings were not the institution, nor did the grounds upon which they stood comprise the same. They were the property of the institution, which, in its last analysis, consisted of the association organized for the specific purpose of establishing and maintaining an institution of learning at Albany, in Linn county. *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201.

By the terms of the conveyance itself, the possibility of a sale of the property was evidently recognized, as is clearly shown by the following proviso: "Provided, always, that the premises herein described and conveyed shall never be sold and conveyed to any religious denomination not herein named without the written consent of the grantors herein." *Expressio unius est exclusio alterius*. The grantors, in effect, said to the grantees, "You may sell to anybody you choose, so long as you do not sell to some other religious denomination." There was reason in this restriction. The grantors were no doubt desirous of seeing a denominational college maintained at Albany. A building adapted to such purposes had been erected on the ground; and if the site of the college should be changed, and the grounds and building sold to some other religious sect, another denominational school might be instituted which otherwise would go to the Presbyterian institution.

We conclude that the property in controversy was given for the same purposes that money or stocks or bonds might have been given, namely, to support and maintain an institution of learning at Albany. It was, no doubt, in the minds of all the parties that for the present the school would be carried on where the buildings had been erected; but from the cost of these buildings, as shown by the deed, it is evident that they were but temporary in their character, and far from being adequate to meet the wants of a growing community. It is true the plaintiff holds the property in trust for the purposes mentioned in the conveyance, and it cannot sell it and apply the proceeds to any other purpose. The moneys received from such a sale must be applied to the purpose of maintaining an institution of learning at Albany of the character specified in the conveyance. It is impressed with a trust that it shall be used for that purpose.

[3] We do not believe that the further so-called "condition" in the habendum clause of the deed affects the conclusion above arrived at. For the sake of clearness, we restate in full this clause in the deed: "To have and

to hold said premises with their appurtenances unto the said board of trustees of the Albany Collegiate Institute and their successors in office for the use and benefit of said corporation, for the uses and purposes mentioned in said articles of incorporation forever. Provided always and expressly conditioned that if at any time, the said corporation shall be dissolved through default of said presbytery of Oregon for any cause whatsoever, or the said institution of learning shall cease to be under the supervision and control of the presbytery of Oregon, in connection with the general assembly of the Presbyterian Church in the United States of America according to the true intent and meaning of said articles of incorporation, then, and in that case, this conveyance shall cease and determine as to the board of trustees aforesaid, and the said described premises with the appurtenances shall become the property of the 'general assembly of the Presbyterian Church of the United States of America' for the uses and purposes herein set forth and no other. Provided always, that the premises herein described and conveyed shall never be sold and conveyed to any religious denomination not herein named without the written consent of the grantors herein." Although the word "conditioned" is used in the restrictive clause, it is not good as a condition, because a condition annexed to real estate can only be reserved to the grantor and his heirs. 2 Blackstone, *156. And, if the reservation be to a third person, the reservation, if otherwise clear, will be held to operate as a conditional limitation. 2 Blackstone, *supra*; Proprietors of the Church, etc., v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725. But taking the conveyance by its four corners, and construing it as a whole, and in the light of the fact that a possible future conveyance of the property was evidently in the contemplation of the parties when the deed was made, as evidenced by the sole restriction on such alienation being that it should not be sold to any other religious denomination, we are of the opinion that the true intent of the clause above considered was to prevent the failure of the trust; that is to say, that, if after a lapse of years, no matter whether 10 or 500, there should be a failure to elect or choose trustees by the board upon nominations made by the presbytery of Oregon, as provided in the articles of incorporation, the general assembly of the Presbyterian Church in the United States of America should succeed to the trust. The words "the said described premises with the appurtenances shall become the property," etc., were apt to describe the property if it should still exist in specie; but they should not be construed as an implied limitation upon the power of alienation. Such limitations are repugnant to the general policy of the law, and should not rest in implication. 24 Am. & Eng. Enc. Law, 872; Rogers v. Birkhead, 3 Jur. N. S. 405; Roederer v. Hess, 112 Ky. 807, 66 S. W. 1012, 23 Ky. Law Rep. 2165.

[4] It is also claimed that a proposed sale to remove the buildings and seat of the institution to a new site, about a mile from its present location, would be in violation of the terms of the trust which provides that the institution shall be maintained "at" the city of Albany; the contention being that the term "at" should be construed to mean "in" or "within" the actual limits of the city. Primarily the word "at" expresses the relation of nearness; the relation of presence; nearness in place. It is less definite than "in" or "on." "At the house" may be "in" or "near" the house. To determine the sense in which the word is used, the subject-matter, with reference to which it is used, must be taken into consideration. In a subscription to a college conditioned to be located at a certain town, the word "at" was construed to have been used only as denoting a place conceived of as a mere geographical point, and not as fixing a condition that the college should be located within the corporate limits of such town. 1 Words and Phrases, 595 (citing Rogers v. Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636), which case is very similar to the one at bar. Rogers had subscribed \$2,500 toward the erection of a college to be located at the town of Searcy. It was located outside the corporate limits, and Rogers claimed that this avoided his subscription. It was held that a location near the town satisfied the terms of the contract. Many cases to the same effect might be cited. Even in criminal law, where great strictness is applied, it has been held that the word "at" might be construed to mean "near to" or in close proximity. Thus in Napier v. State, 50 Ala. 168, where the statute provided a punishment for persons betting on a game of cards played "at a storehouse," etc., it was held that the word "at" should be construed to mean "near to" and "in front of" a storehouse. Also in the case of Ray v. State, 50 Ala. 172, being an indictment under the same statute, it was held that a game played within 10 feet of a storehouse where liquors were sold was played "at a storehouse," within the meaning of the statute.

We conclude, therefore, that any possible or probable sale of the property, with intent to apply the proceeds to the erection or maintenance of a college, under the same auspices and direction as at present existing, upon the property lying near Albany, would not be a violation of the trust, and that any funds derived from such sale are impressed with the original trust, and must be applied to the purposes mentioned in the deed.

The decree will therefore be affirmed, with leave to the defendants to apply to the circuit court to reopen this case to prevent application of funds derived from any such sale to any purpose other than those indicated in this opinion.

EAKIN, J., took no part in the consideration of this case.

(64 Or. 553)

MURPHY v. TILLSON et al.

(Supreme Court of Oregon. March 11, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 43*)—TITLE OF HEIRS OR DISTRIBUTEES—PERSONAL PROPERTY.

While, upon the death of the ancestor, the title to the real estate goes to the heir, subject to the right of the administrator to possession pending administration, title to the personal property passes directly to the executor or administrator; and hence the heirs or legatees have no right to the personal property until the close of the administration, except as derived through the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 279, 281; Dec. Dig. § 43.*]

2. PARTIES (§ 59*)—SUBSTITUTION—"PERSONAL REPRESENTATIVES"—"LEGAL REPRESENTATIVES"—"REPRESENTATIVES."

Under L. O. L. § 88, which provides that, in case of the death of a party, the court may, at any time within one year, on motion, allow the action to be continued by or against his "personal representatives" or successors in interest, the quoted words, as well as "legal representatives" and "representatives," mean "executors" and "administrators," and do not include those who take as sole residuary legatees.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 90-94, 165; Dec. Dig. § 59.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4070-4079; vol. 8, p. 7704; vol. 6, pp. 5358-5362; vol. 8, p. 7753; vol. 7, pp. 6110-6115; vol. 8, p. 7785.]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action begun by Dan R. Murphy against Prosper W. Smith, in which, after defendant's death, the court made an order refusing to continue the action as against Lydia C. Tillson and another, and plaintiff appeals. Affirmed, and cause remanded.

Geo. A. Brodie, of Portland (Murphy, Brodie & Swett, A. C. Middlekauff, and R. K. Walton, all of Portland, on the brief), for appellant. Joseph Simon, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for respondents.

EAKIN, J. Plaintiff, on the 5th day of March, 1909, filed a complaint against Prosper W. Smith to recover the sum of \$15,000 as commission for the sale of real estate upon a contract made with one Hoberg, which was by Hoberg assigned to the plaintiff. Prosper W. Smith was a nonresident of Oregon. Upon the filing of the complaint and the issuance of the summons, which was placed in the hands of the sheriff on March 5, 1909, for service, a writ of attachment was duly issued and served upon the Southern Oregon Company by service of notice of garnishment upon R. E. Shine, secretary of said company, attaching all debts, moneys, and property in the company's hands belonging to Prosper W. Smith; that on May 5, 1900, Prosper W. Smith died testate. In his will he named L. C. Tillson and Anna B. Smith residuary legatees of all his property, and

on April 29, 1910, on application of plaintiff suggesting the death of Prosper W. Smith, the court ordered that the action be continued against the said Tillson and Smith, the legatees and representatives of the said Prosper W. Smith, and that they be served with summons in the action. On April 30, 1910, an amended complaint was filed, naming L. C. Tillson and Anna B. Smith as defendants in the action. Whereupon defendants appeared specially for the purposes of the motion, and moved to vacate the order made April 29, 1910, continuing the action against the personal representatives of Prosper W. Smith, for the reason that they were not proper parties defendant, which motion was allowed by the court. The plaintiff appeals.

[1] There is but one question that we deem important to consider, namely: Can the action be continued against L. C. Tillson and Anna B. Smith individually, as being the sole residuary legatees in the will of the said Prosper W. Smith, deceased? Section 88, L. O. L., provides: "In case of the death * * * of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successors in interest." Plaintiff contends that the defendants Tillson and Smith are "personal representatives," within the meaning of this statute, for the reason that they are legatees of all of Smith's property, or at least they are successors in interest to the property of Smith. This court has frequently held that upon the death of the ancestor the title to the real estate goes directly to the heir, subject to the right of the administrator to possess pending administration, but that the title to personal property passes directly to the executor or administrator. Therefore the heir or legatee has no right to the property of the estate until the close of the administration, except as derived through the executor or administrator. It is said, in the case of *Winkle v. Winkle*, 8 Or. 195, that "it is a fundamental principle of the common law of this country that the personal property of deceased persons goes by operation of law to the administrator;" and under our statute it must be distributed by him under the orders of the county court. This holding is reiterated in *Weider v. Osborn et al.*, 20 Or. 307, 25 Pac. 715, and in *Casto v. Murray*, 47 Or. 64, 81 Pac. 388, 884. In *Re John's Will*, 30 Or. 501, 47 Pac. 343, 36 L. R. A. 245, Justice Wolverton says: "Their probate [wills] has become a necessary process to the establishment of title to either style of property, and is effectuated by the same method and in the same court. * * * Accordingly it has been held, under the statutes of this state, that the transfer of the title to the personal property of deceased persons is accomplished through the sole instrumentality of the court." And we find in the case of *State v. O'Day*, 41 Or. 500, 69

Pac. 544, the following: "The personal property of a decedent goes by operation of law to the administrator, and the title thereto must be derived through him." Williams on Executors (page 485) says: "The general rule is that all goods and chattels, real and personal, go to the executor or administrator. By the laws of this realm, says Swinburne, as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, * * * the whole personal estate of the deceased vests in the executor or administrator."

[2] Plaintiff contends that the term "personal representatives," as used in section 38, L. O. L., does not have reference to executors or administrators alone, but includes those who succeed to the estate, relying upon decisions in the state of Connecticut, and references to Bouvier's Law Dictionary. In *Staples et al. v. Lewis et al.*, 71 Conn. 288, 41 Atl. 815, cited by plaintiff, in referring to the term "personal representatives," the court says: "But as under statutes of distribution executors and administrators are no longer the sole representatives of the deceased as to personal property, these words have lost their original meaning." That language can have no bearing on the terms as used in our statute, where it has not lost any of its significance; but the legal representative of the estate of a deceased person is the executor or administrator appointed by the county court. 18 Am. & Eng. Enc. Law (page 813) defines the term: "The primary and ordinary meaning of the term 'legal representatives,' 'legal personal representatives,' 'personal representatives,' and 'representatives' is executors and administrators, and in the absence of anything to show a contrary intent they must be so construed." That is especially true under our statute, where the title to the personal estate of the deceased person passes directly to the executor or administrator. If these defendants be substituted in place of Prosper W. Smith, such substitution will not give the court jurisdiction of his estate, as they are strangers thereto.

The judgment of the circuit court is affirmed, and the cause will be remanded to the circuit court for such other and further proceedings as to the court may seem proper, not inconsistent with this opinion.

(64 Or. 366)

YASUI v. HALLAM et al.

(Supreme Court of Oregon. March 11, 1913.)

AGRICULTURE (§ 11*)—IMPROVEMENT OF LANDS—STATUTES—"PERSON IN LAWFUL POSSESSION."

Under L. O. L. § 7439, providing that any person, claiming or improving any land at the request of the owner or person in lawful possession thereof, shall have a preferred lien thereon, a contractor, going upon land to clear

it for the owner, is not a "person in lawful possession," and hence his employes have no lien.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 11-30; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 5, p. 4032.]

Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by M. Yasui against A. O. Hallam, Thomas H. Sherrard, Charles S. Chapman, and others. Judgment for plaintiff, and Sherrard and Chapman jointly appeal. Reversed, and suit dismissed.

This is a suit by the assignee of lien claimants to foreclose alleged liens for clearing and improving certain lands. The facts are that the defendants Thos. H. Sherrard and Charles S. Chapman are, and at all times stated herein were, the owners in fee of two tracts of land in section 1, township 1 north, of range 10 east, of the Willamette meridian, containing, respectively, 21 and 5 acres. Sherrard and Chapman on November 10, 1910, entered into a written contract with the defendant A. O. Hallam, by the terms of which the latter undertook to slash, clear, grub, plow, and prepare for cultivation such tracts of land at \$115 an acre, and to accept as part payment thereof another 10 acres, the deed to which was to be placed in escrow until the amount of work performed under the contract equaled \$1,250, the stipulated consideration for the 10 acres. The contract subsequently was modified, but the particulars thereof are not deemed essential. In order to comply with the terms of the agreement, Hallam employed 15 Japanese, who began clearing the land November 30, 1910, and continued to work on the premises until January 5, 1911. Not having received any part of their pay, they on March 1, 1911, severally filed with the county clerk of Hood River county, the political subdivision where the land is situated, verified bills of wages due each for the services rendered, containing a statement of the contract, designating the name of the contractor, describing the land by metes and bounds sufficient for identification, and exhibiting the total amount of each claim after deducting all set-offs and counterclaims, as required by law. L. O. L. § 7490. Thereafter each claimant duly assigned his verified claim to the plaintiff, who instituted this suit. The cause, being at issue, was referred; and, from evidence taken, the court made findings of fact and of law, and, based thereon, decreed a recovery of \$670.03, the amount of the several demands, with interest thereon at the rate of 6 per cent. per annum from January 5, 1911, \$200 as attorney's fees in the suit, and \$75 for preparing and filing the liens, and ordered a sale of the lands to satisfy the sums awarded, whereupon Sherrard and Chapman jointly appealed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Wm. L. Brewster, of Portland (Kingman Brewster, of Portland, on the brief), for appellants. L. A. & A. P. Reed, of Hood River, for respondent.

MOORE, J. (after stating the facts as above). The statute creating the right of lien in cases of this kind, reads as follows: "Any person or persons who shall hereafter clear any land or improve the same by ditching or diking or tilling the same at the request of the owner or person in lawful possession of the same, shall have a lien upon the said lands so improved or cleared for his wages and charges for the said service which lien shall be preferred to every other lien, mortgage or incumbrance of a subsequent date." L. O. L. § 7439.

In construing the clauses of the contract relied upon herein, which terms were also involved in another case for the foreclosure of a lien upon the same land, Mr. Justice Burnett says: "The mere fact that a contractor goes upon the land for the purpose of performing services thereon for the owner does not give him possession. It is manifest that Hallam could not have maintained ejectment against Chapman and Sherrard to recover possession of any of the land described in the complaint. He stood in no better relation to the owners in fee than any employé or servant of theirs, and therefore is not a person in lawful possession of the land in that sense which would authorize him to contract with a stranger so as to charge the owners of the fee or affect their estate."

The decision in that case is controlling herein, from which it follows that the decree should be reversed, and one entered here dismissing the suits, and it is so ordered.

(64 Or. 366)

HUGHES et al. v. EVANS.

(Supreme Court of Oregon. March 11, 1913.)
BROKERS (§ 43*)—AGREEMENTS—STATUTE OF
FRAUDS—IDENTITY OF PROPERTY.

An agreement of a broker to sell land on commission, which does not identify the particular property intended to be sold, does not satisfy the statute of frauds (L. O. L. § 808, subd. 8), requiring contracts, authorizing brokers to sell lands, to be in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43; Frauds, Statute of, Cent. Dig. § 131.*]

Appeal from Circuit Court, Polk County; Henry L. Benson, Judge.

Action by Chasteen Hughes and others against Evan Evans. Judgment for defendant, and plaintiffs appeal. Affirmed.

James E. Godfrey, of Salem (Wm. P. Lord, of Portland, and L. D. Brown, of Dallas, on the brief), for appellants. Oscar Hayter, of Dallas, for respondent.

EAKIN, J. This is an action to collect a commission for the sale of real estate. The

agreement for the payment of commission comes within the statute of frauds (subdivision 8 of section 808, L. O. L.), which subdivision, together with a part of the first paragraph of said section, is in the following language: "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged; * * * evidence, therefore, of the agreement shall not be received other than the writing: * * * (8) An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." The said agreement was in the following words: "Hughes & Bird. Date, March 11, 1910. 358 acres. * * * Acres cleared, 275. House 2 stories, 7 rooms. * * * Barn 2. Orchard ½ acres. * * * Fences in good condition. Watered by springs. * * * All acres hilly. * * * 275 acres timber. * * * Price, \$18,000. Terms, \$8,000. Remarks, terms to suit, 6 per cent. I hereby give Hughes & Bird, Dallas, Oregon, the exclusive sale of, or right to purchase the above described property in consideration of \$1.00 in hand, at the price and on the terms above mentioned, for a period of 15 days from date hereof and thereafter, until withdrawn by me in writing; and agree to pay them a commission of five (5) per cent. in case of sale or purchase. Owner, Evan Evans. P. O. Address, Rickreall, R. F. D. 1. County, Polk." This agreement contains an option to purchase as well as a contract for commissions. The only allegation in the complaint, as to the identity of the property contemplated by the contract, is that it related to certain land belonging to defendant in Polk county, and that defendant did sell "the land." The answer denies the allegations of the complaint. Defendant contends that no particular real property is mentioned in the agreement, and that it is void under the statute of frauds. Upon the trial, the court directed the verdict for the defendant for that reason; and, from a judgment dismissing the action, plaintiff appealed.

In the face of defendant's denial, plaintiff could not prove that the defendant sold the property mentioned in the agreement to a purchaser produced by plaintiff without proving, by parol, what property was intended to be included in the contract, to permit which would be adding to the terms of the contract, which is forbidden by the provision of the statute reading: "Evidence, therefore, of the agreement shall not be received other than the writing." If the property were identified by the agreement, and the description were not sufficient to locate it, extrinsic evidence might be resorted to for that purpose, but not in order to determine what

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property is meant. This agreement does not identify the property, and its identity, as well as location, must be established by extraneous testimony. Therefore, plaintiff could not prove he had produced a purchaser for any particular property. See *Bogard v. Barhan*, 52 Or. 121, 96 Pac. 673, 132 Am. St. Rep. 676. Plaintiff bases his right of recovery exclusively upon the authority of *Henderson v. Lemke*, 60 Or. 363, 119 Pac. 482; but it is held in that case that it is immaterial what the description of the property is, if it can be identified, thus recognizing that the identity of the property is necessary. In that case it was identified. Plaintiff was to find a customer for "my property," and the property was described in the complaint. If defendant had owned two or more pieces of property, no doubt the contract would have been held void, as the property intended could not then have been identified without extrinsic evidence; but this case does not come within the principle as above announced.

The contract is void, and the judgment of the circuit court is affirmed.

(64 Or. 342)

MOORE et al. v. UNITED ELKHORN MINES et al.

(Supreme Court of Oregon. March 11, 1913.)

WATERS AND WATER COURSES (§ 33*)—APPROPRIATION—ACTION TO ESTABLISH RIGHT.

Where defendants lawfully built a reservoir on government land, which plaintiffs subsequently, without any permission from the government, took possession of, irrespective of any question of nonuser of a water right by defendants, plaintiffs' title would not be quieted, because they had no title, and equity would not lend its aid to enable them to acquire property constructed by another.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.*]

On petition for rehearing. Denied.

For former opinion, see 127 Pac. 964.

McBRIDE, C. J. In the able brief accompanying their petition for rehearing, counsel question much of the reasoning in the opinion of the lower court, which was adopted as the opinion of this court. As we expressly stated, we did not commit this court to the adoption of all the conclusions reached by the lower court, and our opinion may therefore be treated more as a concurrence

in the result there reached rather than in the expressions therein employed. We do not consider the question of nonuser of a water right to be involved in this case. Plaintiffs own no land, no ditch, and no water right. They found upon the reserved lands of the United States a reservoir built by defendant's grantor before the land was reserved, and which, under the laws of the United States, defendant alone could be permitted to maintain without a new permit from the government, which permit they did not obtain. Defendant, though not using the reservoir, has paid all the taxes that have been demanded upon the property, and, beyond the fact of failure to use it, has otherwise shown an intent to retain it for use in the future. The position of the parties stands thus: The defendant's grantor had lawfully built upon government land a reservoir. As against every one but the government, it was the owner of the structure. It is not a right or a site that is in controversy, but a concrete, tangible thing, composed of earth, wood, stones, and iron, and costing five thousand real dollars. Plaintiffs, without permission from the government, have entered upon its forest reserve and seized this valuable structure. They have built no reservoir, and have no reservoir site. They say to the defendant: "We have seized this property which cost you \$5,000, and we intend to sell it for \$4,500; and because you dare to whimper as to the injustice of such a proceeding we will ask a court of equity, a court of conscience, to quiet our title, and compel you to pay the costs as a penalty for protesting." Equity will never lend its aid to such a transaction. There are very ancient injunctions against a man's coveting or taking that which belongs to another, and we are still cognizant of the time-honored direction to do unto others as we would that others should do unto us. There is also a maxim that "He who seeks equity shall do equity," and that "He who seeks equity shall come with clean hands." We would disregard all these and make this court an instrument of oppression, instead of justice, should we allow plaintiffs to prevail in this case, especially since they show no better title than that of squatters on a national forest reserve.

The plaintiffs have no title to be quieted, and the petition for rehearing is denied.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(87 Kan. 47)

WELCH v. MCINTOSH et al.

(Supreme Court of Kansas. March 8, 1913.)

*(Syllabus by the Court.)***1. SPECIFIC PERFORMANCE (§ 106*)—PARTIES.**

One having a written contract for the purchase of real estate with a person having a similar contract for its purchase from the owner may maintain an action against the owner, and the person with whom he contracted, for the specific performance of both contracts.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

2. SPECIFIC PERFORMANCE (§ 60*)—MODIFICATION OF CONTRACT—STATUTE OF FRAUDS.

One who agrees in writing to convey real estate for a payment to be made partly by a mortgage and partly in cash, and who afterwards orally consents to accept, and does accept, in lieu thereof a mortgage and money for an equal total, but in different proportions, cannot defeat an action for the specific performance of the contract on the ground that the subsequent arrangement amounted to an attempt to make an oral modification of a contract required by the statute of frauds to be in writing.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 182; Dec. Dig. § 60.*]

3. SPECIFIC PERFORMANCE (§ 97*)—PERFORMANCE BY PLAINTIFF—PAYMENT OF CONSIDERATION.

Under the evidence in this case, an agreement to deliver a second mortgage in part payment of real estate is held to have been substantially complied with by the delivery of one which was subject to three other mortgages; their total amount being that for which the parties knew the property to be incumbered.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

Appeal from District Court, Harper County.

Action by Leon Welch against William McIntosh and others. Judgment for plaintiff, and McIntosh and certain other defendants appeal. Affirmed.

W. W. Schwinn, of Wellington, for appellants. Andrew G. Washbon, of Harper, for appellee.

MASON, J. William McIntosh entered into a written contract agreeing to sell certain city lots to J. C. Elvin. On the same day Elvin signed an agreement to convey them to Leon E. Welch. Elvin and Welch had no disagreement between themselves, but McIntosh refused to make a deed. Welch then brought an action against McIntosh, making Elvin a party, asking for the specific performance of both contracts. Judgment was rendered for the plaintiff, and McIntosh and others appeal.

[1] McIntosh objects to the decree of specific performance upon the ground that he had no contract whatever with Welch, but only with Elvin. There was no element of personal trust in the contract between McIntosh and Elvin. If Elvin had been acting for Welch, Welch could have enforced the contract, although McIntosh knew nothing

of his connection with the matter. *Hawkins v. Windhorst*, 87 Kan. 176, 123 Pac. 761. There was nothing to prevent Elvin from assigning to Welch his rights acquired under his contract with McIntosh (39 Cyc. 1665); and his agreement to sell to Welch the lots he had contracted to buy from McIntosh was in effect such an agreement.

[2] A further objection is based upon these facts: By the terms of the contract he had signed, McIntosh was to receive for the lots a second mortgage for \$900 upon a certain tract of land, or, at the option of the purchaser, either \$425 in cash and a mortgage for \$425, or \$800 in cash. There was evidence, in behalf of the plaintiff, to the effect that McIntosh afterwards orally agreed to accept \$300 in cash and a mortgage for \$700, and that a check for that amount and such a mortgage were then given him; he agreeing to make a deed to Welch, if upon examination he found no more against the mortgaged property than had been represented to him. McIntosh contends that, in view of this situation, the present action amounts to an effort to show that a written contract for the sale of real estate was amended by an oral agreement, and to enforce the contract as so amended. The statute which renders nonenforceable an oral contract for the sale of land prevents as well the enforcement of an oral agreement for the modification of a written contract on that subject. 29 A. & E. Encycl. of L. 824; 20 Cyc. 287; note, 56 Am. St. Rep. 671; note, 4 L. R. A. (N. S.) 980. While not controverting this general rule, a number of courts have recognized what may be called the doctrine of substituted performance; that is, that "parol evidence is admissible to prove a substitute agreement of the performance of an original written contract when such performance is completed." Smith on the Law of Fraud, § 369; 29 A. & E. Encycl. of L. 825, 826; Lee v. Hawks, 68 Miss. 669, 9 South. 828, 13 L. R. A. 633; Neppach v. Or. & Cal. R. R. Co., 46 Or. 347, 80 Pac. 482, 7 Ann. Cas. 1035; Alston v. Connell, 140 N. C. 485, 53 S. E. 292. See, also, cases cited at conclusion of note, 4 L. R. A. (N. S.) 981.

The written agreement bound McIntosh to convey the lots for a mortgage for \$900, or for \$800 in cash, or for \$850 half in cash and half in a mortgage. Of course he could not in the first instance have been required to accept \$300 in cash and a mortgage for \$700. But after having orally agreed to do so, and having received without objection the check and mortgage, he cannot put the buyer in default and refuse performance on his own part by urging that the terms of the original agreement have not been kept. The case is within the principle heretofore applied by this court, indicated by the following quotations:

"The contract did not specify the securi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—41

ties to be taken, and the parties could supplement it orally in this respect. The remainder of the oral negotiations did not create a new contract of sale supplanting the old; and, in any event, the defendants will not be allowed to agree upon a method of performance, induce the plaintiff to act accordingly, and then work a gross fraud by repudiating altogether." *Painter v. Fletcher*, 81 Kan. 195, 196, 105 Pac. 500, 501.

"The furnishing of an abstract or other like condition may be waived; and when waived, as in this case, the appellant could only put appellee in default by a performance or offer of performance on his own part. He cannot induce appellee to desist from action, and then treat the inaction as a default and a basis of recovery." *Hull v. Allen*, 94 Kan. 207, 209, 113 Pac. 1050, 1051.

[3] Another objection to the decree is made on the ground that the contract called for a second mortgage, while there were already three mortgages on the land, so that the plaintiff could only give him a fourth mortgage instead of a second. There was evidence that he received the mortgage offered him, knowing of the three prior mortgages, saying that he would accept it if he found nothing more on record ahead of it. Within the principle just stated, this was a sufficient performance on the part of the buyer, even if originally the seller might have made a point as to the number of separate mortgages ahead of his own, irrespective of the total lien represented. However, the evidence seems to show a mutual purpose to treat the phrase "second mortgage" as having reference to a mortgage subject to a prior indebtedness, without regard to its form. No objection was made to the total amount of the prior liens. Under these circumstances, the fact that the existing incumbrance was distributed between three mortgages, instead of being combined in one, is not a ground for defeating the specific performance of the contract.

The contract between McIntosh and Elvin included a provision that the "securities"—that is, the mortgage given in payment—should be satisfactory to the former. This did not authorize an arbitrary rejection of the mortgage delivered. The only objections made to it are found to be untenable.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 11)

CALDWELL v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. DEATH (§ 2*)—PRESUMPTION FROM ABSENCE.

The principles pertaining to presumptions in cases of the disappearance and unexplained absence for seven years of a member of a fraternal order, stated in *Modern Woodmen v.*

Gerdorn, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809, and *Id.*, 77 Kan. 401, 94 Pac. 788, are followed.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

2. DEATH (§ 2*)—PRESUMPTION—ABSENCE—INQUIRIES—DILIGENCE—QUESTION FOR JURY.

A member of a fraternal order holding a beneficiary certificate left his home and family in this state, declaring his intention to go to California to find a new location, where his family should join him later. Letters were received by his wife at frequent intervals covering a period of five or six months, purporting to have been written by him at different places in California. The last of these letters, save one, was mailed at Stockton, Cal., and gave the information that the writer was sick with small-pox in a pesthouse there. About ten days later the last letter was received, saying that he had suffered a relapse, and was still in the pesthouse. Afterwards his wife wrote several letters addressed to him at Stockton, but hearing nothing further from him, on November 2, 1902, inquired by letter of the postmaster at Stockton, and was informed that her letters had not been delivered. She then wrote for information to the mayor and also to the chief of police of that city, made inquiries of officers and members of the local camp of which her husband was a member, and of his father, brothers, and sister residing at various places in and out of the state, engaged attorneys, who published a notice in a newspaper at Stockton of his confinement in the pesthouse and disappearance, and through an officer of the local camp caused a like notice to be published in the official paper of the order, but obtained no tidings of her missing husband from these or any other source of information. After he had been absent for a considerable time, she had a personal interview with the head consul of the defendant, to whom she related his disappearance and the information received about his sickness, and was advised by that officer to follow up all clues and keep up the insurance payments, and that the amount of her certificate would be paid in seven years from the disappearance, if her husband was not found. Upon these facts and the circumstances, showing his relations to his family, his age, occupation, financial standing, and the like, it is held that there was sufficient evidence upon which to submit to the jury the question of diligence in making inquiries.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

3. APPEAL AND ERROR (§ 301*)—REVIEW OF EVIDENCE—PROCEEDINGS IN TRIAL COURT—MOTION FOR NEW TRIAL.

The rule that evidence excluded by the court must be produced on a motion for a new trial, in order to obtain a review of the ruling excluding it, as declared in *Clark v. Morris*, 88 Kan. 752, 129 Pac. 1195, is followed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1748, 1753-1755; Dec. Dig. § 301.*]

4. DEATH (§ 2*)—PRESUMPTION FROM ABSENCE—TIME.

Where the presumption of death from unexplained absence for seven years, without tidings, applies, there is no presumption that the absentee died at any particular time within that period; but the time may be found by the jury from the circumstances of a particular case, when they are of sufficient probative force to warrant the submission of the question.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

Appeal from District Court, Sedgwick County.

Action by Jane Caldwell against the Modern Woodmen of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Truman Plantz and Geo. G. Perrin, both of Rock Island, Ill., and Rodolph Hatfield, of Wichita, for appellant. Adams & Adams, of Wichita, for appellee.

BENSON, J. The defendant appeals from a judgment rendered upon a beneficiary certificate issued in the year 1890 to W. H. Caldwell, a member of the order, payable to his wife, the plaintiff, at his death. It was admitted that all dues and assessments had been paid to the date of the trial. The petition alleged that Caldwell left his home in Hutchinson on the 7th of April, 1902, and had not been heard from since September of that year, when a letter was received by his wife, informing her of his serious illness at Stockton, Cal. Other statements of the petition set out the inquiries made for the missing man and the failure to obtain information concerning him. This action was commenced April 2, 1910, in reliance upon the presumption of death. The answer admits the issuance of the certificate and good standing of the member, but pleads false warranties in the application respecting the age of his parents; also the adoption of a by-law, which took effect September 1, 1908, providing that no presumption of death should arise from absence or disappearance until the full term of the member's expectation of life had elapsed. The answer also contained a general denial.

The evidence on the part of the plaintiff tended to prove that the member was a well-known citizen of Hutchinson. He had been engaged at different times as foreman of a salt plant, clerk in a hardware store, farmer, thresherman, and grocer. Just previous to his leaving home he had been carrying on a grocery business, which was turned over to his creditors. He left a wife and three children at his home in Hutchinson, 22, 17, and 15 years of age, respectively. His relations with his family were affectionate. He declared his intention to go to California to seek a new location, where his family should join him. His son accompanied him to the train. Letters written by him were received by his family at frequent intervals, averaging one in each week, from several places in California. One of these letters was from Sheridan, and was answered by letter directed to him there. In writing from some of the other places he requested that answers should not be sent until he wrote again. He wrote from Stockton, Cal., in September, 1902, saying that he was sick in a pesthouse there with smallpox, but was getting better. Later, in October, he wrote again that he had suffered a relapse, and was worse. The family wrote several letters to him afterward, but heard nothing further. On inquiry about him by letter to the postmaster at

Stockton, on November 2d, they learned that these letters remained uncalled for. Mrs. Caldwell then wrote to the mayor and also to the chief of police of Stockton, giving them the information she had received about his being in a pesthouse there. The chief of police answered, but gave no information of the missing man. She also wrote to her husband's father, then living in Nebraska, to his brother, living in another place in that state, and to his sister, living in Iowa, giving the facts concerning his absence and asking for information concerning him, but received none. She also consulted with another brother of her husband, living in this state, and with the consul and clerk of the camp at Hutchinson, of which Caldwell was a member. One of these officers sought information from the head camp of the order, sending a photograph of the missing man. At the suggestion of the clerk of the local camp, a notice, stating the facts about his disappearance and asking for information, was published in the Modern Woodman, the official paper of the order, which circulates generally among its members. Inquiries were also made of members of the local camp. Mr. Caldwell's father came to Kansas and consulted with the plaintiff. None of these inquiries were effectual. A firm of lawyers at Hutchinson, at the plaintiff's request, addressed a letter to the mayor of Stockton, giving the facts of Mr. Caldwell's departure from home, of the letters giving information of his sickness in the pesthouse, and the failure to receive further tidings, and asking for information. This letter was published in full in a daily paper in Stockton in January, 1904, with brief editorial comments. No tidings or information of any kind were received from these inquiries or otherwise. In the same month Mrs. Caldwell had an interview with the head consul of the order, and told him of her trouble and the inquiries she had made, and asked for advice. He advised her to keep up the insurance, to follow up all clues, and that in seven years she would get her money, if her husband was not found in that time. In that conversation the head consul inquired about Mr. Caldwell's relatives, and was informed of the age of his father, and that his mother was dead.

Depositions were taken by the defendant of the city health officer, the sextons of cemeteries, and clerks of hospitals in Stockton, and evidence was adduced tending to show that Mr. Caldwell's death had not been reported to the proper officer, and that his name was not found upon the records of the county hospital, where smallpox patients were cared for, nor upon the records of interments in the principal cemeteries of the city. The defendant also offered evidence tending to prove that Mr. Caldwell left debts unpaid at Hutchinson.

[1] It is contended that the inquiries made by the plaintiff were insufficient to overcome the presumption of continuing life by the

presumption of death arising from seven years' unexplained absence. In order that the latter presumption may prevail, there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry. The inquiry should extend to all places and persons where or from whom tidings would likely be received in the ordinary course of events; and, in general, the inquiry should exhaust all patent sources of information and others which the circumstances suggest. *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809; *Renard v. Bennett*, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240. The rule, however, does not require absolutely conclusive proof. It is sufficient if the evidence warrants a finding that such inquiries have been made. In the second review of the *Gerdorn* Case it was said: "Probably all efforts that would ordinarily be suggested, however painstaking or exhaustive, would still leave some source of information unexplored. The parents should only be held to the exercise of reasonable diligence in endeavoring to obtain tidings of their son. They were not required to prove conclusively that he was dead, but were bound to produce such evidence as would fairly lead to the presumption of his death." *Modern Woodmen v. Gerdorn*, 77 Kan. 401, 405, 94 Pac. 788, 789 (syl. 3).

[2] It was argued in that case that inquiries should have been made of members of the lodge. Such inquiries were made in this case, and the efforts of officers and members in aid of the inquiry were sought and obtained. It is insisted, however, that further inquiries should have been made at Stockton. It is suggested that letters should have been written to the pesthouse from which Caldwell had written, or that personal investigation should have been made there. But the name of the pesthouse or institution with which it may have been connected was not stated in the letter, and Mrs. Caldwell did not have any knowledge about it. She was aided by experienced counsel in making the inquiries at Stockton, which were such as, it is believed, are ordinarily pursued. In any event, it cannot be held, as a conclusion of law, that she did not exercise reasonable diligence in this respect. Lack of diligence in making inquiries in other respects is also suggested; but upon a careful consideration of the efforts that were made, in the light of all the circumstances, it must be held that there was sufficient evidence to warrant the submission of the question of diligence to the jury upon proper instructions, which were given in accordance with the rules declared in the *Gerdorn* Case.

The defendant alleged that in his application for membership Caldwell stated that his father was then living, and was 82 years of age, and that his mother was also living, and was 71 years of age; that the certificate

was issued in reliance upon the statements made in the application, and contained a provision that if any of the statements were untrue the certificate should be null and void. It was further alleged that the father was not 82 years of age, and was only 53 years old, and that the mother was not living, having died many years before. Other misrepresentations concerning brothers and sisters were alleged. The application referred to was not set out in the pleadings, and does not appear in the record.

To sustain the issue of misrepresentation, the defendant offered the application in evidence, but it was rejected. This is alleged to be fatal error. While this ruling was included in the grounds presented for a new trial, a copy of the excluded evidence was not produced by affidavit or otherwise on the hearing of the motion, as required by section 307 of the Civil Code (Gen. St. 1909, § 5901). The ruling, therefore, is not open to review. *Clark v. Morris*, 88 Kan. 752, 120 Pac. 1195.

Error is predicated upon the rejection of other evidence. The defendant produced the record of two chattel mortgages and other evidence tending to show that Caldwell left debts unpaid to the amount of about \$500 when he left, and it was in evidence that he turned over his stock to his creditors. A writing was also produced, signed by Caldwell, as follows: "This trouble is all my own. My wife is innocent of everything, so don't blame her for I did it all myself."

The mortgagee was asked if he found out whether Caldwell owned the property (a threshing outfit) described in the mortgage; also whether he had attempted to get possession of the property. Objections were sustained. It is suggested that this was an effort to prove that Caldwell did not own the property, or some of the property, mortgaged, thus tending to prove a motive for leaving home. It was doubtless proper to prove indebtedness at that time, with other circumstances of his leaving, and this was done. It would seem that the jury were sufficiently informed of his financial condition, and the failure to require answers to these questions was immaterial. Last clause of section 307 and section 581 of Civil Code (Gen. St. 1909, §§ 5901, 6176). However, the defendant did not produce the excluded evidence on the motion for a new trial, and, as we have already seen, the ruling cannot be reviewed.

[3] The by-law purporting to change the presumption of death in cases of disappearance is also relied upon as a defense. This by-law was attached to the answer, and was proven on the trial. While it was not produced in evidence on the motion for new trial, it was a part of the pleadings. In this respect it differs from the application above referred to. The member was 32 years of age at the date of the certificate, and the limit of his expectation of life had

not been reached when this action was commenced. Nearly six years of the seven-year period involved in the presumption had expired when the by-law was adopted. Referring to this by-law, the court instructed the jury, in substance, that actual death of the member might be proved, like any other fact, by direct or circumstantial evidence; that considering the circumstances of his disappearance, absence, age, health, character, domestic relations, social rank, and financial condition, and all other facts and circumstances of the case, if they found that he died before the passage of the by-law, it would not prevent a recovery.

Assuming that the by-law was valid and retroactive in its operation, as claimed by the defendant, two questions arise concerning it, viz.: Whether the foregoing instruction is a correct statement of the law, and whether the evidence sustains a finding that Caldwell died before September 1, 1903, when the by-law became effective. In an opinion delivered by Judge Brewer in *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797, it was said that a jury may infer death within less than seven years, where, besides unexplained absence, there are other matters to show death. The opinion also refers to *Tisdale v. Insurance Co.*, 26 Iowa, 170, 96 Am. Dec. 136, quoting therefrom: "The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death." "Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard to the duration of such absence." *Ryan v. Tudor*, 31 Kan. 366, 370, 2 Pac. 797.

[4] In *Lancaster, Adm'r, v. Washington Life Ins. Co. of N. Y.*, 62 Mo. 121, at page 128, it was stated as a general presumption that a person who has disappeared and has not been heard from shall be presumed to continue to live for seven years after he was last known to be alive, "unless within that period it shall be shown that when last heard from he was in contact with some specific peril likely to produce death, or that he disappeared under circumstances inconsistent with a continuation of life, when considered with reference to those influences and motives which ordinarily control and direct the conduct of rational beings; in either of which cases the jury are at liberty to infer that death occurred at such time within seven years as from the testimony may seem most probable."

It was said in the *Gerdome Case*, 72 Kan. 391, at page 395, 82 Pac. 1100, 2 L. R. A. (N.

S.) 809, that death may be proved by circumstantial evidence; and that absence for a considerable period of time is not indispensable in order to generate a satisfying conviction of the fact. Situations were referred to where the fact of death might be forced upon the mind very soon after the disappearance. Circumstances of health, disposition, moral character, domestic relations, social rank, and financial condition were referred to as affording, in some cases, sufficient proof of death. In *Greenleaf on Evidence* (16th Ed.) § 41, after stating that the presumption of continuity of life ceases after an absence for seven years without intelligence concerning the person, it is said: "The presumption in such cases is that the person is dead, but not that he died at the end of the seven years, nor at any other particular time. The time of the death is to be inferred by the jury from the circumstances."

"Death may be inferred from evidence of facts inconsistent with the theory of the existence of life. Thus it has been held that, where an absentee, when last heard of, had just embarked on a vessel which has not since been seen or heard of and is long overdue, his death may be presumed, although the full period of seven years may not have elapsed since it sailed. So, if he was in a 'desperate state of health,' * * * or if he was exposed to some specific peril likely to cause death, when last heard of, it may be presumed that he is dead, although seven years may not yet have elapsed since that time." 1 *Elliott on Ev.* § 112. 2 *Wharton on Evidence*, § 1277, states the same principle.

It is concluded that the instruction is in accordance with the opinions in the *Tudor* and *Gerdome Cases* and the weight of authority upon this question.

But it is argued that the facts of this case do not warrant the application of the principle. It is also said that the negative evidence of the defendant, showing the absence of Caldwell's name from hospital and cemetery records and the register of deaths, rebuts any inference that he died at Stockton. The absence of his name from these records, while competent evidence, is not conclusive of the fact. It is by no means certain that other pesthouses were not provided in or near the city. The cross-examination shows that there was a large sanitarium there, although not within the city limits, concerning which no records were produced. The cemetery records were only those of the three principal cemeteries. Considering the nature and progress of the disease, the patient having suffered a relapse, that temporary provisions in the way of pesthouse accommodations, burial, and the like are often resorted to in such cases, the lapse of time, and all the attendant circumstances, a question of fact was fairly presented by the evidence upon this branch of the case also, and the

general finding for the plaintiff cannot be disturbed.

Some minor rulings are complained of, but no error is found affecting substantial rights.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 24)

McCLAIN v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 10*)—WAIVER.

Ordinarily any ruling or ground for which a new trial may be granted is waived by the neglect of a party to ask for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 13, 115, 131; Dec. Dig. § 10.*]

2. TRIAL (§ 359*)—JUDGMENT—JUDGMENT ON SPECIAL FINDINGS—INCONSISTENCY.

Where no motion for a new trial is made, but, instead, a party moves for judgment on the special findings notwithstanding the general verdict, the question is whether, after indulging every reasonable inference in favor of the general verdict, the special findings returned by the jury are so antagonistic to it as to be absolutely irreconcilable with it, and so complete in themselves as to warrant the entry of judgment thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860, 875, 877, 878; Dec. Dig. § 359.*]

3. RAILROADS (§ 330*)—ACCIDENTS AT CROSSING—CARE REQUIRED.

Where gates have been erected and maintained by a railroad company, where its road crosses a public street in a city, and which are to be lowered by a gateman when trains are passing over the street, the fact that such gates are up when a person approaches the crossing is some assurance to him that he can safely proceed to cross, and, while it will not excuse him for a failure to exercise reasonable care for his safety, he is not required to exercise the same vigilance as he would be at a crossing where gates had not been erected and maintained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.*]

4. RAILROADS (§ 350*)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A traveler approached a railway crossing over a much traveled street in a populous city, where gates had been built and maintained, and, finding them open, proceeded to cross the street without looking up the track where a passenger train was approaching from the north at an excessive and unlawful rate of speed, and which he could have seen if he had looked. After starting across the tracks, a freight train came over the crossing from the other direction, and caused him to stop between the two tracks in a space 8½ feet wide. After standing there about 15 seconds, he was struck by the engine of the passenger train, and killed. Whether he exercised due care for his own safety in view of the conditions existing at the crossing and under the circumstances of the case, or was guilty of contributory negligence, is held to be a question of fact for the determination of a jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from District Court, Sedgwick County.

Action by Hester A. McClain against the

Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Low and Paul E. Walker, both of Topeka, and R. R. Vermillion, of Wichita, for appellant. David Smyth and A. E. Helm, both of Wichita, for appellee.

JOHNSTON, C. J. This was an action brought by the appellee, Hester A. McClain, to recover damages from the appellant the Chicago, Rock Island & Pacific Railway Company for negligently causing the death of her husband, W. M. McClain. The appellant operates a line of railway through the city of Wichita and across Douglas avenue, the principal street of the city. The railroad is built upon Meade avenue, which runs north and south, and at the intersection of Meade and Douglas avenues it consists of two tracks. The passenger station of appellant is located on the west side of Meade avenue, and immediately south and adjoining Douglas avenue. At the intersection of these streets crossing gates had been placed as required by an ordinance of the city, but they appear to have been out of repair at the times in question. The two tracks across Douglas avenue were 8½ feet apart, and the distance from center to center of the tracks was 13 feet, 2½ inches. On the afternoon of June 28, 1909, W. M. McClain, his son, and another companion were walking on the north side of Douglas avenue going towards his home in the eastern part of the city. When they arrived at the crossing, a considerable number of people had congregated on the depot platform, and there were a number of cabs and other vehicles in the street near there awaiting the arrival of the passenger train. After they had started across Douglas avenue, a north-bound freight train, using the east track, began to cross Douglas avenue, and W. M. McClain, who was about 68 years of age, and his companion, stopped on the west side of that track to await the passage of the train while his son hurried over in front of the train. While standing between the east and west tracks awaiting the passage of the freight train a south-bound passenger train traveling at a speed of from 20 to 30 miles an hour, came down upon them. The buildings on Douglas avenue extended to Meade avenue, but the distance from the west edge of Meade avenue to the west track was about 30 feet. When McClain arrived within 20 feet of the west track, he could have seen an approaching train from the north a distance of about a half mile if he had looked for it. At the time the gates were up, and there was no watchman at the crossing. McClain halted between the two tracks awaiting the passage of the freight train about 15 seconds before he was struck by the passenger train. From two to four seconds before he was struck

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

some persons nearby saw his danger, and shouted to him. Apparently the first he knew of the approach of the passenger train was the sounding of a shrill alarm whistle about 200 feet away. On hearing this whistle, the deceased became confused, and in his excitement stepped nearer to the west track, turning his back towards the approaching passenger train. He was caught by some part of the engine, thrown towards the top of it, and in some way he was drawn under the train and killed.

In the petition the negligence alleged was the running of the train at a dangerously high rate of speed across a public street near the business center of the city, contrary to an ordinance of the city limiting the rate of speed to five miles an hour, also the failure of the appellant to have the automatic safety gates closed as required by another ordinance. The absence of a watchman to warn persons about to cross the track of the approach of trains was alleged, and also the failure of the engineer on the passenger train to give proper signals on approaching Douglas avenue, as well as the giving of the shrill blast when the engine was so close to McClain as to startle and confuse him. On the part of the appellant it was contended that McClain was guilty of contributory negligence in going upon the crossing, and standing there for some time without looking for the approach of a train on the west track, when he could have had a view towards the north for a distance of about a half a mile if he had looked. The jury awarded damages against the appellant in the sum of \$1,909, and returned answers to special interrogatories which were submitted to it. No motion for a new trial was made, but appellant asked for judgment on the special findings.

[1] No objections are made to instructions or rulings on the trial, and, since no motion for a new trial was made, no question can be raised here as to the sufficiency of the evidence to sustain the findings of the jury. It has been determined that any matter or ground for which a new trial may be granted is waived by neglect of the party to ask for a new trial. *Nesbit v. Hines*, 17 Kan. 316; *City of Atchison v. Byrnes*, 22 Kan. 65; *Decker v. House*, 30 Kan. 614, 1 Pac. 584; *McNally v. Kepfinger*, 37 Kan. 556, 15 Pac. 534.

[2] One of the grounds for a new trial is that the verdict is contrary to the evidence, and, before that question can be considered on appeal, a motion for a new trial based on that ground must have been submitted to and decided by the trial court. On the motion for judgment on the special findings mere inconsistency in the findings will not avail as that is a ground for a new trial, but the question is whether, after indulging every reasonable inference in favor of the general verdict, the special findings are so antagonis-

tic as to be absolutely irreconcilable with it and so complete in themselves as to warrant the entry of judgment thereon. *Osburn v. Railway Co.*, 75 Kan. 746, 90 Pac. 289. Upon some of the issues herein, no interrogatories were submitted, and hence all of the facts in the case are not embraced in the special findings. The principal ones upon which judgment was asked were that McClain was familiar with the crossing, that he went upon the crossing without looking north for an approaching train, that after he entered upon the crossing, the view was unobstructed for one-half mile, and that, if he had looked when he started across he could have seen the passenger train in time to have retreated to a place of safety, and that, when he reached the east track, he stood there about 15 seconds before he was struck, and from 8 to 10 seconds intervened from the time the engineer sounded the whistle a block away and the time that he was struck by the train. It is insisted that, as he was well acquainted with the crossing, it was incumbent upon him to use his eyes and ears to discover whether there was a train approaching upon the west track, and, if he had done so, he would have seen the train, and, not having exercised that precaution, he was guilty of contributory negligence, which bars a recovery for his death, notwithstanding the negligence of the railway company. It must be held that the railway company was guilty of negligence notwithstanding the fact that the engineer applied the emergency brake, and did all he could to stop the train, and avoid striking McClain after his peril was discovered. The speed at which the train was running across the principal street of a populous city while it was unguarded was negligence beyond question. It is contended that to run a train from 20 to 30 miles an hour over a street which is usually thronged with travelers, a fact well known to the engineer, was a wanton act, and constitutes negligence so gross as to cut off the defense of contributory negligence. No special finding was made as to the rate of speed the train was running, but it was alleged, and there is testimony tending to show, that the train came across the street at a speed of 30 miles an hour, and, as the case is presented, every question is resolved in favor of the general verdict, and in its support we may infer any rate of speed of which there is evidence to support. The running of a train at an excessive rate of speed through a populous city over an unguarded crossing of a much used street which the engineer must have known was usually thronged with pedestrians and vehicles was an extremely reckless act, and, if a finding of gross negligence had been made, it would not have been without support. However, if it be assumed that the negligence of the appellant was not gross nor such as to cut off the defense of contributory

negligence, the question whether McClain was guilty of such negligence as to bar a recovery must be regarded as one of fact for the determination of the jury. Ordinarily, if a traveler proceeds across a railroad track without taking the precaution to ascertain if there is a train in dangerous proximity, he does so at his peril.

[3] The application of this rule is modified to some extent by the circumstance that gates have been erected and watchmen employed at crossings. In such case a traveler is not required to exercise the same vigilance when he approaches a track as he would at crossings not so guarded. The railroad track itself is a warning of danger which a traveler cannot safely ignore, but when it is the custom of a railroad company to provide gates or flagmen, and thus give other warnings of danger that a train is about to pass, the absence of such warnings may lead a traveler to believe that he can safely proceed, or that there will be time to cross before a train will pass. The fact that gates have been erected and are open when a traveler approaches a crossing will not justify him, of course, in closing his eyes and ears when passing over railroad tracks, but it is a circumstance to be weighed by the jury in determining whether at the time he was using the care that a reasonable and prudent man would and should exercise.

In *Glushing v. Sharp*, 96 N. Y. 676, a case where a collision occurred at a crossing when gates which had been erected there were raised as the injured party approached, it was said that: "The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it, is against all human experience. The conduct of the gateman cannot be ignored in passing upon plaintiff's conduct, and it was properly to be considered by the jury with all the other circumstances of the case." 96 N. Y. 677. The Circuit Court of Appeals in *Blount v. Grand Trunk Ry. Co.*, 61 Fed. 375, 9 O. C. A. 526, sanctioned that view, and, while holding that the right of a pedestrian to rely upon the lowering of the gates was not absolute, Judge Taft said that: "It is undoubtedly true that the failure to lower the gates modifies the otherwise imperative duty of travelers, when they reach a railway crossing, to look and listen, and the presence of such a fact in the case generally makes the question of contributory negligence one for the jury, when otherwise the court would be required to give a peremptory instruction for the defendant." 61 Fed. 378, 9 O. C. A. 529. In *Palmer et al. v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678, an injury occurred at an open crossing where the gates had been erected and a person stationed there to open and close them when trains

passed. It was held that, whether the gates were erected by the volition of the company or by command of the law, "the duty of the company was imperative, and it is obvious that an open gate was a direct and explicit assurance to the traveler that neither train nor engine was rendering the way dangerous—that none was passing. A closed gate was an obstruction preventing access to the road, an open gate was equally positive in the implication to be derived from it that the way was safe. Nothing less could be implied, and no other conclusion could be drawn from that circumstance." 121 N. Y. 241, 19 N. E. 680.

The Supreme Court of Rhode Island, however, said that "invitation" was too strong a term to be used as the effect of an open gate, but it did indorse the theory which most of the courts have held, that "open gates, or the absence of the usual signals of an approaching train or engine, are implied assurances that no train or engine is approaching the crossing with intent to cross the street, upon which travelers on the street have a right to rely, and that, if a traveler on the street be injured while crossing the railroad in such circumstances, the question whether he was guilty of contributory negligence is for the jury." *Wilson v. N. Y., N. H. & H. R. R. Co.*, 18 R. I. 491, 493, 29 Atl. 258, 259. In Pennsylvania the Supreme Court takes a different view, and holds that the failure to stop, look, and listen, even where the gates are open, is more than negligence—it is negligence per se. *Greenwood v. Railroad Co.*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614. See, also, *Koch v. Southern California Ry. Co.*, 148 Cal. 677, 84 Pac. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795. The authorities, however, are generally in accord with the decisions from which quotations have been made, and among them may be cited *Williams v. Railroad Co.*, 53 Pac. 834; *Scaggs v. President, etc.*, 145 N. Y. 201, 39 N. E. 716; *Merrigan v. Boston & Albany Railroad*, 154 Mass. 189, 28 N. E. 149; *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312, 27 N. W. 43; *State v. B. & M. R. R. Co.*, 80 Me. 430, 15 Atl. 36; *Richmond v. Railway Co.*, 87 Mich. 374, 49 N. W. 621; *C. v. St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855; *Railway Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Woehle v. Minnesota Transfer Ry. Co.*, 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348; *Indianapolis Union Railway Co. v. Neubaucher et al.*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

[4] It is argued that the passing of the freight train when the gates were up was a notice to McClain that the gates were either not in use or the gateman was not doing his duty at the time, and it therefore became his imperative duty to take the same care for

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 59 Kan. 777.

his safety that he would if no gates had been erected there. It appears, however, that he had started across the track before the freight train came upon the crossing. When he came to the crossing and saw the gates up, he had reason to think that he could safely proceed, and that would tend to quiet any apprehension of a train coming from either direction. When the freight train started across with the gates unclosed, he had reason then to believe that the gate-man was neglecting his duty, or that for some reason the gates were not in operation. It is insisted that his failure to leave the crossing or put himself in a place of safety after discovering that the freight train was passing with the gates up was contributory negligence. However, the time between when he discovered, or should have discovered, that the freight train was going to pass with the gates up and the time when he was struck by the passenger train, was very short, and, besides, the coming of the freight train may have confused him. After he went upon the crossing and learned that the freight was going to pass over, he had then to determine whether to hurry across in front of that train, stand still between the tracks in a space of $8\frac{1}{2}$ feet, or retreat to the west side of the crossing. One of his companions made a rapid movement and crossed in front of the freight train while he and another companion stopped between the tracks. In *Directors, etc., of North Eastern Railway Co. v. Wanless*, L. R. 7 H. L. 12 (7 Eng. & Irish App. 12), a person was injured at a point where gates had been erected, but were open at the time he entered upon the crossing. When he went upon the crossing, a train other than the one which struck him passed in front of him, and it was contended that this was a notice to him that the gates were not being operated, or, rather, that it was inconsistent with the theory of closed gates when trains were passing. The Lord Chancellor said: "It appears to me that the circumstance that the gates at this level crossing were open at this particular time amounted to a statement, and a notice to the public, that the line at that time was safe for crossing, and that any person who under those circumstances went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. Then, when inside the gates, the boy who in this case was injured saw what was inconsistent with the gates being open, namely, he saw one train passing, and it may very possibly be the case that that circumstance embarrassed him, and that his eyes and attention being fixed upon that particular train, when it passed out of the way, he failed to see the other train. He appears not to have seen it, but attempted to cross the line, and was knocked down and injured.

It is quite clear he might have seen the other train—there is no doubt about that—but the result of the state of facts only comes to this: That being brought upon the line through the circumstance of the gate being open, he was placed in a position which was more or less embarrassing, and he did not use his faculties so clearly as he might have done under other circumstances." Page 15. It was therefore held that it was a question for the jury to consider whether he was using ordinary diligence in caring for himself. Here the jury in a special finding, in response to a question as to what there was to prevent McClain from getting off the track and avoiding a collision if he had known of the approach of the train, answered: "Excitement, too short time, and high rate of speed." In view of the open gates, the absence of a watchman, the excessive and unlawful speed of the train the number of people and vehicles near the crossing at the time as well as the noise made by the passing freight train, and the further fact that a strong wind was blowing from the south at the time, it cannot be declared as a matter of law that McClain was guilty of contributory negligence, but these facts in connection with all the other facts and circumstances of the case were properly submitted to the jury, and it was for it to decide whether he observed the care for his own safety that a reasonably prudent man would have exercised under the same conditions.

The judgment of the district court will be affirmed. All the Justices concurring.

(39 Kan. 177)

CHANUTE BRICK & TILE CO. v. GAS
BELT FUEL CO.†

(Supreme Court of Kansas. March 8, 1913.)

JUDGMENT (§ 590*)—RES JUDICATA.

Where the only issue litigated in a former action between the parties was whether plaintiff was entitled to certain equitable relief, and the question of damages was not involved therein, as in the present action, and the evidence in the first action did not tend to sustain the issues herein, the former judgment could not be pleaded as a defense to the present action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102–1106; Dec. Dig. § 590.*]

Appeal from District Court, Allen County.

Action by the Chanute Brick & Tile Company against the Gas Belt Fuel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Maurice H. Winger and Karnes, New & Krauthoff, all of Kansas City, Mo., for appellant. Hugh P. Farrelly and T. R. Evans, both of Chanute, for appellee.

PER CURIAM. The only issue litigated in the former action was whether the brick company was entitled to certain equitable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied April 21, 1913.

relief. The question of damages for failure to furnish gas was not considered. The former judgment therefore could not be pleaded as a defense to the present action. *Stroup v. Pepper*, 89 Kan. 241, 76 Pac. 825. The evidence in the first suit would not have tended to sustain the issue here. *Hudson v. Remington*, 71 Kan. 300, 80 Pac. 568, 6 Ann. Cas. 103. The demurrer to the answer was rightly sustained. As to the evidence of damages we think there was sufficient to sustain the judgment. Appellee was not required to produce evidence of orders unfilled during the days the plant lay idle for want of gas. It would have been folly to expect the company to take orders for brick which it knew could not be filled.

The judgment is affirmed.

(89 Kan. 138)

J. R. WATKINS MEDICAL CO. v. HAMM et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. PAYMENT (§ 36*)—APPLICATION.

Rules governing the application of payments by the court have no field of operation when the payments have already been appropriated by the parties.

[Ed. Note.—For other cases, see *Payment*, Dec. Dig. § 36.*]

2. PAYMENT (§ 76*)—APPLICATION—QUESTIONS FOR JURY.

Where a continuous running account is kept with one who purchases goods upon orders made from time to time in pursuance of a written agreement that he will sell the goods so purchased and make weekly reports and remittances, and this business is continued, and the account is kept in the same manner after the expiration of the time limited in the contract, without any further agreement, the question whether remittances made and entered in the account after such period had expired were applied by the parties upon the items charged and entered before or after that time is one of fact for a jury.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 240-248; Dec. Dig. § 76.*]

3. PRINCIPAL AND SURETY (§ 162*)—RELEASE OF SURETY—APPLICATION OF PAYMENTS.

Where the liability of a purchaser for goods sold on credit is secured by a bond which expired by its terms at a fixed date, and sales are made and the account is continued thereafter in the same manner as before, a finding that the principal is indebted for goods purchased in the period covered by the bond is not inconsistent with a finding that his sureties are not liable therefor, if it is also found that payments made by the purchaser after that period had expired were applied by the parties upon the items charged and entered in the account for goods purchased before that time.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 442-445; Dec. Dig. § 162.*]

4. REFERENCE (§ 8*)—DENIAL—ACCOUNT.

A refusal to order a reference in an action upon a long account is not erroneous, where only three items of the account are in controversy.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 13-23; Dec. Dig. § 8.*]

Appeal from District Court, Cowley County. Action by the J. R. Watkins Medical Company against E. F. Hamm and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Roberts & Richardson, of Winfield, for appellant. A. M. Jackson and A. L. Noble, both of Winfield, for appellees.

BENSON, J. This action is upon an account for goods sold by the plaintiff to the defendant E. F. Hamm between the 18th day of December, 1906, and the 1st day of March, 1908, and a bond given by the defendants M. F. and F. E. Jarvis to secure faithful performance of the contract of purchase. The sales were made under a contract between the company and Hamm, which provided that the goods should be shipped from the plaintiff's place of business at Winona, Minn., to the defendant in this state, as ordered from time to time, and charged against him according to the company's price list; the purchaser agreeing to canvass a designated territory and sell at prices fixed by the company and to make weekly reports and remittances. When this contract was entered into, H. L. Hamm, a brother of the defendant, was indebted to the plaintiff for goods previously sold to him. The bond secured that indebtedness also. Reports were made of goods sold, collections made, and amounts remitted, and monthly statements were sent by the company to Hamm showing the condition of his account. A copy of the account beginning February 23, 1906, was introduced in evidence, in which about 100 items of merchandise are charged and about the same number of items of payments are credited. This account is continuous down to December 31, 1909, showing a balance of \$904.61, due to the company at that time when the account was closed. Balances are stated on the 1st of March in each year; that of March 1, 1908, being \$1,075.39. Goods were sold and charged on this account after March 1, 1908, to the amount of \$915.77; but payments were made during the same time amounting to \$1,086.55, making an excess of credits over debits of \$170.78 for that period. The action was for \$1,075.39, due on the 1st day of March, 1908, the close of the period covered by a bond, less a credit of the \$170.78, excess of payments over charges after that date, leaving a balance of \$904.61. This is the balance shown at the close of the account. Judgment was rendered against the defendant Hamm for that amount, of which he does not complain, but judgment was also rendered in favor of the sureties, and this appeal is taken from that judgment. The plaintiff contends that neither the principal nor sureties are entitled to any credit on the balance of March 1, 1908, except this excess payment after that date, while the sureties contend that the entire amount remitted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

between March 1, 1908, and the close of the account, should, as to them, be credited on such balance. It will be seen that the liability of the defendant Hamm upon the whole account is not affected by the question of application of payments; but if the application of the remittances sent after March 1, 1908, is made upon the items preceding that date, that part of the account is paid, and the sureties are not liable, for their obligation did not cover credits given afterwards. Besides charges for merchandise, the following items appear: "March 26, 1907, H. L. Hamm, \$81.36. April 27, 1907, H. L. Hamm, \$6.84. May 6, 1907, H. L. Hamm, \$558.70." The sureties denied the correctness of these items, but admitted the correctness of the account in other respects. The history of these charges is this: E. F. Hamm made remittances from time to time of moneys collected for goods that had been sold by his brother. Neglecting to state in his reports that these remittances were on his brother's account, they were credited to E. F. Hamm, and afterwards, upon an agreement between the plaintiff and E. F. Hamm, they were charged back to his account and credited to the account of H. L. Hamm. While E. F. Hamm consented to this arrangement and is satisfied with it, the sureties contend that there was no competent evidence that the remittances so made were for the account of the brother, or that they were properly charged against their principal.

The principal controversy arises over the application of payments. If the contention of the sureties that all remittances after March 1, 1908, should be applied on the balance then due, the judgment is right. If only the balance of the remittances made after that date in excess of the price of the goods shipped in that period should be so credited, then a further inquiry must be made to ascertain what amount was due upon the account at that time, which would involve a consideration of the disputed items.

[1] Rules for the application of payments are discussed in the briefs. Much consideration is given to the rule that payments on a running account, if not applied by the parties, should be applied by the court to the oldest items, and also to the rule that such payments should be applied to the unsecured part of an indebtedness. Both these rules have their appropriate field of operations (*State v. Guaranty Co.*, 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. [N. S.] 865), but the first inquiry is whether the parties had made the application. If they had, it cannot be disturbed by either of these rules.

It will be observed that while the obligation of the bond ceased on March 1, 1908, no change was made in the manner of doing business with the principal defendant. He ordered goods and made reports and remittances precisely as he had done before. The company charged the merchandise and enter-

ed the credits upon the same account and sent statements just as it had theretofore done. The same business was continued in the same manner without any further agreement, and the account was continuous. In this situation it may be presumed that it was intended that the terms of the contract should still govern. It is true that the balance of indebtedness was reduced, which may have been the result of greater watchfulness on the part of the plaintiff or of both of the parties. *Schoonover v. Osborne*, 117 Iowa, 427, 90 N. W. 844. The plaintiff's agent testified in general terms that after that date sales were for cash, but on his cross-examination, and upon all the evidence, the fact that they were made upon credit as before clearly appears. There is no more reason to hold that the account after March 1, 1908, was separate from that of the preceding years than that the account after March 1, 1907, was separate from that of the year 1906. The contract provided that the purchaser "may run an open account with the company, the products to be charged in accordance with the regular traveling salesman's price list before referred to, and the account to be paid by remitting to the company each week, as per its weekly report blanks." The orders were made, the goods sold, and the accounts were kept by the company in accordance with these terms. The monthly statements sent to the purchaser informed him of these conditions.

[2] It was a question of fact whether the payments made after March 1, 1908, were appropriated by the parties themselves to the payment of items charged before or after that date. This question was submitted to the jury by the instructions and was determined in the affirmative by the general verdict. The jury were instructed: "You should take into consideration the matter (manner) in which the business was transacted and the payments made and the goods sold, and the way in which the account was kept by the plaintiff, and from all these facts and all the other evidence in the case determine whether any application had been made by the plaintiff of the payments made by Hamm, and, if you find that no application of such payments has been made by the plaintiff, then it would be your duty to apply the payments made first to such separate and distinct account of the plaintiff, if any, as was unsecured." This instruction, in connection with another, stated the principle of the application of payments to unsecured items in preference to the oldest items. While the entries in the account alone might not have the effect of an application, still the entries in connection with the terms of the contract, the reports, the statements, mode of business adopted, and all circumstances shown, furnish evidence that they were so applied. 96 Am. St. Rep. 62, note "a." "Payments by the debtor will be applied according to the intention of

the parties, where that can be determined with reasonable certainty. And the court will not generally exercise the power of appropriating payments when an appropriation has already been made by either debtor or creditor. Where an arrangement has been made that money paid shall be appropriated to the discharge of specified debts, the court may enforce the agreement." 30 Cyc. 1240.

[3] It is argued that the verdict is inconsistent; that, the jury having found that Hamm was indebted on the account for \$904.61, the sureties must be liable upon their bond for the same amount. But a finding against the principal does not necessarily bind the surety. While the principal was indebted for the amount found by the jury against him, the sureties are not indebted at all if it should be found that all that part of the account accruing during the time covered by the bond had been paid by remittances made after that date.

It is also argued that the instructions were contradictory and confusing, stating the general rule that, in the absence of an application by the parties, payments upon an account should be applied to the oldest items; also, that they should be applied to the unsecured rather than the secured items. It was held in the opinion in the Guaranty Company Case that instructions stating the ordinary rule in running accounts that the first credit items extinguished the first debit items, followed by the additional one based upon equitable grounds that payments in certain cases should be applied to unsecured rather than secured debts, were not prejudicially erroneous. The same observation applies here. Considered together as they must be, the instructions were not contradictory or objectionable.

[4] Error is also predicated upon the refusal of a request for a reference, made on the ground that the action involved the consideration of a long account. Only three items of the account, however, were in dispute, and the refusal of the request was not erroneous.

Special findings were not requested. The general verdict must be held to include a finding which is supported by the evidence that the payments made after March 1, 1908, were applied by the parties themselves upon the account generally and were therefore appropriated to the payment of the preceding items, thus discharging the indebtedness for which the sureties were liable. It follows that an investigation of the disputed items to ascertain whether that amount should have been reduced is unnecessary.

It may be that the judgment should be sustained for another reason. It has been held that the rule of apportioning payments preferentially to unsecured debts will not be applied where the other claims are secured by personal guarantors, or sureties, who are

favorites of the law. Note, citing cases, in 96 Am. St. Rep. 56, 57. But these personal guarantors must not be understood to include companies engaged in furnishing bonds for hire. *Hull v. Bonding Co.*, 86 Kan. 342, 120 Pac. 544. This feature of the case, however, was not argued and is not decided.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 58)

OSINCUP v. HENTHORN et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. EQUITY (§ 8*)—JURISDICTION—MISTAKE OF FACT.

The mistake of the wife and mother of a decedent in regard to the law of descents and distributions of a state other than that of their residence, which led to the apportionment and transfer of land owned by the decedent at the time of his death to the mother, when, under the statute, the widow was entitled to all of it, is a mistake of fact against which equity will relieve unless some principle of equity bars the granting of such relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 14, 17-20; Dec. Dig. § 8.*]

2. EQUITY (§§ 71, 75*) — LACHES AS A DEFENSE.

The general rule is that equity will not interpose to relieve from a mistake where there is inexcusable delay and negligence in asserting a right, or where the granting of the relief would operate inequitably; but laches is an equitable defense and will not bar a recovery from mere lapse of time, nor where there is a reasonable excuse for nonaction of a party in making inquiry as to his rights or in asserting them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211, 227, 228, 230, 233, 234, 239, 240; Dec. Dig. §§ 71, 75.*]

For other definitions, see Words and Phrases, vol. 5 pp. 3969-3972; vol. 8, p. 7700.]

3. REFORMATION OF INSTRUMENTS (§ 46*) — LACHES — EVIDENCE — QUESTION OF FACT.

In view of the testimony herein as to the delay of appellant in making inquiry or in asserting her right to land owned by her, but which was conveyed to the mother of decedent by mistake, the question whether she was guilty of laches was one of fact, and the ruling of the trial court sustaining a demurrer to her evidence was error.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 194; Dec. Dig. § 46.*]

Appeal from District Court, Trego County.

Action by Etta H. Osincup against Jennie Henthorn and others. Judgment for defendants, and plaintiff appeals. Reversed.

Herman Long, of Wakeeney, for appellant. W. E. Saum, of Kansas City, Mo., for appellees.

JOHNSTON, C. J. Manfred E. Hull and his wife, Etta H. Hull, now Etta H. Osincup, the appellant, were in 1894 residents of the state of Iowa, and with them lived his mother, Julia A. George. Manfred E. Hull was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

possessed of certain property in the state of Iowa, and also of certain land in the state of Kansas. On October 24, 1894, Hull died intestate, leaving surviving his wife and mother, but no children. In order to settle up the estate, and acting upon the advice of an attorney, who, as it is alleged, informed appellant and Julia A. George that they were each entitled to one-half of the Kansas land, appellant and Julia A. George entered into a contract which recited that, "In consideration of the love and affection existing between the parties," the estate, including the Kansas land, should be equally divided between them, after the payment of debts and funeral expenses. To carry out this agreement, appellant made a quitclaim deed for the Kansas land to Julia A. George "in consideration of one dollar and other valuable considerations," and later received from Julia A. George a quitclaim deed for an undivided one-half interest in the land for the same consideration. In each of the deeds it was recited that Julia A. George was the mother and only heir of Manfred E. Hull. In 1910 Julia A. George, while a resident of Illinois, died, leaving a will naming the appellees as devisees. At this time appellant was a resident of California, and, after Julia A. George's death, appellant alleges that, by consulting an attorney regarding her interest, if any, in the estate, she for the first time found herself to have been entitled to the whole of the Kansas land owned by Manfred E. Hull, and she thereupon brought this action to set aside the agreement entered into with Julia A. George and the deed conveying the land. She gave testimony that she had not resided in the state of Kansas, and had therefore had no opportunity to become familiar with Kansas laws. In their answer to appellant's petition, appellees deny that, at the time of the making of the contract and deed, appellant was laboring under any mistake as to the legal rights of the parties, and assert that the instruments were voluntarily given and entered into. As a further defense, appellees set up that appellant was guilty of laches in not familiarizing herself earlier as to her legal rights under the Kansas laws. On a trial of the cause, the appellant produced the evidence above outlined; but a demurrer to her evidence was sustained, and the case dismissed.

[1] Accepting as true all of the testimony which tends to support the allegations of the appellant in her petition, and drawing every fair inference from it favorable to her, as must be done upon a demurrer to evidence, did she present a case for equitable relief? She alleged that, upon the death of her husband, she became the absolute owner of the Kansas land, but that she and Julia A. George were advised by the attorney and led into the mistaken belief that the law of Kansas was the same as the law of Iowa, where they resided, giving the mother of decedent one-

half of the land in Kansas as well as in Iowa, and that transfers were made by each to the other of a one-half interest in the land, without any consideration, and that neither of them resided in Kansas, and neither discovered the mistake before the death of the mother in 1910, and that after her death, and upon inquiry, appellant discovered the mistake, and that she promptly came to a court of equity in order to correct the mistake and obtain relief.

The testimony shows plainly enough that a mistake was made, and also that it was a mutual mistake. The oral evidence of appellant is supported by the recitals in the deeds that were executed. In the deed executed by appellant, it is recited: "The grantee is the mother and only heir at law of said Manfred E. Hull, deceased, who died intestate without living issue." In the deed from Julia A. George to appellant there is a recital as follows: "The said Julia A. George is the mother and sole heir at law of Manfred E. Hull, and the grantee is the widow of said Manfred E. Hull, deceased, who died intestate without living issue."

The mistake was not an unnatural one. The deceased owned land in Iowa, where he lived with his wife and mother, and under the law of that state one-half of the real estate which he had owned there descended to the mother and the remainder to the widow. They believed that the law of descents and distributions was the same in Kansas as in Iowa, and of this they were reassured by the advice of a lawyer of that state.

It is contended that, if a mistake was made, it was a mere mistake against which equity will not relieve. Passing the question as to whether equity ever gives relief for a mistake of a person as to his legal rights or as to the law, it must be held that the mistake claimed by appellant was one of fact. It was not a mistake as to the legal effect of the deeds executed, but it was a mistake as to the law of descents and distributions of a state other than the one in which the parties resided and of the rights of the parties under that statute. It has been decided that a mistake as to the law of another state is one of fact against which relief may be had, in the absence of countervailing equities. On this question it has been said: "The general rule that a mistake of law, pure and simple, is not adequate ground for relief rests upon the fundamental assumption that persons of sound and mature mind are presumed to know the law; but this assumption does not apply to the laws of another state. 2 Pom. Eq. Jur. (3d Ed.) § 842. Ignorance of these laws is deemed to be ignorance of fact." *Bolinger v. Beacham*, 81 Kan. 746, 750, 106 Pac. 1094, 1095. Other cases of like import are *Railroad Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976; *Mystic Legion v. Brewer*, 75 Kan. 729, 90 Pac. 247; *Morgan v.*

Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

Through this mistake of fact, based on erroneous advice from one on whom she would naturally rely, appellant conveyed property to which she had a clear and complete title to one who gave no consideration for it, and who had no interest in or right to it. The preliminary contract between them referred to the consideration of love and affection, and in the deeds the consideration recited was "one dollar and other valuable considerations"—an expression used to indicate a nominal consideration, and is ordinarily employed in cases where nothing is actually paid. It is not easy to infer that appellant intended to donate and convey land of which she had an absolute title to Mrs. George; but her testimony, which is uncontradicted, is that there was no consideration in fact paid, and no intention to make a gift to the grantee, but that, through the erroneous advice and the mistake as to their rights of inheritance under the statute, they apportioned the land between them in equal shares, and deeds were accordingly executed.

[2] The next contention is that equity will not grant relief from the mistake in question because of the laches or negligence of appellant in making inquiry and in asking for redress. The general rule is that equity will not interpose to relieve from mistake where there is inexcusable negligence, or where the granting of the relief asked would operate inequitably and do an injustice. On the other side, it is said that there were good reasons for the delay; that no circumstances arose to cause distrust of the advice given to appellant until about the time that the action was brought. It appears that neither of the parties ever lived in Kansas. For about six years after the transfers were made, appellant and Julia A. George lived together in Iowa. After that time Mrs. George removed to Illinois, while appellant went to California. When Julia A. George died, appellant consulted an attorney in California as to whether she had an interest in the estate of Julia A. George, when she was informed for the first time that, under the Kansas statute, she was entitled to all of the Kansas land which her husband owned at the time of his death. The advice given the parties, and the circumstances under which they acted, the exchange of deeds, which would naturally end inquiry and be accepted as the final division and settlement of their rights in the lands of the deceased, the absence of appellant from Kansas, and the fact that no circumstances arose to challenge the correctness of the advice or the legality of the apportionment of the land are the excuses assigned for the long delay in discovering the mistake and in asking for relief; and, in view of these facts, it can hardly be said that the inaction of appellant was inexcusable. Laches is an equitable de-

fense and ought not to be applied in a way that would do injustice or defeat the real owner of land from recovering it. Although about 16 years elapsed between the execution of the deeds and the bringing of this action—a fact which made it incumbent upon appellant to show some sufficient excuse for the delay—it is well settled that the lapse of such a time will not necessarily defeat the granting of equitable relief. If a party has no knowledge of his rights, he can hardly be charged with negligence in failing to assert them; neither can he be regarded as having abandoned such rights as he may have.

In *Gallher v. Cadwell*, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738), the court said: "They [cases on laches] proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that, by reason of his delay, the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

If, as the testimony tends to show, appellant acted as soon as she learned of the mistake and of the fact that her land was held by another, how can it be said that there was any abandonment of her rights or laches in asserting them? It would be inequitable to impute negligence to one who was ignorant of her rights. It has been said: "There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." *Halstead v. Grinnan*, 152 U. S. 412, 417, 14 Sup. Ct. 641, 643 (38 L. Ed. 495).

In *Nicholson v. Nicholson*, 83 Kan. 223, 109 Pac. 1086, a case similar to the one under consideration, it was said: "It is conceded that a mistake as to the law of another state is a mistake of fact; but it is urged that the plaintiff's petition discloses laches; that she has been negligent in not reading up on the law of Ohio. A woman 84 years of age, who has resided in Kansas for many years, and is ignorant of the laws of another state, and who relies upon the statements of her adopted son that such laws are thus and so, cannot, as a matter of law, be held guilty of laches in failing to discover the truth with respect thereto." 83 Kan. 223, 109 Pac. 1086.

[3] No one would have questioned the right of appellant to relief if it had been asked for within a short time after the mistake was made; and it should not be denied now, unless there are other considerations than the mere lapse of time. If the rights of creditors were involved, or innocent purchasers affected, or if the granting of relief would operate unjustly as against any one, other considerations would arise. There has

been no change of conditions connected with the delay, so far as the testimony of appellant goes, which would necessarily make it inequitable to grant relief to her. The appellees are claiming under Mrs. George, and have no better rights to the property than she had. The death of one of the parties, it is true, is a consideration for the court, as it may affect the production of evidence as to the circumstances of the transfer; but this, of itself, is not sufficient to prevent the granting of relief in this case. On all of the testimony of appellant, it cannot be held, as a matter of law, that she has been guilty of laches either in failing to discover the mistake or in failing to act with promptness after making the discovery. It is not determined, of course, that appellant is entitled to a judgment for the recovery of the property, as the testimony of appellees has not yet been produced, but only that the testimony of appellant appears to make out a prima facie case for relief, so that it became a question of fact whether there were laches or any circumstances which would make the granting of the relief asked inequitable or unjust.

There was error in sustaining the demurrer to the evidence of appellant, and for that reason the judgment will be reversed. All the Justices concurring.

(89 Kan. 21)

DUNCAN v. JOHNSON.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—SPECIAL FINDINGS.

Special findings should contain the facts and not the evidence thereof; but when it appears that the trial court must have believed the things shown by such evidence no prejudicial error was committed in refusing to find the ultimate facts instead of their evidentiary basis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW OF EVIDENCE.

Two conflicting claims were made respecting a land transaction, one amounting to an ownership in common, the other to a separate title in the defendant. Each claim was supported by competent evidence, and the trial court, having seen and heard the claimants, believed the former, and decided accordingly. *Held*, that such decision must stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. FRAUDS, STATUTE OF (§ 56*) — CONTRACT RELATING TO LAND.

When two parties purchase a tract of land for their mutual profit, and the consideration is paid by one of them and the deed made to him, with the verbal agreement that he is to hold for both, unless other arrangements are subsequently made, the statute of frauds does not preclude an action by the other party to

be adjudged the owner of an undivided one-half of the land, and for an accounting.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.*]

Appeal from District Court, Saline County.

Action by Joseph Duncan against John L. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

David Ritchie and Z. C. Millikin, both of Salina, for appellant. C. W. Burch and B. I. Litowich, both of Salina, for appellee.

WEST, J. Duncan sued Johnson for an adjudication that he was the owner of the undivided half of the land in controversy, and for an accounting, alleging that after certain transactions and agreements the deed was made to the defendant, who paid the purchase price, upon the understanding that, in case he should not conclude to keep the land for his own, he should be repaid plaintiff's share of the purchase price, but otherwise he could make settlement when they had agreed upon the terms, and that until such determination and settlement he was to hold the title for the benefit of both. The court made findings of facts, and concluded, as a matter of law, that plaintiff was the owner of an undivided half of the quarter section involved, and that he should pay the defendant \$2,121.75, with interest, which should be a lien upon the land. It was found that the parties entered into a partnership for the purpose of speculating in real estate, and purchased the land for that purpose.

The principal contention centers upon finding No. 13, which was as follows: "At the time of the delivery of said deed to said real estate, defendant stated to plaintiff that, in case it was decided that said defendant should not keep the land as the sole owner thereof, plaintiff could pay to defendant plaintiff's share of the purchase price of the land. Defendant further stated at that time that, should it be decided that he (the defendant) was to keep the land as the sole owner thereof, a settlement could be made between them, when they had agreed upon the terms on which defendant should keep the land as sole owner thereof."

[1] It is complained that this finding consists of evidence rather than of facts; and that the court, upon the defendant's request, should have made it more specific, definite, and certain by finding the ultimate facts. The defendant also contends that this finding, with others, is unsupported by the evidence; and it is insisted that the court erred in the finding that a partnership existed, as the constituent elements of the partnership were not disclosed by the evidence, and numerous reasons are assigned for this contention.

[2] Briefly stated, the testimony shows

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the parties agreed to buy the land as a matter of speculation; that afterwards Johnson concluded that he might desire to keep it for himself, and after numerous attempts to sell at an advance the deed from the owner was made to Johnson, and he paid the consideration. As to whether or not, at that time, the agreement was that he was to be the owner, or that the land was to remain the property of the two, subject to subsequent settlement, was the vital point in the case, on which the testimony was in irreconcilable conflict. The court, having heard the parties tell their own stories, and having considered all the facts and circumstances shown, decided in favor of the plaintiff, and required him to make good his share of the purchase price. There can be no question that this finding is so supported by the evidence that, under the well-settled rule, it must stand.

The defendant's criticism that the finding in question was not the ultimate facts, but the statements of the parties amounting to evidentiary matter, is justified. However, from the record it appears clearly enough that the trial court believed from the evidence the ultimate facts which would necessarily arise from the evidence stated in the findings; and therefore nothing beneficial to the defendant could have been accomplished by complying with his request to make definite and certain.

Defendant's counsel, with his usual learning and ability, points out many reasons, supported by authority, why the relation of the parties should not properly be called a partnership; but whether their dealing amounted to a joint adventure or something properly characterized by another term makes no material difference, as the question still remains whether one of the parties owned all the land, or whether both of them owned it in common. The court having taken the latter view, supported by the evidence, as already indicated, we find no material error prejudicial to the defendant.

[3] The land being owned in common by the parties in pursuance of their agreement to handle it for their mutual profit, unless they should subsequently agree that it should belong to the defendant, the statute of frauds is out of the case, and need not be considered.

The judgment is affirmed. All the Justices concurring.

(39 Kan. 160)

STATE v. WHEELER.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

On a trial for one offense, evidence tending to prove other distinct unconnected offenses by other parties with whom it was not

shown that the defendant had associated, conspired, or was in any way connected, is irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

Evidence that a defendant in a criminal action had been arrested and given bail for another distinct offense not connected with the one for which he is on trial, and that other persons, with whom it was not shown that he had conspired, associated, aided, or been connected with, have been convicted of such other offenses, is irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

In the light of the circumstances stated in the opinion, it is held that the admission of the irrelevant testimony referred to in the above first and second paragraphs was prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

Appeal from District Court, Washington County.

Frank Wheeler was convicted of burglary, and appeals. Reversed.

Edgar Bennett, of Washington, for appellant. John S. Dawson, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and J. R. Hyland, of Washington, Kan., for the State.

BENSON, J. The defendant appeals from a conviction for burglary and larceny.

About 2 o'clock on the morning of December 3, 1910, the Taft State Bank at Hanover in Washington county was broken into, and over \$4,000 in money was stolen from its safe. Several explosions were heard, and four men were seen standing outside the bank building. A citizen approaching the building inquired what was going on, and one of the men answered, "We are robbing this bank, and if you don't go back I will kill you." After the robbers had left, the vault and safe were found blown open and the money gone. The front door appeared to have been pried open. About 40 minutes before the explosion, an automobile carrying five men was noticed coming from the south, going in the direction of a bridge about a half mile north and west of the bank, outside of the town. At daylight the sheriff and his assistants found automobile tracks indicating that the car had been turned out of the road near this bridge, and back into the road again; the tracks leading north. These tracks were followed to Gerardy, where they turned east. The pursuers, however, proceeded north about five miles to Lanham, in Nebraska, where the tracks were again seen and followed north to a point near Odell, where they turned east and were lost. The pursuers went on about 14 miles to Wymore, which is 30 miles northeast of Hanover. The places mentioned are on the usual traveled road between Hanover and Wymore. After

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

visiting Beatrice, the sheriff's party returned to Wymore. Leaving Wymore at 4 o'clock p. m., they proceeded a short distance, when their car became disabled. At their request the defendant then took them in his automobile, a five-passenger touring car, to resume the journey. Owing to an apparent want of knowledge of the route taken, and accidents to the car, they were about four hours on the way, reaching Hanover at midnight. It appears that the defendant had formerly been engaged in the shop service of a railway company, later in conducting a clubhouse in Wymore, and for a short time before this occurrence had been running an automobile for hire. He did not appear to be skillful in managing the car. On the trip the defendant told the sheriff that he had been to Lincoln with a bunch of traveling men the night before.

Evidence was given tending to show that an automobile carrying five men was seen coming from the south on the road from Odell to Wymore about 5 o'clock on the morning of December 3, 1910, and that the defendant was driving the car. The witness standing at the roadside, recognizing Wheeler, said, "Hello," but received no response. The other occupants of the car were not recognized by the witness. Another witness testified that he saw a dark red car with five men in it, driven by the defendant, pass a corner in Wymore at 6 o'clock that morning, coming from the direction of Odell, on the usual route. The witness identified the defendant as the driver, but not positively. He identified the other passengers in the car as Red Watson, Frank Black or "Blackie," Neil Mulcahy, and Frank Jackson or "Shorty." These four, with Dan Carney, called "Crippled Dan," Crawford or Carlisle, and others, called "Johnboys," associated together at Henry Hoerr's house, where some of them boarded, and at O'Donnell's saloon and other drinking resorts in Wymore. After this burglary the four mentioned appear to have left Wymore and were not seen there afterwards. The defendant, however, appears to have remained, pursuing his accustomed business. The defendant's car was seen on the morning of the same day, December 3d, standing in a garage next to the door opening upon an alley. The direction that the car was taking when seen at the corner was toward this alley. The witness who saw the car pass the corner testified that some time afterwards he heard the defendant say that he was in Hanover that night; that he had a bunch of traveling men; and that he passed these yegg men on the road broken down. A toolhouse on the railway near the bridge before referred to was broken into that night and a pick and track wrench taken from this shop were found in the bank the morning of the robbery.

The fact of the association together of the
130 P.—42

men called "Johnboys," and by some "yegg men," having been shown, as already indicated, and also by other testimony, the state offered evidence showing that Henry Hoerr was seen afterwards in jail at Marysville, where he was confined on a charge of robbing the Beattie State Bank on November 8, 1910. State v. Hoerr, 88 Kan. 573, 129 Pac. 153. Also, that Dan Carney had been arrested and convicted of the same burglary, and that Mulcahy was also convicted and sentenced at Marysville. While this evidence was being introduced, the presiding judge inquired of the prosecuting attorney whether the necessary connection would be shown, and, being answered in the affirmative, overruled an objection and received the evidence. After it had been admitted, a motion to strike this evidence out was overruled. Later in the trial the sheriff of Marshall county, a witness for the state, was permitted to testify over the objection of the defendant that he had arrested Henry Hoerr for the robbery of the Beattie State bank; that he had also arrested Mulcahy for burglarizing the Waterville Bank on December 31, 1910, and also Dan Carney for the Beattie State Bank robbery; and that these men had been tried and convicted. He was also allowed to testify that he arrested the defendant on February 5, 1911, upon a charge of burglarizing the Beattie State Bank on November 8th; and that he was out on bond. The defendant objected to all this evidence, and after it was received moved to strike it out, but the motion was overruled.

The police judge of Wymore was allowed to identify pictures of the so-called "Johnboys" which were offered in evidence. He gave their names as heretofore stated, adding, however, that of another. He was then asked, "What was the business of those men you have just enumerated?" An objection was overruled, and the witness stated that they had no business; that they stayed around Henry Hoerr's house and O'Donnell's saloon; that they were coming and going; and that four or five of them had been arrested.

The city marshal of Wymore testified, over defendant's objection, to the arrest of Hoerr, Mulcahy, and Carney and the defendant for the Beattie Bank robbery. He was then asked, "Did the defendant, Wheeler, associate with this bunch?" and answered, "I have never seen him with them." On cross-examination he testified to the association of the persons named at Hoerr's house and at various saloons, and that Wheeler was in town all the time, but that he had never seen him with them or talking with them. The police judge also testified that he had never heard that the defendant was mixed up with the yegg men.

[1] It was held in State v. Hoerr, 88 Kan. 573, 129 Pac. 153, that where a burglary had been committed by several, one being on

trial, his association with others tending to show a guilty combination might be shown when limited to a reasonable time before the crime, and that for identification it might be shown that some of these associates were seen in jail afterwards. Here, however, no association of the defendant with the men shown to have been arrested and convicted of other crimes appears. On the contrary, the evidence of the police judge and of the marshal, who were apparently familiar with the haunts and habits of these men, negatives such an association. We have then a case where other distinct crimes have been shown and the conviction of other persons for such crimes without connecting the defendant in any way before the crime was committed either with the crimes or the criminals. In addition to this, the arrest of the defendant himself for another distinct offense for which it was shown that others had been convicted was admitted without evidence of any association with the perpetrators, or connection between the different offenses, in the way of preparation, concealment, or otherwise. Where a conspiracy is shown, acts indicative of a preparation to commit the crime or preserve its fruits may be shown, although they involve the commission of another crime. *State v. Adams*, 20 Kan. 311. "As a general rule, testimony tending to show the commission of another offense than the one charged is not admissible; but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove that the defendant is guilty of another offense." *State v. Reed*, 53 Kan. 767, 774, 37 Pac. 174, 177 (42 Am. St. Rep. 322). Testimony of a conversation with a defendant tending to prove guilt is admissible, although in such conversation he admitted the commission of other crimes; the statements being made in the course of a single conversation. *State v. Cowen*, 56 Kan. 470, 43 Pac. 687. Any facts relevant to the issue may be given in evidence, although they tend to prove the commission of another offense. *State v. Franklin*, 69 Kan. 798, 77 Pac. 588. It has also been held that evidence of the commission of similar offenses is admissible in some cases to show guilty intent. *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904; *State v. Hetrick*, 84 Kan. 157, 113 Pac. 383, 34 L. R. A. (N. S.) 642. It will be seen that this case does not fall within the principles declared in cases where a previous conspiracy or subsequent concealment is shown. It does not appear that any of the other crimes were committed in connection with or in preparation for the Hanover burglary, and there was no evidence of any association, combination, or conspiracy to commit this or any other crime. The evidence referred to relating to other crimes and other criminals ought not to have been received. *State v. Boyland*, 24 Kan. 186;

State v. Hansford, 81 Kan. 300, 106 Pac. 738; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, and note; *Davis v. State*, 54 Neb. 177, 74 N. W. 599; 1 Wigmore on Ev. § 305.

[2] The general rule is that the charge upon which a person is being tried cannot be supported by proof that he committed other offenses even of a similar nature. *State v. Kirby*, 62 Kan. 436, 63 Pac. 752. This evidence does not fall within any of the recognized exceptions. Evidence that other persons have been charged with, or convicted of, similar crimes, is still further removed from relevancy. It is not deemed proper to comment on the weight of the competent evidence against the defendant, as the case must be retried. It is sufficient to say that it was wholly circumstantial, and in view of the fact that the other crimes referred to had been committed shortly before the trial in nearby places, and that odium necessarily attached to the perpetrators, the natural effect of the erroneous testimony was to distract the attention of the jurors from the case on trial and to arouse resentment. This irrelevant testimony was persistently offered and forms no inconsiderable part of the record. The repeated rulings of the court indicated to the jury that it was entitled to consideration and weight in determining the issue upon which, as appears from this record, without other circumstances to show its relevancy, it had no legitimate bearing.

[3] Many decisions demonstrate the purpose of this court to give full effect to the rules of the Code requiring that errors and irregularities not affecting substantial rights shall be disregarded. Code Cr. Proc. § 293 (Gen. St. 1909, § 6867). The rulings complained of here, however, do not fall within that wholesome rule. The substantial rights of the defendant respecting rules of evidence were denied to his prejudice, and for this error the judgment must be reversed.

There was a reference in the instructions to the effect of concealment of the crime or its results. No evidence tending to prove concealment is found in the abstracts, and therefore this part of the instruction ought to have been omitted. Similar language in the instructions in the Hoerr Case was commented on in the opinion in that case.

The contention of the state that a proper bill of exceptions was not allowed and signed is not sustained. At the close of the trial, time was given to transcribe the evidence by continuing the case for judgment to the next term. While it was not stated in the order that this was done to extend the time in which to settle a bill of exceptions beyond the term, as provided by chapter 275 of the Laws of 1901, it was doubtless so understood by the court and by the parties, and the signature of the judge to the record including the evidence and exceptions was a sufficient signing. The record so made up and attested

is a sufficient bill of exceptions. To hold otherwise would be to disregard the provision of the Criminal Code already referred to, which applies to irregularities not affecting substantial rights, whether invoked by the state or the defendant. See, also, section 294 of the Criminal Code (Gen. St. 1900, § 6868):

The judgment is reversed, and the cause remanded, with directions to grant a new trial. All the Justices concurring.

(89 Kan. 84)

WILEY v. SOUTHWESTERN INTERURBAN RY. CO.†

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 117*) — COLLISION—CONTRIBUTORY NEGLIGENCE.

The failure of one driving upon a city street to look along a street car track before attempting to cross it does not, as a matter of law, preclude a recovery on account of injuries occasioned by a collision with a car, unless by looking and seeing the car approaching he would necessarily have been apprised that he could not safely cross.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 117*)—COLLISION—CONTRIBUTORY NEGLIGENCE.

Where one driving by the side of a street car track in a city attempts to cross to the other side, at an intersecting street, and is struck by a car coming from the rear at the rate of 30 miles an hour, he is not to be deemed guilty of contributory negligence, as a matter of law, because he had driven 300 feet at a walk since he last looked along the track, at which time he could see but 1,400 feet; no car being then in sight.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Appeal from District Court, Cowley County.

Action by E. C. Wiley against the Southwestern Interurban Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

O. T. Atkinson, of Arkansas City, for appellant. Love & Wright, of Arkansas City, for appellee.

MASON, J. A car of an interurban electric line ran into a team and covered wagon in a city street. The owner brought an action against the company. A demurrer to his evidence was sustained upon the ground that it showed him to have been guilty of contributory negligence. He appeals.

The plaintiff introduced evidence tending to show these facts: Having stopped while driving by the side of the track parallel to it, he looked backward, where he could see a distance of three or four blocks of 350 feet each, and saw no car. He then drove at a walk for about 300 feet, and, without again looking back, turned to cross the track at an intersecting street. A car coming from

behind at the rate of 30 miles an hour, giving no signal until practically the moment of collision, struck the wagon in the rear part of the front wheels with such force as to carry it 180 feet, and the team half as far.

[1] The defendant maintains that the plaintiff's failure to look again along the track, before attempting to cross it, constitutes contributory negligence, as a matter of law. The plaintiff contends that it was for the jury to determine, from all the circumstances, whether he had acted with reasonable prudence. A person driving across or upon a car track of any kind is required to exercise ordinary care in providing for his own safety in order to hold the company liable for injuries resulting from its negligence. But conduct on his part that would, in the case of an ordinary railroad, be held to be negligence, as a matter of law, may in the case of a street railway be regarded either as absolutely blameless or as of a debatable character to be settled by the decision of the court or jury before whom the case is tried. 2 Joyce on Electric Law, §§ 570, 650; 36 Cyc. 1533-1542, especially 1539, note 78; note, 15 L. R. A. (N. S.) 254. It is perhaps not strictly accurate to say that a higher degree of care is required in the one case than in the other. Ordinary care must be exercised in either case, and in neither is more than that necessary. But specific precautions may be imperative in one case and not in the other. The fundamental difference is that the commercial railroad company needs to use its tracks, and so is accorded the right to use them, with comparatively little regard to other travel, while the cars of the street railway company can be, and so are required to be, operated more nearly upon terms of equality with other vehicles. The traveler by private conveyance has a right to act upon the assumption that a street car will be so controlled as to protect him, which he could not indulge so fully in the case of a train of cars. 36 Cyc. 1552. Where one is driving lengthwise upon a street car track, the question of how often he must look behind, in order to be deemed to be in the exercise of ordinary diligence, is held to be one of fact. 36 Cyc. 1547-1548, note 12; Schilling v. Metropolitan Street R. Co., 47 App. Div. 500, 62 N. Y. Supp. 403; Bensiek v. Transit Co., 125 Mo. App. 121, 102 S. W. 587; Ablard v. Detroit United Ry., 139 Mich. 248, 102 N. W. 741.

Where one is driving by the side of the track, the situation is very much the same as though he were driving upon it. It may be said that in the one case a motorman who approaches from the rear necessarily sees the vehicle upon the track, while in the other he may have no notice of the intention of the driver to turn upon it. The driver, while upon the track, is justified in assuming that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

† Rehearing denied April 21, 1913.

the street car will not approach dangerously near him without giving a signal. In a particular case, it may be a fair question for a jury whether one driving beside the track may not also assume that a car, while running at such a high rate of speed as to place it beyond control, will not be brought, without any signal being given, so close to him that, if he should attempt to turn upon the track, a collision would be inevitable. "A motorman seeing a team driving ahead of his car in the same direction he is traveling, and parallel with the track, might be justified in assuming that the teamster would not attempt to cross the track at other points than street crossings; but he would not be justified in assuming that the driver would not cross when he reached the intersection of another street where it might become necessary for him to change his course of travel." *Tecklenburg v. Everett R. Light & Water Co.*, 59 Wash. 384, 387, 109 Pac. 1036, 1037 (34 L. R. A. [N. S.] 784, 788).

One who is struck by a street car while attempting to cross a track is not held guilty of negligence, as a matter of law, although he entered upon the track knowing that the car was approaching, if he had reason to believe its distance and speed gave him time to cross in safety. *Railway Co. v. Slayman*, 64 Kan. 722, 68 Pac. 628; *Railroad Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344; *Railway Co. v. Summers*, 75 Kan. 342, 89 Pac. 652; *Murray v. St. Louis Transit Co.*, 108 Mo. App. 501, 83 S. W. 995; *Grimm v. Milwaukee E. R. & L. Co.*, 138 Wis. 44, 119 N. W. 833; 2 *Thompson on Negligence*, § 1450; 36 *Cyc.* 1536, notes 50 and 51. "If the driver of a vehicle who arrives at a street intersection, and who sees an approaching car, is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said, as a matter of law, to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury, to be determined from all the evidence before it." *Omaha Street R. Co. v. Mathiesen*, 73 Neb. 820, 824, 103 N. W. 666, 667. "Whether one who has observed an approaching street car should have also apprehended that it was approaching at such a speed as to reach him before he could cross the track is generally a question of fact to be determined upon the circumstances of each particular case." *Lawler, Adm'r, v. Hartford Street Ry. Co.*, 72 Conn. 74, 82, 43 Atl. 545, 548.

In the present case the plaintiff knew he had time to cross the track before the car reached him, unless it should travel at least 1,700 feet while he was going 300. If he had a right to assume that the car would not travel over 15 miles an hour, this gave him a considerable margin, for he could hardly have been more than a minute in going the

300 feet. No ordinance limiting the speed of the cars was shown; but it was for the jury to say what rate, under all the circumstances, would be dangerous and negligent. *Railway Co. v. Summers*, 75 Kan. 342, 89 Pac. 652.

[2] Considering the actual speed of the car, and assuming that it could be seen at no greater distance than three or four blocks, or 1,050 to 1,400 feet, if the plaintiff had looked back 30 seconds before the collision, he either would not have seen the car at all or would have seen it at such a distance that he might well have supposed he had time to get safely over. From his position near the track, he could not accurately gauge the speed of the car, and he could not be chargeable with notice that it was making 30 miles an hour. There was no moment of time, before he had advanced too far to withdraw, of which it can be said with certainty that, if he had then looked, he must necessarily have seen that the car was too close to permit his crossing in safety. His failure to look is not fatal to his recovery unless by looking he would necessarily have been apprised of his danger, for otherwise the injury would not be shown to be due to his omission. *Railway Co. v. Young*, 57 Kan. 168, 171, 45 Pac. 580; *Railway Co. v. Jaffl*, 67 Kan. 81, 72 Pac. 535. A glance backward just before turning upon the track would have advised him that a car was approaching, but could hardly have told him of its great rate of speed, which was all that made the crossing dangerous.

In *Nappli v. Seattle, Renton & S. R. Co.*, 61 Wash. 171, pages 173, 174, 112 Pac. 89, page 91, the facts were essentially the same as those here presented. There was evidence that the plaintiff was driving parallel to the street car track, and undertook to cross it at an intersecting street, when he was struck by a car going at the rate of 60 miles an hour. He testified that he had last looked back when he was within 25 feet of the crossing. The court said: "Assuming that the respondent should have seen the car before he drove upon the track because the car was evidently in plain view at that time, it was 100 feet or possibly a block away. Under these circumstances, we think it cannot be said, as a matter of law, that the respondent should not have attempted to cross over the tracks. He had a right to assume that the car was under control, and, when the car was that far away, that he would be in no danger and might pass in safety without risk of danger. At any rate, the question whether he was negligent in attempting to cross the track when the car was that far away was a question for the jury. Street crossings are to be used, and the mere fact that an approaching car is in sight does not determine the right of a traveler to cross. His right depends upon what a reasonably careful man would do under the circum-

stances. If the approaching car is so close and coming so fast that it cannot be stopped in time to avoid a collision, and such facts are or should be observed, then a person attempting to cross may be said to be negligent, as a matter of law. But where an approaching car is far enough away to be stopped after a person has passed upon the tracks, or when a reasonably careful man would undertake to cross ahead of it, then it cannot be said, as a matter of law, that a person attempting to cross is negligent."

The judgment is reversed, and a new trial ordered. All the Justices concurring.

(80 Kan. 112)

WEBBER v. WICHITA WATER CO.†

(Supreme Court of Kansas. March 8, 1913.)

1. MASTER AND SERVANT (§ 130*)—INJURIES TO SERVANT—METHOD OF WORK—NONDELEGABLE DUTY.

A master's duty to adopt a reasonably safe method of doing the work in hand is nondelegable, and hence the master is liable for injuries to a servant resulting from a failure to perform the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.*]

2. MASTER AND SERVANT (§ 162*)—INJURIES TO SERVANT—EFFICIENT FELLOW SERVANTS.

A master is liable for injuries to a servant caused by the master's failure to perform the nondelegable duty of providing a sufficient number of reasonably careful and efficient fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 327; Dec. Dig. § 162.*]

Appeal from District Court, Sedgwick County.

Action by S. E. Webber against the Wichita Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

David Smyth and J. W. Smyth, both of Wichita, for appellant. A. V. Roberts and W. D. Jochems, both of Wichita, for appellee.

PER CURIAM. Appellee recovered damages for personal injuries sustained while removing a casing or pipe, with a cylinder point attached, from an abandoned well. The grounds upon which a recovery was asked were that appellant did not adopt or provide a safe method of work, nor furnish a sufficient number of men to do the work, and that the men provided were not reasonably careful and competent co-workers, and that it did not provide a reasonably safe place at which to work. There was testimony offered that appellee had only worked for appellant a very brief time, had never before lifted such a casing, and that appellant had never moved a casing with a sucker point attached with less than eight or nine men, but had used rollers in moving heavy casings of this kind. Appellee and five others were directed to carry a casing with a sucker point attached which weighed

about 800 pounds. The point was perforated and partly filled with sand. It lay near the well in a narrow furrow, through sand which had been thrown from the well, and hence those lifting the casing did not have a firm or safe footing, but had to place one foot on the bottom of the furrow and the other against the sloping wall of sand. There were only three men at each end of the casing. Appellee, Terrell, and Peterson lifted one end, and Peterson let go of his hold, throwing the whole weight of that end upon appellee and Terrell, causing a rupture and a severe injury to the abdomen of appellee.

[1, 2] It is contended that the evidence did not support the verdict. There is testimony, though, tending to show that the appellant did not adopt a reasonably safe method of doing the work, and this is a nondelegable duty of the master, the neglect of which imposes a liability for a resulting injury. *Carillo v. Construction Co.*, 81 Kan. 823, 106 Pac. 1050. There was testimony, also, that a sufficient number of men were not employed to do the work, and one of those employed who was working with appellee was not a reasonably careful co-servant. The master owes to the servant the duty to take reasonable precaution to protect him from injury, and a nondelegable duty of the master is not only to provide a sufficient number of co-servants, but to furnish him with reasonably careful co-servants. *Schwarzchild v. Weeks*, 72 Kan. 190, 83 Pac. 406, 4 L. R. A. (N. S.) 515; *Railway Co. v. Loosley*, 76 Kan. 103, 90 Pac. 990.

It appears that Peterson was a shirking and incompetent workman, and, while the testimony showing that his negligence and incompetency was brought to the attention of appellant is rather meager, the jury has found that appellant not only should have known of his incompetency, but that it had actual knowledge that he was a careless and incompetent co-servant, and it cannot be said that the finding is without support.

The objections to the instructions are not substantial, and in view of the testimony and findings, it cannot be held that the amount of the damages awarded is erroneously excessive.

The judgment is affirmed.

(80 Kan. 125)

McVEY v. COATES.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

BROKERS (§ 85*)—ACTION FOR COMMISSION—EVIDENCE.

On the trial of a controverted fact as to the amount contracted to be paid as a commission for the sale of land, each party pleading and testifying that there was a definite agreement in reference thereto but differing as to the amount, it is error to admit evidence that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied April 21, 1912.

a third party, at some indefinite time prior thereto, had an agreement with the landowner for the same service, and for a commission much less than that claimed by one party and much greater than that testified to by the other.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

Appeal from District Court, Bourbon County.

Action by R. E. McVey against R. W. Coates. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Keene & Gates, of Ft. Scott, for appellant. Charles A. Blair and W. W. Padgett, both of Ft. Scott, for appellee.

SMITH, J. This action was brought by the appellee against the appellant to recover a commission for the sale and trade of lands owned by appellant in Bourbon county for lands in Smith county, and for a large amount of cash. The appellee claims in his petition, and also testified, that previous to the selling and trading of appellant's land, he and the appellant entered into a verbal contract, by the terms of which appellant agreed to pay him the sum of \$2,000 if he would sell the 770 acres of land belonging to appellant for a cash consideration of \$60 per acre, or would procure a trade of the land which the appellant would accept, and that he did procure for the appellant a trade for a portion of the land which the appellant accepted, and the sale of the remainder at \$60 per acre. The appellant answered and, in substance, testified that he entered into a verbal contract with the appellee that, if he would sell a portion of the land for \$65 in money, and obtain a trade of the remainder for a certain like number of acres in Smith county, he would pay the appellee \$500, less the expense of going from Kansas City to Smith Center, Kan. He also alleged the amount of the expenses and certain interest that the appellee undertook to allow him as an offset, all aggregating \$57.90. In the answer it is also alleged that the appellee did not represent the appellant in good faith, but was the "duly appointed and qualified agent" of the other party to the transaction, and was paid a commission therefor by the purchaser without the knowledge or consent of the appellant. On the trial, after the appellee had testified to the facts substantially as claimed in his petition, and offered other evidence as to the usual price charged by real estate agents for selling property, the appellant demurred to the evidence of the appellee. The demurrer was overruled. The ground of the demurrer was that the reply of appellee was unverified, and hence admitted the allegation of the answer that appellee did not fairly represent appellant in the transaction, "but was the duly appointed and qualified agent" of the other party thereto, and received compensation therefor without the knowledge or con-

sent of appellant. After the close of the evidence the reply was, by leave of court, verified, and the question will not recur on another trial. After the appellant had testified, in substance, that he had given the appellee the agency to sell or to make an acceptable trade of his land, and had agreed to pay appellant \$500 therefor, and had not agreed to pay \$2,000 as a commission therefor, and had produced other witnesses whose evidence tended to corroborate his statements, he rested. In rebuttal the appellee produced as a witness one, Anderson, who testified, over the repeated objections of appellant, to the questions asked as follows: "Q. Did this man Coates ever put this land in your hands to sell at any time? A. He did. Q. Was the land in your hands, did he put the land in your hands for sale at \$40 an acre, and were you to have \$1,000 commission if you sold it at \$40 an acre? A. Yes, sir." There is no evidence as to how long it was before the contract was made between appellant and appellee that Anderson was given the agency to sell the land. It may have been weeks or years before. The appellant, however, himself testified that he gave Anderson the agency to sell the land at \$40 per acre, and that such agent continued until the time or about the time the contract was made with the appellee. He denied that he ever agreed to give Anderson \$1,000 commission in case Anderson secured a sale. That there was an agreement, a contract as to the amount appellee was to receive in case he procured a trade or sale of the land, is pleaded and testified to by both of the parties; also it is agreed that the sale of a part and an accepted trade of the remainder was brought about by the appellee. The issue before the jury, then, was whether the commission was fixed by the contract at \$2,000 or at \$500. The verdict was for \$1,180. The province of the jury was to determine which of the two sums was agreed upon, and not to make a new contract for the parties.

The evidence of Anderson was incompetent. It was not a part of the *res geste*, and was not shown to have had any connection in point of time to the transaction in question. As stated by him, his agreement may have been weeks or years before the making of the contract in question.

The judgment is reversed, and the case is remanded for a new trial. All the Justices concurring.

(39 Kan. 32)

COLLINS v. BELFORD & STUMP.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. **BROKERS (§ 66*)—CONTRACTS BETWEEN—CONSIDERATION—DIVISION OF COMMISSIONS.** An agreement between two real estate agents to divide commissions, in pursuance of which one produces customers and the other

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

makes sales to them and receives the commission, rests upon a sufficient consideration, and should be enforced.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 51; Dec. Dig. § 66.*]

2. NEW TRIAL (§ 99*)—NEWLY DISCOVERED EVIDENCE.

A decision denying a motion for a new trial based upon newly discovered evidence, is sustained upon the authority of *Sexton v. Lamb*, 27 Kan. 432, and *Shores v. Surety Co.*, 84 Kan. 592, 114 Pac. 1062.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

Appeal from District Court, Sumner County.

Action by H. M. Collins against Belford & Stump. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Dinsmoor, of Caldwell, and James Lawrence, of Wellington, for appellant. W. T. McBride, of Wellington, for appellee.

BENSON, J. The parties are real estate agents at Caldwell, and this action is to enforce an agreement for the division of commissions on sales of land made by the defendants to customers who had been introduced to them by the plaintiff, in whose favor the verdict was rendered.

The principal contention of the defendants is that the evidence does not sustain the verdict. Briefly stated, the evidence on the part of the plaintiff tended to prove that a person from Harper county in quest of land called at the plaintiff's office. He said that his brother-in-law was coming in a short time from Ohio, and that each of them wanted to buy a farm in the vicinity of Renfrow, Okl., which is about nine miles from Caldwell. Lists of lands in that vicinity and a map were shown. Two farms were selected which, it was thought, would be satisfactory, and a proposal was made to show them. This offer, however, was declined awaiting the arrival of the brother-in-law. In a few days the same person called again with his brother-in-law. They wanted to examine the farms referred to in the first interview, but were informed that they had been sold. Other farms were then pointed out on the lists, located in Kansas, but the intending purchasers declined to look at them, as they desired to buy land near Renfrow. The plaintiff then took the two men in his automobile to Mr. Belford, of the defendant firm, who was at the Reunion grounds near the city, and had a conversation with him, but not in the presence of the intending purchasers. The plaintiff introduced them after the conversation. The purport of the conversation was that the plaintiff said he had two customers desirous of buying farms near Renfrow that he would turn over to Belford, and wanted him to take them out and make sales if he had land that would suit them, and that the plaintiff would expect to receive half the commission, to which proposition Belford assented, and requested the plaintiff to take the men back to

his office and await his (Belford's) arrival. They were so taken back, and in a short time Belford came to the plaintiff's office, and found one of the men there and the other at a barber shop and took them to Renfrow, and sold each of them a farm in that vicinity, receiving net commissions upon the two sales amounting to about \$1,500. Evidence was also offered tending to prove that Belford, soon after the sale, stated to another party that he had made the sales, but that Collins had furnished the men, and he had to split commissions with him. Other transactions had previously taken place between the parties in which commissions upon sales made by one of them had been divided with the other.

[1] The defendants denied any agreement to divide commissions, and offered evidence tending to support the denial conflicting with that of the plaintiff. Upon this conflict of evidence the finding of the jury for the plaintiff, approved by the district court, is conclusive. The fact being thus established that the plaintiff produced the purchasers, upon the promise of Belford to divide commissions, there was a sufficient consideration for the agreement.

[2] Error is alleged in overruling a motion for a new trial based upon newly discovered evidence. The evidence was that of two witnesses, one of whom testified at the hearing upon the motion that he was present at the Reunion grounds and heard the conversation between Collins and Belford. He gave a version of that conversation, tending to corroborate that given by Belford and to contradict that given by Collins, but differing in some respects from the testimony of either. He testified that Collins said that he had customers who wanted to look at land in Oklahoma, and asked Belford to show them such land, but that nothing was said about splitting commissions. The testimony of the other witness was not offered, but the plaintiff's affidavit stated that it would be the same. These witnesses were friends and acquaintances of the defendant living in or near Caldwell.

An objection is made that the proposed evidence is merely cumulative. It is not necessary to discuss that question, in view of other objections thereto. The only reason suggested for not producing the witnesses at the trial was the failure of Belford to remember that they were present at the conversation. Whether mere failure of recollection is a sufficient explanation may be doubted. It has been held that it is not, and does not meet the requirement of diligence. *Moran v. Abbey*, 63 Cal. 56; *Upton v. Levy*, 39 Neb. 331, 58 N. W. 95.

Not only was the showing of diligence meager, but it is by no means apparent that the proposed new evidence was of such character and strength that it would with reasonable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

probability have compelled a different verdict if it had been introduced. A finding to that effect was necessary in order to sustain the motion. *Sexton v. Lamb*, 27 Kan. 432; *Railway Co. v. Mosher*, 76 Kan. 599, 806, 92 Pac. 554; *Shores v. Surety Co.*, 84 Kan. 592, 114 Pac. 1062.

The district court heard the oral examination of one of the witnesses, and the testimony of the plaintiff on the motion, and the finding against the sufficiency of the application will not be disturbed.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 90)

CUE v. CONNECTICUT FIRE INS. CO.
(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

INSURANCE (§ 378*)—CONDITIONS OF POLICY—WAIVER.

Where an agent of an insurance company sends a solicitor to inspect a risk and take a written application for insurance and upon the application issues a policy, the company is bound by knowledge of the solicitor of the fact that gasoline is being used on the premises, and will be presumed to have waived a condition in the policy forbidding such use.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

Appeal from District Court, Cowley County.

Action by Will H. Cue against the Connecticut Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. T. Atkinson, of Arkansas City, for appellant. Faulconer & Cunningham, of Arkansas City, and W. P. Hackney and J. T. Lafferty, both of Winfield, for appellee.

PORTER, J. Action on a fire insurance policy. Plaintiff recovered, and the defendant appeals.

A solicitor in the employ of the local agents of the insurance company took the written application for the policy, and the appellee's evidence tended to show that the solicitor inspected the property and had knowledge of the fact that gasoline was used on the premises, and that the building had no chimney or flue for a stove; further, that the solicitor told the assured that it would be all right to use gasoline. The agents issued the policy after approving the application. The appellant contends that, under these circumstances, a mere solicitor, who is not directly in the employ of the insurance company, cannot by parol waive a written condition of the policy. That the agent himself may do so is well settled. *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *Hulen v. Insurance Co.*, 80 Kan. 127, 102 Pac. 52. And the same principle applies to the situation here presented. Where an insurance com-

pany approves an application taken by one who is not at the time its agent or in its employ and issues the policy, it will not be heard to deny the fact of his agency. It cannot accept the benefits of the transaction and refuse to assume the burdens and liabilities thereof. So, where an agent of an insurance company employs a solicitor to inspect risks and to take applications for insurance and issues a policy upon a written application so obtained, the company is bound by the knowledge of the solicitor and his representative made in securing the application to the same extent as though the agent himself had made the inspection and taken the application. *Insurance Co. v. Davis*, 59 Kan. 521, 53 Pac. 856; *Pfeister v. Insurance Co.*, 85 Kan. 97, 116 Pac. 245, and cases cited in the opinion. In *Gurnett v. Ins. Co.*, 124 Iowa, 547, 549, 100 N. W. 542, 543, it was held that in the matter of imputing the agent's knowledge to the insurer no distinction should be made between a recording and a soliciting agent. In the opinion in that case it was said: "The law is charitable enough to assume, in the absence of any showing to the contrary, that an insurance company intends to execute a valid contract in return for the premium received; and when the policy contains a condition which renders it void at its inception, and this result is known to the insurer, it will be presumed to have intended to waive the condition, and to execute a binding contract, rather than to have deceived the insured into thinking his property is insured when it is not, and to have taken his money without consideration." Other cases in point are: *Brewing Co. v. Insurance Co.*, 95 Iowa, 31, 63 N. W. 595; *Salzman v. Insurance Co.*, 142 Iowa, 99, 120 N. W. 697; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121.

Upon the question of whether the policy was canceled previous to the loss, there was a conflict in the testimony which the jury decided adversely to the appellant.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 70)

HALL v. KANSAS CITY, L. & T. ELECTRIC R. CO.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 543*)—EXPERT EVIDENCE—VALUE OF PROPERTY.

On appeal from an award of damages for land taken for a right of way, a witness who had dealt in land in the general vicinity, and had seen and examined the land in question, was permitted to give his opinion touching its value, although stating that he was not acquainted with the market value of land in the immediate vicinity. Held not materially prejudicial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. EMINENT DOMAIN (§ 262*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

In such case, when numerous witnesses testify as to their knowledge of the land and its value, it is not material error to reject evidence offered by the defendant as to its rental value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

3. EMINENT DOMAIN (§ 203*)—EVIDENCE—IMPROVEMENTS.

When witnesses for both parties testify as to the acquaintance with the land and as to its value before and after the appropriation of the right of way, it is not error to reject evidence in chief as to the character of surrounding improvements offered for the purpose of showing that the condemnation did not in fact damage the land not taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.*]

Appeal from District Court, Johnson County.

Action by Samuel N. Hall against the Kansas City, Lawrence & Topeka Electric Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. R. Ogg and Chas. C. Hoge, both of Olathe, for appellant. J. W. Parker, of Olathe, for appellee.

WEST, J. The railroad took 1²²/₁₀₀ acres of plaintiff's 62 acres of farming land in Johnson county, and the county commissioners, acting as appraisers, fixed the value of the land taken at \$93.75, and damage to the land not taken at \$40. The plaintiff appealed, the jury found the value of the land taken to be \$92.25, the damage to the remainder \$310, making \$402.25, for which judgment was rendered, and defendant appeals.

[1] Complaint is made that one of plaintiff's witnesses, admitting that he was not acquainted with market value of the land in the immediate neighborhood, was permitted to testify. He stated, however, that he had handled land in almost all directions from Kansas City within 25 miles, and that the land in question was 11 or 12 miles out; that he was acquainted with the market value of land within a range of 15 or 20 miles southwest from Kansas City; and that he thought he knew the value of it; that the land before the road was built was worth from \$125 to \$140 an acre. He described the land in question, which he had seen and examined. Numerous other witnesses about whose competency there is no question placed it variously at \$100, \$95, \$75, \$80, \$110, and \$115. The witness complained of placed the value after building the road from \$78 to \$80 per acre, and numerous competent witnesses placed it variously at \$95, \$87, \$75, \$90, \$70, and \$95 an acre. There was abundant competent testimony, therefore, to support the verdict, and we think the evidence complained of was not materially prejudicial; its weight being for the jury.

[2] The defendant sought to prove the

rental value of the land, and complains because not permitted to do so. Such evidence is competent when it is the best that can be had, and its reception would not have been error. *Kelchner v. Kansas City*, 86 Kan. 762, 121 Pac. 915. But, in view of the knowledge shown by the witnesses of the value of the land itself, the exclusion of its rental value was not materially prejudicial.

[3] It was sought, also, to show the effect of various improvements aside from those caused by the road upon the land in question to which objections were sustained. It is argued that some of these improvements were made by those associated in a manner with the building of the railroad, but not directly interested therein, and for that reason the land was worth more on the open market after the location of the railroad than before. It is said that the constitutional provision that compensation must be made irrespective of any benefit from any improvement proposed by the corporation (section 4, art. 12) seems harsh and unjust in this advanced age. Nevertheless, it is still the Constitution, and we are bound thereby. It is argued that there would be no damage to the land not taken, unless, after the location of the right of way, it would sell for less on the open market than it would before. We must assume, however, that the witnesses who testified as to their knowledge of the land and its value before and after gave their best judgment as to its actual value after considering the circumstances and surroundings aside from any supposed benefits from the railroad itself.

The jury were the judges of the facts, and the testimony supports their verdict.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 66)

OHIO INV. CO. v. BROWN.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. INTEREST (§ 34*)—RATE OF INTEREST.

If the contract rate of interest for the forbearance of the payment of money does not exceed the highest rate prescribed by the statute as recoverable, the courts will enforce the contract.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 71-74; Dec. Dig. § 34.*]

2. INTEREST (§ 33*)—RATE OF INTEREST.

The highest rate of interest recoverable at the time of the execution of the principal note, in this suit, was 10 per cent. per annum.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 68-70; Dec. Dig. § 33.*]

3. USURY (§ 72*)—CONSTRUCTION OF CONTRACT.

Where a written contract for interest on money loaned is susceptible of two constructions, one of which would render the contract usurious and the other not usurious, the latter must be adopted.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 147; Dec. Dig. § 72.*]

Appeal from District Court, Cowley County.

Action by the Ohio Investment Company against W. B. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

Hackney & Lafferty, of Winfield, for appellant. Wheeler & Switzer, of Topeka, for appellee.

SMITH, J. This action was brought for judgment upon a principal note and interest coupon notes, and to foreclose a real estate mortgage given to secure the payment thereof. There are no questions of fact involved in this case, but only an interpretation of the terms of the notes sued on and the mortgage given to secure the payment thereof. On February 3, 1903, the appellant executed and delivered to one Merriam his certain principal promissory note for \$12,000, due February 1, 1910, also seven interest coupon notes for \$780 each, and due, successively, one each year, from February 1, 1904, to February 1, 1910, and executed a real estate mortgage to secure the payment of the indebtedness at maturity. It will be observed that the debt was to bear interest at the rate of 6½ per cent. per annum. A clause in the principal note, however, reads: "This note and these coupons are to draw ten per cent. interest per annum after due or after default of any interest payment, and are secured by a mortgage of even date herewith on real estate." It was also provided in each coupon that the amount named therein should draw interest at the rate of 10 per cent. after due. The mortgage also contains a provision that the principal note should become due and should draw interest at 10 per cent. upon the nonpayment of any interest note when due. It seems that the first three coupons for annual interest were paid, but the fourth and fifth, which fell due February 1, 1907, and February 1, 1908, respectively, were not paid. The action for judgment on the notes and to foreclose the mortgage was commenced on February 4, 1909, and the appellee declared upon the principal note and the two interest coupon notes which had matured before that date, and also claimed interest on both the principal note from the first default and on the coupon notes after due. While within the letter of the contract, this claim is not enforceable, and cannot be allowed in full. On March 5, 1909, the appellant paid the appellee \$15,619.90, which he claimed was more than the amount of his indebtedness. On November 16, 1910, while the action was still pending, the appellant, by leave of court, filed an answer and cross-petition, in which he alleged that the amount due to the appellee on March 5, 1909, including indebtedness on commission notes, \$215.40, for which the appellee had not sued, was \$14,928.79 but that the appellee demanded and refused to accept a sum less than \$15,619.90, which sum the appellant was com-

pelled to pay, and did pay, to save his property from being sacrificed at sheriff's sale, and appellant prayed judgment against the plaintiff (appellee) for \$691.11, with interest thereon from March 5, 1909. To this answer and cross-petition the appellee demurred, first, that the answer and cross-petition did not state facts sufficient to constitute a cause of action in favor of appellant; second, that the answer and cross-petition did not state facts sufficient to constitute a counterclaim or set-off. The demurrer was sustained by the court, and the appellant brings the case to this court for review.

[1, 2] The highest rate of interest recoverable at the time of the making of the contract in 1903 was 10 per cent. per annum on the amount of the indebtedness, and the parties had a right to contract for any rate of interest which did not exceed 10 per cent. They also had a right to contract that the coupon notes should draw interest at the rate of 10 per cent. per annum after maturity; also to contract that upon the nonpayment of any interest coupon the whole indebtedness should become due. This, of course, would include the principal debt and the interest then due. Upon the maturity and nonpayment of interest coupon No. 4, February 1, 1907, the amount thereof and the principal note, \$12,780, became due, and thereafter by the terms of the contract bore interest at the rate of 10 per cent. per annum, but subsequently maturing interest coupons should thereafter be ignored, as the principal note then bore the highest rate of interest recoverable. The principal, then, to bear interest from February 1, 1907, at 10 per cent. was \$12,780. Two years, one month, and four days thereafter the payment was made, and the interest on such principal for that time amounted to \$2,668.43, and the aggregate of indebtedness at time of payment was \$15,448.43. In addition thereto the appellant admits in his answer that he owed appellee \$215.40. Appellant pleads in his cross-petition that he paid the appellee \$15,619.90, which was \$43.93 less than the amount of his indebtedness. The court therefore did not err in sustaining the demurrer to his answer and cross-petition.

The appellant relies upon the following provision in the mortgage: "But if said principal or interest notes or any part thereof or interest thereon be not paid according to the terms of said notes * * * then this conveyance shall become absolute and the whole of said principal shall immediately become due and payable at the option of the party of the second part or assigns; and in case of default of payment of any sum herein covenanted to be paid for the period of thirty days after the same becomes due, the said first parties agree to pay to the said second party or his assigns interest at the rate of ten per cent. per annum, computed annually on said principal note from the date of default to

the time when said principal and interest shall be paid."

[3] Construing the note and mortgage together, this is the only clause of the contract which provides that the principal note shall become due upon any contingency before the time therein specified. This clause provides that the principal shall become due and payable at "the option of the party of the second part or assigns" if the principal or interest notes or any part thereof, shall not be paid according to the terms thereof. This option, it is conceded, was exercised in the bringing of the action February 4, 1909. The mortgage has the same provision as to interest after default as the notes. There is therefore no conflict in the provisions of the mortgage and notes. Except as to the date and amount of the payment and the compelling reasons for the payment, the cross-petition contained no averment which was not determinable by construction of the contract, which was within the province of the court.

The judgment of the district court is affirmed. All the Justices concurring.

(39 Kan. 114)

VOSBURG v. ATCHISON, T. & S. F. RY. CO.†

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 20*)—CONSTITUTIONAL LAW (§ 248*)—EQUAL PROTECTION OF THE LAWS—ATTORNEY'S FEES.

The provision of the act relating to the furnishing of cars by railway companies to shippers of freight (Gen. St. 1909, § 7203), which allows shippers to recover attorney fees in actions successfully prosecuted under the act, does not deny the railway companies the equal protection of the laws guaranteed by the federal Constitution because they are not allowed attorney fees if they are successful in such suits, or because they are not allowed attorney fees in actions successfully prosecuted by them against shippers for the detention of cars contrary to the reciprocal provision of the act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20;* Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 248.*]

Appeal from District Court, Edwards County.

Action by J. B. Vosburg against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and Wm. Osmond, of Great Bend, for appellant. W. E. Broadie, of Kinsley, for appellee.

BURCH, J. Chapter 345 of the Laws of 1905, as amended by chapter 275 of the Laws of 1907, concerns the furnishing of cars by railway companies to shippers of freight. When cars applied for under this statute are not duly furnished, the railway

company is liable to the shipper for all actual damages suffered, for a penalty of \$5 per day for each car not supplied, and for a reasonable attorney fee. Shippers who fail to use cars placed at their disposal are subject to a penalty for their detention, but are not liable for attorney fees. The plaintiff recovered a judgment against the defendant for a violation of this statute, including an attorney fee, and the defendant appeals on the ground that the provision relating to attorney fees denies it the equal protection of the law guaranteed by the federal Constitution.

The question being one which involves an application of a provision of the federal Constitution, the decisions of the Supreme Court of the United States are, of course, controlling. Certain fundamental principles are generally recognized. All persons, including corporations, hold property and engage in business subject to the police power of the state. In the exercise of the police power the state may legislate for the general peace, good order, health, safety, convenience, and welfare. Such regulations must be reasonable and fairly adapted to secure the ends in view. They must operate alike upon all persons similarly situated, but classifications may be made in view of peculiar circumstances or conditions which furnish ground for difference in regulation. The Supreme Court of the United States has dealt with these principles in several cases involving the allowance of attorney fees.

In the case of Gulf, Colorado & Santa Fé Ry. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 668, it appeared that a statute of Texas gave attorney fees in cases of claims not exceeding \$50 in amount against railway companies for personal services, labor, damages, overcharges on freight, and stock killed. The statute was held to be void. The court said: "The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff. If it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right, while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied April 21, 1913.

is obvious from a mere inspection of the statute. * * * While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action. * * *

The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored. * * * But, if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which

they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri Pacific Railway v. Humes*, 115 U. S. 512 [6 Sup. Ct. 110, 29 L. Ed. 463]. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others, a duty which can be enforced by the Legislature in any proper manner—and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of police power of the state, and with a view to enforce just and reasonable police regulations. While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The Legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and, as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory. It is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the state. But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and, while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich, or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency. Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for failure to perform certain duties, duties which are equally obligatory upon all debtors, a punishment not

visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the Legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained." 165 U. S. 153, 154, 155, 156, 157, 165, 17 Sup. Ct. 256, 257, 258, 261, 41 L. Ed. 666. This opinion was written by Mr. Justice Brewer. Chief Justice Fuller and Justices Gray and White dissented.

In the case of *Atchison, Topeka, etc., Railroad v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, the court considered the statute of Kansas which allows an attorney fee in an action against a railroad company for damages by fire caused by operation of the road. The statute was held to be valid. In the opinion written by Mr. Justice Brewer it was said: "The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is 'caused by the operating' of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Missouri Pac. Railway v. Humes*, 115 U. S. 512 [6 Sup. Ct. 110, 29 L. Ed. 463]. And yet its purpose is not different. Its monition to the railroads is not 'Pay your debts without suit, or you will, in addition, have to pay attorney's fees,' but rather, 'See to it that no fire escapes from your locomotives, for, if it does, you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed.' It has been frequently before the Supreme Court of Kansas,

has always been so interpreted by that court, and its validity sustained on that ground. In *Missouri Pac. Railway v. Merrill*, 40 Kan. 404, 408 [19 Pac. 793, 795], it was said: 'The objection that this legislation is special and unequal cannot be sustained. The dangerous element employed and the hazards to persons and property arising from the running of trains and the operation of railroads justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised.' And in the opinion filed in the present case (58 Kan. 447, 450 [49 Pac. 602, 603]), that court observed: 'Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the Legislature has the right to give in such cases.' * * * That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken (and sometimes in spite of such care), scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. * * * No other work done, or industry carried on, carries with it so much danger from escaping fire. In 1887 the Legislature of the state of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated directly or indirectly from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. *St. Louis & San Francisco Railway v. Mathews*, 165 U. S. 1 [17 Sup. Ct. 243, 41 L. Ed. 611]. So when the Legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire." 174 U. S. 98, 101, 102, 19 Sup. Ct. 610, 611, 43 L. Ed. 909.

The *Ellis* Case was distinguished on the ground that the statute of Texas was not a police regulation, and that the classification there attempted was purely arbitrary. While the *Ellis* Case involved the killing of a colt, the purpose of the statute was not to lessen the hazard to stock. If that had been true, the more stock found on a railroad track, the greater would have been the danger, and the

more imperative the need of protection. Yet claims under the statute were limited to \$50, making it clear that no police regulation was intended. The statute was simply one to compel the payment of debts. Compelling the payment of debts is not a police regulation, and no reason existed for singling out railroad companies from all other debtors and punishing them for such a delinquency. The general principles governing the subject were restated in the following manner: "On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the Legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that, whenever he or it is sued, the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. *Yick Wo v. Hopkins*, supra [118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220], forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business, was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished. * * * It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the Legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that, if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the

very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." *Atchison, Topeka, etc., Railroad v. Matthews*, 174 U. S. 96, 104, 106, 19 Sup. Ct. 609, 613 (43 L. Ed. 909). Justices Harlan, Brown, Peckham, and McKenna dissented. In the dissenting opinion delivered by Mr. Justice Harlan, it was said: "Manifestly the statute applies only to suits against railroad companies, and only to causes of action arising from fire caused by operating a railroad. It establishes against a defendant railroad company a rule of evidence as to negligence that does not apply in any other suit for damages arising from the negligence of a defendant, whether a corporate or natural person. It does more. It imposes upon the defendant railroad corporation, if unsuccessful in its defense, a burden not imposed upon any other unsuccessful defendant sued upon a like or upon a different cause of action. That burden is the payment of an attorney's fee as a part of the judgment. Even if it appears that the railway company was not guilty of any negligence whatever, or that the plaintiffs were guilty of contributory negligence preventing any recovery in their favor, no such fee nor any sum beyond ordinary costs is taxed against them. * * * I do not perceive that the judgment now rendered finds support in any adjudication by this court. The above cases proceed upon the general ground that in the exercise of its police power a state may by statute impose additional duties upon railroad corporations, with penalties for the nonperformance of such duties, and that such legislation is not, because of its special character, a denial of the equal protection of the laws. It is said to be of the essence of classification that 'upon the class are cast duties and burdens different from those resting upon the general public.' But here the state does not prescribe any additional duties upon railroad companies in respect of the destruction of property by fire arising from the operating of their roads. It simply imposes a penalty which it does not impose upon other litigants under like circumstances. It only prescribes a punishment for assuming to contest a claim of a particular kind made against it for damages. The railroad company can escape the punishment only by failing to exercise its privilege of resisting in a court of justice a demand which it deems unjust. Undoubtedly, the state may prescribe new duties for a railroad corporation and impose penalties for their nonperformance. But, under the guise of exerting its police powers, the state may not prevent access to the courts by all litigants upon equal terms. It may not, to repeat the language of the court in the *Ellis Case*, 'arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others

guilty of like delinquency.' Arbitrary selection cannot, we said in the same case, 'be justified by calling it classification.' There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the *Ellis* Case was exactly in point, namely, 'as no duty is imposed there can be no penalty for nonperformance.' Instead of prescribing some penalty for the neglect by the railroad company of duties specifically enjoined upon it, the state attempts—and by the decision just rendered is enabled—to take from the company the right which we declared in the *Ellis* Case was secured by the Constitution, namely, the right to 'appeal to the courts as other litigants, under like conditions and with like protection.' Some stress is laid upon the fact that the statute under consideration was passed by a state in which fires caused by the operating of railroads may often cause and are likely to cause widespread injury to grass, crops, houses, and barns. What in the light of the authorities the state may constitutionally do in order to protect its people against dangers of that character I need not stop to consider. The only question here is whether, in the absence of any statutory regulation prescribing what a railroad corporation shall or shall not do in order to guard property against destruction by fire arising from the operating of road, the state can deny to such a corporation, when defending a suit brought against it to recover damages on the ground of negligent destruction of property, a privilege which it accords to its adversary in the trial of the issues joined. May the state meet the railroad corporation at the doors of its courts of justice, and say to it: 'If you enter here for the purpose of defending the suit brought against you, it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?' Nothing has ever heretofore fallen from this court sustaining the proposition that the constitutional pledge of the equal protection of the laws admitted of a litigant, because of its corporate character, being denied in a court of justice privileges of a substantial kind accorded to its opponent. If there is one place under our system of government where all should be in position to have equal and exact justice done to them, it is a court of justice—a principle which I had supposed was as old as *Magna Charta*. In my opinion the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general principles of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws." 174 U. S. 107, 123, 19 Sup. Ct. 613, 620 [43 L. Ed. 909].

The next case deserving special attention

is that of *Fld. Mut. Life Ass'n v. Mettler*, 185 U. S. 808, 22 Sup. Ct. 662, 46 L. Ed. 922. In that case it appeared that a statute of Texas allowed attorney fees in actions upon policies issued by life and health insurance companies. Fire and marine insurance companies and mutual benefit and benevolent associations were not similarly penalized. The entire argument of the court is represented by the following paragraph from the opinion delivered by Chief Justice Fuller: "It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions of which life and health insurance companies are permitted to do business in Texas, and the power of the state in the matter of the imposition of conditions on its own and foreign corporations has been repeatedly recognized by this court. If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in *Railroad Co. v. Matthews*, 174 U. S. 96 [19 Sup. Ct. 609, 43 L. Ed. 909], applies rather than that in *Railway Co. v. Ellis*. The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The Legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." 185 U. S. 326, 22 Sup. Ct. 669, 46 L. Ed. 922. Justice Brewer concurred in the judgment. Justices Harlan and Brown dissented. In the dissenting opinion by Justice Harlan it was pointed out that it is one thing to impose conditions upon the doing of corporate business in a state, but an entirely different thing to subject certain corporations to arbitrary statutory penalties after they have been admitted to the state and licensed to do business there. The opinion continues as follows: "The court says that the ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious. The only reason assigned for that statement is 'the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries

had been deprived by the death of the insured.' But the same reasons exist for prompt payment by a fire insurance company when the house which shelters the insured and his family is destroyed by fire. And yet, under the statute, a fire, marine, or inland insurance company, if it resists a claim for loss, is not liable, when its defense is unsuccessful, to pay any special damages or special attorney's fee. It can defend any suit brought against it under the same conditions accorded to individual citizens or to corporate bodies generally. But a different and most arbitrary rule is prescribed for life and health insurance companies. Their good faith in refusing to pay a claim for loss, or in defending an action brought to enforce payment of such a claim, is not taken into account. If, in any case, they do not, within a specified time, pay the amount demanded of them, no matter what may be the reason for their refusal to pay, and if they do not succeed in their defense, they must pay not only the principal sum, with ordinary interest, but, in addition, 12 per cent. damages on the amount of the principal and all reasonable attorney's fees for the prosecution and collection of the loss. Thus the state, in effect, forbids a life or health insurance company to appear in a court of justice and defend a suit brought against it, except subject to the harsh condition that, if the jury does not sustain the defense, the company must pay special damages and special attorney's fees that are not exacted from any other defendant, corporate or individual, who may be sued for money. This is such an arbitrary classification of corporations and such a discrimination against life and health insurance companies as brings the statute within the decision in the *Ellis Case*, which has been often referred to by this court with approval. 185 U. S. 335, 22 Sup. Ct. 672, 46 L. Ed. 922. The decision in the *Mettler Case* was followed without discussion of principles in the case of *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204.

In the case of *Farmers', etc., Ins. Co. v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821, the court considered a statute of Nebraska which reads as follows:

"Sec. 43. Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages.

"Sec. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this state,

and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

"Sec. 45. The court, upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." Compiled Statutes of Nebraska, c. 43.

The statute was held to be valid.

On the strength of the *Mettler Case* and two others, *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, and *Hancock Mutual Life Ins. Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 755, it was simply announced that insurance policies are susceptible of classification, not only apart from other contracts, but from each other. It was then held that the difference between real and personal property, and the difference between total and partial destruction of property, are enough to warrant classification which will sustain the allowance of attorney fees; the court saying: "It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney's fee in case of a total loss of real estate insured, and not permit recovery of such fee when the property insured has been only partially destroyed? The distinction between real and personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value fixed by both parties in the policy, the question of legal liability under the policy would be as a general rule the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the state. If in regulating and classifying insurance contracts the Legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason." *Farmers', etc., Ins. Co. v. Dobney*, 189 U. S. 301, 305, 23 Sup. Ct. 565, 567 (47 L. Ed. 821). This opinion was written by then Justice, now Chief Justice, White. Justices Harlan, Brewer, and Brown dissented, but no dissenting opinion was filed. The "obvious distinction" between

life insurance policies and fire insurance policies which in the Mettler Case furnished a basis for the imposition of attorney fee penalties in suits on life policies seems to have disappeared. It is very easy to say that the distinction between real and personal property gives rise to differences in regulation, but what has become of the doctrine of the Ellis Case that mere classification is not enough, and that the peculiar regulation which follows the classification must bear some natural and substantial relation to the distinction upon which the classification is based? It may be observed that "it is obvious" that the partial destruction of real estate covered by insurance concerns the homes of many people the same as total destruction. But, with due deference, it is not obvious upon bare suggestion why differences respecting matters other than value, arising in the adjustment of losses, as for example, fraud on the part of the insured, or non-compliance with some just and reasonable condition of the policy, are so unlike differences respecting value as to spell attorney fees in one case and not in the other. Indeed, so far as the grounds for this decision are concerned, it would have been precisely the same had the classification been reversed, the property being personal and the loss partial, which is to say that insurance companies may be penalized by the imposition of attorney fees practically at the will of state Legislatures, notwithstanding the fourteenth amendment to the Constitution of the United States. Several state courts have been embarrassed in their efforts to conform to the Ellis Case, as the case note 17 L. R. A. (N. S.) 910, shows, and the question arises whether or not that decision is to be refined away in railroad and other cases as it has been in insurance cases. No decision subsequent to the Dohney Case throws any clarifying light upon the subject.

Whatever the answer to the question just propounded may be, the court is of the opinion that the statute now under consideration may be sustained under both the majority and minority opinions in the Matthews Case, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. The act is clearly a police regulation. Perhaps the Legislature had in mind certain car shortages which have occurred in the wheat belt of Kansas coincident with manipulations of the Chicago wheat market, discriminations between favored and disfavored shippers, and some other practices quite detrimental to the public welfare. Besides these special matters the prompt furnishing of cars for the transportation of the products and property of the state is so essential to its prosperity that the subject falls well within the police power. In the exercise of this power specific regulations have been adopted and specific duties imposed. These duties may properly be enforced by penalties in the form of per diem

forfeits and attorney fees recoverable in suitable actions. The control of railroad companies over their cars, except in the extraordinary cases exempted from the statute, their capacity mischievously to disturb and obstruct trade, and the helplessness of shippers and others when cars are carelessly or arbitrarily withheld, all combine to place such companies in a class by themselves for the purpose of securing efficient car service, and the equal protection of the law requires no more than that all railway companies shall be penalized alike. It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether or not they too shall be penalized, and, if so, to what extent, is a fit subject for legislative consideration. But the railroad companies cannot complain if the Legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves.

The result is that the statute may be upheld without going to the lengths apparently permitted by the Dohney Case and the judgment of the district court is therefore affirmed. All the Justices concurring.

(89 Kan. 145)

WILLIS v. SKINNER et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

TRIAL (§ 358*)—REVERSAL—INCONSISTENT SPECIAL FINDINGS.

Consistent special findings control the general verdict when contrary thereto; but when they are inconsistent with one another, some showing a right to a verdict and others showing the contrary, the case is left in the condition of being really undecided, and a new trial should be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 856; Dec. Dig. § 358.*]

Appeal from District Court, Shawnee County.

Action by W. F. Willis against Clarence D. Skinner and Harry Gayhart, doing business as the Merchants' Transfer & Storage Company. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

C. A. Magaw, R. W. Blair, and B. W. Scandrett, all of Topeka, for appellants. D. H. Branaman, of Topeka, for appellee.

WEST, J. The plaintiff sued for injuries received while unloading marble for the defendants. A transfer wagon containing marble slabs, some of which were four to seven feet long and four to six feet wide, was standing alongside the walk. The slabs were standing on edge in the wagon; those on the right having been unloaded before the plaintiff was put at the task. Several men were engaged in carrying them into the building,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—43

and two were engaged in getting them out of the wagon. The foreman and one of the defendants appear to have been at the place overseeing the work. The plaintiff alleged that he was directed by the foreman to get into the wagon and assist two other men to put out the marble to other men who were on the pavement below; that upon obeying the direction the foreman ordered one of the other men out, leaving only the plaintiff with one other to handle the marble; that on account of the negligence of the defendants in removing part of the help, and on account of their failure to keep in the wagon a sufficient force of men to handle the marble, and on account of ordering plaintiff to place something under the end of a slab about to be removed, which he was in the act of doing, a large number of pieces of the marble fell over upon him, seriously injuring him. In another paragraph he alleged that all of the injuries were caused wholly by the negligence, carelessness, and failure of the defendant to properly provide him with a reasonably safe place to work, and by ordering and directing him into an unsafe and dangerous place to work, well knowing it to be unsafe, and in removing a part of the help from the wagon, thereby leaving an insufficient number of men to do the work. A demurrer to the petition was overruled, and an answer filed containing a general denial and pleas of contributory negligence and assumption of risk. The jury found for the plaintiff and answered a number of questions, by which answers it appears that the plaintiff knew the size of the slabs when he got into the wagon; that there was nothing to prevent him from seeing the conditions which surrounded him, nothing to prevent the other workmen from holding the slabs up after the plaintiff was in the wagon; that there were two men assisting before he got in, but that one of them exchanged places with the plaintiff; that the place where the injury occurred was not a reasonably safe place to work, because there were not enough men to perform the labor. The fourteenth and fifteenth questions were as follows: "(14) Were the defendants guilty of any negligence toward the plaintiff? Answer: Yes. (15) If you answer the last question, 'Yes,' then state in what particular they were negligent. Answer: Not men enough in the wagon to perform the labor." The twenty-first was: "If the plaintiff had exercised ordinary care, could he have prevented the accident and avoided the injury of which he complains? Answer: He did, but was unable to avoid the accident." A demurrer to the evidence, a motion for judgment on the findings, a motion to set aside the findings, and a motion for new trial were overruled, and the defendants appeal.

It is earnestly contended that the facts do not entitle the plaintiff to recover; that he had full opportunity to see and appreciate the situation; that he assumed whatever risk

there was; and that the finding of the jury that the alleged negligence consisted of insufficient help excludes all other negligence from the case. The defendants cite *Plummer v. Railway Co.*, 86 Kan. 744, 121 Pac. 906, wherein several acts of negligence were alleged; and the only one found was in reference to keeping a certain gate closed, which was said to exclude all other negligence. The finding that there were not enough men in the wagon to perform the labor must of course be considered in the light of the situation disclosed by the evidence, and implies that the work required of the plaintiff was such as to be dangerous, unless he were provided with sufficient help. It appears from the evidence that the plaintiff, a man some 65 years old, unfamiliar with this kind of work after having assisted in carrying in one or two slabs, was directed to get into the wagon and help unload others; and, complaint having been made that the first one which plaintiff helped to unload had become chipped, he was ordered to put a stick under the next one, so that it would not be injured in taking it from the wagon; that, as he stooped down to do this, the other man was at the farther end of the slab ready to push it out, when it, with the others, fell over upon the plaintiff and injured him. When loaded there were five or six slabs on either side of the wagon, leaving a space in the center of about three feet. They were set edgewise and rested on strips of inch and a quarter lumber running crosswise of the wagon bottom. They weighed about 600 pounds each, and it required at least four men to carry the heavier ones from the wagon into the building where they were to be used.

The plaintiff's own testimony was to the effect that, as he was getting the first slab out, one of the defendants complained that he knocked a piece off, and said, "Take that piece there and put it under that other one so it won't scratch when you take the other one out;" that he tried to put the piece under, when it fell over on him. "I went to try to put this piece under. I first had to pull it out from against the other slabs. They were set up on this side. I had to pull it out a little, so as to lift that up to get that end. I got it out about four inches. Q. Tell what occurred while you were at work there moving this slab. A. When I got it out about four inches, I would judge, I caught down to try to raise it up so I could put this piece under it, so when he went to slide it out it wouldn't catch on this iron, as he told me to do. They started over on me and I raised up as quick as I could and throwed my hands up to catch this way [indicating], and they were so heavy they mashed me." In cross-examination he testified: "When I pulled them over I took the other hand and was trying to raise it with this hand, trying to slip it under, trying to see if I couldn't raise it up enough. Q. Now, when you got in the

wagon there, you saw the situation, didn't you? A. I could see at the time, a moment's time. I never thought of any danger when I got in there. Q. It didn't look dangerous to you? A. I didn't think about it. Q. You didn't think anything about it one way or the other, did you? A. No, sir; I just got in there. I got in according to orders. Q. You knew if they had a jar, or if they were pulled away from the wagon so that the top came over towards you, they would come on over that way, didn't you? A. Yes, sir. Q. You knew the danger of the slabs falling over on you if he didn't hold them, didn't you? A. No, sir; I didn't think they would hurt me if they did fall over on me. I didn't know they would hurt me so bad. Q. You didn't think they were dangerous at all, then? A. I didn't think they were that dangerous. I didn't think they would break my arms and ribs and mash me up like they did. I didn't think they would do that; no, sir. I never seen slabs like them before. I never handled anything like that. I have been a farmer all my life." He also testified that he did not think they would have fallen if the man in the wagon had had his hand on them and held it there.

There is room to argue that any man with fair eyesight and common experience would know that a heavy marble slab, set on edge, might fall over and injure any one caught thereunder, and that, with this knowledge, the plaintiff assumed the risk of the work. On the other hand, it might be said that plaintiff was not familiar with the work of handling material of this kind, and, being called on to assist others who presumably were, he sought to obey the orders which were given him, not observing any immediate danger, and not stopping to ascertain whether he was ordered into a place and directed to a task likely to bring harm to him, but, assuming that he could safely obey orders, proceeded to do so, and was seriously injured.

The whole situation presented questions of fact as to negligence, contributory negligence, and assumption of risk, which were properly submitted to the jury. After answering that the particular negligence was, "Not men enough in wagon to perform the labor," the jury also found that Jennings, the other man, could not with ordinary care have prevented the slabs from falling. But in answer to question 5, "Was there anything to prevent Mr. Jennings from holding the slabs up after Mr. Willis got into the wagon?" they answered, "No." This is utterly inconsistent with the other answers just referred to, and equally inconsistent with the general verdict. An attempt to harmonize such findings would be hopeless. Under such circumstances, the motion for a new trial should have been granted. When the special findings, taken together, consistently show a right contrary

to the one evidenced by the general verdict, they are controlling, as a matter of statute law. Civil Code, § 294 (Gen. St. 1909, § 5888). But when they are inconsistent with one another, some harmonizing with the general verdict and others in direct conflict therewith, then neither party is entitled to a judgment. *Edwards v. Railway Co.*, 86 Kan. 257, 119 Pac. 872. While the general verdict alone might entitle the plaintiff to a judgment, its effect is neutralized by the special finding which shows that he is not thus entitled; and this is not overcome by others inconsistent with it, for it amounts to finding both ways, and the court cannot regard one and disregard the other. Hence such inconsistencies leave the matter in such uncertainty that in effect it is still undetermined whether or not the plaintiff ought to recover. The court is of the opinion that such is the condition presented by this record.

The judgment is therefore reversed, and the cause remanded, with directions to grant a new trial. All the Justices concurring.

(89 Kan. 108)

HILLYARD v. FICK.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. EJECTMENT (§ 120*)—WRIT OF POSSESSION—PURCHASER PENDENTE LITE.

Where a conveyance by the defendant is made before an action in ejectment is commenced, but is withheld from the record until some time afterward, and the plaintiff has no notice of the conveyance or of the claims of the grantee, and there is no change in possession or other indication of any claim or interest by any person except the defendant, and the suit proceeds to a judgment against him, a writ of possession should issue upon the application of the plaintiff, under which the defendant and all persons holding under or in privity with him after the commencement of the action, including such grantee, should be dispossessed.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 380, 382-395, 398-401; Dec. Dig. § 120.*]

2. APPEAL AND ERROR (§ 413*)—JURISDICTION—REVIEW—APPLICATION FOR WRIT OF POSSESSION.

This court is not without jurisdiction to review an order denying an application for a writ of possession against a person bound by the judgment, but not a party to the action; notice of appeal having been served upon the defendant in the action, but not upon the person against whom the writ was asked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2136-2139; Dec. Dig. § 413.*]

Appeal from District Court, Scott County.

Action by J. L. Hillyard against Arnold Fick. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

H. O. Trinkle, of Garden City, for appellant. E. P. Rochester, of Scott City, and W. H. Russell, of La Crosse, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

BENSON, J. This appeal is from an order denying an application of the plaintiff for a writ of possession upon a judgment in an action of ejectment. The motion was for the writ against the defendant and also against his wife, who was not a party to the suit. A notice of the motion was served upon the wife, but she did not appear.

The following facts were agreed to upon the hearing: "This action was begun on February 5, 1908, for the recovery of the possession of the S. W. $\frac{1}{4}$ of section 4, township 16, range 31, in Scott county, Kan. The defendant's wife, Louisa J. Flick, was not made a defendant. Plaintiff was the owner of the original patent title, and the defendant appeared of record to be the owner of a tax title on said land. At the time the action was begun, the tax deed mentioned was on record in the name of the defendant, Arnold Flick. He was at that time living upon the N. W. $\frac{1}{4}$ of section 4, township 16, range 31, which adjoined the land in controversy, with his wife and family; and the land in controversy was being used, when the action was begun, by the defendant and his family in connection with the land on which they lived. The land on which the family lived was also in the name of Arnold Flick when this suit was begun. The defendant had, on December 28, 1906, executed a quitclaim deed to the land in controversy to his wife, Louisa J. Flick; but this deed was not filed for record until May 23, 1908. After the said deed was executed to the wife, defendant and his wife and family continued to use the said land in the same manner as before the deed was executed; and nothing transpired in connection with their use and occupation of the said land to suggest any change in its ownership or occupation. Prior to and up to the time of the commencement of this action, a small portion of this land was farmed; the work being done by the defendant and the members of his family. The remainder of the land was used as pasture land, over which the cattle of the defendant grazed. The defendant paid the taxes on the said land under his tax deed until February 7, 1908, the date of the last payment of taxes in his name. Louisa J. Flick paid no taxes on said land until March 10, 1910. The plaintiff herein conveyed all of his interest and estate in said land, and the same has been transferred by a regular chain of conveyances down to Bertha M. Sturgell, who is now the record owner thereof; and it is asked to have her placed in possession of the land by the writ applied for. On March 16, 1908, the defendant, Arnold Flick, filed his answer to the plaintiff's petition, in which he disclaimed any title or possession to said land. Louisa J. Flick had actual notice of the pendency of this action in time to appear and defend, and she did appear for the special purpose of getting leave of the court to withdraw an

unauthorized appearance and pleading. Judgment was rendered for the plaintiff upon the pleadings on October 6, 1908, for the possession of the land described in his petition."

[1] The writ was refused for the reason stated in the judgment "that the court has no jurisdiction over the person of Louisa J. Flick, the wife of the defendant; she not having been made a defendant in the original action." Mrs. Flick, having withheld the conveyance from record until after the action was commenced by the plaintiff, who was ignorant of its existence, is deemed a purchaser pending the suit, and is bound by the judgment rendered in the action. *Caldwell v. Bigger*, 76 Kan. 49, 90 Pac. 1095; *Smith v. Worster*, 59 Kan. 640, 54 Pac. 676, 68 Am. St. Rep. 385.

The possession of the land appeared to be and was that of the husband. There was no sign of the wife's title. She left the world in ignorance of her claim. She failed to give notice by the record, by possession, or otherwise. This was the situation when the suit was begun, and until her deed was recorded, and she remained silent and inactive while the suit proceeded to judgment. The judgment is conclusive, not only against the defendant, but against the wife, who is deemed a purchaser pendente lite. Process against him to carry the judgment into effect is as potent against her as it is against her husband. 3 *Freeman on Executions* (3d Ed.) §§ 471-475.

It was said in *Harrod v. Burke*, 76 Kan. 909, 92 Pac. 1128, 123 Am. St. Rep. 179: "It was proper, however, for the sheriff, under the writ, to place the plaintiffs therein in possession, and in performing this duty to dispossess the defendants named in the writ and all persons holding under or in privity with them after the commencement of the action."

Such a writ may be issued against a person bound by the judgment, although not a party to the action. *Crane v. Cameron*, 71 Kan. 880, 81 Pac. 480, 87 Pac. 466.

[2] It is contended by the defendant that this court has no jurisdiction of this matter, because notice of the appeal was not served upon Mrs. Flick. Notice was, however, served upon the defendant against whom the judgment was rendered, which, as we have seen, is conclusive of her rights. Being bound by the proceedings in the district court, she is in like manner and for the same reason bound by proceedings in the same action in this court. She must not only yield to the judgment, but to its execution, and is bound by all proper proceedings taken in the action to reach that end. Being deemed a purchaser pendente lite, a summons to her was not necessary before judgment; nor is a notice of appeal necessary upon proceedings to carry the judgment into effect.

The order appealed from is reversed, with directions to allow the writ as prayed for. All the Justices concurring.

(89 Kan. 106)

BOARD OF COMRS OF NEOSHO COUNTY v. SPEARMAN et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

PLEADING (§§ 193, 367*)—INDEFINITENESS—MOTION TO MAKE MORE DEFINITE.

Where the only objection to a petition is that the material facts are set forth in general terms and amount to mere conclusions of facts, the remedy is a motion to make more definite and certain, and, where such a petition is not attacked by motion, a demurrer should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443, 1173-1193; Dec. Dig. §§ 193, 367.*]

Appeal from District Court, Neosho County.

Action by the Board of Commissioners of Neosho County against Hattie Spearman and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

David F. Carson, of Kansas City, Jones, Reid & Allen, of Chanute, and Jas. A. Allen, of Chanute, for appellants. R. B. Smith, of Chanute, and Cline & Stratton, of Erie, for appellee.

PORTER, J. Action by the county to foreclose a tax lien. The court sustained a demurrer to the answer of appellant. The only question is whether the answer stated a defense good as against a general demurrer. The objections to the answer are that the material facts are stated in general terms and amount to mere conclusions of the pleader. The lien sought to be foreclosed is for special taxes assessed against appellant's land to pay for the construction of a levee by a drainage district. The answer alleged that the levee was never completed; that it had been changed in a number of important particulars, and as constructed was and is a material departure from the levee as originally located and contracted for; that the board of county commissioners acted upon erroneous, untrue, and misleading statements of the engineer in making assessments; that such assessments are in excess of the value of the property and of the estimate made by the engineer; and that they amount to a confiscation of appellant's property. A motion to require the answer to be made definite and certain by alleging in what respect the levee as constructed had been changed from the original specifications, to what extent it had not been completed, and in what respect the engineer's estimates were erroneous, would have been proper; but a general demurrer is not the way to attack a petition bad for generality of its averments, or for general statements

of conclusions of fact. *Meagher v. Morgan*, 3 Kan. 372, 87 Am. Dec. 476; *Gilmore v. Norton*, 10 Kan. 491; *Leavenworth L. & G. R. Co. v. Leahy*, 12 Kan. 124; *McPherson v. Kingsbaker*, 22 Kan. 646; *Hayes v. Railway Co.*, 84 Kan. 1, 4, 113 Pac. 421; *Gano v. Cunningham*, 88 Kan. 300, 302, 128 Pac. 372.

In the absence of a motion to make more definite and certain, the general statements of conclusions of fact will be held good as against a demurrer.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer. All the Justices concurring.

(89 Kan. 168)

STATE ex rel. DAWSON, Atty. Gen., v. INNES et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 167*)—TEXT-BOOKS—UNIFORMITY.

The uniformity act (chapter 179, Laws of 1897; Gen. Stat. 1909, §§ 7810-7838) requires the use of the same text-books in all the schools, in order to lessen the expense while insuring the quality.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 338; Dec. Dig. § 167.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 167*)—CITY BOARD OF EDUCATION—ADOPTION OF SCHOOL BOOKS.

The board of education of a city has no power to adopt and use in its schools other books than those adopted by the state text-book commission, except such proper books of reference as may reasonably be used as such; books of reference being books to refer to in connection with, but not to use in place of, the regular text-books.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 338; Dec. Dig. § 167.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 167*)—TEXT-BOOKS—INJUNCTION.

It was admitted and shown that the defendants had "adopted" and were using other and costlier readers than those prescribed by the commission, practically in the same manner as if they had all been regularly and lawfully adopted. Held error to refuse an injunction against the continuance of such practice.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 338; Dec. Dig. § 167.*]

(Additional Syllabus by Editorial Staff.)

4. SCHOOLS AND SCHOOL DISTRICTS (§ 167*)—"REFERENCE BOOKS."

"Reference books" are ordinarily understood to mean books to refer to, a reference library being defined by Webster as a library for public reference, where the books are not allowed to be taken out or put in; and a first reader cannot be used as a reference book by a child learning to read in another.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 338; Dec. Dig. § 167.*]

Appeal from District Court, Douglas County.

Action by the State of Kansas, on the relation of John S. Dawson, Attorney General,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
; Rehearing denied April 21, 1913.

for an injunction against George Innes and others. Injunction denied. Plaintiff appeals. Reversed and remanded.

John S. Dawson, Atty. Gen., and Hugh T. Fisher, of Topeka, for appellant. Wm. E. Higgins and James H. Mitchell, both of Lawrence, for appellees.

WEST, J. This action was brought by the state, on the relation of John S. Dawson, Attorney General, to enjoin the board of education and superintendent of schools of the city of Lawrence from adopting, using, or permitting to be used, certain unadopted text-books. The petition alleged that the text-book commission had adopted certain readers for the first, second, third, fourth, and fifth grades, the maximum prices fixed being 10, 17, 23, 30 and 40 cents, respectively; that the defendants had adopted certain text-books, and were using them and permitting them to be used, including Ward's First Reader and Ward's Second Reader, costing 40 and 45 cents, respectively, instead of 10 and 17 cents, the cost of the adopted readers. The answer admitted that the defendants had adopted and were using and permitting to be used the books named in the petition, including Ward's Primer and Ward's First and Second Readers. The answer, among other things, further alleged: That the text-books adopted by the text-book commission were sufficient to occupy the time of the pupils for only five or six months of the school year, and insufficient to accomplish the teaching of words, the mechanics of reading, and the simplest expressions of English and of good literature to the extent desired by the board of education; and that, if restricted to the use of the adopted texts, pupils would be greatly harmed in their development of a vocabulary, in learning the "mechanics of reading," etc. "Wherefore the said board of education has adopted and is using and permitting to be used in connection with the said readers adopted by the state text-book commission, and with reference to the matter therein contained, * * * Ward's Primer and Ward's First and Second Readers." That by direction of the board of education, and with its consent, the additional work of instruction and reading in the first and second grades was formulated either as introductory or supplementary to the matter contained in the adopted books; and that the state board of education had adopted and authorized the use of state text-books supplementary to those adopted by the commission.

The court made findings of facts in accordance with these allegations and admissions, and found, also, that the Attorney General and department of public instruction had construed the text-book law as giving permission to use supplementary readers, if the adopted books were used in good faith; that, if restricted to the adopted books, the pupils

would be greatly hindered, and would suffer loss in their development of a vocabulary, in the mechanics of reading, such as enunciation, pronunciation, expression, and the like, in acquainting themselves with the simpler expressions of English, etc. As a conclusion of law, it was decided that to enjoin the defendant as prayed for would be most harmful to the school children and a most unconscionable exercise of the equity powers of the court. The injunction was therefore denied, and the defendants given judgment for costs. The plaintiff appeals.

Section 7813, General Statutes 1909, empowers the text-book commission to select and adopt a uniform series of school text-books for use in the public schools in certain named branches, including reading; and section 7815 fixes the maximum prices for first and second readers at 10 and 17 cents, respectively. Section 7822 authorizes the school district, by a vote at an annual meeting, to purchase, own, and furnish text-books, as provided in the act, for use in the schools, free of charge to the pupils. Section 7824 requires the contract made by the text-book commission to be for five years each, and provides that no school district board or board of education of any city of the first and second class shall adopt, use, or permit to be used, any other school text-books than those provided for in this act, "provided that nothing herein contained shall be construed to prevent the teachers and pupils of this state from using any school text-book other than those provided for in this act as reference books in such schools." Section 7830 makes it a misdemeanor for any person to demand or receive anything above the contract price for adopted books, except the 10 per cent. allowed local agents and dealers, and provides that "any member of any school board in any city of the first or second class or any teacher of any school, who shall adopt, use or permit to be used, or cause to be used in any public school of this state, any other text-book or books than those provided for in this act, shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction shall be fined in any sum not less than \$25 or more than \$100, or by imprisonment in the county jail not to exceed 90 days, or by both such fine and imprisonment."

The state board of education, consisting of the state superintendent, the chancellor of the state university, the president of the State Agricultural College, the president of the State Normal School, and three others appointed by the Governor by and with the consent of the Senate, was required by chapter 387 of the Laws of 1905 to prescribe a course of study for the normal institutes and for the public schools of the state, and to revise the same when the interest of the schools should require it, provided that the course of study for all elementary schools should include all studies required by cer-

tain other statutes, which include reading. This board prepared a course of study, a revised edition of which was dated September, 1910, and included a course in reading in the adopted books. On page 12 of this publication a paragraph closes with this sentence: "If the classes can complete this book in less time than suggested it is a good plan to take up a new book of the same grade." The opinion of the former Attorney General and superintendent of instruction, under date of November 18, 1908, was to the effect that a school board has the legal right to adopt books to supplement the adopted books, providing the latter are used in good faith, and that the former are not made a mere pretext to avoid the use of regular adopted state texts; that a school board has the legal right to provide a supplemental or advanced text-book to follow the state text, when it has been honestly and properly completed.

[1] It is suggested that, as the findings were sustained by evidence, they cannot be set aside. Assuming, however, that they must stand as correct, it remains to be determined whether the conclusions of law are justified thereby. It is well understood that the demand for uniformity of school books, after much public discussion, developed into the statute referred to, for the purpose of lessening the expense of books for the use of Kansas pupils and to insure a good quality at a reasonable price. Parents with large families of children moving from one portion of the state or from one district to another often found that the books with which they had supplied their children were entirely useless, and that new ones must be purchased; that some were of inferior quality, and most, if not all, were charged for exorbitantly. To do away with this crying evil and the burdensome expense incident thereto, the law was passed, and the whole matter was placed within the control of the state text-book commission. As said in *State ex rel. v. Fairchild*, 87 Kan. 781, 125 Pac. 40: "It is a matter of common knowledge that the principal mischief sought to be avoided by the statute was the lack of uniformity in the books in the same grades of the public schools, which necessitated the purchase of new books for school children, when a family moved from one town to another, or from one district to another."

[2] The mere authority of the state board of education to prescribe a course of study does not give that board any power to amend the statute or control the action of the state text-book commission in respect to the books to be used in the public schools of the state. The law prescribes the books which are to be used, and the board of education merely prescribes the course of study to be followed in such use. The whole question, therefore, rests upon the meaning of the proviso, already quoted, that nothing shall be construed to prevent the use of any school text-books,

other than those provided for in this act, as reference books in such schools. It is argued that the intention of the Legislature was simply to provide a series of basic texts and permit the use of any sort of books, even other text-books, for the purpose of reference. The practical suggestion which would arise in the mind of any father with a half dozen children would be how he had been saved expense by the uniformity act, if, in addition to their first and second readers at 10 and 17 cents, he should be required to supply them with other readers at two or three times this price, to be used under the guise of reference books. But it is said that the Legislature has given this construction by the language used in section 4, c. 287, Laws of 1911. This was an act "relating to boards of education and schools in cities of the first and second class and repealing certain other acts and parts of acts in conflict with the provisions hereof." It relates almost wholly to the election and duties of the boards of education. Section 4 provides, however: "That the board of education shall not authorize or permit any teacher or other employé to exclude as a basic text-book any text-book or other adoption now or hereafter adopted under authority of General Statutes of this state, and any violation of this act shall render the violator liable to the same penalties as prescribed in chapter 179, Laws of 1897."

There is nothing whatever in this title to indicate any intention to amend any portion of the text-book law. Neither does the act contain any language evidencing an effort to modify or impair the general law under which school books are adopted and their use prescribed. If this section means anything, it is in the nature of a reminder and reinforcement of the penalty section already referred to. It certainly does not authorize, in the slightest degree, the use of books other than those prescribed by the text-book commission. The inference to be drawn from the language is that certain boards of education had gone so far as to exclude the adopted books, and had usurped the province of determining for themselves, regardless of the text-book commission, what texts should in fact be used. The use of the word "basic" may be unfortunate, and may have been designed by the person who drafted the section as one for convenient exploitation for future purposes; but it is sufficient to say that a prohibition against excluding adopted books as "basic" books is no license to override the decisions of the text-book commission and evade the law by naming the adopted books "basic," and using others more to the taste of the local board of education for the real purpose of instruction.

[4] The Legislature long ago prescribed that "words and phrases shall be construed according to the context and the approved use of the language." Gen. Stat. 1909, § 9037. We ordinarily understand by reference books

books to refer to. Webster defines a reference library as "a library for public reference, but where the books are not allowed to be taken out." Webster's New International Dictionary, 1912. He defines reference as "an act of referring, or state of being referred, as reference to a chart." He defines "refer," "To bring, carry or send back," and, as uses of the word, cites: "As to refer a student to a book; to refer a bill to a committee." It is plain that in such studies as history, literature, or civil government the text-book could naturally and profitably be supplemented by reference to other books on these subjects, in order to obtain broader or different views of other authors. But how one first reader can be used as a reference book by a child learning to read in another is difficult to understand. The common sense of it is that no such result was contemplated; but that the Legislature had in view such studies as might naturally and properly be aided by reference to other books on kindred subjects.

One witness testified that in the second grade they used the adopted reader, Ward's First Reader, and Ward's Second Reader; that the teachers had the privilege of doing as they liked; that some began with one book and some with another, the only requirement being that they get through all of them at the end of the year; that much of the work in the Ward books was parallel with that of the adopted books and some of it preliminary. The witness was unable to state how there could be a uniform system if each board used its own discretion. A teacher testified that she completed the first half of the Ward reader first, using the Ward reader for the entire first six weeks as a text. Another that she used the adopted books and Ward's First Reader for the first term, and for the second term used the Ward in the morning and the adopted in the afternoon, exercising her own judgment as to what part of the Kansas course to follow.

While it does not appear from the evidence that the pupils or the parents are imperatively required by the local school authorities to purchase the unadopted books, there is no claim that the board purchases them; and we must conclude that the practical effect of the method adopted at Lawrence is that the parents of children in the first and second grades must buy the adopted books at 10 and 17 cents and the unadopted books at 40 and 45 cents. Should these same parents move to Topeka and find a board with different notions, requiring books by some other author, and provide them accordingly, and then move to Wichita and find a different requirement, it would doubtless occur to them that uniformity of text-books in Kansas is more nominal than real.

In 1901 an attempt was made to amend the uniformity act, so as to provide for "supplemental" books. The attempt was a failure. Senator McMillan, in his protest

against this provision, said: "Further, the amendment permitting the use of supplemental text-books * * * will be found to be the entering wedge in destroying state uniformity, and, whether so intended or so understood by the movers of the same, is so construed by the book trusts, who in reality are behind this fight on the laws which this act will displace. That the changes made in this law will be followed by a gradual and eventually marked increase in the cost of school books to the pupils of this state. For these reasons, I vote 'No.'" Sen. Jour. 1901, 895.

No more insidious and yet effective manner of nullifying the statute and bringing back the very burdens it was intended to dissipate could well be devised than the one used in this case. If the obedience to the law as it now exists works harm to certain pupils, who complete the use of the adopted readers before the close of the term, the legislative, and not the judicial, department of the government is the one to enact needed amendments. Other courts, finding similar situations, have spoken to the same effect. *Westland Publishing Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096; *Wagner v. Royal*, 36 Wash. 428, 78 Pac. 1095; *State ex rel. v. Haworth*, School Trustee, etc., 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; *State ex rel. Roberts v. School Directors of Springfield*, 74 Mo. 21.

As to the attitude of the legal and educational departments, it is proper to say that this action was brought by the present Attorney General, and that former Superintendent Fairchild, in Circular No. 122f, under date of June 30, 1909, was at pains to print the following: "It is unlawful to use in the schools of Kansas any texts in the subjects named other than the ones adopted by this commission."

The judgment is reversed and the cause remanded, with directions to grant the injunction as prayed for. All the Justices concurring.

(39 Kan. 96)

CITY OF WINFIELD v. BELL

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

STATUTES (§ 123*) — TITLE OF ACT — ROADS AND HIGHWAYS.

The title of the "Act in relation to roads and highways" (Laws 1911, c. 248) is sufficiently comprehensive to cover the provision in the act which imposes a penalty on those who are chargeable with a poll tax and refuse to pay the same.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

Appeal from District Court, Cowley County. Action by the City of Winfield against Boecoe Bell. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hackney & Lafferty and Roscoe Bell, all of Winfield, for appellant. O. P. Fuller, of Winfield, for appellee.

JOHNSTON, C. J. This case involves the validity of a provision of the road law recently enacted, which requires the payment of a poll tax, and provides that any one failing to pay the tax shall upon conviction be adjudged guilty of a misdemeanor. Laws 1911, c. 248, § 36. The appellant resisted the payment of the tax on the ground that the provision imposing a penalty for nonpayment is not within the title of the act. The title is, "An act in relation to roads and highways," and repealing certain acts and parts of acts which are named. This is one of the broadest and most comprehensive of titles. It has a single subject, which fairly embraces all the steps in establishing, building, and maintaining highways, and for raising the revenue necessary to accomplish the legislative purpose. The provisions for enforcing compliance with the act are naturally and reasonably connected with its subject, and are germane to its title. Acts with general titles of this kind prescribing requirements and which include provisions to compel obedience to them have been frequently considered and upheld. It was said in *Harrod v. Latham Mercantile & Commercial Co.*, 77 Kan. 466, 468, 95 Pac. 11, 12, that: "An examination of many of our general laws will show that the incorporation of penalties in acts having only a general and comprehensive title has been common practice in our legislation. The executor's act has such a general title, and yet it embraces an instance of embezzlement, and provides punishment therefor. 'An act in relation to marriage' is another example of this practice. 'An act in relation to roads and highways' includes penalties for obstructing roads, defacing mile-stones, and the like. Whenever the penalty is fairly incidental to the regulation of the subject expressed, it may properly be included in the act without special mention in the title. The act in question is to regulate insurance companies, and this suggests means to make the regulation effective. To regulate is to direct by rule or restriction; to govern." Other authorities tending to sustain the validity of such a title are *Bowman et al. v. Cockrill*, 6 Kan. 311; *Woodruff v. Baldwin*, 23 Kan. 491; *La Harpe v. Gas Co.*, 69 Kan. 97, 76 Pac. 448; *State v. Thomas*, 74 Kan. 360, 86 Pac. 499; *State v. Everhardy*, 75 Kan. 851, 90 Pac. 276; *In re Ellis*, 76 Kan. 368, 91 Pac. 81; *State v. Peyton*, 234 Mo. 517, 137 S. W. 979, Ann. Cas. 1912D, 154, and note.

The legislative purpose was to provide for the establishing, making, and maintaining of highways, and the penalty provision in the act has a logical connection with the general subject, and is fairly adapted to ac-

complish the legislative purpose. The act is valid, and under section 15 thereof the city was given power to pass any ordinance necessary to carry out the provisions of the act.

The judgment of the district court is affirmed. All the Justices concurring.

(89 Kan. 151)

MILLER v. MILLER et al.†

SAME v. WAYMIRE et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 328*)—DECREE OF FOREIGN STATE—FAITH AND CREDIT.

By a statute of this state any judgment or decree of divorce rendered upon publication service in any state of the United States, in conformity to the laws thereof, has the same force, and must be given the same faith and credit, as if rendered by a court of this state.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. § 328.*]

2. JUDGMENT (§ 497*)—CONCLUSIVENESS.

It is a law of this state that whenever the jurisdiction of a court depends upon a fact properly litigated and determined in the action itself the judgment rendered finding the fact is conclusive evidence of its existence and of the jurisdiction of the court, until the judgment is vacated, reversed, or annulled in a direct proceeding instituted for that purpose.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

3. DIVORCE (§ 327*)—JUDGMENT—COLLATERAL ATTACK.

Under the laws of the territory of Utah it was necessary for the plaintiff, in an action for divorce, to plead and prove residence in the territory for one year prior to the commencement of the proceeding. Held, that a judgment of divorce rendered upon publication service against a resident of this state by a court of Utah having jurisdiction of actions for divorce, as the result of proceedings in all respects regular, cannot be collaterally impeached in this state, on the ground that the plaintiff was in fact a resident of Kansas and not of Utah.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. § 327.*]

4. DIVORCE (§ 168*)—DECREE—COLLATERAL ATTACK.

Neither can such judgment be collaterally impeached on the ground that it was procured by means of fraud practiced by the successful party.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 549, 550; Dec. Dig. § 168.*]

Appeal from District Court, Linn County.

Appeal from District Court, Woodson County.

Actions by Dora Miller, as guardian, against Dora Miller and others, and by Dora Miller, as guardian, against Florence Waymire and others. Judgment for defendants in both cases, and plaintiff in each case appeals. Affirmed.

Joe Rolston, of Burlington, for appellant. Lamb & Hogueand, of Yates Center, John A. Hall, of Pleasanton, and W. R. Biddle, of Ft. Scott, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes
† Rehearing denied April 21, 1912.

BURCH, J. The action in the district court was one of ejectment and for partition. It was brought by Dora Miller, as guardian of her mother, Maggie Waymire, an insane person. The property in controversy formerly belonged to Hiram Waymire, the plaintiff's father, and is now claimed by J. R. Holmes. Hiram Waymire died in August, 1908. The petition asserts that the Holmes title is invalid; and that upon the death of Hiram Waymire the land became the property of Maggie Waymire and Dora Miller. Judgment was rendered against the plaintiff, and she appeals.

Hiram Waymire and Maggie Haffin were married at Anderson, Ind., on April 29, 1869. One child was born to them, Dora, now Dora Miller. In 1877 the family came to Kansas and established a residence at Pleasanton, in Linn county. On May 10, 1882, proceedings were had in the probate court of Linn county, whereby Maggie Waymire was found to be insane, and pursuant to such proceedings she was taken to the state hospital for the insane at Osawatomie on May 17, 1882, where she has since been confined. The record made at the time of her admission to the hospital shows that her disease was inherited, her father having been insane; that it took the form of melancholia with suicidal tendencies; and that at times she was quite rational. Dr. Uhls, superintendent of the hospital since 1899, has known her condition since 1895, and has never known her to have a lucid interval. On May 10, 1882, letters of guardianship were issued to Hiram Waymire for his wife, and he took the oath and gave the bond required in such cases. In March, 1883, Hiram Waymire commenced an action for a divorce against his wife in Linn county, alleging residence in Kansas. This action was dismissed in August, 1883. In September, 1883, he was granted a divorce from his wife by the probate court of Salt Lake county, Utah, a court possessing jurisdiction over the subject of divorce. In November, 1883, he was married to Florence Shepard, with whom he lived as his wife until his death, a period of approximately 25 years. Six children were born to them, two of whom survive and are defendants in the action. The year following his second marriage Hiram Waymire established a residence at Yates Center, in Woodson county, where he spent the remainder of his life, and his daughter Dora continued to be a member of his family until her marriage in 1891.

In the year 1888 Hiram Waymire and Florence Waymire executed a deed of the land in controversy to Clara J. Holcomb. It was purchased by Louisa Holmes in 1895, from whom her son, J. R. Holmes, inherits. Since 1895 the land has been the homestead of the Holmes families.

In April, 1909, an amicable division of the estate left by Hiram Waymire was made between Dora Miller, on the one side, and

Florence Waymire and her two children, on the other. Dora Miller received \$1,250 in money and deeds to certain real estate. She executed deeds on her part, and a bill of sale of the personal property, in return. The deeds which she accepted contained the following recitation: "Whereas, Hiram Waymire died intestate in the summer of 1908, leaving surviving him an estate of real and personal property, and Florence Waymire, his widow, and Glenna Waymire, Arthur Waymire and Dora Miller, his children, being his sole surviving heirs."

In August, 1910, Dora Miller took out letters of guardianship of her mother, and on the same day commenced the action in which the present appeal is taken. The proceedings in the Utah divorce case and the laws of Utah governing them were pleaded and proved. Residence in the territory of Utah for one year was required of plaintiffs in actions for divorce, and that fact was alleged in the petition and found in the judgment, together with a proper cause for divorce. After proper foundation had been laid, service was made by publication, which was in all respects regular. The judgment recited that upon proof taken all the material allegations of the petition were sustained by testimony free from all legal exceptions to its competency, admissibility, and sufficiency. If the Utah divorce proceedings are not utterly void, they cannot be collaterally attacked in this action, and the plaintiff must fail.

It is claimed that Hiram Waymire was not a resident of the territory of Utah, and consequently that the probate court of Salt Lake county had no jurisdiction to grant the divorce. In the course of the trial some testimony was given that Hiram Waymire was away from Pleasanton from June to August, 1883; that he went to Utah about the 1st of September, 1883; and that he did not return to Pleasanton until the latter part of March, 1884. Some of this evidence came from sources confessedly unfriendly to Hiram Waymire and to Florence Waymire and her children.

If the district court had been retrying the subject of Hiram Waymire's residence in 1882 and 1883, for the purpose of determining the validity of the Utah decree, it would have had the right to insist upon the most complete and convincing proof. The presumptions are all in favor of the regularity of the Utah decree. Besides this, some 28 years had gone by before a reinvestigation was suggested. Following the Utah decree, the marriage of Hiram Waymire and Florence Shepard was duly solemnized. For a quarter of a century they demeaned themselves before the eyes of the world as husband and wife, and in the interest of innocence, morality, and the sanctity of the marriage relation the presumption in favor of the validity of that marriage is the strongest known to the law. *Shepard v. Carter*, 86 Kan. 125, 119 Pac. 533, 38 L. R. A. (N. S.)

568. The district court, however, was not permitted in this action of ejectment to re-examine questions put in issue and litigated in and decided by the Utah court in the divorce case. It is true that judgments may be collaterally attacked for want of jurisdiction; and that the Utah court had no jurisdiction to render the decree, unless the plaintiff had been a resident of the territory for the statutory period. The fact of such residence, however, was a matter which the plaintiff was obliged to plead and prove as a part of his cause of action. The ascertainment of the fact by the court necessarily preceded an investigation of the merits.

[2] Jurisdiction over the subject-matter, the plaintiff's petition, and lawful service on the defendant gave the court jurisdiction to determine whether or not it had authority to proceed, and its judgment finding the fact is as conclusive as if both parties had actually appeared, and the case had been contested on the ground of the nonresidence of the plaintiff; it being settled law in this state that whenever jurisdiction depends on a fact properly litigated and determined in the action itself the judgment rendered is conclusive evidence of the fact and of jurisdiction, until it is reversed or is vacated in a direct proceeding for the purpose. In *re Wallace*, 75 Kan. 432, 89 Pac. 687; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546, and cases cited in these opinions.

It is insisted, however, that the decree is void, because it must have been induced by false testimony and the suppression of evidence regarding Hiram Waymire's residence; and, consequently, that jurisdiction was obtained by fraud. Authorities are numerous which sustain this contention, but, as pointed out in *Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, 106 Pac. 1079, 25 L. R. A. (N. S.) 1237, *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546, and *Bleakley v. Barclay*, 75 Kan. 482, 89 Pac. 906, 10 L. R. A. (N. S.) 230, they are unsound. The fraud, if any, did not relate to an extrinsic or collateral matter, but to a matter inherent in the cause of action itself, which the Utah court was obliged to investigate and determine. That court was just as competent to test the credibility of witnesses, sift evidence, and determine whether or not the burden of proof had been sustained as a Kansas court sitting for the trial of the same question 28 years later; and a wise public policy forbids the reinvestigation of adjudicated controversies, when the adjudication is collaterally attacked for fraud in some other proceeding.

"The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any com-

pensation arising from doing justice in individual cases." *United States v. Throckmorton*, 96 U. S. 61, 68, 25 L. Ed. 93.

The case of *Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145, decided by this court in 1878, is cited in opposition to the foregoing views. Litowich procured a divorce from his wife in Utah. Neither party was a resident of Utah, or had ever been there. In a subsequent action by the wife for alimony the validity of the Utah divorce was put in issue, and all the facts relating to its procurement were developed in evidence. The divorce was held to be void for want of jurisdiction in the court rendering it, and it was held that want of jurisdiction could be shown by evidence outside the divorce court. The question here encountered, collateral attack upon a matter regularly adjudicated as a portion of the merits of the controversy, was not raised, considered, or decided, and the case was disposed of as if the divorce were directly assailed by the alimony action.

Courts generally have permitted foreign divorce decrees to be impeached "for want of jurisdiction," when other judgments could not have been similarly attacked, because of reluctance to permit foreign courts to fix the marital status of resident citizens, and because of the peculiar character of the marriage relation. The marriage status has been regarded as a kind of *res having no situs* in the state granting the divorce, unless one or both of the parties lived there. This attitude is disclosed in the case of *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21, the first authority cited in *Litowich v. Litowich*. The opinion reads as follows: "To avoid misconstruction, we wish it to be borne in mind that the record of the suit in the territory of Utah, in question in this case, was not one upon an ordinary, simple contract between parties, who could make and rescind such contract at pleasure, but it was a suit to sever the bonds of matrimony between the parties in that suit; to dissolve a relation into which the parties could enter only in accordance with the law of the state, and which could not be dissolved by act of the parties, but only by permission of the state having, at the time, jurisdiction over both or one of them. As is well said by Stuart, J., in *Noel v. Ewing*, 9 Ind. 37: 'Marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.' It is a status; a domestic relation resulting from a consummated contract to marry. *Ditson v. Ditson*, 4 R. I. 87; *People v. Dawell*, 25 Mich. 247, page 270 [12 Am. Rep. 260]. It is to a proceeding to dissolve such a relation that what is said in this case applies."

All this is well said, but it does not affect the doctrine of collateral attack.

[1-4] Other courts have regarded foreign divorce decrees, based on publication service,

as belonging to a special class, because they are not protected by the full faith and credit clause of the Constitution of the United States. Following the decision in *Haddock v. Haddock*, 201 U. S. 562, 28 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, the Legislature of this state placed such decrees on the same basis as judgments of our own courts (Laws 1907, c. 184, § 1); and the judgment of the Utah court granting Hiram Waymire a divorce is to be accorded the same force and the same faith and credit as if it had been rendered by a district court of Kansas. If that judgment had been rendered by a district court of Kansas, it would be subject to impeachment for sufficient cause. It could be set aside, or its effect could be nullified, for want of jurisdiction and for fraud; but it could be impeached on the ground that the plaintiff had not resided in the state for the statutory period, or for fraud practiced by the successful party, only in a direct action instituted for that purpose, and not in a collateral proceeding brought for the purpose of trying the title to real estate.

The Utah judgment is further questioned because letters of guardianship for the defendant had been issued to the plaintiff in Kansas. The proof was that the lunacy proceeding was not instituted by Hiram Waymire; and that it was a mere paper affair, void in law and insufficient to sustain the appointment of a guardian. The defendants argue that these facts free the conduct of Hiram Waymire, in suing one who was nominally his ward, from impropriety. The court, however, does not deem them material. If the personal interest of Hiram Waymire in the divorce action conflicted with duties owed by him in a representative capacity to the defendant in that action, the jurisdiction of the Utah court was not affected. In its worst aspect his conduct could only be regarded as fraudulent. The ground of relief against the judgment would be fraud practiced by the successful party, and that relief could be obtained only in a direct proceeding.

It is well settled that the Utah court was not ousted of jurisdiction, and that its judgment was not void, because the defendant was insane. 39 L. R. A. 775, note.

This case affords a practical illustration of the wisdom of holding judgments, like that rendered by the Utah court, conclusive against collateral attack. The action is not instituted for the benefit of Maggie Waymire. She has long been dead to the world and all its sordidness. If the plaintiff were to succeed, she would dishonor her father's memory, fill with shame and disgrace the declining years of the woman who so long stood toward her in the relation of mother, bastardize her father's living children, and dispossess a second generation of innocent occupants of the land of their homestead. These consequences are so appalling that

they ought not to be contemplated, except as necessary results of a direct action specially instituted at the behest of the sternest kind of duty.

The judgment of the district court is affirmed.

The action in the case of *Miller v. Waymire*, No. 18,009, is of the same character as that involved in the case just decided, except that the land in controversy is claimed by Florence Waymire and her children. The facts were not as fully developed as in the companion case, and the court sustained a demurrer to the plaintiff's evidence. The plaintiff herself, however, pleaded the proceedings in the Utah divorce case; and, since the decree rendered in that suit cannot be collaterally attacked, the judgment of the district court is affirmed. All the Justices concurring.

(89 Kan. 131)

HARRELD v. PARIS et al.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

In an action for relief on the ground of fraud, an instruction that the plaintiff is entitled to recover if he has proved his allegations by a preponderance of the evidence, and that a bare preponderance is sufficient for the purpose, will not require the setting aside of a verdict against the defendant, in the absence of anything further to indicate that the jury were misled, where they were also told that matters that are unusual, unnatural, or out of the ordinary course of affairs should not be taken for granted upon slight proof, but can be established only by evidence of a reliable character, such as satisfies the mind.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

2. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

In a case which at the first trial turned wholly upon a question of veracity between the parties, it is held that a new trial should be granted on the ground of newly discovered evidence, in order to give opportunity for the production of a disinterested witness upon the vital matter at issue.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Appeal from District Court, Woodson County.

Action by L. Harreld against Herbert Paris and Karl Garvin. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

G. R. Stephenson, of Yates Center, for appellants. Lamb & Hogueland, of Yates Center, for appellee.

MASON, J. Mrs. L. Harreld sued Herbert Paris and Karl Garvin, alleging that by false representations concerning a piece of real estate they had induced her to purchase

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

it, and asking for damages on that account. She recovered a judgment, and the defendants appeal.

Some question was made with regard to the title to the property, but if there was a defect it was corrected and has become immaterial. Two of the misstatements alleged to have been made were as to the amount of a mortgage lien and taxes due against the property. The defendants admit that each was understated, but say this was due to a mistake. They offered to pay the difference, with costs, so this feature of the matter is also taken out of the case. The remaining misrepresentations alleged are that the property was worth \$1,600, and that it was rented for \$15 a month. The value of the property was, of course, to a greater or less extent a matter of opinion (*Else v. Freeman*, 72 Kan. 666, 83 Pac. 409; 20 Cyc. 51); but the amount of revenue it produced was necessarily fixed and definite. It was in fact bringing in but \$6 a month. The defendants maintain that they so stated to the plaintiff, and deny having made any different representation. This was the vital issue in the case, and the testimony upon it was sharply conflicting.

[1] A reversal is asked because of the instructions given and because of the overruling of a motion for a new trial on the ground of newly discovered evidence. For the reason that the plaintiff's action was based upon an alleged fraud, she was required to prove it by stronger evidence than would suffice in an ordinary case. The defendants maintain that the court committed error in not making this distinction clear in the instructions given to the jury. An instruction that fraud must be proved by a preponderance of the evidence has been held sufficient, so long as nothing is added tending to minimize the quantity of evidence necessary to overcome the presumption of good faith and fair dealing. *Tanton v. Martin*, 80 Kan. 22, 101 Pac. 461. Here the jury were given the usual instruction to the effect that the plaintiff was entitled to recover if there was a preponderance of evidence in her favor. But they were also told that the preponderance did not need to be great—that it was sufficient if it just barely preponderated. Such an addition has been held to constitute prejudicial error. *Bank v. Reid*, 86 Kan. 245, 120 Pac. 339. The judgment must therefore be reversed, unless that result is avoided by this language, used elsewhere in the charge: "If the claim made by either party is unusual, unnatural, or out of the ordinary course of affairs, you are not required to take the same for granted upon slight proof, nor should you so find except upon evidence of a reliable character and which satisfies the mind." While a more explicit statement of the rule applicable to the proof of fraud might well have been made, we think the objectionable part of

the instruction must be regarded as so far modified by the sentence quoted, as not to require the setting aside of a verdict, in the absence of anything further to suggest a probability that the jury were actually misled. The negotiations leading up to the contract between the parties were begun by a letter which was written by the defendants in response to an advertisement inserted by the plaintiff in a newspaper, and which reached her through that channel. A second letter was written directly to her. At the trial the defendants produced two documents, each written upon two sheets of their letter heads, which they asserted to be these original letters. The plaintiff testified that the second sheet of those offered as constituting the second letter was not genuine, and she called attention to its fresh appearance as indicating that a substitution had been made. She also denied the genuineness of what the defendants asserted to be the first letter, which she testified was written upon a single sheet. According to the documents produced by the defendants, the first page of the first letter and the second page of the second bore the statement that the property was rented for \$6 a month. The plaintiff's claim is based upon the contention that she was deceived into the belief that the rental was \$15 a month. Therefore, if either of the letters produced at the trial is genuine, it is fatal to her recovery. The jury evidently believed that they were spurious.

[2] The motion for a new trial on the ground of newly discovered evidence was based in part upon two affidavits that the plaintiff's reputation for truth and veracity was bad. "New trials should not be granted generally, for the purpose of producing impeaching evidence." *State v. Lackey*, 72 Kan. 95, 82 Pac. 527. But there was also presented an affidavit of the advertising manager of the newspaper in which the plaintiff's advertisement was published, identifying, as the original letter sent by the defendants, the document introduced in evidence. The reason given by the defendants for not having produced this witness at the trial is that they had not anticipated that the plaintiff would dispute the genuineness of the letter. This may not be a complete excuse, for it was only by such denial that the plaintiff could sustain her case. Nevertheless, it explains the omission, and, since the whole controversy turns upon a question of veracity between the parties, we think the testimony of a disinterested third person upon the vital matter in issue is of such obvious importance that it should be received and considered, since it can be had. The affidavit of the advertising manager states that the document introduced at the trial is the letter which was received by the paper, "identified also by the No. 20,893, on the back of the letter." The implication seems to be that the figures were placed

upon the letter by the witness, or by some one with whose writing he is familiar, in which case his identification of at least the second sheet of the letter would be most convincing. With respect to this letter the plaintiff's contention at the former trial was not that a substitution had been made for the first sheet, but that neither of the proffered sheets was genuine, because the original instrument had consisted of but one. In this situation the testimony of the newspaper man is so important that we think justice requires that the defendants should have the benefit of it.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

(39 Kan. 38)

ÆTNA MILL & ELEVATOR CO. v. ATCHISON, T. & S. F. RY. CO.†

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 179*)—OBSTRUCTION OF SURFACE WATER—INJURIES—SPECIAL FINDINGS—EVIDENCE.

Special findings of fact returned by the jury examined, and held to be inconsistent and erroneous, to the prejudice of the defendant's substantial rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.*]

(Additional Syllabus by Editorial Staff.)

2. WATERS AND WATER COURSES (§ 179*)—OBSTRUCTION—ACT OF GOD—ACTIONS—INSTRUCTIONS.

Where, in an action against a railroad company for obstructing a water course to plaintiff's damage, defendant claimed that the flood resulted from an act of God, it was error to refuse to charge that, even though defendant failed to provide for the passage of waters passing down a creek, and such failure was negligence, yet if the flood was caused solely by an act of God, and would have caused plaintiff to have sustained the loss in question regardless of defendant's negligence, the jury should find for defendant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.*]

3. WATERS AND WATER COURSES (§ 179*)—OBSTRUCTION—"ACT OF GOD"—ACTIONS—INSTRUCTIONS.

Where plaintiff was injured by a flood, claimed to have resulted from defendant's negligence in constructing its right of way, while defendant claimed the loss was caused by an act of God, an instruction that defendant was not liable if the loss was caused by act of God, meaning those events and accidents which proceed from natural causes, and which cannot be anticipated, guarded against, or resisted, provided defendant was not guilty of any want of ordinary or reasonable care to guard against such loss, was improper.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 118-123.]

Appeal from District Court, Sumner County.

Action by the Ætna Mill & Elevator Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Ed. T. Hackney, of Wellington, for appellee.

BURCH, J. The plaintiff sued the defendant for damages resulting from the flooding of its mill on the night of June 28, 1908. The claim was that the defendant did not provide sufficient openings through its grades and beneath its tracks for the water of Hargis creek, a small stream from 10 to 20 feet wide, with banks from 4 to 6 feet high, which flows from north to south through the city of Wellington. The defense was that the flood was caused by a cloud-burst, was so extraordinary and unprecedented that it ought to be designated as an act of God, and consequently that the defendant was not responsible for its ravages. The plaintiff recovered, and the defendant appeals.

[1] The flood was the most disastrous in the history of the stream. Within a remarkably short time 12 inches or more of rain fell, and the valley of the stream was immediately filled with a torrent of water which carried destruction and devastation in its wake. Bridges over the creek were washed away, fences, telegraph poles, and telephone poles were swept down, trees were uprooted, and buildings were engulfed before their occupants could escape. Houses were swept from their foundations and carried downstream and dashed against the railway bridge before the inmates could be rescued. Several lives were lost, many people were rendered homeless, stock was drowned, and much property was destroyed. Indeed, the flood was quite unprecedented in all its aspects, unless it be with respect to the height to which the water rose. Some witnesses thought that the Jackson flood, which occurred in 1876, before the railway was built, rose higher. Others were of a different opinion, and numbers of witnesses, including several old settlers, testified that the flood of 1908 was the highest ever known. A flood, known as "the cyclone flood," accompanied the tornado which visited Wellington in 1892; but the water at that time was from 22 inches to 2 feet lower than in 1898.

At the time of the flood in 1908 three of the defendant's tracks crossed Hargis creek. The northernmost one is called the "mill track," the next one is called the "main line track" and the southernmost track is called the "Hunnewell branch track." The Hunnewell branch track is not important to a consideration of the case. Bridges were maintained for the mill track and the main

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 21, 1913.

line track over Hargis creek and over A street, which is a street of the city of Wellington lying east of the stream, and running north and south. Bridge No. 254 is the main line track bridge across A street. In 1887, when the railroad was first built, the length of this opening was 30 feet. It was increased to 58 feet in 1898 and to 66 feet in 1902, at which length it remained at the time of the flood. Bridge No. 255 is the main line track bridge across Hargis creek. The length of this opening was 30 feet in 1887. It was increased to 56 feet in 1898 or 1900, and was 56 feet long at the time of the flood. Bridge 254a is the mill track bridge across A street. In 1887 it was 96 feet long. It was reduced to 94 feet in 1890, and was further reduced to 74 feet in 1903, at which length it remained at the time of the flood. Bridge No. 255a is the mill track bridge across Hargis creek. In 1887 the length of this opening was 176 feet. In 1898 it was reduced to 167 feet, and in 1903 it was further reduced to 84 feet, which was its length at the time of the flood. The A street bridges afforded outlets for the water of the creek whenever it overflowed its banks. The creek frequently overflowed at times of heavy rain, but the bridges described took care of all flood waters previous to 1908, including the cyclone flood of 1892. At that time the total length of all the openings was 330 feet. In 1908 the total length was 280 feet, a net reduction of 50 feet. The plaintiff, of course, made much of this reduction, while the defendant maintained that it was the result of prudent engineering in the light of all the factors of the drainage problem.

The plaintiff's mill was situated about 400 feet east and about 800 feet north of the A street bridges. One of the plaintiff's chief witnesses testified that on the night of the flood the creek was 1,000 feet wide, and from 12 to 18 feet deep from the bottom of the channel, at a point 3,000 feet north of the railway tracks. The fall of the stream was about 12½ feet to the one-half mile. If the character of this flood was such that the defendant could not reasonably anticipate it, or if, notwithstanding the inadequacy of the defendant's waterways, the flood was of such a character that the plaintiff would nevertheless have suffered, the defendant was not responsible in damages for what occurred.

In order to develop the facts showing the peculiar character of the flood and the relation of the defendant's bridges to it, the jury were requested to answer a large number of special questions, and the manner in which they dealt with these questions is important. Certain of them, with the answers returned, follow:

"Question 5a. What was the area of the opening of defendant's bridge 255a up to ele-

vation 86.0 at the time of flood in question? Answer: Don't know."

"Question 6a. Was the area of the opening of bridge 255a up to elevation 86.0, 220 square feet? Answer: Approximately; yes."

"Question 14a. Was the storm and flood of June 28, 1908, what is known as an act of God? Answer: No."

"Question 15a. Was the storm and flood of 1908 in question what is commonly known as a cloud-burst or waterspout? Answer: No."

"Question 16a. Did the flood down Hargis creek June 28, 1908, come in waves or walls of water several feet high, short intervals apart? Answer: We think not."

"Question 17a. Did the bridges and waterways in defendant's railroad at the places in question prove sufficient for all waters that had come down Hargis creek prior to the flood of June 28, 1908? Answer: They had been sufficient prior to change of bridge and building fill for new tracks."

"Question 20a. Were there from 12 to 15 inches of water that fell along Hargis creek on the night of June 28, 1908? Answer: The exact amount of inches unproved."

"Question 21a. If you answer 'No' to the last question, then state what was the greatest amount of water that fell in the region of Hargis creek on the night of June 28, 1908? Give it in inches. Answer: —"

"Question 19. Do you find, as testified to by several, that 10 to 12 inches of water fell in the region of Hargis creek north of Wellington on the night of June 28, 1908? Answer: Yes."

"Question 21. Were there dead bodies of different animals taken from a flood that came down Hargis creek on the night of June 28, 1908? Answer: No evidence."

"Question 22. What was the greatest number of inches of rainfall that occurred at any point within eight miles of Wellington on the night of June 28, 1908? Answer: Not proven."

"Question 30. Were there about 12 inches of rain fell at Hargis creek on the night of June 28, 1908? Answer: Yes."

"Question 32. Did flood waters fall on Hargis creek and come down on the city of Wellington on the night of June 28, 1908, in waves one to three feet high, so suddenly that much property and a number of lives were lost in and near Wellington before relief or assistance could be given? Answer: Yes."

"Question 33. Were there trees of considerable size washed loose and carried down the flood in Hargis creek on the night of June 28, 1908? Answer: No evidence."

"Question 36. How often, if ever, before June 28, 1908, did so large a volume of water flow down Hargis creek into the city of Wellington as the volume that came down on the evening and night of June 28, 1908? Answer: Once."

"Question 37. Give the dates that a volume of water came down Hargis creek into Wellington as large or larger than the volume that came down on the evening or night of June 28, 1908. Answer: The Jackson flood in 1876 or '77."

"Question 39. Was the water in Hargis creek valley, as it passed over the land of C. G. Epperson, who testified as a witness in this case, higher during the storm of 1908 than it was at the time of the cyclone storm in 1892? Answer: Yes."

"Question 40. If you answer the last interrogatory in the affirmative, state how much higher. Answer: About 20 or 22 inches."

"Question 41. How far north of the mill track on the Santa Fé was the C. G. Epperson place, where it crossed Hargis creek valley? Answer: Between one-half and three-fourths miles."

Findings 5a and 6a cancel each other. The jury say they do not know, and that they do know. Besides this, there was no controversy over the area of the opening inquired about. It was shown to be about 230 square feet by a map, with sectional drawings, which was introduced in evidence, and which the plaintiff admitted to be correct and to show truthfully the things it purported to show. The controversy arose over the size of these openings and the findings relate to a fundamental fact in the case.

Findings 16a and 32 cancel each other. The jury say the flood did not come down in waves of water at short intervals, and that it did come down suddenly in waves of water from one to three feet high. The manner in which the flood came down the valley was a fact of the highest importance, and a number of eyewitnesses graphically described the movement of the water.

Finding 20a is evasive and untrue. The jury were not asked for the exact number of inches, but were asked whether or not 12 to 15 inches of rain fell along the creek, and in findings 19 and 30 they were able to fix the quantity at about 12 inches. The question bore directly upon the subject of whether or not the flood was an act of God.

The answer to question 22 is untrue. Finding 30 establishes the fact that about 12 inches of rain fell, and if that was the greatest quantity the jury should have so answered. If it were not, the jury should have given the greatest quantity. The witness Metcalf, living four miles northeast of Wellington and two miles west of Hargis creek, testified that from 18 to 20 inches of water fell, measured in a 40-gallon barrel, which was empty before the rain. The witness Geuch, living about two miles from the headwaters of Hargis creek, testified that two candy buckets, 16 inches deep, were filled and ran over, and that he never saw or heard of a storm of like proportions. The witness Chambers, living four miles northeast of

Wellington and one-half mile from Hargis creek, testified that from 12 to 14 inches of water fell the night of the flood. He had lived there about 17 years, and had never seen any flood nearly so large. The witness Hummel, living $3\frac{1}{4}$ miles north of Wellington and three-quarters of a mile from Hargis creek, testified that the rain filled an empty half-bushel. How much ran over he did not know, but his judgment was that from 12 to 15 inches of water fell. He described the storm as a waterspout. He had lived in the neighborhood for 28 years, and had never before seen such a flood. Other witnesses described the storm as a cloud-burst. Perhaps, if the true answer had been given to the question, it would have conflicted with findings 14a and 15a, that the storm was not what is commonly known as a cloud-burst or waterspout, and that the flood was not an act of God.

Finding 33 is untrue. The witnesses Lawrence, Jackson, Rothrock, Covell, and Shoemaker all gave evidence upon the subject. Standing trees were uprooted, swept away, and some of them carried through the defendant's bridges. These witnesses all regarded the storm as unprecedented and no witness in the case described any other storm in the history of the stream which descended so suddenly and so violently. One of the plaintiff's principal witnesses testified as follows: "I was at the Antlers Hotel sitting up until the storm was over, and some fellow came along and said the creek was up, and I immediately went down to the creek. I went down on east Harvey street. I don't think the water raised very much after I got there, a couple of feet, perhaps. It possibly might have been going on probably 15 or 20 minutes before I got there. I did not see walls of water coming down. These houses that were washed away and demolished were the first houses that the stream met, I presume. I think there were no houses north of there. The flood rain must have happened along about 10 o'clock. I got down somewhere about half past 10. The flood waters came right around 11. When I got down there, the stream was up almost to the eaves of some of the houses. That all happened from between 9 and 10 o'clock up to between 10 and 11."

While the answer to question 21 is, perhaps, technically correct, the evidence was that domestic animals were washed away and were drowned in the flood. There was testimony that one man lost sixteen head of horses; and a witness said that he tried to reach one or two dead horses and two dead cows to get them out of his way while he was working in the flood.

The answer to question 17a is clearly evasive. It related to a fact bearing directly upon the question of the defendant's foresight and care. If it had been candidly answered, the answer would have been distinctly favorable to the defendant, because the

evidence was that the defendant's bridges had safely taken care of all flood waters which came down the creek prior to 1908. As it stands, the answer is equivocal, because a number of changes were made at different times in the bridges and in the grades for new tracks.

The answer to question 40 depended upon the testimony of C. G. Epperson, who was referred to in question 39. He testified that the flood of 1908 was from 22 to 24 inches higher than the cyclone flood, and that he had made measurements which enabled him to give his evidence. The jury arbitrarily pared down his figures 2 inches. Apparently, however, the jury readily accepted the testimony of the plaintiff's chief witness that the flood of 1876 was higher than that of 1908, although the marks by which his judgment was guided left a margin of uncertainty of 5 feet as to the height of each flood.

Several other answers show the unwillingness of the jury to make fair findings of facts established by the evidence, which would have been favorable to the defendant.

The findings of the jury were duly attacked, and relating as they do to material questions in the case they were highly prejudicial to the defendant.

[2] The defendant requested the following instruction: "(4) Even if you should find that the defendant failed to provide for the passage of waters passing down Hargis creek at the time in question, and that such failure constituted negligence on the part of the defendant, yet if you further find that the flood was caused solely by what is known in law as an 'act of God,' and would have caused the plaintiff to have sustained the loss in question, regardless of defendant's care or want of care and foresight in the constructions and maintenance of its road across Hargis creek and at the places in question, then you should find for the defendant, as in such case the loss would be the result of an act of God, and not the result of the negligence of the defendant."

[3] The instruction stated the law, and no equivalent for it was given. Indeed, the jury was, in effect, instructed to the contrary in the second paragraph of instruction numbered 12, which reads as follows: "The defendant is not liable for what is commonly known as an act of God, by which is meant those events and accidents which proceed from natural causes, and which cannot be anticipated, guarded against, or resisted. For losses occurring by any of these means, the defendant is not liable, provided it has not been guilty of any want of ordinary or reasonable care to guard against such loss."

The effect of instruction 12 is that the defendant is not liable for events which cannot be anticipated or guarded against at all, unless he has been guilty of want of reasonable care to anticipate or guard against them.

While these instructions did not affect the verdict, because the jury found the flood was not an act of God, the subject may become important at another trial.

Because of the inconsistencies and errors in the findings of fact, the judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring.

(89 Kan. 51)

SAYLOR et al. v. CROOKER et al.

(Supreme Court of Kansas. March 8, 1918.)

(Syllabus by the Court.)

1. MORTGAGES (§ 37*)—ABSOLUTE DEED AS MORTGAGE—PAROL EVIDENCE.

An instrument in writing, which purports, on its face, to be an absolute deed of conveyance of land, may be shown by parol evidence to have been executed for the purpose of securing the payment of money, or to secure the performance of any act or thing which the parties to the instrument may lawfully contract to be performed or done.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

2. MORTGAGES (§ 608½*)—ABSOLUTE DEED—PLEADING.

In an action to have a deed declared a mortgage and canceled, a petition, which alleges that an instrument, in the form of a deed, was intended by all parties as a mortgage to secure payment to one of the grantees of 50 per cent. of his sales, under verbal contract that one of the grantees would and did enter into the business of selling an article of commerce, and did thereby incur an indebtedness or obligation to the mortgagor, which obligation the mortgagor had discharged, is not demurrable as not stating sufficient facts to constitute a cause of action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

Appeal from District Court, Labette County.

Action by J. W. Saylor and others against Edwin R. Crooker and others. Judgment for defendants, and plaintiffs appeal. Reversed.

John Madden, W. W. Brown, and W. S. Hyatt, all of Parsons, for appellants. Glasse & Burton and C. E. Pile, all of Parsons, for appellees.

SMITH, J. This action was brought by the appellants against Edwin R. Crooker, George W. Moore, and L. H. Jackson, as sheriff of Labette county. The first count of the petition alleges, in substance, that the appellants were, at the time of the filing of the petition and during all times therein referred to, the legal owners in fee and in the open, notorious, and exclusive possession of a certain part of lot 4, block 160, in the city of Parsons, Labette county; that the appellants had executed to appellees, Crooker and Moore, an instrument, in writing, purporting to be a deed of conveyance of said part of said lot in consideration of \$2,750; that in fact said instrument was, and was intended by all the parties thereto to be, a mortgage

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—44

to secure the payment to Crooker of 50 per cent. of the proceeds of the sale of the "Little Crater Crude Oil Burner"; that said J. W. Saylor and one Tinder, having theretofore entered into a written contract with Crooker to buy an agency contract for the sale of interests in the patent right to said "Little Crater Oil Burner," had agreed to pay upon the purchase price thereof 50 per cent. of the amount received from such sales of the right. It was also alleged that J. W. Saylor had, prior to the making of the mortgage deed, made a verbal contract with Crooker that he would engage in the business of selling family rights to said burner; and that upon the representation of Crooker that Moore was interested in the agency contract the mortgage deed was executed by appellants to Crooker and Moore to secure the performance of the contract on Saylor's part.

The petition, in the first count thereof, further alleges that J. W. Saylor had engaged in the business of selling the said burner rights, had made certain sales thereunder, and had paid to Crooker all that he was obligated to pay under such verbal contract, and that the mortgage deed was thereby fully satisfied, and that the appellants were entitled to the cancellation thereof or a reconveyance of the property by a quitclaim deed.

Also it is alleged: "That the defendant Thomas H. Murray instituted an action against Edwin R. Crooker in the district court of Labette county, Kansas, sitting at Parsons, on or about April 12, 1909, and on or about the 16th day of April of said year caused an order of attachment to issue out of said court, directed to the sheriff of said county, commanding him to attach and safely keep the lands, tenements, chattels, moneys, and effects of Edwin R. Crooker not exempt by law, to be applied to the payment of the claim of the said Thomas H. Murray for \$3,000; that under said order the sheriff of said county attached the land of these plaintiffs hereinbefore described, and the same was appraised at \$2,250; that on the 20th day of May, 1911, a judgment was rendered by said court against said Edwin R. Crooker and in favor of the said Thomas H. Murray for \$3,375, together with costs, and declaring the same a lien under the attachment proceedings on the said described real estate, and ordering that said real estate be sold as on execution to satisfy said judgment so rendered against Edwin R. Crooker; that in pursuance of said order L. H. Jackson, as sheriff of Labette county, Kansas, and successor in office of J. A. Holmes, has advertised and is threatening to and will sell said real estate, unless restrained from doing so by order of this court. * * *

The second count in the petition, as to the allegation of the possession of the real estate, is inconsistent with the allegations of the first count. The third count contains practically nothing that is not contained in the first count.

The court finds that due service was made upon the appellee Crooker by publication, and the notice thereby is approved. Such service is authorized, in an action of this nature, by section 48 of the Code (section 5641 of the General Statutes of 1909).

There is no finding with reference to Moore, and neither Moore nor Crooker made any appearance in the action.

[2] Murray and Jackson each filed general demurrers to the several counts of the petition. The first count of the petition constitutes the gist of the action, and, although the cause of action is not well pleaded, by a liberal construction it states a cause of action against all of the appellees. The demurrers thereto should have been overruled.

[1] If Crooker had a mortgage only upon the property, the property was not subject to attachment in an action by Murray against Crooker; and if Murray had no legal attachment against the property the sheriff, Jackson, had no right to sell it. It thus appears that the entire action and rights of the parties depend upon the question whether the instrument purporting to be a deed, executed by appellants to appellees, Crooker and Moore, was intended, and was in fact, a deed of conveyance of the title to the land, indefeasible, or whether it was intended, and was in fact, a mortgage to secure the performance of the contract of J. W. Saylor that he would engage in the business of selling interests in the patent to the Little Crater Crude Oil Burner, and would pay Crooker whatever he was entitled to out of the anticipated sales thereof, according to the contract. That an instrument purporting to be an absolute deed of conveyance may be shown by oral evidence to have been intended as security for the payment of money or the performance of an act is, in effect, implied by statute (section 5195 of the General Statutes of 1909), and has frequently been decided by this and other courts. See *McNamara v. Culver*, 22 Kan. 661; *Yost v. Bank*, 66 Kan. 605, 72 Pac. 209; *Martin v. Allen*, 87 Kan. 758, 74 Pac. 249; *Hubbard v. Cheney*, 76 Kan. 222, 91 Pac. 793, 123 Am. St. Rep. 129, note, page 133.

It appears from the petition that all the rights of Murray and Jackson depend upon the title in Crooker to the property in question, and, by the interplea of appellants in the action brought by them against Crooker, they had actual notice of appellants' rights therein. It also appears from the journal entry of the judgment that the motion of the appellants for judgment against Crooker was overruled upon the objection of Murray and Jackson, who, so far as appears, in no way represented Crooker, and "for the reason that the defendant Murray, an attaching and now judgment creditor of defendant Crooker, claims a lien upon said property as such creditor. * * *" This also was error.

In the absence of fraud, a debtor of one of the grantees in the deed can obtain no lien

upon the premises by attachment in an action against such grantee, if the deed was in fact intended by the parties thereto, and was in fact given, only as a security for the performance of a contract and for the payment of anticipated profits therein to one of the grantees.

The judgment is reversed, and the case is remanded, with instructions to proceed with the trial, after allowing any proper amendments to the pleading and summoning the other party to the deed or mortgage, if desired. All the Justices concurring.

(59 Kan. 4)

KENNETT v. KIDD et al.

(Supreme Court of Kansas. March 8, 1913.)

On rehearing. Former opinion adhered to.
See 87 Kan. 652, 125 Pac. 36.

WEST, J. A rehearing was granted to enable the parties to present fully their views on questions which it was claimed had not been properly presented or correctly decided. The principal contention is that we were in error in holding that the local camp could not take the property willed to it to use as it saw fit. A re-examination of the matter leads to the same conclusion. In 1898 the Legislature took control of fraternal beneficiary societies, defining them, and prescribing the restrictions under which they were to operate. Laws of 1898, c. 23. Section 1 provided that the fund from which the payment of benefits was to be made and from which the expenses of such association should be defrayed "shall be derived from assessments or dues collected from its members." The next year this was amended so as to read: "Assessments, premiums or dues collected from its members, and interest accumulations thereon." Laws 1899, c. 147, § 1 (Gen. Stat. 1909, § 4303). Section 8 (Gen. Stat. 1909, § 4310) makes a fraternal assessment order organized under the act a body corporate and politic with power to take, purchase, hold, and dispose of real estate for the purpose of the corporation. But there is nothing in the entire act thus empowering a local camp, and nowhere in the statutes can be found any provision that such camp is to be deemed a corporation. Indeed, the act itself makes no mention of local or subordinate organizations. However, chapter 164 of Laws of 1899, as amended by section 1, c. 171, Laws 1909 (Gen. Stat. 1909, § 1832), authorizes any subordinate lodge or camp under control of a supreme, grand, or other superior organization to purchase, own, manage, control, improve, mortgage, and dispose of such real estate, including necessary buildings as may be necessary to provide suitable accommodations for holding its meetings and transacting its business. It also authorizes such camp to handle stock in a corporation organized for the

purpose of erecting such buildings. The act vests the title of such property in the local organization, and gives it a right to contract, sue, and be sued in any manner affecting such real estate or buildings. Only to this extent can the camp claim any corporate rights or character.

The Legislature having twice taken pains to prescribe the only source of income to the parent order itself, we must conclude that it was not the intention to permit a local camp to be the beneficiary in a will. Neither organization is for profit, but each is for the mutual benefit of its members, and especially for the survivors of its members who have contributed to the general fund in accordance with the rules prescribed by the association itself. There is no restriction on using for the purpose of providing necessary buildings a portion of the income received in the manner pointed out by statute. But the case is not one of an ordinary corporation which all agree may take by will unless expressly precluded. It is the case of a local fraternal beneficiary body which the Legislature has confined within a narrow zone of activity, dealing out its powers with a sparing hand. If a man in advanced years can be induced to devote the bulk of his estate to a local camp as was the testator in this case, then there is no reason why other benefactors might not add their gifts until a local organization of a few neighbors could become the holder of property of great value far beyond any real or imaginary needs for the transaction of its business.

The decision is not to be carried beyond its terms, and does not interfere with the privileges accorded the societies and associations, including Masons and Oddfellows, mentioned in section 1830, General Statutes of 1909. The authority granted to local subordinate organizations by section 1832 in no wise enlarges or changes the source of income from which they may provide necessary buildings, but simply directs how they may handle and hold such property, instead of doing so by and through the grand or superior organization.

In *Bankers' Union v. Crawford*, 67 Kan. 449, at page 456, 73 Pac. 79, at page 81 (100 Am. St. Rep. 465), it was held that one fraternal beneficiary association has no authority to consolidate with another, or to contract to pay a death loss of another like association in consideration of its transfer of its membership and offices. In the opinion it was said: "Its business is defined in the statute to be the making of provision for the payment of benefits in case of death, sickness, or temporary disability, and this business must be carried on for the sole benefit of its members and their beneficiaries. For the purpose of carrying on this business, such associations are authorized by the statute to create a fund 'from which the expenses of such association shall be defrayed,'

which 'shall be derived from assessments, premiums or dues from its members, and interest accumulations thereon.' Thus it appears clearly that these associations are to be administered for the sole benefit of their members and their beneficiaries by means of assessments and dues collected from such members; that is, that only members may be called upon to contribute, and only they or their beneficiaries may receive indemnity. These associations are not permitted to go out and engage generally in the business of furnishing indemnity. Their distinct characteristics and charter life would be destroyed in so doing." See, also, *Scott v. Bankers' Union*, 73 Kan. 575, 85 Pac. 604, and *Boice v. Shepard*, 78 Kan. 311, 96 Pac. 485. It may be said with equal propriety that local camps are not to be permitted to go into real estate or general business even as beneficiaries of testators who seek to give their property to use as such camps see fit.

We do not feel impelled to change the views expressed in the former opinion. All the Justices concurring.

(88 Kan. 645)

WILCOX v. GILLET, District Judge.

(Supreme Court of Kansas. Jan. 18, 1913.)

Application by E. C. Wilcox for writ of mandamus to Preston B. Gillett, Judge of the Twenty-Fourth Judicial District of Kansas. Writ denied.

PER CURIAM. Upon the showing made, the court is of the opinion that the order made by the district court did not amount to a disbarment or suspension of the attorney, or to a denial of his right to be heard upon a formal application for a change of venue or for the selection of a pro tem. judge to try his cases. It cannot be known at this time when a judgment will be reached in the disbarment case, but it is evident that the interval will be so considerable that no proceedings in the district court should be held in abeyance to await the result in that matter.

The application for a writ of mandamus is denied.

(89 Kan. 104)

CITY OF TOPEKA v. BOARD OF COM'RS OF SHAWNEE COUNTY.

(Supreme Court of Kansas. March 8, 1913.)

Appeal from District Court, Shawnee County.

Action by the City of Topeka against the Board of County Commissioners of Shawnee County. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Simon and Edwin A. Austin, both of Topeka, for appellant. W. C. Ralston and James W. Clark, both of Topeka, for appellee.

PER CURIAM. The appellee and the appellant were, in a sense, engaged in the same public enterprise, viz., in restraining the Kansas river from overflowing its banks and causing great damage in the vicinity of the Melan arch bridge and within the city and county. For this purpose the appellant had condemned a

strip of land along the south bank of the river, and had erected a dike thereon, and, at the time complained of, its employees were building a revetment to the dike, between the dike and the stream, to prevent the washing away and destruction of the dike in times of high water. The plan of the engineers was to cut off the bank between the dike and the stream, then at low water, so that the concrete revetment should slope like an apron from the dike down to the stream. The foundation of the revetment was to be set below the low-water mark.

The city, to widen the channel, had voted bonds to build an extension of the Melan bridge and to remove the earth under the extension and on either side thereof to widen the channel. The extension had been built, and the earth, to the desired depth thereunder and to some extent on either side thereof, had been removed, when the employees of the appellant commenced to cut down the bank for the building of the revetment. There was evidence that the appellant's employees, over the protest of the appellee and its employees, continued to dump the earth from the bank into the excavation which the employees of the city had made and were making for the purpose of widening the channel of the stream.

Each party had a right to do the work it was doing, so long as it did not unnecessarily interfere with or destroy the work of the other, but not otherwise. The trial court found in favor of the city, and granted the injunction prayed for, including a mandatory injunction, requiring the appellant to remove the earth which appellant had theretofore dumped and placed in the excavations under and on either side of the bridge made by the employees of the city.

There was ample evidence that the action of appellant and its contractors, who were parties to the action, was unjust and inequitable, and the judgment is affirmed.

(89 Kan. 173)

STATE ex rel. DAWSON, Atty. Gen., v. LANDER et al., Councilmen.†

(Supreme Court of Kansas. March 15, 1913.)

Quo warranto by the State, on the relation of John S. Dawson, Attorney General, against F. J. Lander and others, Councilmen. Judgment of ouster.

See, also, 87 Kan. 474, 124 Pac. 384.

J. S. Dawson and F. P. Lindsay, both of Topeka, for plaintiff. A. M. Jackson and Jackson & Noble, all of Winfield, for defendants.

WEST, J. When this action was first presented and considered, certain plain duties of the parties were pointed out, and it was said: "The case will be continued, with the right of either party to apply for further orders herein, for final disposition when the court becomes satisfied whether or not the mayor and council are acting together in good faith for the welfare of the city in the performance of their official duties." *State ex rel. v. Lander*, 87 Kan. 474, 124 Pac. 384, 385.

Pursuant to applications for final judgment, the parties have placed on file a showing as to their conduct since the continuance was had. This showing leaves the court without any doubt that the defendants have been and are guilty of willful misconduct in office and willful and persistent failure to perform their official duties.

Judgment of ouster is therefore rendered. All the Justices concurring.

† Rehearing denied April 21, 1913.

(21 Cal. App. 14)

RYAN v. OAKLAND GAS, LIGHT & HEAT CO. (Civ. 999.)

(District Court of Appeal, Third District, California. Jan. 13, 1913. Rehearing Denied Feb. 11, 1913. Denied by Supreme Court March 14, 1913.)

1. MASTER AND SERVANT (§ 189*)—FELLOW SERVANTS—VICE PRINCIPAL.

The superintendent of a power company who employed and discharged the men who were working on an excavation with plaintiff and directed the work generally when present, and the foreman who directed and discharged the men in the superintendent's absence, were not fellow servants of a laborer engaged in the excavation work, being vice principals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

2. MASTER AND SERVANT (§ 231*)—CONTRIBUTORY NEGLIGENCE—RELIANCE ON CARE OF MASTER.

A laborer engaged in excavating could assume that his superintendent was making the place of work safe by cribbing or bracing the walls as the work progressed; that being a part of the superintendent's duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

3. MASTER AND SERVANT (§ 185*)—FELLOW SERVANTS—DELEGATION OF DUTIES.

An employer cannot escape responsibility for the proper performance of a duty to his employes by delegating its performance to another servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

4. MASTER AND SERVANT (§ 107*)—PLACE OF WORK—CHANGING CONDITIONS.

The rule that an employer is not bound to protect his employes from changes in the place of work necessitated by the character of the work as it progresses would not apply where employes engaged in excavation were not furnished with materials to brace the walls, and the walls were further weakened by a parallel covered ditch near to that being dug which was unknown to the employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—NEGLIGENCE.

In an action for injuries to an employe by the caving in of the walls of a ditch which he was assisting in digging, whether it was his employer's duty to brace the ditch in the course of the work held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1050; Dec. Dig. § 286.*]

6. DAMAGES (§ 216*)—INSTRUCTIONS—PHYSICAL AND MENTAL SUFFERING.

The court instructed in a personal injury action that, in estimating the amount of pecuniary damages allowed, the jury might consider the physical and mental pain "suffered," if any, the nature, extent and severity of the injuries, "the extent, degree, and character of suffering, mental or physical, if any, its duration and its severity," and might also consider whether the injury was temporary. *Held*, that the instruction referred to past physical and mental suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

7. DAMAGES (§§ 32, 48*)—ITEMS OF DAMAGES—PHYSICAL AND MENTAL SUFFERING.

Where the person injured is himself suing for such injuries, damages for physical and mental suffering may be recovered contrary to the rule, where the suit is brought in a representative capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 40, 41, 71, 100-103, 255; Dec. Dig. §§ 32, 48.*]

8. DAMAGES (§ 26*)—PROSPECTIVE CONSEQUENCES—"NECESSARILY."

"Necessarily" means "unavoidably," "indispensably," so that a thing which necessarily must happen may reasonably be said to be certain to happen.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 69, 236; Dec. Dig. § 26.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4703, 4704.]

9. DAMAGES (§ 53*)—PERSONAL INJURIES—MENTAL SUFFERING.

Mental suffering, as an element of damage, is not confined to that resulting from such injuries as would from their character cause the injured person to be shunned or cause a feeling of humiliation, but may arise out of the fear of physical suffering reasonably certain to continue, and continued even after physical pain has ceased.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255; Dec. Dig. § 53.*]

10. DAMAGES (§ 149*)—PERSONAL INJURIES—MENTAL SUFFERING.

Mental suffering may be presumed to follow upon a serious physical injury causing pain and impairment of earning capacity, so that it need not as a rule be specially pleaded to be recovered for.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 149.*]

11. APPEAL AND ERROR (§ 171*)—PRESENTATION BELOW—THEORY OF PLEADINGS.

Though the complaint, in a personal injury action, merely alleged that plaintiff was rendered lame and incapable of performing labor by such injuries, and had undergone great physical suffering, and would be incapacitated from laboring for life, where the trial was conducted on the theory that physical and mental suffering were proper items of damage, if proved, defendant cannot object on appeal that damages for such items were allowed, though not more specifically pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

12. DAMAGES (§ 185*)—INJURIES—SUFFICIENCY OF EVIDENCE—EXTENT OF INJURIES.

Evidence in an employe's action for personal injuries held to sustain a finding that the injuries were permanent, and incapacitated plaintiff for an indefinite time from doing manual labor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503-508; Dec. Dig. § 185.*]

13. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—EVIDENCE.

Evidence in an employe's action for personal injuries held to show that an award of \$7,500 damages was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Mathew Ryan against the Oakland Gas, Light & Heat Company. From a judgment for plaintiff, and an order denying

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.; Key-No. Series; & Rep'r Indexes.

a motion for new trial, defendant appeals. Affirmed.

Myrick & Deering, of San Francisco, for appellant. Fitzgerald & Abbott, of Oakland, for respondent.

CHIPMAN, P. J. The complaint in this case was filed in December, 1904, and was brought to issue by answer in October, 1905. On appeal from the judgment at the first trial, it was held that the evidence was sufficient to support the verdict in favor of plaintiff, but the judgment was reversed because of an instruction which, in the opinion of the appellate court, took from the jury a question of fact. 10 Cal. App. 484, 102 Pac. 558.

Respondent contends that, so far as the facts are concerned, the decision on the first appeal is the law of the case, inasmuch as the evidence is substantially the same—in deed, differs only in the fact that some additional testimony favorable to plaintiff was introduced. It would occupy about as much time and space to determine whether or not respondent's contention is sound as it would to determine the facts for ourselves. Therefore, we shall not accept the law of the case upon the facts as having been established. Plaintiff brings the action to recover damages for personal injury while at work as a laborer digging a trench for defendant in the streets of Oakland. The injury complained of occurred July 5, 1904.

Paragraph 4 of the complaint is as follows: "That the said excavation and construction of said trench, at said time and place, was dangerous to the life, body, and limbs of plaintiff, while employed as aforesaid, unless the walls and banks of said trench were braced and secured from falling or caving in on plaintiff while standing in said trench, and engaged in his said employment as aforesaid; that said danger consisted in the liability that the walls and banks might fall and cave in on plaintiff while working in said trench, because of the character of the soil, as hereinafter stated; that said danger to plaintiff, while working and employed as aforesaid, unless said walls and banks were braced and secured as aforesaid, was at all times known and familiar to said defendant and its said superintendent and vice principal, but that despite said knowledge of said danger to plaintiff, while working and employed as aforesaid, said defendant and its said superintendent and vice principal did not brace, or in any way secure, said walls and banks from falling upon, or caving in on, plaintiff while engaged in said trench as aforesaid; but, on the contrary, willfully, knowingly, and carelessly failed and neglected to brace, or in any way secure, said walls and banks from falling or caving in on plaintiff while working as aforesaid; that, had said wall been braced and secured as aforesaid, the injuries to plaintiff here-

inafter alleged could, and would, not have happened."

Then follow averments particularizing at considerable length the character of the work plaintiff was doing, his inexperience in similar situations, the circumstances attending the accident, the character of the soil and its liability to cave, plaintiff's ignorance of the danger, defendant's failure to provide against the injury that befell plaintiff by carelessly and negligently failing to brace the walls of said trench to prevent their caving in and in failing to inform plaintiff of the dangerous character of his said work, by reason of which plaintiff "was violently jammed and pinned by said falling wall against the opposite wall of said trench, and suffered great bodily hurt and injury by the fracture in two places of the pelvis bone."

Paragraph 7 is as follows: "By reason of said injury received through the negligence and carelessness of defendant as aforesaid, said plaintiff has been ever since said time sick, sore, lame, prostrated, and rendered incapacitated from performing any labor, and from attending to any kind of business or duty whatever, and has undergone great physical suffering and agony, and will continue lame and incapacitated from performing any labor for the rest of his life." The answer is a specific denial of most of plaintiff's averments, except as to the fact that he was injured while working for defendant. As a separate defense, it is alleged that plaintiff and his fellow employees working in said trench were at all times cautioned to brace the walls and that defendant furnished lumber and materials for that purpose; that it was part of plaintiff's duty to prevent the walls of said trench from falling by bracing the same, of which plaintiff was fully aware, and that the accident resulted from plaintiff's neglect in this regard, and that he voluntarily assumed all risk. It is also alleged that the injury to plaintiff was not the result of the earth falling on him but of his struggle "to free himself without the assistance of his fellow employees, although cautioned by them to allow them to assist him and extricate him from the soil."

It developed at the trial that the walls of this trench were weakened by another parallel trench which had the year before been dug alongside and near to the trench in question which defendant well knew, and of which plaintiff was ignorant, and that this fact contributed to the accident. An amendment to the complaint was allowed to conform to these facts. An answer was also filed denying the averments of the amendment.

Plaintiff was employed by defendant in digging a trench which defendant was sinking, in Oakland, for the purpose of laying its pipes. The ditch began near First street, came up Brush to Second, then easterly on Second to Grove street, thence southerly on Grove. On Brush and Second streets the ditch was braced, and on Saturday, July 2,

1904, the ditch on Grove street had been run about 30 or 40 feet. It was between 4 and 5 feet deep and about $3\frac{1}{2}$ feet wide. The men ceased work Saturday afternoon, the third was Sunday and Monday, the fourth, was a holiday. They resumed work on Tuesday morning. After the men had been working about two hours, the eastern bank of the ditch gave way, catching plaintiff, who was working in the trench. This ditch was parallel to a wall surrounding the defendant's property, about three feet away. A year or more prior to digging the trench a ditch had been dug between it and the wall parallel thereto for the purpose of laying a gas pipe about two inches in diameter. Kirk was superintendent of the company; "did the employing and discharging of men and directed the work generally when present." Welling was foreman, and, in Kirk's absence, "directed and discharged the men." Welling testified: "There was a carpenter employed by the company at that time. His name was Dillon. His work was to do such carpenter work as might be necessary in bracing up and timbering the ditch that should be braced. As a matter of fact, this ditch on Grove street where Ryan was hurt was not timbered up or braced. We timbered all the ditch on Second street as we came along Second street for two blocks." Dillon testified: "This ditch that was being constructed from Brush street up to Grove and down Grove street, in 1904, I braced it, or cribbed it, to keep it from caving. I know there was an accident July 5, 1904. I came up there that morning. I did some work there that morning. I went there to see if they wanted any more bracing put in. I saw Mr. Kirk, and Mr. Welling, I think, was there. I asked Mr. Welling if he wanted any more bracing done, and he said he did not think it was necessary. I don't think there was any lumber there that morning to do the cribbing. After Mr. Kirk told me that, I went on over to another job I was looking after. I didn't return until after the accident. I was not there at the time of the accident." On cross-examination he testified: "I don't know as I know precisely what the foreman said. Mr. Kirk said he didn't think it would need any bracing there, it was getting shallower, so I went over to the purifiers. * * * Mr. Welling never gave me any instructions when Mr. Kirk was there, otherwise he acted in the capacity of foreman." There is conflict in the evidence as to whether there was cribbing material at or near the trench where plaintiff was at work. There was evidence justifying the jury in finding that such material was not there. And the fact that Kirk and Welling concluded that no bracing was necessary would account for there not being any material on hand to do the bracing. Moreover, the evidence showed that it was no part of plaintiff's work or duty in performing his task to do this bracing. Dillon was specially employed to do this under the

direction of either the superintendent, or, in his absence, of the foreman, and their relation to the work was such as not only gave them authority to determine whether cribbing should or should not be used as their judgment might dictate, but devolved this duty upon them.

[1] Nor can we admit the soundness of defendant's argument that Kirk and Welling were fellow servants with plaintiff, thus giving effect to the rule in such cases, and relieving the defendant from liability. That the place in which plaintiff was working was dangerous is not seriously disputed; that he had no warning of the danger, except such as his own judgment would suggest to him, is not questioned; that the superintendent knew of the danger is manifest from the fact that he caused the trench to be braced until Grove street was reached; and it was by his direction that the ditch along Grove street was not cribbed.

[2] Plaintiff had nothing to do with this part of the work except as directed by the superintendent or foreman. His work was with the pick and the shovel, and he had a right to assume that the superintendent was guarding his safety in the place where he was working so far as this particular work of cribbing or bracing was concerned. We entertain no doubt from the facts disclosed in this case that Kirk certainly, and we think, also, Welling was the agent of defendant, or its vice principal.

[3] What was said in *O'Connell v. United Railroads*, 124 Pac. 1022, 1030, is equally applicable here: "It may be said to be true that in a general sense, or generally speaking, the motorman and conductor of an electric work car are fellow servants, but the books are full of cases showing where one fellow servant, in the discharge of a particular duty for his employer, may become, by reason of the peculiar nature of such duty, the master's agent so as to bind the latter for any damage resulting from its negligent execution. The rule is that, where the master owes a duty to his employé, he cannot escape responsibility for its proper performance, or liability for an injury to one servant occasioned by a failure to perform such duty, by delegating its performance to another servant. *Tedford v. Los Angeles Elec. Co.*, 134 Cal. 79 [66 Pac. 76, 54 L. R. A. 85]." In the *Tedford* Case the court said: "The fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer—sometimes called a vice principal. In such case negligence of the servant is the negligence of the principal, for which the latter must answer." (Citing cases).

There was evidence that the parallel ditch referred to weakened the bank and added a further danger to the workmen on the ditch being dug and had a tendency to cause the caving. This was known to defendant, and was unknown to plaintiff. He had no special

knowledge or experience in ditch digging either along the streets of Oakland or elsewhere. It is contended by appellant that "where the place in which the employes are working is made by the employes themselves, and material suitable in quantity and quality to make it safe and suitable tools and competent men to assist are furnished by the master, if the place be not made safe through the omission to use or negligent use of such materials even though by a foreman or even by a superintendent, the negligence is that of a fellow servant, for which the master is not responsible." *Callan v. Bull*, 113 Cal. 593, 605, 45 Pac. 1017, *McDonald v. Hoffman*, 10 Cal. App. 515, 102 Pac. 673, *Kerrigan v. Market St. Ry. Co.*, 138 Cal. 506, 71 Pac. 621, are cited in support of this contention. In *Callan v. Bull* it was held that: "If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation." In that case plaintiff and other workmen were building a jetty and the place where the work was to be done was prepared by the laborers themselves, for which suitable materials were supplied. In *McDonald v. Hoffman* plaintiff was one of a number of carpenters "engaged in the same general work in and about the construction of a building and warehouse." It became necessary for the workmen to construct a scaffold or platform on which to work. All of the materials necessary for the construction of the platform were there at their hands. *Kerrigan v. Market St. Ry. Co.* was a case where the plaintiff and others were engaged in loading ties on a platform car and the ties were held in place by stakes, on the front and sides of the car, which were made and adjusted by the men themselves from material at hand. It is not difficult to perceive that the facts in those cases were very different from the facts here. Neither *Kirk*, *Welling*, nor *Dillon* was engaged in the same work that plaintiff was doing, except in the most general way. They were especially charged with the duty of determining when and where the trench required bracing and to attend to having it done. Plaintiff's only duty was to do the work to which he was assigned, namely, to shovel dirt out of the trench. Besides, if there was any duty put upon him to do the bracing, the jury found on sufficient evidence that materials for that purpose were not furnished.

In this connection it is urged by appellant that the place of work changed with the work and that no omission of duty owed by the defendant to plaintiff is shown, and hence the verdict should have been for defendant. 2 *Labatt on Master and Servant*, § 588, is cited, where the author says: "Where the

work is of such a character that, as it progresses, the environment of the servant must necessarily undergo frequent changes, the master is not bound to protect the servants engaged in it against the dangers resulting from those changes." It cannot be said that the place of the work changed in the sense contemplated by the cases cited in support of the text so far as any danger attended the work. And had defendant continued to protect the workmen by bracing the sides of the trench as it had done up to the day before the accident, no injury would have occurred.

[4] The rule contended for does not apply in this case because materials were not furnished the men in the ditch to protect themselves, and there was a hidden danger in the covered ditch that had been dug alongside of the ditch in which plaintiff was working known to defendant and unknown to plaintiff, and there was evidence that this old ditch contributed to the caving in of the walls.

[5] Furthermore, the question whether it was defendant's duty to brace the trench was a question for the jury. "Whether the depth of the soil, the hidden causes known only to defendant, and the character of the soil, were such facts as to make it the duty of the defendant to brace the trench, was a question peculiarly for the determination of the jury." 10 Cal. App. 490, 102 Pac. 560, *supra*.

Error is claimed in the giving of the following instructions:

"(16) If you find that the plaintiff is entitled to recover, you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent, and severity of his injury or injuries, if any, the extent, degree, and character of suffering, mental or physical, if any, its duration and its severity, and medical expenses incurred or paid, the cost of nursing and attendance, if any, and the loss of time and value thereof, and the loss of earning capacity, if any. You may also consider whether the injury, if any, was temporary in its nature, or is permanent in its character. And from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

"(17) If you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury he has sustained. The elements entering into this damage are the following: (1) Such sum as will compensate him for the expenses he has incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding the amount alleged in the complaint.

(2) The value of his time during the period that he was disabled by the injury. (3) If the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power. (4) Such reasonable sum as the jury may award for pain suffered or to be necessarily suffered from the injury. The first two of these elements are the subject of direct proof, and are to be determined by the jury on the evidence they have before them. The third and fourth elements are from necessity left to the sound discretion of the jury, but the damages in all cannot exceed the amount alleged in the complaint."

Appellant seeks a reversal because the court in these instructions "makes no distinction between mental and physical suffering," and, furthermore, that "the vice of all this is that the complaint does not charge any mental suffering. It merely alleges past physical suffering, and does not allege future pain, physical or mental."

[6] Instruction No. 16, we think, should be read as in the past tense, and as referring to past physical and mental pain. The courts apply a different rule where the plaintiff sues in a representative capacity and where the victim of the injury is the plaintiff.

[7] In the latter case damages for physical and mental suffering may be recovered. *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 116, 91 Pac. 522.

Paragraph 4 of instruction 17 is attacked on the ground that it makes no distinction between mental and physical suffering. The rule of damages is laid down in section 3283 of the Civil Code: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." In *Melone v. Sierra Ry. Co.*, supra, the jury were instructed that an element of damage was "such reasonable sum as the jury shall award him on account of the pain and anxiety that he has suffered or *may suffer* by reason of his injuries"; also, that the jury may take into consideration "the physical and mental suffering he may have sustained or *may undergo* in the future by reason of his injuries." These instructions were held error, while it was also held that the true rule was given in an instruction that plaintiff was entitled to "recover not only such damages as he may have suffered, but also 'such damages as by the evidence it is reasonably certain he will suffer in the future.'" The erroneous instructions were condemned because they left out the element of certainty as to the future suffering, whereas the statute allows only such damages as are "certain to result in the future." The language used in the present case is—"pain suffered or to be necessarily suffered from the injury."

[8] "Necessarily" means "unavoidably"; "indispensably." Webster. A thing which necessarily must happen may reasonably be

said to be certain to happen. To say that from a given physical injury physical or mental pain must necessarily be suffered is only another way of saying that it is certain to result. The statute makes no distinction between physical and mental suffering, and, in a case where mental suffering is a proper element of damage at all, the damage is not necessarily confined to the date of the trial but "damages may be awarded * * * for detriment * * * certain to result in the future." So far as concerns damages for pain to be suffered in the future, this court held, in *Sally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 153, 104 Pac. 325, that they are recoverable, and that case had the sanction of the Supreme Court. Mental suffering can hardly be said to be susceptible of direct evidence.

[9] In personal injury cases mental suffering arises out of the physical injury and depends much upon the extent, character, and probable durability of the injury. It may also arise out of the dread of physical suffering reasonably certain to continue in the future; and this, it seems to us, would be something apart and different from the physical suffering itself. If one is conscious that a long period of physical suffering is in store for him, he must necessarily undergo mental anxiety and worry by reason of this feeling. We do not think that mental suffering which may be considered as an element of damages is confined to such injuries as would from their character cause the person to be shunned or would produce a feeling of humiliation and mortification. To be injured so as to cause total blindness would inspire in one's associates only pity and sympathy. But mental suffering would inevitably follow such a calamity, and such suffering would be something more than and apart from that form of mental suffering described as physical pain, referred to in *Merrill v. L. A. Gas & E. Co.*, 158 Cal. 490, 512, 111 Pac. 534, 540 (139 Am. St. Rep. 134), cited by appellant. So of one crippled for life and unable ever to engage in occupations to which he was accustomed, or for which he was fitted, he might well be said to suffer mental pain which is "something more than that form of mental suffering described as physical pain." He may in some classes of injuries no longer suffer physical pain, but his mental suffering may be none the less acute, and may be directly referable to the injury he has received. In the present case, as we shall see, the plaintiff was on crutches at the time of the trial and had been for over six years, and entirely incapacitated to perform physical labor and was still suffering pain from his injuries. He was over 40 years of age, and had no trade, and no sedentary occupation was open to him because his capacity was limited to that of a day laborer. Thus handicapped, his outlook into the world before him could not be otherwise than

accompanied by gloomy forebodings and more or less mental anxiety and suffering.

[10] As mental suffering is something which may be presumed to follow upon a serious injury producing physical suffering and impairment of one's capacity to earn a living, it has been held not necessary to be specially pleaded. There is a distinction between mental impairment and mental suffering. It has been held that in the former case it must be specially pleaded and proven (*Comaskey v. N. P. Ry. Co.*, 3 N. D. 276, 55 N. W. 732); but as said in an instructive opinion in *Gagnier v. City of Fargo*, 12 N. D. 219, 96 N. W. 841, after having pointed out the seriousness of the injury suffered and distinguishing the *Comaskey* Case: "Such evidence clearly shows physical injuries from which physical pain and mental suffering necessarily follow. Mental suffering is the natural and necessary result of physical injury, and equally as much so as physical pain. The physical injury being proved, pain and mental suffering are presumed. The physical pain and mental suffering need not be pleaded nor specially proved, but are taken to follow as a necessary consequence of the physical injury, and to be inseparably connected therewith. There is great uniformity in the authorities on this question"—citing 1 *Sutherland on Damages* (2d Ed.) §§ 419-421, and numerous cases. See 2 *Sutherland on Damages* (3d Ed.) § 421. Mr. Sutherland says: "The jury may consider the case with all its facts, and take into account, not only the physical pain, but also such mental suffering as they are satisfied must have been experienced as the natural result of the wrong done or the injury inflicted." 4 *Sutherland on Damages* (3d Ed.) § 1243, and a large number of cases in footnote. "When bodily pain is caused, mental suffering follows as a consequence, especially when the former is so severe as to create apprehension and anxiety; as where one is conscious of the impairment of his earning capacity." *Id.*

[11] Whatever may be the rule of pleading in this state, the trial in the present case was conducted on the theory that physical and mental suffering were proper matters of inquiry. The pleadings were sufficient to warrant the invocation of the rule that it is now too late to make the objection urged. *Tuffree v. Polhemus*, 108 Cal. 870, 41 Pac. 806; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572; *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091; *Merrill v. Pac. Transfer Co.*, 131 Cal. 582, 63 Pac. 915. The subject of plaintiff's injury, its nature and character, its extent, its probable durability, its effect as producing physical pain and suffering, and, at least by inference, its causing mental suffering, were gone into with great minuteness by quite an array of medical witnesses, without objection from either party. These medical examinations have been going on to some extent ever since

the accident, and were brought down almost to the day of the second trial. No question was raised at the trial that this evidence was outside or beyond the issues. There was evidence that for 6½ years plaintiff had suffered physical pain from his hurt, and was then suffering. Plaintiff testified that he was first taken to the receiving hospital, then to his home, and from there to the Providence Hospital. He was put in splints for a week or two and next in plaster—from the pit of his stomach to his toes, and so remained four or five months, taking medicine daily. "The skin all peeled off from me, every place the plaster was on." For a while he was wheeled around in a chair after the plaster was removed. He then went on crutches. "I carried crutches four or five years. * * * I tried various times to get along without them, I couldn't. When the ditch fell in, I thought I could feel all my bones cracking. I thought it was the last of me. From that time and while I was in plaster cast I suffered pain around my hips, my legs and my knee. Continues yet at times. I feel it here in the groin, in the back, and in my knee. At the time of the accident there was no difference in the size of my legs. There is now. I don't exactly know what it is. The doctors measured them; the left leg is smaller than the right. I was receiving \$2.25 per day at the time of the accident. Since that time I have not been able to do any physical work. I am not able to lift anything. The difficulty seems to be in my back and hips and my leg, and am not able to use a pick and shovel at the present time. If I try to walk up an incline or upstairs, it hurts me in the knee, from the knee up, in my left leg. The hospital bill was \$400. * * * I have never done anything but laboring work. I have no trade." On cross-examination he testified: "These medical examinations have been going on from time to time for the past six years, and up to three weeks ago. Some were made in an endeavor to cure me, others were made for the purpose of ascertaining whether or not I had suffered any fracture."

Dr. James P. H. Dunn and Dr. H. Koford attended plaintiff at the hospital. Dr. Dunn testified: "I determined what his injury was after making an examination of him. * * * He remained in the hospital under my care until the 1st day of January, 1905, I think. I had a bed prepared especially for him, what we call a fracture bed, and the patient couldn't move, and we could not move the patient on account of the fracture of the pelvis, and I had a mattress made with a trap in it. We examined the fractures of the bones under the anesthetic, then put a bandage about the body, about the hip here, and then applied a split here from the axilla to the leg, in order to keep the body at rest and stop any movement of the patient,

* * * when I was sure there would be no danger of abscess forming and then I placed a plaster cast on the patient from here, covering in that whole leg. [Illustrating.] The plaster cast extended from the lower ribs down to the toes of the left foot. * * * When I examined him under the anesthetic, I found a fracture of the pelvis. * * * I am positive that neither of these fractures which I found united. I am positive that they did not. * * * I have examined him recently. I am still of the opinion that there is no union. I have examined him within a week. I will say that I do not think it advisable to perform the operation which is possible to create a union there on account of the danger, and then you don't know, you are not positive what result you will get. In my opinion Ryan in his present condition is not capable of doing any physical labor. In my opinion his injuries are permanent. Those fractures which he had are very rare. He was extremely tender over the left pubic bone, and he is tender now. There is a tenderness there now. That discoloration I spoke of extends to the thigh. My charge for treating was \$1,000. There were a number of physicians who saw the patient with me." Dr. Koford testified, corroborating the opinion expressed by Dr. Dunn. He testified: "After the cast was removed, we found him practically the same as when we put it on. The discoloration was gone, but he had his pain on pressure. He was unable to stand on his leg. He complained of pain. He was in the hospital six months altogether. When he left, he walked with crutches. * * * I noticed no difference in the legs of Ryan when he went into the hospital. They are not the same now." The left leg, he testified, is smaller and shorter than the right. Dr. O. D. Hamlin testified: "There was an apparent shortening or tilting of the pelvis. * * * I would say that the atrophy in Ryan's left leg was due to injury. From the fact that the atrophy has existed a number of years, I would say that the injury would probably be more or less permanent. Just how permanent or how long that would last it would be impossible to say. I would say that there was a tendency for it to last a very long time." Dr. Hamlin examined him three or four weeks before the trial. Dr. W. B. Coffey examined him. He testified: "I found that Ryan had a defective locomotion and wasting of his left limb, and the apparent motion at the junction of the back with one of the pelvic bones. In addition to that he suffered from an injury to the pubic end of the pelvis." Further describing his condition he said: "Any serious injury that would produce motion in that joint would render the individual practically disabled permanently. It would require a good deal of force to produce a separation at that point, but after the injury was received the slightest motion would permanently disable a man.

It is an uncommon injury." He assisted in an X-ray examination. He testified: "The picture here shows there has been a fracture. It is overlapping here on the left side of the body. Here is a thickening that nature has thrown out to repair the substance, what we call callous. Shows a complete union at that point with a slight overlapping. * * * I had Ryan stand up and walk to see if we could detect any motion at this point that I have previously mentioned and observed his gait. I could not detect any motion. If there is motion and this wasting is still present, and if it is true that he has pain in that point, even without apparent motion, then he is permanently injured. There might be motion there and no one detect it. * * * I do not know whether the man has pain because I cannot question his honesty or veracity. If he has pain (and he so claimed when the doctors were examining him) even if it were without motion, then he is permanently injured, and the man is in a serious condition. I would say worse now than when I examined him before because it has run a longer period." The skill of eight different physicians was sought in an effort to determine more particularly the permanency of plaintiff's injuries. That he had been seriously injured no one questioned. The controversy seemed to be how serious and how permanent was the injury.

[12] In the somewhat conflicting testimony there was ample to justify the jury in regarding plaintiff's injuries as permanent, and that he was incapacitated to do manual labor, and would so continue for an indefinite period of time. We may well imagine plaintiff's mental anxiety and worry and suffering as he was subjected to this antemortem examination by so many doctors, resulting at the best in grave doubt of his ultimate recovery or his ability ever again to earn a living by manual labor.

[13] Defendant's chief reliance for a reversal is that the jury were permitted to consider future mental suffering as an element of damage. When we take into account his physician's fee, \$1,000, and the hospital charges, \$400, and his earning capacity when he was injured at \$2.25 per day for the working days in six and a half years, the difference between that sum and \$7,500, the amount of the verdict, it will appear that the jury were not required to speculate as to future damage. The difference is readily accounted for by the physical and mental suffering he endured for this long period, not to speak of the advance in wages since 1904, which would itself more than make up the difference. From this point of view, assuming that plaintiff is entitled to damages, it seems to us inconceivable that defendant should undertake to escape liability altogether because of an imaginary uncertainty as to the period for which damages were awarded for physical and mental suffering. Without considering

that plaintiff is in all probability disabled for life, the verdict was reasonable, but if this injury is permanent, as the evidence shows it is, he is but poorly recompensed.

We are unable to take any view of the case that will justify a reversal. The judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

(21 Cal. App. 9)

WHITNEY v. ARONSON. (Civ. 1,003.)

(District Court of Appeal, Third District, California. Jan. 13, 1913.)

1. EVIDENCE (§ 457*)—PAROL EVIDENCE—AMBIGUITIES—"WINTER MONTHS."

A lease which provides that the lessor shall furnish heat during the "winter months," but does not show whether the term was used in its technical or popular sense, is ambiguous, and evidence should be admitted to show what was meant; the winter months in a technical sense being December, January, and February, in the popular sense being the cold months, while the astronomer would say that winter extended from the winter solstice, about December 21st, till the vernal equinox, about March 21st.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.*]

2. EVIDENCE (§ 516*)—"STANDARD OF HEAT."

In an action involving the question of heat between a lessor and lessee of offices, an answer to a question, "What is the standard temperature of offices that are required to be heated?" was improperly stricken by the court on the ground that there was no standard; the test being that degree of heat generally recognized and approved by the class of persons engaged in such a building for a similar purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2325; Dec. Dig. § 516.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Sturtevant, Judge.

Action by Arthur L. Whitney against A. Aronson. Judgment for defendant, and plaintiff appeals. Reversed.

N. A. Eisner, C. H. Oatman, and H. W. Philbrook, all of San Francisco, for appellant. Hugo K. Asher, of San Francisco, for respondent.

BURNETT, J. The controversy is between a lessor and lessee. The former insists that rent is due, and the latter that, by reason of the lessor's failure to keep a certain covenant, the lease has been terminated and the lessee absolved from any further obligation. The covenant in question is as follows: "That the lessor agrees to supply the premises with heat during the winter months without cost to the lessee." It is claimed by the lessor that this covenant called for "heat" only during the months of December, January, and February, and that the term could not be extended by parol testimony. On the other hand, the lessee sought to introduce

evidence that the intention of the parties was to provide for the cold season, and not simply for the said three months. The learned trial judge agreed with the contention of the lessor and held that the parties had definitely and clearly expressed their intention in writing, and they must thereby abide, and he therefore sustained an objection to questions asked with a view of showing that the parties attributed a more comprehensive meaning to the term employed, and that the lessor actually so treated the contract, and also that there was a failure to supply heat, when needed, in other cold months.

[1] Assuming that the expression was ambiguous or uncertain, then it is not disputed that "it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." Civ. Code, § 1649. It is also, of course, well settled that, "When the meaning of the language of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties." *Rockwell v. Light*, 6 Cal. App. 563, 92 Pac. 649; *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406.

If the covenant in question admits of varying constructions, there is another rule also to be kept in view, stated by Mr. Justice Shaw in *Stein v. Archibald*, 151 Cal. 223, 90 Pac. 537, as follows: "It is a well-settled principle, applicable to the construction of contracts, that where one construction would make the contract unreasonable, unfair, or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted. It is also a principle of construction, with respect to ambiguous contracts, that the circumstances surrounding and known to both parties at the time of the execution of the contract may be taken into consideration in determining the meaning to be conveyed."

Reverting now to the expression used, can it be said to involve any uncertainty or ambiguity? I am of the opinion that this should be answered in the affirmative for the reason that it does not appear whether the term "winter months" was used in a technical or popular sense. In the common language of the people, the "winter months" are the cold months; but, when they use the language with greater scientific accuracy, they mean the months of December, January, and February. The astronomer, on the other hand, would say that the winter, north of the equator, lasts from the winter solstice, about December 21st, till the vernal equinox, about March 21st. One of the definitions given in Webster's New International Dictionary of the word "winter" is "the season of the year, in any region, in which the noon-day sun shines most obliquely; the coldest

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

season of the year; hence, fig., cold weather." In common parlance the word "winter" is generally so used. In fact, in ordinary conversation, it is perhaps seldom that the term "winter months" is used with the limitation contended for by respondent. I think, therefore, that it cannot be said that the term reveals, definitely and clearly, the intention of the parties so as to exclude parol evidence.

Of course, if we are permitted to invoke the rule of reason or probability, there can be no question as to the result. It is not likely that the lessee of an office in the city of San Francisco, containing a heating plant, would be satisfied with an agreement on the part of the lessor to operate that plant and furnish heat to the office during the months of December, January, and February only. If the heat were confined to those months, it would not be disputed by one familiar with the climate there that, during a considerable period of time, the office would be untenable. It is to be supposed that the parties had in view the necessities of the situation and framed their agreement accordingly. Indeed, it does appear, from the following testimony of defendant, that he construed his covenant as conveying this larger and more reasonable signification: "Mr. Elsner: Q. During what months did you supply heat for that building? Mr. Aronson: A. Any time when it is cold. Q. Any time when it is cold? A. Yes, sir. That is the orders the men have got. We are not stingy with oil. Q. You are accustomed at all times to supply heat? A. Yes, sir." But, as already indicated, the court took a different view of the contract, and it cannot be said that this did not affect the result to the prejudice of plaintiff.

[2] Another ruling of the court in this connection demands consideration. William E. Leland, an expert witness for plaintiff, was asked these questions, "What is the standard temperature of offices that are required to be heated?" and "What is the standard temperature of office buildings?" The court sustained an objection to each, stating, "There is no standard." The agreement was to furnish heat, and that the premises were to be used for offices. The degree of heat was not specified; but it is apparent that the only fair construction of the provision is that plaintiff was to furnish sufficient heat for the contemplated use. It would not do to say that any degree of heat would satisfy the requirement of the contract. It would be equally unreasonable to hold that an excessive amount could be demanded by the tenant. There is also, undoubtedly, a difference in the degree of heat required by different persons to produce comfort, and likewise there is a difference in the requirement for an office and for premises occupied for other purposes. It would seem

that there must be some measure or test to apply to the covenant in question to determine whether it has been observed. It must be the degree of heat generally recognized and approved by the class of persons engaged in that particular business, or, what is probably the same thing, the amount of heat to make him comfortable, required by the average person occupying such a building for a similar purpose. The witness had testified, but the testimony was stricken out, that the standard temperature was about 70 degrees. There would probably be no dissent from this; and unless the court is to take judicial notice of it, as a matter of general notoriety, I think the answer of the witness should have been allowed to stand. Some other interesting questions are discussed by counsel, but it is deemed unnecessary to notice them at this time.

I think the judgment and order should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(21 Cal. App. 33)

CITY OF OXNARD v. BELLAH, City Clerk.
(Civ. 1,237.)

(District Court of Appeal, Second District,
California. Jan. 17, 1913.)

1. MUNICIPAL CORPORATIONS (§ 918*)—CREATION OF INDEBTEDNESS—ELECTION—SUBMISSION OF QUESTION.

A proposition which, as stated on the ballot, submitted to the voters of a city the question whether bonds should be issued in a certain sum for the acquisition, construction, and completion of a municipal street lighting system sufficiently submitted the question whether an indebtedness should be incurred for such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 918*)—BOND ELECTION—VALIDITY.

The statute providing that propositions for incurring indebtedness for more than one object may be submitted at the same election permits the submission of various propositions, though the ordinances in relation thereto be passed at different times; and hence a city bond election was not invalid because called by separate ordinances, even though a single ordinance might have embodied all the propositions submitted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

3. MUNICIPAL CORPORATIONS (§ 918*)—ORDINANCE CALLING BOND ELECTION—SUFFICIENCY.

A city ordinance calling a bond election and providing that the ballots should contain the provision relative to incurring the indebtedness, and that connected therewith should be printed the words "Yes" and "No," sufficiently fixed the manner of voting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. MUNICIPAL CORPORATIONS (§ 918*)—ISSUANCE OF BONDS—AMOUNT—ESTIMATE.

It is not essential that municipal bonds issued pursuant to an authorization of the voters, following an ordinance wherein the cost of the proposed improvements is estimated, shall be for the full amount of the estimate, but the bonds may be issued for a lesser amount if the board of trustees are of the opinion that such an amount only is necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

5. MUNICIPAL CORPORATIONS (§ 927*)—VARIANCE BETWEEN BONDS AND ORDINANCES.

A city clerk could not refuse to sign municipal bonds because they differed from the bonds described in the preliminary ordinances in respect to the time when the bonds and interest thereon were made payable; it not being necessary or material that such time be specified in the ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1940; Dec. Dig. § 927.*]

Original petition for mandamus by the City of Oxnard against G. R. Bellah, as City Clerk. Alternative writ made peremptory.

Chas. F. Blackstock, of Oxnard, and Merle J. Rogers, of Ventura, for petitioner. G. R. Bellah, of Oxnard, in pro. per. I. W. Stewart, of Oxnard, and Hiatt & Selby, of Los Angeles, amici curiae.

PER CURIAM. In mandamus. The alternative writ was issued by this court upon the filing of an affidavit setting forth that the petitioner, a municipal corporation, through its board of trustees, employed certain engineers to assist in making estimates of the cost of a proposed municipal water system for the city; that, after consultation with such engineers, the board of trustees made an estimate that the cost of such proposed water system would amount to \$107,513.76; that thereafter the board, by an ordinance adopted February 6, 1912, determined and declared that the public interest and necessity demanded the acquisition, construction, and completion of such improvement; that the estimated cost of the same is \$107,513.76; that such cost is too great to be paid out of the ordinary annual income and revenue of said city; and that it is the intention of the board of trustees of said city to call a special election for the purpose of submitting to the qualified electors of the city of Oxnard the proposition of incurring a debt in the sum of \$100,000 for the purpose of acquiring, constructing, and completing such municipal waterworks, which ordinance was duly published. Thereafter the board of trustees by resolution called a special election to be held on the 5th day of April, 1912, for the purpose of incurring, on the part of said city of Oxnard, a debt for the purposes set forth in the ordinance above referred to. By section 2 of said resolution it was stated that said proposition, to be voted on at said election, is the following, to wit, the issuing of bonds

of the city of Oxnard in the sum of \$100,000 in accordance with the laws of the state; and further providing for the number and denomination of the bonds and rate of interest they were to bear, and that such interest should be payable semiannually on the 1st day of June and the 1st day of December of each year. On the 13th day of February, 1912, the board of trustees passed another and further ordinance determining that the public interest and necessity demanded the acquisition by said city of a certain other municipal improvement, to wit, the acquisition, construction, and completion of a municipal lighting system, the estimated cost of which is \$31,607.98, which ordinance was duly passed, signed, and published; and an election was to be held in said city of Oxnard on the 5th day of April for the purpose of voting thereat upon the proposition of incurring a debt upon the part of said city for the purpose set forth in said ordinance. By section 2 of said ordinance it was provided that bonds should be issued in the sum of \$30,000, giving the denomination thereof, the rate of interest, and when payable. The substantial form of the bond in each instance was set forth in the ordinance. The ordinance, in relation to the municipal street lighting system, called for an election to be held on the 5th day of April, and provided for the manner in which the votes should be cast, and provided further that said ballots, with respect to said public improvement, should contain the following proposition to be voted on by the voters:

Shall bonds of the city of Oxnard in the sum of \$30,000 be issued for the purpose of the acquisition, construction and completion by said city of Oxnard of a certain municipal improvement, to wit, a municipal street lighting system? . . .	Yes	
	No.	

The proposition, with reference to the vote upon the municipal waterworks system, was in practically the same form. The ordinances further provided that the ballots should be in all respects in accordance with the general election laws of the state of California, in so far as the same apply to a municipal corporation, and that the special election shall be conducted in accordance with the election laws of the state of California, in so far as applicable to municipal corporations. The election officers were duly selected and named, places for voting designated, and notice of said election given. The resolutions, with reference to the two municipal enterprises as to the election, the bonds, and matters connected therewith, were identical. The election, so called, was regularly held, and both propositions were submitted to the voters upon the same day and the same ballot. This pursuant to resolutions of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

board of trustees; and at said election more than two-thirds of the electors voting voted in favor of the issuance of the bonds of both kinds, and a canvass of the vote was regularly held, and such result declared. Thereafter the board of trustees duly adopted an ordinance providing for the issuance of the bonds for said improvements, directing the signing thereof by its officials, the sale thereof, and the publication of the proceeds for the purposes expressed in the general intention; that said city, through its boards, caused to be prepared and presented said bonds, signed by the president and treasurer of said city, as by the ordinances provided, and presented the same to said respondent Bellah, the clerk of said city, with a demand that he countersign said bonds, as by the ordinances theretofore required, which the said clerk fails, declines, and refuses to do. It is further made to appear that the bonded indebtedness is within the limits established for the creation of municipal indebtedness; and provision has been made for the proper sinking fund and the levying of taxes for the payment of said bonds. A writ of mandate is asked directing the city clerk to countersign said bonds that the same may be utilized for the public purposes intended.

Respondent Bellah justifies his action in refusing to countersign said bonds upon the following grounds: First, that the proposition of incurring a debt has not been submitted to the voters; second, that two elections were called, and only one was held; third, that the ordinance calling the election did not fix the manner of voting for or against the debt; fourth, that the ballot prescribed by the ordinance was not used at the election; fifth, that notice was not given as required by section 4459 of the Political Code; and, sixth, that the amount of the bonds differed from the estimate upon which the necessity for the incurring of an indebtedness was based.

[1] We see no merit in the contention that the incurring of a debt has not been submitted to the voters. It is clear that the authority to issue bonds evidencing a debt was submitted, and that the voters directed the issuance thereof, the effect of which would be to create and establish an indebtedness; and it should follow that a proposition to issue bonds evidencing a new and independent indebtedness is a proposition to incur an indebtedness, and comes within the purview of the statute which provides that the proposition of incurring a debt for the purposes set forth in said resolution, and no question other than the incurring of an indebtedness for the purpose, shall be submitted. There is presented no question with relation to the renewal of an existing indebtedness by new evidence, which question was before the court in the case of *City of Los Angeles v. Teed*, 112 Cal. 327; 44 Pac. 580.

[2] The statute provides that propositions

of incurring indebtedness for more than one object or purpose may be submitted at the same election. We think this statute, properly construed, permits the submission of various propositions involving the creation of indebtedness, even though the ordinances in relation thereto be passed at different times, and that the election is not invalidated because of separate ordinances calling the election, even though a single ordinance calling such election might embody all of the propositions to be submitted. We are unable to conceive how any misunderstanding could arise through the call for election by separate ordinances. The proceedings in this case calling the election seem to have been substantially within the statute.

[3] The statute provides that the ordinance calling an election shall fix the manner of voting for or against the proposition submitted. The ordinances under consideration, we think, did provide such manner. They provided that the ballots should contain the proposition relative to incurring the indebtedness, and that connected therewith should be printed the words "Yes" and "No." This is the manner and form provided by the general election laws of the state for the submission of public questions to the electors, and, to our minds, clearly fixing the manner of voting for or against the propositions. There is nothing in the record indicating that there was any material variance between the form of ballot prescribed by the ordinances and the one actually used. The affidavit discloses, without contradiction, that the ordinances were duly and regularly passed. This contemplates a due performance of all acts in the mode and manner provided by law.

[4] The ordinances declared in apt language what was the estimated cost of each improvement. This must be accepted as a declaration and finding that such estimates had been previously made. The law provides no particular manner of fixing estimates. *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722. We do not construe the statute as making it obligatory upon the trustees to issue bonds for the full amount of the estimate. In our opinion, bonds may be issued for a lesser amount, if in the opinion of the board such amount only is necessary for the accomplishment of the purpose.

[5] Finally, it is claimed by respondent that the bonds differed from those described in the ordinances. This difference is only in relation to the time when the bonds and interest thereon are made payable—a matter not material or necessary to be included in the call for election or other preliminary ordinances. It is a matter for determination by the board of trustees, after authority to issue is given. *City of Santa Barbara v. Davis*, 6 Cal. App. 342, 92 Pac. 308.

As a summary, then, we feel constrained to hold that the matters and facts alleged and

established by the affidavit and record evidence such a compliance with the law, in all material respects, as to justify us in holding that the validity of the bonds is established, and that respondent's refusal to countersign was an omission to perform a plain ministerial duty devolving upon him by law.

The alternative writ of mandate is made peremptory.

(21 Cal. App. 30)

Ex parte HART. (Cr. 277.)

(District Court of Appeal, Second District, California. Jan. 16, 1913.)

1. HABEAS CORPUS (§ 99*)—JURISDICTION—ADOPTION OF CHILD.

The Court of Appeal, on habeas corpus by parents to recover the custody of a child claimed to be illegally restrained by respondents, who seek to adopt the child as an abandoned child, has no jurisdiction to determine whether the best interests of the child demand that it be given to petitioner or respondents, but only to determine the right of present custody; the superior court alone having jurisdiction in adoption matters.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.*]

2. ADOPTION (§ 7*)—CONSENT OF PARENTS—RELINQUISHMENT OF CHILD—"ABANDONMENT."

A father's relinquishment of a minor child, without the mother joining therein, would not operate as an "abandonment" of the child; Civ. Code, § 224, as amended by St. 1911, p. 899, requiring a relinquishment to be executed by both parents, unless there has been a previous adjudication of adultery or cruelty resulting in divorce—the fact that adultery of the mother was subsequently adjudicated not validating such relinquishment.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559.]

In the matter of the application of Lester Hart for habeas corpus. Writ granted.

Frank C. Dunham, of Pasadena, for petitioners. G. F. McCulloch, of Los Angeles, for respondents.

PER CURIAM. The petition for the writ is signed by the father and mother of Lester Hart, an infant, alleging their parentage and the illegal restraint by respondents of said child.

The record discloses these facts: The parents of Lester Hart separated in February, 1912, on the 3d day of which month the father, without the mother joining therein, executed an instrument in writing to the Children's Home Society, through which he attempted, because of his inability to properly provide for and bring up said Lester Hart, to relinquish and abandon to said society his right of custody, services, and earnings of said child, authorizing said society to place said child in a home, at its discretion, and waiving all notice of proceedings in adopting and consenting to adoption. It further appears that before the date of such attempt-

ed relinquishment, to wit, on the 1st day of February, 1912, the husband instituted an action for divorce, charging his wife with adultery; than on the 25th day of April, 1912, an interlocutory decree of divorce was granted, from which no appeal has been taken; that thereafter in June the parents became reconciled and in September resumed their marital relations; that in December following, upon their application, the interlocutory decree of divorce was vacated and the action dismissed, and on the same day the parents remarried. Custody of the child, at a date not appearing, was surrendered by the Children's Home Society to respondents, who, by the return to the writ, claim that under the facts of the case the child was an abandoned child to which the parents had relinquished all right, and that the best interests of the child demand that they be permitted to adopt the same.

[1] In this proceeding this court is not called upon, nor, in our opinion, has it jurisdiction or authority, to hear evidence with reference to the best interests of the child—a matter which might be for consideration before the superior court, which court alone has jurisdiction in matters of adoption. Upon this application the only question for consideration is as to the right of present custody.

[2] We think it clear that under the facts of this case such right of custody is in the parents. The mere relinquishment by the father, without the mother joining therein, could have no effect, except, where there had been a prior adjudication with reference to her adultery, under section 224 of the Civil Code, as amended April 12, 1911. Stats. 1911, p. 899. Here there had been no adjudication, and at the date of the execution of the instrument the mother possessed the right to be heard and to resist any attempt to relinquish parental control of the child to the Children's Home Society. The subsequent adjudication of her previous adultery would not have the effect to destroy that right. The child, then, was in the custody of the Children's Home Society by the sufferance of the father alone, without the mother's consent; and respondents, by assuming custody under authority of the Children's Home Society, acquired no right as against the mother. In *Ex parte Jonie Becknell*, 119 Cal. 496, 51 Pac. 692, it is said by our Supreme Court: "Parents are the natural guardians, and cannot be deprived of their right to the care, custody, society, and services, except by a proceeding to which they are made parties, and in which it is shown that they are unfit or unwilling or unable to perform their parental duties." Further, under section 224 of the Civil Code, a relinquishment, duly signed and acknowledged, must be executed by both parents, unless there has been a previous adjudication of adultery or cruelty, on account of which a divorce has been granted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It affirmatively appears that the attempt to abandon by the father had not extended to the period of a year, nor had the society for a year cared for the child and supported it, which questions might arise in proceedings for adoption, but do not arise where, as in this case, no proceedings for adoption have been instituted, and the present custody of the child is alone for consideration.

The writ is granted.

(20 Cal. App. 737)

PITZEL v. MAIER BREWING CO.

(Civ. 1,187.)

(District Court of Appeal, Second District, California. Dec. 30, 1912. Rehearing Denied by Supreme Court Feb. 28, 1913.)

1. PLEADING (§ 209*)—SPECIAL DEMURRER—EFFECT.

Where a pleading states a good cause of action or a good defense, the effect of sustaining a special demurrer to part thereof is the same as though motion to strike out had been sustained, and hence, in an action to recover over payments on account, claimed to have been made through mistake, sustaining a special demurrer to a counterclaim did not affect the issues framed upon defendant's denials of the allegations of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 520; Dec. Dig. § 209.*]

2. PLEADING (§ 142*)—SUFFICIENCY OF COUNTERCLAIM.

In an action to recover money overpaid on account, a counterclaim based on a note secured by deed of trust on real property was insufficient, where it failed to show release of defendant's obligation to foreclose the mortgage in an independent action before pursuing a personal action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. § 142.*]

3. PLEADING (§ 142*)—SET-OFF AND COUNTERCLAIM—IMPROPER JOINER.

A counterclaim setting up claims for goods sold, for rents, and for money lent is demurrable under Code Civ. Proc. § 444, as improperly joining several causes of counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. § 142.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Dan Pitzel against the Maier Brewing Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

For opinion of Supreme Court denying rehearing, see 130 Pac. 706.

Mott & Dillon, of Los Angeles, for appellant. C. F. Culver, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover a large sum of money alleged to have been paid to defendant through mistake. The cause of action as alleged rested upon a certain written contract which in the part most material to the alleged right of recovery referred to the purchase by plain-

tiff from defendant of beer. In this contract it was agreed that beer sold by defendant to plaintiff should be at the prevailing market price, whereas plaintiff alleged that he had paid the sum of \$8 per barrel for the beer, when, in fact, the market price was \$7 per barrel, and that he made settlement at the rate of \$8 per barrel through misapprehension, and because of lack of information as to the market price of beer, which he alleged was peculiarly within the knowledge of defendant. He further set up that, after an open account had been running for some time, on the 1st day of June, 1909, a statement was rendered showing a balance due defendant of \$5,459.05, that settlement thereof was made, and that the whole of the amount of difference between the market price and the price actually paid was the sum of \$6,200. Defendant made answer to the complaint, which contained specific denials of all of the material allegations thereof. As to the market price of beer, plaintiff in his complaint alleged that such market price was the sum of \$7 per barrel and no more, and defendant in its denials denied that the market price was the sum of \$7. Plaintiff by his allegation admitted that the market price was the full sum of \$7 per barrel and the denial of defendant was sufficient to put plaintiff upon proof as to his allegation that the market price was no more than \$7 per barrel. However, after making denials in the form mentioned, defendant alleged that divers settlements had been made between the parties since on or about the 1st day of May, 1907, at which times it had been mutually agreed that the price of \$8 per barrel was the market price of beer, and that settlements were made accordingly. It was also alleged in the answer that plaintiff at the time said accounts were adjusted and settled well knew that the price of \$8 per barrel was the market price of beer. The plea was also made that the statute of limitations had interposed to bar plaintiff's cause of action, and statement of two counterclaims was then made, one for an alleged indebtedness in the sum of \$6,000 which had been secured by a deed of trust, the second being a claim for the sum of \$1,092 for "goods, wares and merchandise sold and delivered to said plaintiff by said defendant, and for rents of the premises described in the contract and lease set forth in the complaint and for sums of money loaned by defendant to plaintiff, and for sums of money advanced and paid by defendant to and for the use and benefit of plaintiff." To this answer plaintiff specially demurred, first, on the ground that the counterclaims were improperly joined and that the several causes of defense and counterclaim were not separately stated, and that the answer was uncertain in that it could not be told when the various alleged accountings had been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—45

made, or what real property was given as security for the deed of trust, or when or in what manner plaintiff became indebted to defendant in the sum of \$1,002. The further grounds of demurrer were made that in neither of the counterclaims was there alleged facts sufficient to constitute a cause of action. The court made a general order sustaining the demurrer, and, defendant failing to amend its answer, judgment was taken against it by default, and this appeal followed.

[1, 2] By the denials contained in the answer of defendant, issue was made of the material facts alleged in plaintiff's complaint, and these issues were so raised by denials which were sufficiently clear and free from ambiguity or uncertainty. The defense that at various times settlements had been made and the market price of beer agreed upon between the parties we think was sufficiently definite and certain; at least, it was as complete in its statement of particulars as the allegations contained in the complaint referring to transactions had between the parties as to the purchase of beer and settlement made therefor. The grounds of plaintiff's demurrer to the answer were those provided by the Code as special causes of demurrer, and, even though all of such grounds should be held to have been properly taken, still there would remain sufficient in the answer to entitle defendant to require plaintiff to make proof on trial of his allegations. Where a pleading contains sufficient to make a good cause of action or a good defense, the effect of sustaining a special demurrer thereto is no different than that which results where a motion to strike out has been granted. Where such a demurrer is sustained and the party affected fails to amend, then the portions of the pleading so specially demurred to will be taken out of view for the purposes of trial and be deemed to have been stricken out. However, the order sustaining a special demurrer should be specific in pointing out what portions of the pleading are to be affected by it. *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135. The decision in the case of *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 66 Pac. 255, cited by respondent, does not in our opinion make any different statement of the law than that contained in the case first cited. We are of the opinion that both of the alleged counterclaims were properly subject to objections raised by the demurrer.

In the first cause of counterclaim it was alleged that plaintiff and his wife executed in favor of defendant their promissory note for the principal sum of \$8,000, payment of which had been secured by a "deed of trust of certain real property in the city of Los Angeles," and which note was past due and had not been paid. By these allegations it appeared that real property had been made

holden as security for the payment of this debt. It was alleged that the form in which security was given was by deed of trust, but the nature of the contract was not set forth. Where real property is charged as security for the payment of a debt, it is so charged ordinarily by a contract of mortgage. Whether the instrument denominated by defendant a "trust deed" conveyed title to a trustee with power of sale, or whether it was such in terms as to require an action of foreclosure to be brought in order to have subjected the security to the discharge of the debt, cannot be told from the allegations of the answer. If the latter action would be required to be resorted to in case of default in payment of the promissory note, then the counterclaim could not be set up in this action. Section 726, Code Civ. Proc. Therefore, in order that facts sufficient to constitute a good cause of counterclaim be set up, it should have been made to appear that the contract of security was such as to relieve the creditor from the obligation of exhausting his security before pursuing a personal action. As the Supreme Court has intimated in the case of *Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745, even though a contract for security of this nature lacks the essentials of a mortgage, still the engagements of the parties may be such as expressed in the terms of their contract—call it a trust deed or what not—as to entitle the debtor to insist that the creditor shall first resort to the security in obtaining satisfaction of the debt. The demurrer on the general ground to this alleged cause of counterclaim we think should be sustained.

[3] The second alleged counterclaim contained the statement of several causes of counterclaim, one for goods, wares, and merchandise sold, one for rents, and one for money loaned and advanced. These causes should have been separately stated, and that objection was properly raised by the demurrer. Section 444, Code Civ. Proc.

The judgment is reversed, with direction to the trial court to overrule the demurrer to defendant's answer, except as to the alleged causes of counterclaim set up in said answer and as to which to sustain the demurrer of plaintiff.

We concur: ALLEN, P. J.; SHAW, J.

(20 Cal. App. 737)

PITZEL v. MAIER BREWING CO.
(L. A. 2,931.)

(Supreme Court of California. Feb. 28, 1913.)

PLEADING (§ 224*)—SPECIAL DEMURRER—EFFECT OF SUSTAINING.

Treating a special demurrer as being limited to some particular detailed part of an answer as a counterclaim, the answer, also, denying the allegations of the complaint, sus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tention of the demurrer does not affect the remainder of the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 568; Dec. Dig. § 224.*]

On petition for rehearing. Petition denied.

For opinion in District Court of Appeal, see 130 Pac. 705.

PER CURIAM. The petition for a hearing in this court after decision by the District Court of Appeal of the Second District (130 Pac. 705), is denied. In denying such petition, we deem it proper to say that we consider the following portion of the opinion, viz: "Where a pleading contains sufficient to make a good cause of action or a good defense, the effect of sustaining a special demurrer thereto is no different than that which results where a motion to strike out has been granted. Where such a demurrer is sustained, and the party affected fails to amend, then the portions of the pleading so specially demurred to will be taken out of view for the purposes of trial and be deemed to have been stricken out"—correct if the term "special demurrer" be limited to a demurrer to some particular detached portion of the answer, as for instance, if a demurrer be limited to a counterclaim set up in the answer, the answer also denying the allegations of the complaint, the sustaining of the demurrer and failure to amend would not affect the remainder of the answer.

The opinion and judgment show that the term "special demurrer" was used in this limited sense in the opinion.

(164 Cal. 718)

NAKAGAWA v. OKAMOTO. (L. A. 2,805.) (Supreme Court of California. Feb. 19, 1913.)

1. BILLS AND NOTES (§ 92*)—CONSIDERATION.

Where defendant was not a party to an agreement between other members of an association, pursuant to which notes were given to the association binding the parties to pay the notes, if they breached their agreement to deal with a certain market, and did not receive any benefit in consideration of his note, there was no consideration to support it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-212; Dec. Dig. § 92.*]

2. BILLS AND NOTES (§ 496*)—ACTION BY ASSIGNEE—BURDEN OF PROOF.

The burden is on an assignee suing upon a promissory note to show an assignment to him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1669-1674; Dec. Dig. § 496.*]

3. ASSOCIATIONS (§ 18*)—AUTHORITY OF OFFICERS.

That a member of an unincorporated association, who indorsed a note executed to the association, was also its treasurer, would not make the assignment of the note one by the association, especially where he did not sign as such.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 31-35; Dec. Dig. § 18.*]

4. ASSOCIATIONS (§ 18*)—POWERS OF OFFICERS.

The assignment of a note is not within the usual powers of a treasurer of an unincorporated association.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 31-35; Dec. Dig. § 18.*]

5. DAMAGES (§ 85*)—PENALTY.

If a provision in a contract is in the nature of a penalty and not liquidated damages, it is not enforceable; only the actual damages sustained being recoverable in case of breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. § 85.*]

6. DAMAGES (§ 77*)—LIQUIDATED DAMAGES OR PENALTY.

In determining whether a provision in a contract is for liquidated damages or a penalty, the intention of the parties, as shown by the entire contract construed in view of the circumstances, should be determined.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 156; Dec. Dig. § 77.*]

7. DAMAGES (§ 78*)—CONTRACTS—LIQUIDATED DAMAGES.

Defendants were members of an unincorporated association known as the "Japanese Farmers' Association" and were engaged in raising produce for sale in the city markets. There were two markets in the city, known as the "Ninth" and "Third" Street Markets, and they executed an agreement by which they should deal only with the Ninth Street Market, the agreement reciting that it was necessary that they work for the success of that market and protect it, and in order to show their good faith, and that none of them might be persuaded to return to the Third Street Market, each of the parties agreed to put up \$500 in promissory notes which should become due in case either of them violated the agreement by returning to the Third Street Market. Held, that the provision making the notes due upon breach of the agreement was a penalty and not liquidated damages, so that the notes executed pursuant thereto were not enforceable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Consolidated action by E. Nakagawa against M. Okamoto; by M. Yamaguchi against F. A. Kasuyama; by K. Akutagawa against U. Abe; and by K. Akutagawa against M. Matsuno. From a judgment for plaintiff in each case, and an order denying a motion for new trial, several defendants appeal. Reversed.

Ingall W. Bull, of Los Angeles, for appellants. Isidore B. Dockweiler and Walter R. Leeds, both of Los Angeles, for respondents.

ANGELLOTTI, J. The four actions above specified were tried together, all involving the same questions. The defendant in each action appeals from a judgment given in favor of the plaintiff therein and from an order denying his motion for a new trial. The motions for a new trial in the four cases were heard upon a single statement, and the record on the four appeals is contained in one transcript. The original complaints were in the usual form of a complaint on a promissory note, each alleging substantially: That

on or about July 22, 1909, the defendant executed and delivered to the "Japanese Farmers' Association" his promissory note in the following words, viz.: "Los Angeles, Cal., July 22, 1909. One day after date I promise to pay to the order of Japanese Farmers' Association, five hundred dollars, for value received, with interest at per cent. per from until paid, both principal and interest payable only in United States gold coin, and in case suit is instituted to collect this note, or any portion thereof. promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees, in said suit. \$500.00." That no part thereof has been paid. And that prior to the commencement of the action the Japanese Farmers' Association duly transferred and sold said note to plaintiff. The answer in each case, among other things, denied the alleged transfer of the note to the plaintiff therein, and set up as a defense want of consideration. The trial was commenced upon these pleadings.

The evidence developed the fact that the circumstances attendant upon the execution of the notes were substantially as follows: In June, 1909, there were located in the city of Los Angeles two market houses, one known as the Third Street Market and the other as the Ninth Street Market. At that time there was a large number of Japanese farmers engaged in raising garden vegetables to be sold in the markets of said city, many of whom were members of what was called the Japanese Farmers' Association. This body was an unincorporated association, and, so far as the record shows, had no business or purpose defined by any agreement of any kind or character, or any articles of association whatever, was not engaged in business of any kind, and had no property. The president testified that he could not explain "what it is." There is absolutely nothing in the record to indicate what were the duties or powers of any of the officers thereof. Prior to June, 1909, most of the Japanese farmers so associated were doing their individual business and selling their produce at the Third Street Market. In that month they agreed among themselves that they would move to the Ninth Street Market, and discontinue doing business at the Third Street Market, and they so did. Some of them purchased stock of the corporation conducting the Ninth Street Market. After this, while these Japanese were so established at the Ninth Street Market for the sale of their produce, some of them owning stock in the corporation conducting the same, a so-called agreement in writing was signed by some 80 of them, including, according to some of the evidence, three of the defendants. It was stipulated that defendant Matsuno never signed this paper and had no knowledge thereof. The so-called agreement, as shown by an alleged reproduction thereof from the memory of the person who prepared it, entered upon the

minutes of the Japanese Farmers' Association, was as follows: "Agreement. We, the undersigned, since moved to the Ninth Street new market, we must pray for the success of the said market, and it became necessary to provide for the expansion of the said market. Therefore, each of us agrees to protect new market and furthermore in order to show their good faith, not to be persuaded by the Third Street old market under any inducement, each of us hereby agree to put up five hundred dollars in promissory notes, and at the same time it is agreed that in case of violation of the agreement, the note at once become due; and it is understood and agreed that there would be no objection for the members of the association to attach the property. In witness whereof, each of us do hereby sign our names."

The so-called agreement as entered in the minutes was preceded therein by the following preamble: "July 22nd. Since Japanese farmers, Chinese and white farmers moved to the Ninth Street new market the old market is in very lonesome condition. They feel especially in the scarcity of vegetables. They bought up Japanese farmers with money, or bought up farmers by inducing Chinese with money, and attempted to buy with several hundred dollars. We, the Farmers' Association, tried to prevent it, and also in order to prevent it we provided that each member of the association to give a five hundred dollar note payable one day after date, and after each signed an agreement we took the note. The agreement and the note are as follows." The notes in suit were signed by the defendants except Matsuno solely in pursuance of this so-called agreement, and there was no other consideration therefor. So far as Matsuno's note is concerned, there is no basis whatever for any claim that there was a sufficient consideration. Subsequently, in the latter part of August, 1909, each of the defendants, being dissatisfied with the conditions existing at the Ninth Street Market, left the same, and re-established himself for the sale of his produce at the Third Street Market. Thereupon T. Izumi, who testified that he was the treasurer of the Japanese Farmers' Association, indorsed these notes to the respective plaintiffs. The indorsement in the first case, the others being similar in form, was as follows: "Pay to F. Nakagawa, Japanese Farmers' Ass'n. By T. Izumi." Izumi testified substantially that he was never formally directed or authorized to make any such transfer. He said that "the board of directors have nothing to do with the assignments in these cases," and that "there wasn't any meeting about it," and he did not intimate that he had any authority to transfer any property of the association.

At the close of the trial, the plaintiffs were allowed, over the protest of the defendants, to file amended complaints, setting up the so-called agreement, according to their construction of the same, and the notes, together

with the circumstances under which it was claimed the agreement was entered into and the notes were given, and asked for judgment on the notes as specifying the amount of damage agreed upon by the parties for a violation of the agreement. It was stipulated that the allegations of the amended complaints should be deemed denied by the defendants, and that the defendants should have the benefit of the affirmative defenses set up in their original answers. The findings were in favor of the plaintiffs as to everything alleged by them, and against the affirmative defenses set up in the answers.

As might well be expected from a reading of the foregoing, many points are made against the judgment.

[1] It is obvious from what we have said that the judgment in the action against Matsuno is erroneous. As to him, at least, the note given was absolutely without consideration. He was not a party to the so-called agreement, and neither received nor was promised anything of benefit in consideration for his note.

[2-4] As was held by the District Court of Appeal of the Second District in deciding these cases, there was not sufficient evidence to show an assignment to the respective plaintiffs by the "Japanese Farmers' Association" or the members thereof of any of the notes or obligations. Therefore the finding on the issue of assignment in each case should have been in favor of the defendant instead of the plaintiff; the burden of proof being on the plaintiff to show his alleged assignment. The mere fact that the individual member who made the indorsement on each of the notes was the treasurer of the association is not sufficient to sustain a conclusion that there was an assignment, or to shift the burden of proof, as suggested. He did not even sign expressly as treasurer; confessedly he had not been expressly authorized by the association or the governing body thereof to make these particular assignments, there was no showing that under the articles of association or any by-law or resolution the treasurer had any authority to sell or dispose of the assets of the association, or to assign any of its obligations; or even that the articles of association provided for a treasurer; or even, indeed, that there were any articles of association. Nor do we understand, as suggested by learned counsel for plaintiffs, that such assignments are acts within the usual powers of a treasurer.

[5, 6] There was no proof of actual damage to the Japanese Farmers' Association, or any of the members thereof, resulting from the withdrawal of defendants from the Ninth Street Market and their return to the Third Street Market. Judgment for any of the plaintiffs can be sustained only on the theory

that the case is one where the parties have agreed upon the amount of \$500 as the amount of damage that will be sustained by a breach of the so-called agreement, in view of the fact that from the nature of the case it would be impracticable or extremely difficult to fix the actual damage (section 1871, Civ. Code); in other words, that the provision is one for liquidated or stipulated damage, which may be recovered upon a simple showing of breach of the agreement without any showing of damage. "But where it appears that the parties intended the sum named to be a forfeiture or penalty, it has been generally held that the party in whose favor the penalty or forfeiture exists must prove his damage." *Muldoon v. Lynch*, 66 Cal. 540, 6 Pac. 417. If in the nature of a penalty, rather than liquidated damages, it is not an actual debt, and cannot be recovered, but only the real damages which have to be proved. 1 *Sutherland on Damages*, § 283. In determining whether a provision in a contract is for liquidated damage or for a penalty, "the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made." *Id.*

[7] To our minds it is impossible to read the so-called agreement in the light of the circumstances that we have set forth without being convinced that the provisions as to the notes were intended purely by way of penalty or forfeiture, and without any reference to the question of damage. The sole design of these provisions was apparently to furnish a club to be used to prevent any person signing the agreement from returning to the Third Street Market, by making him liable to a penalty or fine of \$500 if he so did, absolutely irrespective of any question of damage. This object is plainly avowed in the preamble on the minutes of the Japanese Farmers' Association, which we have hereinbefore set forth. It is furthermore expressly avowed, in effect, in the agreement itself, and there is nothing in the circumstances shown by the evidence to detract in the slightest degree from the effect of the language used in the writing. In the absence of proof of actual damage, there could therefore be no recovery either on the agreement or on the notes.

In view of our conclusion on the questions already discussed, it is unnecessary to notice any of the many other points made for reversal.

The judgment and order denying a new trial in each of the cases are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

(164 Cal. 724)

Ex parte ZANY. (Cr. 1,771.)

(Supreme Court of California. Feb. 19, 1913.)

1. HABEAS CORPUS (§ 113*)—REVIEW.

The Supreme Court has no power to review a determination of the superior court in habeas corpus; the superior court not acting as an inferior court in such proceedings, and not even being bound to follow precedents of the Supreme Court.

[Ed. Note.—For other cases, Habeas Corpus, Cent. Dig. §§ 105–115; Dec. Dig. § 113.*]

2. HABEAS CORPUS (§ 113*)—REVIEW—TRANSFER FROM DISTRICT COURT OF APPEAL.

The Constitution authorizes District Courts of Appeal to issue writs of habeas corpus within their jurisdictions, and also gives the Supreme Court appellate jurisdiction in all cases and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to it for decision, and further provides that the Supreme Court shall have power to order any cause pending before a District Court of Appeal to be heard by the Supreme Court, and that such order may be made before judgment is rendered by a District Court of Appeal, or within 30 days thereafter; and Penal Code, § 1475, recognizes the right to make an original application to the Supreme Court for a writ of habeas corpus, in case relief is denied by a District Court of Appeal. *Held*, that the Supreme Court could not review a determination of a District Court of Appeal in habeas corpus proceedings; and hence could not review an order denying the writ on transfer from the District Court of Appeal.

[Ed. Note.—For other cases, Habeas Corpus, Cent. Dig. §§ 102–115; Dec. Dig. § 113.*]

3. HABEAS CORPUS (§ 109*)—PROCEEDINGS—UNANIMOUS AWARD OF COURT.

It is a proper practice of the District Courts of Appeal to remand petitioner for habeas corpus to custody, upon the ground that the justices cannot agree upon his discharge, where they are unable to agree upon the merits of the application.

[Ed. Note.—For other cases, Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. § 109.*]

Shaw, J., dissenting.

In Bank. In the matter of the application of Charles Zany for writ of habeas corpus. On application for hearing in the Supreme Court on attempted transfer by the District Court of Appeal after decision in that court (129 Pac. 295) discharging petitioner from custody. Application denied.

Ben. Berry and Gordon A. Stewart, both of Stockton, for petitioner. L. J. Maddux, Dist. Atty., of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for respondent.

ANGELLOTTI, J. An order denying the application for a hearing in this court, after decision by the District Court of Appeal for the Third district discharging the petitioner from custody, was made by this court on January 13, 1913. We deem it proper to say that the order denying the application was made without regard to the merits of the decision of the District Court of Appeal, which we have not considered, and as to which we express no opinion, and solely upon the ground that this court has no such pow-

er of transfer in habeas corpus proceedings.

Such has been our ruling as to all such applications heretofore made; there having been several such applications since the establishment of our District Courts of Appeal. The court, however, has never heretofore stated in writing the ground upon which such denials were ordered.

[1] It has always been the law in this state that the decision of any court in a habeas corpus proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. We are speaking now without regard to the provisions of our Constitution relative to District Courts of Appeal, which we will consider later. The result has been that, with reference to such proceedings, the Supreme and superior courts, to each of which was given the power to issue writs of habeas corpus, stood upon the same plane; neither being inferior to the other in any other sense than that a superior court, in determining any such matter, would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It, however, had the power to disregard it; and its determination, whether in accord with the law as laid down by the Supreme Court or not, was an end of the particular proceeding, and in case of a discharge of the petitioner from custody was final and conclusive. Such is still the law with relation to the superior court of the state, as was recently decided by this court in bank; Mr. Justice Shaw writing the opinion. See *In re Hughes*, 159 Cal. 360, 113 Pac. 684. Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated, and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court, and can still do so, but is now limited in the making of a new application, by statutory provision, to a higher court; either the District Court of Appeal having jurisdiction, or the Supreme Court. Such was the only remedy afforded by our law to the petitioner when remanded, and, as we have said, a discharge from custody by a superior court was final and conclusive.

[2] When our District Courts of Appeal were established, power was expressly conferred upon them by the Constitution "to issue writs of * * * habeas corpus" within their respective jurisdictions. As was already the situation with reference to Justices of the Supreme Court, each of the Justices of the Court of Appeal was given power to issue such writs returnable "before himself." It is self-evident that by these provisions it was intended to place such courts and the justices thereof in the same position

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with reference to habeas corpus matters that the Supreme and superior courts were already in. It is not conceivable that it was intended that these appellate courts should have less power than the inferior superior courts in such matters, as would be the case if their determination in habeas corpus proceedings were reviewable by the Supreme Court. As a matter of fact, the power to issue writs of habeas corpus was conferred in practically the same language as is used with reference to superior courts and the Supreme Court; and the language used must be taken as indicating the intention to confer the same power that had already been given to the superior and the Supreme Courts, with all the incidents thereof.

It is by reason of certain other provisions of the Constitution, relative to District Courts of Appeal, that reliance is placed for the claim that the Supreme Court may review a decision of a District Court of Appeal in a habeas corpus proceeding, although it may not review a decision of a superior court in such a matter. The first of these is the provision that the Supreme Court "shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision as hereinafter provided." It is obvious that it was not the design of this provision to create a right of appeal in any matter, or to give appellate jurisdiction to the Supreme Court in any matter, where no right of appeal was given by some other provision of law. The whole design was simply to give to the Supreme Court the *appellate jurisdiction of the District Court of Appeal* in any case, matter, or proceeding which might be legally transferred from such District Court of Appeal to the Supreme Court. The other provision relied on is the following: "The Supreme Court shall have power * * * to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." To hold this provision applicable to habeas corpus proceedings would be productive of some peculiar results. As we have already seen, it would render a determination of a superior court in such a proceeding one of greater dignity and more effective than that of a District Court of Appeal, in so far as the possibility of any review by the Supreme Court is concerned. The determination of a superior court would not be so reviewable; while that of a District Court of Appeal could be so reviewed.

Likewise, it would make the decision of a single justice of a District Court of Appeal in such a matter, where he had made the writ returnable before himself, more effective and of greater dignity than the decision of three justices of such court sitting as a *court*. It would, moreover, seriously impair the efficacy of the remedy of habeas corpus, in so far as the District Courts of Appeal are concerned, first, by preventing one who was improperly remanded to custody by such a court from immediately inaugurating a new proceeding in the Supreme Court, and requiring him to remain in custody at least 30 days before the order for a transfer could legally be made by the Supreme Court and the inquiry as to the legality of his custody be commenced by such court; and, second, by preventing any judgment of discharge from being effective as a judgment until the expiration of the time within which such an order of transfer might legally be made by the Supreme Court, viz., 60 days; and this without any provision under which the person found by the District Court of Appeal to be illegally confined could, pending further proceedings, be temporarily released from such custody. It goes without saying that an intention to accomplish any such result, so absolutely at war with the whole purpose and scheme of the remedy by habeas corpus, which was designed to summarily release a person from an unlawful custody, should be most clearly and unequivocally expressed, before this court should declare the law to be so written. In view of what we have said as to the well-settled law relative to habeas corpus proceedings, we feel that it is a reasonable construction of the provision of the Constitution under discussion that it does not include such proceedings. The words "any cause pending" used therein may reasonably be read, in the connection in which they are used, as not intended to include, and as not including, any matter as to which the well-settled law excludes the idea of any right of review, except where there is a lack of jurisdiction. Such clearly is a habeas corpus proceeding. But, at any rate, the power of the Supreme Court to order a transfer is expressly limited to "any cause *pending* before a District Court of Appeal." A habeas corpus proceeding cannot fairly be said to be so "pending" at any time after judgment by such court. Such a proceeding is finally and definitely ended by the judgment; and if the petitioner be ordered discharged thereby he is at once restored to liberty. The constitutional provision should be considered in the light of this well-recognized law, and so considered it appears to us to be a reasonable construction thereof to hold that it does not include habeas corpus proceedings.

[3] Besides uniformly denying such applications for transfer of such matters as have heretofore been made, we have also uniform-

ly, without dissent, immediately entertained original applications for writs on behalf of persons remanded to custody by District Courts of Appeal, made at any time after such remand and within 60 days thereof, which we would have no right to do if the power of transfer existed. It has also been the uniform practice of our District Courts of Appeal in habeas corpus proceedings, where the justices of any such court were unable to agree upon the merits of the application, to remand the petitioner to custody, upon the ground that they are unable to agree upon his discharge; those courts, under the Constitution, having no power to decide any matter except by unanimous vote. This is a practice fully authorized by the views expressed in such cases as *Santa Rosa, etc., Co. v. Central St. Ry. Co.*, 112 Cal. 436, 44 Pac. 733, *Frankel v. Deidesheimer*, 93 Cal. 73, 28 Pac. 794, and *Luco v. De Toro*, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543, which practically authorize an affirmance of proceedings below, where the concurrence of the necessary number of justices in any other action cannot be obtained. Such a remand, of course, terminates the proceeding in that court. It may further be said that the Legislature has practically construed the constitutional provision as not including habeas corpus proceedings by recognizing, in section 1475, Penal Code, the right to an original application to the Supreme Court, in the event of a denial of relief by a District Court of Appeal.

No very dire results are to be apprehended from this construction of the constitutional provision. Certainly the situation is no worse by reason thereof than it has been during all the period preceding the establishment of our District Courts of Appeal. If it develops that there is any substantial conflict between decisions of different District Courts of Appeal on any question presented on an application in habeas corpus, consideration of the question can be had by this court on an original application for writ of habeas corpus to this court by the person remanded to custody. The general questions involved in this particular case are already before this court for consideration in a proceeding of another character transferred from the District Court of Appeal of the Second district.

For the reasons stated, we have always heretofore ruled that we have no such power to transfer in habeas corpus proceedings, and we adhere to such conclusion.

We concur: HENSHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

SHAW, J. (dissenting). A majority of this court has heretofore in several instances tacitly held that the Supreme Court has no power to transfer a case in habeas corpus from a District Court of Appeal to the Su-

preme Court for a rehearing. I have never agreed to such construction of the Constitution. In my opinion, it is directly contrary to the constitutional provisions on the subject. The language conferring the power is so clear and plain that no interpretation is necessary. The District Courts were created by a constitutional amendment adopted in 1904, amending several sections of article 6. Section 4 contains this clause: "The Supreme Court shall have power * * * to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been announced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon expiration of thirty days after the same shall have been pronounced. The Supreme Court shall have power to order causes pending before a District Court of Appeal for one district to be transferred to the District Court of Appeal of another district for hearing and determination."

This provision expressly gives the Supreme Court power to transfer *any cause*. This includes cases in habeas corpus as clearly as it includes any other kind of action. The word "cause" includes proceedings in habeas corpus. Bouvier defines the word "cause," when used to refer to judicial proceedings, as: "A suit or action. Any question, civil or criminal, contested before a court of justice." Volume 1, p. 295. See, also, Webster's Dic. and Standard Dic. There are many decisions of like effect. *Taylor v. United States* (O. C.) 45 Fed. 531; *Erwin v. United States* (D. C.) 37 Fed. 470, 2 L. R. A. 229; *In re Farnum*, 51 N. H. 383; *Nacoochee H. M. Co. v. Davis*, 40 Ga. 320; *Bridgton v. Bennett*, 23 Me. 425. The two cases first cited hold that a proceeding to punish a witness for contempt of court is a "cause." In the *Bridgton Case* the court said: "A term more comprehensive could not have been readily selected."

The context of section 4 shows that proceedings in habeas corpus were intended to be included in the term "cause" in the paragraphs above quoted. The first paragraph of the section defines the appellate and original jurisdiction of the Supreme Court. With respect to the latter, it declares that it shall have "power to issue writs of mandamus, certiorari, prohibition and habeas corpus." Following are provisions defining the boundaries of the several districts of the state. Then comes a paragraph defining the original and appellate jurisdiction of the District Courts of Appeal. Their original jurisdiction is declared to include "power to issue writs of mandamus, certiorari, prohibition

and habeas corpus." Then follows the clause first above quoted, giving the Supreme Court power to transfer "any cause" to or from either court. In cases of mandamus, certiorari, and prohibition, begun in the District Court, the Supreme Court has always recognized and has frequently exercised this power of transfer. By the above-quoted clauses the proceeding in habeas corpus is placed in the same category with the classes of cases just mentioned. It seems indisputable that the court must have the same power to transfer in habeas corpus as in the other cases. If a case in one of the classes first named is a "cause," a proceeding in habeas corpus must also be a "cause," within the meaning of the section.

Furthermore, section 24 of the same article, being a part of the same amendment, provides that if the justices of a District Court "are unable to concur in a judgment, they shall give their several opinions in writing and cause copies thereof to be forwarded to the Supreme Court." It does not provide for a transfer to the Supreme Court in such cases. The paragraph of section 4, first quoted, has always been considered to authorize such transfer, and transfers are made accordingly. It was evidently intended to include cases where there was a disagreement in the District Court, as well as other cases, in order to avoid the predicament of absolute inability of the District Court to dispose of the cause, or the imperative necessity, under the reasons given in *Luco v. De Toro*, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543, for some of the justices to concur in a judgment which they believe to be erroneous, merely to end the litigation. There is absolutely no good reason for forcing the justices of that court to do this in habeas corpus cases alone, when it can be avoided by allowing section 4 to have the effect which its words express.

The fact that the Supreme Court has heretofore entertained original applications in habeas corpus by persons who have been remanded on a similar application to the District Court, and the fact that the Legislature has recognized its power to do so, is without argumentative force. The power is given by the Constitution. The Legislature can neither take it away nor confer it; nor does legislative sanction strengthen it. A judgment in habeas corpus, refusing to discharge a person in custody on a criminal charge, is no bar to a subsequent writ in any court for the same cause. It is a bar only where there is a discharge, or where two persons are contending for the right to the custody of a third person. 1 Freeman on Judgments, § 324; *Ex parte Perkins*, 2 Cal. 424; *Ex parte Ring*, 28 Cal. 251. This principle gives this court full power to entertain such applications after a judgment of remand in the District Court, and the exercise of this power heretofore has been wholly attributable to this reason, and not to the theory that no

power existed to order a transfer. No application for a transfer to this court from a District Court has ever been made in a case where the right to custody of a third person was in issue, and the District Court had given judgment upon it. Being a former adjudication, there would be no right or power of review in any court, unless this court has power, under section 4, aforesaid, to vacate the decision of the District Court of Appeal and transfer the cause to the Supreme Court for a rehearing. If the power exists in that case, it must exist in all cases.

The argument that the provision should not be given effect to allow transfers from District Courts, because hitherto no appeal has ever been provided in this state from a decision in habeas corpus by a superior court or judge thereof, or by a justice of the Supreme Court, I cannot understand. If the words are unambiguous, as I think must be admitted, and the power of transfer is given thereby, the giving or withholding of the right of appeal from decisions of other tribunals by other statutes or parts of the Constitution has no bearing upon the meaning of this particular part of the Constitution. Such analogies are significant only when there is an ambiguity to clear up. That there should be a right of appeal by the state from the judgment of the superior court discharging a prisoner is shown by the result of the *Hughes Case*, 159 Cal. 360, 113 Pac. 684, where a prisoner in Folsom state prison, regularly convicted and sentenced by the superior court of one county, was released without legal cause by the superior court of another county, and the state was declared to be remediless. Moreover, the Legislature could at any time destroy this argument by providing for an appeal in such cases. The argument amounts to only this: That since a defect in one part of our judicial system has been suffered to continue so long although it has caused some miscarriages of justice, it must be assumed that a constitutional provision designed to avoid a similar defect in the District Court system does not mean what it plainly says, because to give it such effect would make the system different in that respect from any that has heretofore been established. It seems to me that the obvious defect existing as to superior courts furnishes a good reason for avoiding it in the newly created jurisdiction, and for giving the provision that effect, even if it were not clear, but might reasonably be so construed.

The decision defeats to a very large and important extent one of the main objects for which this power of transfer was given. In *People v. Davis*, 147 Cal. 348, 81 Pac. 718, this court declared that the power to transfer was given to make the Supreme Court the court of final decision upon all important questions of law, and to enable it to supervise the decisions of the several District

Courts of Appeal, in order to secure a uniform rule of decision throughout the state. The proceeding in habeas corpus is resorted to, more than any other form of action, to obtain decisions upon the construction, constitutionality, and effect of penal laws. The result of this decision is that we may have in this state three independent judicial systems, each construing and giving effect to statutes, charters, and the Constitution in their own way and differently from the others, without there being any means of revising or harmonizing their decisions, except upon the chance that some other person may bring a case in the Supreme Court involving the same question. The experience of eight years which have elapsed since the District Courts were created demonstrates that this chance never happens when a decision of the District Court is against the state.

For these reasons, I am of the opinion that the power to transfer exists in cases of proceedings in habeas corpus as fully as in any other kind of action or proceeding; and that to hold otherwise is contrary, not only to the letter, but also to the purposes, of the constitutional provision.

(164 Cal. 751)

KERN RIVER CO. v. LOS ANGELES COUNTY. (L. A. 3,007.)

(Supreme Court of California. Feb. 21, 1913.)

1. TAXATION (§ 156*)—CORPORATE FRANCHISES—OCCUPANCY OF HIGHWAYS.

Right of occupancy of highways by an electric light and power company by its transmission lines is a taxable franchise.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 276; Dec. Dig. 156.*]

2. TAXATION (§ 276*) — CORPORATE FRANCHISES—OCCUPANCY OF HIGHWAYS.

In assessing an electric company's franchise to use public highways in a county, the requirement under Const. art. 13, § 10, that property be assessed in the district in which it is situated, etc., was substantially complied with by valuing the franchise in each school district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which the lines were erected.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 453, 466-468; Dec. Dig. § 276.*]

3. TAXATION (§ 458*)—ASSESSMENT—IRREGULARITIES—EFFECT.

In the absence of fraud, mere irregularities in a tax assessment do not vitiate it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 814; Dec. Dig. § 458.*]

4. TRIAL (§ 396*)—FINDINGS—NECESSITY.

A trial court need make no finding upon an issue raised by the pleadings but not by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

5. TAXATION (§ 490*)—EQUALIZATION—CONCLUSIVENESS.

Action of a board of equalization, in confirming an assessment on the franchise of an electric company to use the public highways of a school district, is void, if the company did

not use any part of the highways in that district.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 872, 873; Dec. Dig. § 490.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the Kern River Company against the County of Los Angeles. From part of the judgment, plaintiff appeals. Partly affirmed and partly reversed, with instructions.

Gibson, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued, with partial success, to recover certain taxes for the fiscal year 1908-09, which had been paid under protest. This appeal is from that part of the judgment which was adverse to plaintiff.

Plaintiff is a corporation engaged in the business of producing electricity for light and power. From its power plant in Kern county it transmits its product over its lines to a transforming station in the city of Los Angeles, where all of its electricity is delivered to another corporation. No local service is given along the course of its transmission lines.

The tax which was paid under protest was levied upon plaintiff's "franchise to use the public highways of the county of Los Angeles." This franchise to use the highways of the county outside the city of Los Angeles was assessed for the aggregate sum of \$28,960, the total amount being distributed by the assessor among the various school districts through which plaintiff's lines extended in proportion to the mileage in each district, without regard to the actual use of the public highways therein. In Delsur district plaintiff's lines extended entirely over private rights of way, and not a foot of any county road was used. In Elizabeth Lake, Castiac, Newhall, and Vinedale the only use of public highways was in crossing; nine public roads being so used for an aggregate distance of 360 feet. In four other districts (Morningside, Burbank, West Glendale, and Tropic) more than 14 miles of the public roads were occupied longitudinally by plaintiff's power line, yet in the districts wherein the roads were merely crossed for an aggregate distance of 360 feet the assessment was more than twice as much as in the four wherein 14 miles of highways were utilized in part for plaintiff's benefit.

Plaintiff presented its objections to the board of equalization, but that tribunal affirmed the assessment.

[1] Appellant's first point is that its occupancy of the highways of Los Angeles county by its transmission lines is not a franchise, and not assessable as such. In

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this behalf it calls attention to the fact that it is merely a manufacturer of electric power, which it delivers to a single consumer, and that it does not use its transmission lines for the purpose of collecting tolls. Further, it submits that the assessment of its transmission lines in their entirety should be deemed to include whatever rights of way it possessed in the public roads. In support of this position, Spring Valley Water Works v. Barber, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416, is cited. There is, however, a difference between that case and this. In that case, the permission granted by the supervisors of Alameda county to lay pipes along the highways of said county did not authorize the water company to sell water in that county and to collect tolls. "It had a mere right of way in common with all other persons, entirely unconnected with any privilege granted by the county to take tolls, collect water rates, or enjoy any other special prerogative or advantage." In the case at bar the findings show that in 1896 the board of supervisors of Los Angeles county by ordinance granted a franchise to plaintiff's predecessor to construct a line or lines along certain designated highways of Los Angeles county, for the purpose of conducting and distributing electrical energy along said route. The franchise carried with it "the right to collect rates or compensation for the use of electrical energy." It is true that this part of the franchise was not being used at the time of the assessment here attacked, and that was a matter proper for the consideration of the board of equalization in fixing the value of plaintiff's privilege for the purposes of taxation. The mere fact that the right to collect rates was not asserted did not make it valueless, however. Plaintiff's position as a going company, traversing a rich territory, was of some increased value in keeping out possible competitors, in view of the fact that at any time it might have undertaken to supply electricity to the residents along the lines of its transmission system. It possessed an assessable franchise.

[2-4] Appellant's next contention is that the assessor violated the constitutional mandate of section 10 of article 13 in failing to assess the property in the districts in which it was situated. While we must concede that the method followed by the assessor was, to say the least, unscientific, in that he valued the franchise in each school district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which said lines were erected, we find that the assessment in each instance purported to be upon the franchise used in a particular school district. This was a substantial compliance with the requirement of the Constitution. In the absence of fraud, mere irregularities in an assessment do not vitiate it. While there were allegations of fraud in the complaint, and denials thereof in the an-

swer, no evidence thereon was introduced, and the court made no finding upon the subject. This did not constitute error. Kaiser v. Dalto, 140 Cal. 170, 73 Pac. 828. In the absence of fraud on the part of the assessor, his method of arriving at the valuation of property is a matter committed entirely to his determination. San Jose Gas Co. v. January, 57 Cal. 614; Los Angeles v. Western Union Oil Co., 161 Cal. 206, 118 Pac. 720.

[5] Respondent is of the opinion that the case of Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 165, 121 Pac. 384, is decisive of the problems presented here. In that case, as in this, the public service corporation had appealed to the county board of equalization to correct the alleged inequalities in the assessment of its properties. The board had refused to reduce the assessment, and it was held that in the absence of fraud the action of the board of equalization was absolutely binding upon this court. That case is therefore conclusive against appellant with reference to the assessments made in school districts where there was property in the nature of "franchises to use the public highways of the county of Los Angeles." But we do not think the action of the board of equalization is conclusive with reference to the assessment of such "franchise" in Delsur school district, wherein not one foot of the public roads was utilized by the plaintiff in the operation of its lines. The action of the board of equalization upon a subject not properly within its jurisdiction is not beyond review. Even a body possessing powers so enormous, and in certain instances final jurisdiction, may not validate an assessment upon nonexistent property. Public highways are easements, and when they are enjoyed in part by a public service corporation in a way creating a special privilege, and derogating to that extent from the public servitude, the corporation becomes subject to an assessment for such a franchise as that here sought to be taxed. Where no such use appears within the territory covered by an attempted assessment, obviously there is nothing to assess, and a charge by the assessor would be as much without jurisdiction as his effort to assess property mortgaged to the state, without deduction for the mortgage. In such a case the board of equalization is not the only tribunal to which the taxpayer may apply for relief. Brenner v. Los Angeles, 160 Cal. 77, 116 Pac. 397.

That part of the judgment refusing plaintiff's demand for a return of the taxes paid under protest upon the assessment of its "franchise to use the public highways," in that part of Los Angeles county embraced within the territory of Delsur school district is reversed, with instructions to the lower court to enter judgment accordingly. In all other particulars the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(164 Cal. 748)

DANIELSON et al. v. NEAL. (L. A. 2,974.)
(Supreme Court of California. Feb. 21, 1913.
Rehearing Denied March 19, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 24*)—ACTION—NECESSITY OF DEMAND.

A demand by plaintiff that the mistake be corrected is not essential before suing to re-form a deed by correcting a mutual mistake therein.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 83; Dec. Dig. § 24.*]

2. ACTION (§ 11*)—CONDITIONS PRECEDENT—DEMAND.

Where a demand is an essential part of a cause of action, it must be made before the action is brought; but the action itself is the only demand necessary where it is defendant's unconditional duty to perform an act, to compel a performance of which is the object of the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 53-75; Dec. Dig. § 11.*]

3. REFORMATION OF INSTRUMENTS (§ 36*)—ALLEGATIONS OF COMPLAINT—MUTUAL MISTAKE.

A complaint alleged that plaintiff purchased three acres of land from defendant, which were to be bounded on the east by defendant's land, on the south by a railroad right of way, and should be so located as to embrace just three acres, but that, by mutual mistake and oversight, the courses and distances given in the deed fell short of containing three acres, and that the mistake in the amount of acreage arose because the lines and courses were not run at right angles, but were run as stated. Held, that the complaint was sufficient as against demurrer and sufficiently alleged a mutual mistake as to the amount of land conveyed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

4. EQUITY (§ 34*)—RIGHT TO RELIEF—TRIVIAL MATTERS.

The fact that the amount of land omitted from a deed by mutual mistake in description was only about 1/27 of an acre, valued at \$83, would not prevent plaintiff from obtaining the relief prayed on the ground that equity would treat the discrepancy as too minute to be material.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 98; Dec. Dig. § 34.*]

5. REFORMATION OF INSTRUMENTS (§ 23*)—ACTION—LIMITATION.

The fact that an error in the description in a deed could have been discovered from the face of the deed did not necessarily charge the grantee with laches in failing to discover it so as to bar a suit for reformation of the deed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Hattie C. Danielson and another against Ann M. Neal. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Day & Day, of Santa Barbara, for appellants. G. H. Gould, of Santa Barbara, for respondent.

HENSHAW, J. Plaintiffs seek by their action the correction of two deeds made to

them by defendant, the one for three acres of land, the other for one acre of land. The facts touching the first deed sufficiently indicate the character of the mutual mistake which it is alleged existed in the making of both deeds. Those facts are that plaintiff Hattie C. Danielson bought of defendant three acres of land. It is alleged that these three acres were to have a southern frontage of 417.4 feet and "should be bounded on the east by the easterly line of defendant's land and on the south by the Southern Pacific Railroad Company's right of way, and should be so located that the lines should embrace just three acres of land, but that the lines should be in the proportion of two to three, so that two acres should front to the south and the one acre lying back should be just half the width of the other two acres." It is then alleged that by mutual mistake ignorance, and oversight, the courses and distances actually given in the deed fell short of containing three acres; the allegation in this respect being the following: "That the mistake in the amount of acreage as aforesaid, arose from the fact that the distances given in the deed and the length of the boundary lines would, if run at right angles, include the three (3) acres, but the lines and courses were not run at right angles to each other, and not being so run at right angles to each other, decreased the amount of acreage; the north and south lines, instead of running at right angles to the east line, which is a due north and south line with the deflection of only 15', varied from a right angle to said east line 7° and 53' and from the west line of said tract as designated in said deed to the same extent, leaving the southeast angle and the northwest angle obtuse ones 7° and 53' in excess of right angles and the southwest angle and the northeast angle 7° and 53' less than right angles, and by reason of such deflection of lines the east and west lines are brought much nearer together on a measurement on right angles than four hundred and seventeen and four-tenths (417.4) feet, which was intended, but leaves the north and south lines, three hundred and thirteen (313) feet apart as was intended." The deeds so made were dated, one in July, 1906, the other the 21st of November, 1907; but plaintiffs allege that they did not discover the mistake until the 15th day of December, 1910, after survey made by the county surveyor. A demurrer, general and special, was interposed and sustained to the complaint. Judgment followed for defendant, and plaintiffs appeal.

[1] In support of the judgment respondent contends that this action for reformation will not lie without a demand previously made, which demand is not here alleged. There is authority supporting this view, but such is not the rule of decision in this state, nor is it the rule of general adoption.

[2] Wherever a right arises or is dependent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon demand—in other words, when the demand is an integral part of the cause of action—it must be made before action brought. But when it is an unconditional duty of a defendant to perform a certain act, the suit itself is the only demand necessary. *Gray v. Dougherty*, 25 Cal. 266; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; 9 Cyc. 725. In some cases, no other consequences follow a failure to make demand before suit brought, than that the plaintiff will not be allowed to recover his costs. *Jones v. Petaluma*, 36 Cal. 230; *Heinlen v. Martin*, 53 Cal. 321.

[3] The first deed, after the description of the land, declared that it contained "three acres of land more or less." It is argued from this that the grantor did not intend to convey an exact three acres, and therefore it is apparent that there was no mutuality of mistake. It is quite true, as said in *Commissioners v. Younger*, 29 Cal. 179, that expressions used in such deeds, "about so many acres" or "so many acres more or less," are openly indeterminate and uncertain and show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned, is placed, not upon them, but upon the description by metes and bounds. But this action is for a reformation because of mistake, a part of which mistake was the use of these very words. We think, without elaboration, that the complaint is sufficiently free from ambiguity to pass demurrer.

[4] There was omitted from the deeds about $\frac{1}{27}$ of an acre. The value of the omitted land, upon the basis of the purchase price, respondent points out is \$83; but we cannot agree with respondent that, because these are the facts, equity will treat the omitted land as a minute discrepancy of no material importance. The price or value of omitted lands is, of course, an element in determining whether or not equity will take cognizance of a suit to recover the omitted portion. *Backus v. Jeffrey*, 47 Mich. 127, 10 N. W. 138. But in a suit for land, it is by no means the all-controlling and determinative consideration. The omitted land may be of great importance to the value of plaintiff's remaining land. It may have a peculiar value, pretium affectionis, in plaintiff's eyes. Many other considerations may enter into the matter, making it of importance to plaintiffs to recover that which is rightfully theirs.

[5] The demurrer that the cause of action is barred by the statute of limitations is not well taken. The argument upon this point is addressed to the fact that the error was patent upon the deed; that the means of discovery were therefore at hand to plaintiffs, and their failure to discover charges them with laches and brings them within the bar of the statute of limitations. But the contrary view is expressed in *Allen v. Reed*, 51 Cal. 362; *Shells v. Haley*, 61 Cal. 157;

Breen v. Donnelly, 74 Cal. 301, 15 Pac. 845; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Hart v. Walton*, 9 Cal. App. 502, 99 Pac. 719.

It is therefore ordered that the judgment is reversed, and the cause remanded; defendant to be permitted to answer to the merits.

We concur: MELVIN, J.; LORIGAN, J.

(164 Cal. 686)

PEOPLE v. BAUWERAERTS. (Cr. 1,744.) (Supreme Court of California. Feb. 18, 1913.)

1. HOMICIDE (§ 253*)—EVIDENCE—SUFFICIENCY.

Evidence on a trial for murder in the first degree held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

2. CRIMINAL LAW (§ 742*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESS.

Where on a trial for homicide a witness for the state testified to facts tending to show accused's guilt, while accused attempted to show that such witness was himself the murderer, the credibility and veracity of the witness was for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.*]

3. CRIMINAL LAW (§ 738*)—QUESTIONS FOR JURY—ABSENCE OF MOTIVE.

The absence of motive on the part of a person accused of crime should be considered by the jury in weighing the evidence, but does not establish his innocence as a matter of law, or necessarily raise a reasonable doubt of his guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1705, 1707; Dec. Dig. § 738.*]

4. CRIMINAL LAW (§ 706*)—MISCONDUCT OF COUNSEL.

Where a person accused of homicide was evidently unfamiliar with English, especially with legal phrases, and his answers furnished some indication of an intent to evade a direct answer, a repetition by the district attorney of a question on cross-examination whether he had not been convicted of a felony in a foreign country after he had denied such conviction was not misconduct requiring a new trial, although the district attorney had no legal evidence of such conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1661; Dec. Dig. § 706.*]

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Frank Bauweraerts was convicted of murder in the first degree, and he appeals. Affirmed.

A. Heber Windler and Richard L. North, both of Riverside, for appellant. U. S. Webb, Atty. Gen., and Lyman Evans, Dist. Atty., of Riverside, for the People.

PER CURIAM. The defendant was charged with the murder of one Harriet Guyot, in Riverside county, convicted of murder in the first degree, and sentenced to death. He appeals from the judgment and an order denying his motion for a new trial.

As grounds for a reversal it is claimed by appellant that the evidence is not sufficient to sustain the verdict, and that he was precluded from having a fair and impartial trial through prejudicial misconduct on the part of the district attorney.

[1] The evidence in the case shows that the defendant, a native of Belgium, came to the United States a few years ago, and toward the end of the year 1911 located in Portland, Or. He worked in different capacities in Portland, and during his stay there stopped at a lodging house kept by one Andre Guyot, son of the woman he was convicted of having murdered. All of these parties became quite friendly. About January 1, 1912, the defendant, who claimed to have some knowledge of prospecting and attracted by reports of gold discoveries in Imperial county, this state, induced the deceased, Mrs. Guyot, to furnish the money for a prospecting tour in that locality. The deceased, a woman aged about 59 years, agreed to go with the defendant, and at her request a friend of hers, a Miss Julia Francois of The Dalles, Or., was to accompany them under an arrangement that all should share equally in whatever successes the enterprise attained. All of the parties were natives of Belgium, though unrelated to each other. The defendant was about 37 years of age, and Miss Francois about 19 years of age. Mrs. Guyot furnished \$550 for the necessary expenses of the enterprise, which was about the only money the party had. This she turned over to the defendant, who acted as treasurer of the expedition, paying all the bills, purchasing all the supplies, and retaining control and possession of the money. The party left Portland in January, 1912, and in due time arrived in Brawley, in Imperial county. On investigation it was ascertained that the reports of discovery of gold mines there were without merit, and, after some further investigation, it was determined that the party should go up into the Chuckawalla Mountains in the eastern part of Riverside county, where some prospecting had been done and some mining locations made. Proceeding by train part of the way and the rest by wagon, the party made their permanent camp about $3\frac{1}{2}$ miles from Chuckawalla Springs, which point they reached about February 1, 1912. The locality where their camp was made was a remote, lonesome spot, the surrounding country for miles in every direction being a desolate waste of mountains and desert, visited only by occasional prospectors. The three members of the party occupied a single tent, the women sleeping together in the rear, while the defendant occupied a bed at the entrance of the tent. They prospected for gold in the nearby canyons for about six weeks, but without success, and their supply of money had diminished to about \$117. About the 1st of March, 1912, one M. D. C. Putman, an American, came into the hills, making his camp

about two miles from the camp of the defendant. Putman was a prospector, and had theretofore located mining claims near where he camped, and had come up for the purpose of looking after them. He met the defendant and the women at their camp a day or so after he arrived. All along after the party had left Portland defendant, when occasion called for it, represented the elder woman as his mother and the younger as his wife, himself going under the name of Frank Guyot, and so stated such relationship to Putman. No particular importance, however, is to be attached to these representations; they being doubtless made, as stated by defendant, to avoid possible comment and talk while the party was together. On Friday, March 15, 1912, the defendant, accompanied by the younger woman, came to Putman's camp, and Putman asked the defendant if he could let him have some salt, of which he was in need. Defendant promised to let him have it, and on the following Sunday, March 17th, about 9 o'clock, Putman went over to the camp of defendant and got it. When within a short distance of the camp, he perceived the defendant moving rapidly backwards and forwards carrying sand in a bucket, and scattering it near the tent. When defendant discovered Putman approaching, he called to him to wait, and he would bring him the salt, which he did. He appeared nervous and excited. After handing him the salt, defendant stated he would go to Putman's camp with him, and they both started in that direction. As they proceeded Putman asked defendant how his wife and mother were, and defendant told him that they were down at the dry washer which the defendant had set up about a mile below his camp. This statement surprised Putman, as he had passed the dry washer on his way to defendant's camp, and, assuming that he might be in that vicinity, had called and had got no answer from any one. He further stated that his wife and mother were going over to Chuckawalla Springs the next morning, and there catch a wagon that would take them to the railroad, as his mother was to meet a government engineer in Yuma. Putman testified that his suspicions were aroused from the peculiar action and conduct of the defendant. He had no weapon in his camp of any character, and he knew that defendant was armed. About noon of that day—Sunday—Putman left his camp and took his station on a high hill some distance from the camp of the defendant, and where he could look down upon it. He remained at this point until about 5 o'clock in the afternoon, observing the actions of the defendant. When he first reached his point of observation defendant was engaged with a pick and shovel caving down a bank some 25 feet high a short distance from the tent. After he accomplished this, the defendant then engaged in burning up rags and papers which he brought from the tent at a small furnace located near it.

While so occupied he walked around the tent, looking up and down the wash. When Putman left the hill to return to his own camp, defendant was seated near his tent. At no time during the afternoon did Putman see either of the women about the place. Early the next morning, satisfied that there was something wrong, Putman walked about 12 miles to a camp where two men were working, told them of his suspicions, and tried to get them to come back with him and investigate the disappearance of the two women. They could not do so as they expected visitors that day to their camp, but they loaned Putman a rifle and cartridges. Putman returned to his camp that night and the next morning—Tuesday—started for the camp of the defendant. On the way he stopped at Chuckawalla Springs where he met two men—Heyman and McCarty—with the former of whom he was acquainted. Putman told them of the apparent disappearance of the women and his suspicions, and the three proceeded to the defendant's camp which they found deserted. With a pick and shovel found in the tent Putman and Heyman dug into the gravel that had been caved down from the bank, and, when they had dug about ten inches, struck a blanket, which they ripped open with a penknife, and found that it enveloped a human body. No further investigation was made and the grave was covered up. It was then agreed that Heyman, who had seen the defendant the day before, should go to the railroad station and telegraph the defendant's description in order to secure his arrest. Putman, after investigation for that purpose, found in one of the dry washes the tracks of the defendant leading towards Putman's camp. He followed it that far and found on the table in his tent a note from defendant which the latter had left there Tuesday morning. Subsequently a note was also found in defendant's tent which had been left there by him for Putman. In these notes defendant stated that his wife and mother had left the camp on the Sunday Putman was over there, but that he was too sick to go with them; that he had been over to Chuckawalla Springs the day before (Monday); that he had found no trace of a wagon there, and that he thought the women had followed the wagon train of Putman (the latter had come out in a wagon on a return trip from Brawley with provisions a few days before) or the Palo Verde trail; that he was going to find out which trail they had taken, and, if he did not return in five or six days, to take such provisions from his tent as he could use. Putman took up the trail of the defendant from where it left his camp, and followed it on foot for about 30 miles towards Imperial Junction, to which defendant also on foot was evidently proceeding. Night overtook Putman near Iris, a telegraph station about 10 miles east of Imperial Junction. He proceeded to Iris, and had the operator there telegraph to Imperial Junction to

arrest the defendant for killing his mother and wife. In pursuance of the dispatch the defendant was apprehended on the train as he was about to take it at that place, and Putman that night took the train to Imperial Junction. When arrested, the defendant stated that he was on the way to Yuma to employ men to work his mines. After being informed that he had been arrested at the instigation of Putman, and when the latter came into his presence at Imperial Junction that night, he accused Putman of having killed the women, and compelling him to bury their bodies. After the arrest of the defendant, he made a plat for the officers showing about where the bodies of the women had been buried and where other things had been hidden by him, and the coroner and sheriff, accompanied by Putman and others, went over to the camp of the defendant where they exhumed the bodies of both Mrs. Guyot and Miss Francois. The body of Mrs. Guyot was found buried under a bank about 100 feet from the tent at the spot where Putman, Heyman, and McCarty had discovered it Tuesday morning. The body of Miss Francois was found buried at another spot about 30 feet from the tent. Both bodies were attired in nightgowns. A shawl strap had been buckled and some cording wrapped about the remains of Mrs. Guyot, and her body was entirely enveloped in a blanket which was held closely in place by hammock cords tied about it. She had been killed by a pistol bullet fired into the base of her brain. Immediately above the spot where the body of Miss Francois was buried a large quantity of ashes were found, the remains evidently of quite a large fire. Her body was also wrapped in a blanket, and in addition a mattress was wrapped around it tightly corded. She had been shot through the right arm and through the head. There was also found buried near the tent two suit cases containing women's clothes, and some women's clothing and a man's overcoat were also found buried. All the bedding used by the women had been buried with their bodies, and in and about the tent were no articles of clothing or effects to indicate that any women had ever occupied it, and fresh sand and gravel had been strewn about the floor inside the tent. It appears further that the defendant on Monday morning, March 18th, went to Chuckawalla Springs, where persons going and coming through the country necessarily stopped for water. He met the witness Heyman there, who with the witness McCarty had reached the wells the day previously about 1 o'clock in the afternoon and were camped there. McCarty was away when the defendant came. Defendant asked Heyman if there had been a light wagon there drawn by two horses, and was told that there had not. Defendant then said that his wife had told him at 1 o'clock Sunday that the wagon had come, and that "they had got ready right away and left." Hey-

man and defendant looked around for possible tracks of a wagon, but found none. Heyman told the defendant that, if he believed the women had become lost, he would aid him in trying to find them, but defendant said they had probably taken another trail, and let the matter rest at that. He remained about an hour, and started back to his camp. There were other circumstances of minor importance tending to show the defendant's guilt which we do not think it necessary to mention.

[2, 3] The facts related in the foregoing statement constitute legal evidence of the defendant's guilt sufficient to justify the verdict. The testimony of the defendant, and his claim prior to the trial, to the effect that Putman was the guilty person, is not entirely credible in itself, and it is in many respects inconsistent with the facts established by the testimony of other witnesses at the trial. The question of Putman's credibility and veracity was for the determination of the jury. They believed Putman, as they had a right to do. The attempt to impeach Putman's reputation for truth resulted in disclosing that, after the homicide and after the defendant's statement that Putman had committed the murder had got abroad in the village of Brawley, the tongues of a few gossips became busy and made a reputation for Putman which he did not have before. The attempt was met by that of a number of witnesses who had known him for many years to the effect that he was a man of good repute and character. The proof does not show any adequate motive for the crime. The absence of motive is a fact favorable to one accused of crime, and is to be considered in weighing the evidence against him. But of itself it does not as matter of law establish innocence or necessarily raise a reasonable doubt of guilt. Its effect is a question for the jury to decide. We find no reasonable ground for the claim that the evidence does not sustain the verdict.

[4] During the cross-examination of the defendant, the district attorney asked this question: "I ask you if you were not in the first tribunal court of Brussels, Kingdom of Belgium, on or about the 26th of February, 1904, convicted of a felony, embezzlement?" He answered: "No, sir." Afterwards he was recalled by his counsel for further examination, and thereupon the district attorney made a further cross-examination: At the close of this cross-examination he asked leave to renew the above inquiry as to a former conviction, saying that he did not think the witness had understood the question. Leave being given, the defendant was then asked: "Do you know what a felony is?" He answered, "No, sir." The court then, at the district attorney's request, explained to the defendant the meaning of the word "felony." Thereupon the following examination took place: "Q. Were you not in Brussels, Belgium, just a year or so before

you came to Canada, convicted of a felony? A. No, sir; I never noticed it. Q. Were you ever convicted in the criminal court of Brussels, Belgium, sentenced to punishment in the state prison for five years? A. No, sir, by golly, no. I stand right up upon that. Five years? No, sir. Q. Were you not in the criminal courts of Belgium convicted of a felony and sentenced to the state prison? A. No, sir. No. Q. You were not? A. I know nothing about that." The district attorney had received from the commissioner of police in Brussels a letter, the date of which does not appear, stating in substance that the defendant had there been convicted of a felony. The information was filed on March 29, 1912, and the trial was begun on May 21, 1912. No record of the conviction of such felony was introduced or offered in evidence. It is not claimed that there was time within which to obtain such record after the receipt of the letter.

Where the defendant offers himself as a witness, he may be asked, for the purposes of impeachment, if he has not been convicted of a felony. Code Civ. Proc. § 2051; *People v. Johnson*, 57 Cal. 573; *People v. Crowley*, 100 Cal. 482, 35 Pac. 84; *People v. Sears*, 119 Cal. 271, 51 Pac. 325. The defendant's counsel concede this, but they argue that the repetitions of the question in different forms, after the negative answer had been given to the first question, would naturally lead the jury to infer that the district attorney had in his possession some authentic information to the effect that the defendant had been so convicted, and that, therefore, such repetition constituted misconduct prejudicial to the defendant, depriving him of a fair trial. They do not assert that the district attorney intended to produce this belief by the jury, but they claim that it is prejudicial misconduct of itself, regardless of his motive or purpose. The previous examination of the witness, his unfamiliarity with the English language, and the form of the answers to the questions as above given, sufficiently exonerate the district attorney from any charge of an improper purpose. There was no impropriety in the repetition of the question, under the circumstances existing. The defendant, while able to speak fluently, was evidently unfamiliar with English, especially the legal phrases used in a courtroom. The answers furnish some indication of an intent by him to evade a direct answer. The cases from this state, cited by counsel in support of this point, involved questions put by the district attorney tending to elicit incompetent or irrelevant evidence of a character injurious to the defendant. Whether the repetition of a proper question may constitute misconduct in any circumstances, sufficient to call for a reversal, we need not determine. We are satisfied that under the circumstances shown in this case no cause for reversal upon that ground exists.

The claim that the district attorney was guilty of misconduct in exhibiting to the jury, while he was asked the foregoing questions, the letter from the commissioner of police of Brussels, above mentioned, is not sustained by the record. The letter was written in the French language, and it does not appear that it would have conveyed any information to any juror had he seen it. The evidence taken on the hearing of the motion for a new trial on this subject shows that the district attorney did not mention the letter, or show it to the jury, or have it in his hands while asking these questions. In the examination no reference was made to such letter. The affidavits of the jurors state that they knew nothing about the letter, and that it was not referred to during their deliberations. There is also a claim that the district attorney was guilty of misconduct in exhibiting the same letter to a newspaper reporter immediately after the jury was charged and while they were filing out of the courtroom, this being done in close proximity to their line of march. The affidavits of the jurors above referred to show that this exhibition, if it was known to them at all, produced no effect upon them. Counsel's surmise that it may have done so is not worthy of consideration. These are all the points made in support of the appeal. An examination of the record discloses no other objections worthy of mention.

The judgment and order are affirmed.

BEATTY, C. J., does not participate in the foregoing.

(164 Cal. 735)

Ex parte POTTER. (Cr. 1,749, 1,750.)

(Supreme Court of California. Feb. 19, 1913.)

1. POISONS (§ 2*)—SALE—REGULATION—STATUTES.

The state board of pharmacy, empowered by Poison Act (St. 1907, p. 124) § 4, to further restrict or prohibit the retail of any poison by rules "not inconsistent with the laws of this state," and by Pharmacy Act (St. 1905, p. 535) § 7, "to regulate the sale of poisons," may not, in view of St. 1909, p. 1013, amending section 16 of the pharmacy act to provide that certain articles, including "ant poison," may be sold by grocers without restriction, when sold in the original packages, labeled with the official poison labels, prohibit sale of ant poison, except by licensed pharmacists; such acts being in pari materia, and to be harmonized, if possible.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. § 2.*]

2. POISONS (§ 2*)—SALE—REGULATION—REPEAL BY IMPLICATION.

The effect of the amendment by St. 1911, p. 1106, of the poison act (St. 1907, p. 124), by provision regulating the sale of opium and other like drugs and poisons, is not to re-enact the poison act as of the date of the amendment, and thus repeal by implication the authority in pharmacy act (St. 1905, p. 535), as amended by St. 1909, p. 1013, for the sale of certain poisons, including ant poison, by grocers; absolute repugnancy between the laws, necessary for repeal by implication, not existing.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. § 2.*]

In Bank. Applications by E. S. Potter for writ of habeas corpus prayed to be directed against Charles E. Sebastian, Chief of Police, City of Los Angeles. Petitioner ordered discharged from custody.

See, also, 126 Pac. 1135.

Parker & Moote, of Los Angeles, for petitioner. John D. Fredericks, Dist. Atty., Guy Eddle, City Prosecutor, Frank W. Stafford, Asst. City Prosecutor, and L. H. Roseberry, Special Prosecutor, all of Los Angeles, for respondent.

HENSHAW, J. Petitioner is held under arrest by virtue of two criminal complaints; the one charging him with a violation of the so-called "poison act," the other with a violation of a resolution and regulation prescribed by the state board of pharmacy under and by virtue of certain provisions of the poison act. The legal questions presented under the two applications are intimately related and may be considered together.

The so-called "poison act" is "an act to regulate the sale of poisons in the state of California and providing a penalty for the violation thereof." It was approved March 6, 1907. Stats. 1907, p. 124. It has been amended in 1909 (Stats. 1909, p. 422), and again in 1911 (Stats. 1911, p. 1106). But these amendments do not affect the original act as to any of the legal questions herein to be considered. The poison act enumerated many poisonous, deleterious, and injurious drugs and other substances in a list called "Schedule A." It regulated the sales of the articles in Schedule A, and in section 4 provided: "When in the opinion of the state board of pharmacy, it is in the interest of the public health, they are hereby empowered to further restrict, or prohibit the retail sale of any poison by rules not inconsistent with the provisions of this act, by them to be adopted, and which rules must be applicable to all persons alike. It shall be the duty of the board, upon request, to furnish any dealer with a list of all articles, preparations and compounds, the sale of which is prohibited or regulated by this act." A violation of any of the provisions of the act was declared to be a misdemeanor and an appropriate penalty was prescribed. Standing at the head of the list enumerated in Schedule A is "arsenic, its compounds and preparations."

The pharmacy act—"An act to regulate the practice of pharmacy in the state of California"—was originally adopted in 1905 (Stats. 1905, p. 535). It declared in section 1: "From and after the passage of this act it shall be unlawful for any person to manufacture, compound, sell, or dispense any drug, poison, medi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—46

cine or chemical, or to dispense or compound any prescription of a medical practitioner, unless such person be a registered pharmacist or a registered assistant pharmacist within the meaning of this act, except as hereinafter provided." Amongst the powers conferred upon the board of pharmacy created thereby was the power "to regulate the sale of poisons." In 1909 (Stats. 1909, p. 1013) section 16 of the act was amended. This amendment contained much new matter. Thus it made provision for the board of pharmacy to issue a permit to general dealers in rural districts to sell drugs and ordinary household remedies until such time as "a registered pharmacist shall establish a pharmacy within three miles by the shortest road from the place of business of such general dealer," when no further permit was to be granted. It then provided (and this is the provision bearing upon the questions before the court) that "the following drugs, medicines and chemicals may be sold by grocers and dealers generally without restriction." Then followed an enumeration of many articles, the list concluding with "insect powder, fly paper, ant poison, squirrel poison, and gopher poison, and arsenical poisons used for orchard spraying, when prepared and sold only in original and unbroken packages and labeled with the official poison labels."

The state board of pharmacy adopted a regulation as follows: "Whereas, complaint and knowledge has come to this board that during the year last past not less than two deaths have come to children from Kellogg's Ant Paste (an arsenical preparation); and it appearing to this board that to more fully protect the public health the delivery and sale of this preparation should be more strictly safeguarded, it is hereby resolved by this board: That the sale of this preparation will hereafter be permitted only when said sales are made as required for all sales of arsenic and its preparations (vide Schedule A) and in absolute compliance with sections 1, 2 and 3 of the 'Act to regulate the sale of poisons in the state of California.'" The effect of this resolution, if valid, is to deprive grocers of their right to sell any ant poison which might be an arsenical compound, and to limit the right of sale of such poisons to regular licensed pharmacists.

The laws have thus been set out. The facts are that petitioner is a grocer and was arrested for selling Kellogg's Ant Paste, an ant poison containing arsenic. He bases his right so to do upon the above-quoted provision of section 16 of the pharmacy act, and contends that the regulation of the board of pharmacy, by which he is forbidden so to do, is an illegal effort to deprive him of a right accorded him by positive law. Upon the other hand, respondent contends that the power to regulate the sale of poisons is expressly conferred upon the board of pharmacy, and that, in the exercise of that power,

it is legal to regulate the sale of arsenical compounds and to place the sale of such compounds exclusively under the control of registered pharmacists, under the provisions of sections 1 and 4 of the poison act.

Sections 1, 2, and 3 of the poison act, to which reference is made in the resolution of the board of pharmacy, throw certain precautionary limitations and restrictions around the sale of poisons. A book for the entry of sales is required, with the name, address, and signature of the purchaser, and the quantity of poison sold; a form of label is prescribed which shall bear a skull and crossbones and contain the word "poison"; the name of an antidote, or of suitable common antidotes, shall be printed on the label; and the board of pharmacy shall have power to revise and amend the list of antidotes. But, besides being regulatory in the matter of the vending of poisons, sections 1, 2, and 3 of the poison act are also restrictive. They limit the right to sell to registered pharmacists alone.

[1] It is manifest, from a reading of the pharmacy act and the poison act, that they are statutes in pari materia, dealing in many particulars with the same subject-matter, and are to be construed and harmonized, if possible. And, so reading and construing them, the power is expressly conferred upon the board of pharmacy to promulgate "regulations not inconsistent with the laws of this state as may be necessary for the protection of the public" in the sale of poisons. But the very apparent and declared limitation upon the power of the board in this respect is to adopt such regulations as are "not inconsistent with the laws of this state"; and the conclusion cannot be avoided that the regulation here under consideration is in direct conflict with an express law of the state—a law which expressly empowers grocers, such as the defendant, to sell ant poisons "when prepared and sold only in original and unbroken packages and labeled with the official poison labels." For, upon most manifest considerations of public welfare, we construe the phrase last quoted to apply to all poisons permitted to be sold by grocers. Little difficulty would be experienced if the regulations here under consideration went no further than to require grocers and dealers generally to adopt the same measures and precautions exacted of registered pharmacists under sections 1, 2, and 3 of the act. Regulations such as these, in the nature of things, would not be held unreasonable. But the regulation in question unfortunately goes further and, as we have said, bars the grocers and dealers generally from an express right conferred upon them by statute. For, construing these two acts by their terms, they amount to this: That restrictions are cast around the sale of poisons, both as to the persons who may sell and the methods by which the sales may be made. These

sales, generally speaking, may be made only by a registered pharmacist or a registered assistant pharmacist; and the board of pharmacy may make reasonable regulations in addition to those prescribed by the state, and may add to the list contained in Schedule A, of poisonous, deleterious, and injurious substances, any other such as in its view should properly be placed there. But with this limitation, however, that certain designated articles may be sold by grocers and dealers generally, amongst which is ant poison in original and unbroken packages. Indeed, so far as the safety of the public is concerned, if the board of pharmacy had seen fit to impose upon the grocers and dealers the same restrictions and regulations that are or may be imposed upon the registered pharmacists, everything desirable would have been accomplished. The same safeguards and precautions would then attend the sale, whether by pharmacist or grocer; and no one would contend that any greater safety to the public would arise if the original package of poison were handed out by a drug clerk than would attach if it were delivered by a grocery clerk.

Under the view thus expressed, we need not be at pains to follow counsel through their discussion of the law touching the power of the Legislature to delegate its functions, or touching the power of some designated inferior board or tribunal to create or declare a crime. For, having determined that the regulation itself is not one within the power of the board of pharmacy to pass, all other considerations become subordinate and unnecessary. In passing, however, it is proper to say that no doubt, of course, can be entertained of the legislative power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any branch of the business of the state, and for the same legislative power to declare a violation of those rules a penal offense. *United States v. Moody* (D. C.) 164 Fed. 269; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. What has already been said sufficiently indicates our views and the reasons therefor, to the effect that the poison act itself is not unconstitutional.

[2] In 1911 the poison act was amended by provision regulating the vending of opium and its derivatives, cocaine, chloral hydrate, and other like drugs and poisons. Respondent argues that the legal effect of this amendment is to re-enact the poison act as of the date of the amendment, and thus to repeal by implication the authority in the pharmacy act for the sale of certain poisons by grocers. But this would be carrying the doctrine of repeals by implication to a most extraordinary length, and would do violence to the express terms of the law. Pol. Code, § 325; *Swamp Land, etc., v. Glide*, 112 Cal. 90, 44 Pac. 451. Counsel admit their inability to

furnish authority sustaining the doctrine of such a repeal; and the absence of such authority is a strong argument against the soundness of the doctrine. The law, of course, is that repeals by implication are not favored, and they are declared only where an absolute repugnancy between laws exists. Here no such repugnancy exists, and it is the duty of the court to reconcile rather than to destroy. The harmony between, and the reconciliation of, the terms of the two statutes is abundantly established by treating the authority to the grocers to vend certain poisons as an exception to the general law.

It follows herefrom that the criminal complaints against this defendant charge no crime, and that therefore he is entitled to his liberty.

It is therefore ordered that the petitioner be discharged from custody.

We concur: SHAW, J; SLOSS, J; ANGELLOTTI, J; MELVIN, J.

(164 Cal. 705)

CAKE v. CITY OF LOS ANGELES.
(L. A. 2,980.)

(Supreme Court of California. Feb. 18, 1913.)

1. MUNICIPAL CORPORATIONS (§ 514*) —
STREET OPENING PROCEEDINGS—STATUTORY
REQUIREMENTS—EFFECT

Even if the requirement under Street Opening Act March 24, 1903 (St. 1903, p. 381) § 19, that "like proceedings" for a new assessment of benefits shall be had as in the case of an original assessment includes the 60-day limit for completion of the assessment provided by section 16, as amended by St. 1909, p. 1040, for original assessments, such provision must be deemed directory and not mandatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

2. STATUTES (§ 227*) — CONSTRUCTION —
"SHALL."

The word "shall" when found in a statute will not be deemed to be mandatory, unless the legislative intent that it be so construed is clearly evidenced, by express declaration or by negative words forbidding an act after the time fixed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6459-6469; vol. 8, p. 7799.]

3. MUNICIPAL CORPORATIONS (§ 514*) —
STREET OPENING ASSESSMENTS—VALIDITY.

An assessment of benefits under Street Opening Act of 1903 (St. 1903, p. 376) is not invalid because made by the board of public works under instructions by the city council; the power to so instruct not being lost by sustaining objections to the original assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

4. MUNICIPAL CORPORATIONS (§ 493*) —
STREET OPENING ASSESSMENT—CONCLUSIVE-
NESS.

An assessment of benefits, under Street Opening Act of 1903 (St. 1903, p. 376), con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

firmed by the city council is conclusive in the absence of fraud in the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1091-1093, 1160-1165; Dec. Dig. § 493.*]

5. MUNICIPAL CORPORATIONS (§ 524*) — STREET OPENING ASSESSMENTS—PENALTY FOR DELINQUENCY—COMPUTATION.

The 5 per cent. penalty on a delinquent street opening assessment, prescribed by Street Opening Act March 24, 1903 (St. 1903, p. 382) § 22, should be based on the total assessment of benefits, and not on the balance remaining after deducting an award of damages for land condemned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1237; Dec. Dig. § 524.*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Mary E. Cake against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Hester, Merrill & Craig, of Los Angeles, for appellant. John W. Shenk, City Atty., and E. R. Young, Asst. City Atty., both of Los Angeles, for respondent.

HENSHAW, J. After general demurrer sustained to her complaint, judgment was entered for defendant, and plaintiff appeals upon the judgment roll.

By her complaint she seeks to recover from the city of Los Angeles moneys paid by her under a street assessment, which moneys she alleges were paid by compulsion and under protest. The complaint charges in two counts. In the first, allegations are set forth upon which it is contended the assessment was void. By the second, the illegality of the assessment is not asserted, but it is alleged that plaintiff was compelled to pay a sum greater than that for which she was legally liable.

The facts disclosed by the complaint are the following: The city of Los Angeles, defendant herein, under the Street Opening Act of 1903 (St. 1903, p. 376), undertook to widen one of its streets named Hill street. A portion of one of plaintiff's lots lay within the proposed street as widened, and under condemnation proceedings plaintiff was awarded \$8,475.81 for this land. The street work was done and an assessment upon the land within the district was made and returned by the board of public works. Objections were filed to the assessment, and on May 24, 1910, the committee on streets and boulevards of the city council of the city of Los Angeles recommended that the assessment "be referred back to the board of public works for modification." This recommendation was adopted by the council. The objections to the assessment were then sustained, and the assessment referred to the board of public works. On August 23, 1910, the council by resolution instructed the board of public works to make the new or modified assessment in accord-

ance with a memorandum prepared by its committee on streets and boulevards. In pursuance of such resolution the board of public works, on August 25, 1910, filed with the city clerk of the defendant a new assessment. This new assessment was made in strict conformity with instructions of the city council, and, it is alleged, not in accordance with the free and uninfluenced judgment of the board of public works. Plaintiff was assessed upon three parcels of land, the assessment upon the first being \$8,810.40, the second \$4,360.35, and the third \$438.35. It is alleged that the first two items of assessment were disproportionate to and in excess of the benefits that would be derived from the improvement, and were likewise disproportionate to and in excess of the assessments upon other properties within the assessment district which were of greater value and would receive larger benefits from the improvement. Upon the filing of the new assessment, notice thereof and of the time for filing objections thereto was given in accordance with the requirement of section 18 of the street opening act. Pursuant to notice, objections to the assessments were filed by certain owners of the land, of whom plaintiff was one. The objections were overruled, and the new assessment was confirmed. Afterward, and in accordance with the provisions of the street opening act, the board of public works fixed the 16th day of December, 1910, as the time when all unpaid assessments should be and become delinquent, and fixed the 13th day of January, 1911, as the time when lands subject to the lien of the delinquent assessment should be sold. Under the conviction that the assessment was void plaintiff did not pay the amounts assessed against her lands before the date of delinquency. On January 5, 1911, she commenced proceedings in the superior court to have the proposed sale of her lots enjoined, upon the ground that the assessment was void, and on the 9th day of January moved the court for an order restraining the sale until her action could be heard upon its merits. This motion was on the 9th day of January denied by the court, and the board of public works declared that it would sell plaintiff's property upon the date fixed for sale, unless plaintiff would execute to the board a receipt for the sum of \$8,475.81, awarded to her as the value of her property taken for the purposes of the improvement, and additionally should pay the sum of \$5,824.64. This latter sum was made up of three separate items: First, the sum of \$5,142.24, the difference between the total assessment of \$13,618.10 and the \$8,475.81 award in the condemnation proceedings; second, \$1.50, the cost of advertising the sale; and, third, \$680.90, the amount of the 5 per cent. penalty provided by law, estimated upon the total sum of \$13,618.10. To protect her property from this forced sale, after pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

test and under compulsion, plaintiff gave the receipt and paid the full amount demanded. Thereafter and before the commencement of the action plaintiff filed her claim against the defendant in the manner provided therefor by the charter of the defendant, and upon the refusal to allow or pay her claim commenced this action.

[1] 1. Under her first count, charging upon the invalidity of the assessment, appellant contends that the new or second assessment was not returned within the time limited by the law. The proceedings upon an original assessment are prescribed by section 16 of the act as amended in 1909. Stats. 1909, p. 1040. There it is declared that: "The street superintendent, upon receiving the said diagram, shall proceed to assess the total expenses of the proposed improvement upon and against the lands * * * within said assessment district * * * in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for the completion of said assessment for a period not exceeding ninety days additional."

Section 19 of the same act further provides: "And said council shall hear all such objections at said meeting or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment, and may confirm, modify or correct said assessment, or may order a new assessment, upon which like proceedings shall be had as in the case of an original assessment; or if there be no objections the council shall, at any regular meeting after the expiration of the time for filing objections, confirm such assessment and the action of the council upon such objections and the assessment shall be final and conclusive in the premises."

It is conceded that the action of the city council upon the protests raised against the original assessment amounted to an order upon the board of public works to prepare a new assessment. Appellant points out that the original assessment is to be completed within 60 days after the receipt by the street superintendent (here, board of public works) of the diagram, or within such extended period not exceeding 90 days' additional time, as the council may award. Further, appellant points out that when a new assessment is ordered, it is declared that upon this "like proceedings shall be had as in the case of an original assessment." Appellant construes this language to limit the time within which the new assessment must be prepared, and as the new assessment was not prepared within 60 days from the date of the order of the council upon the board of public works so to prepare it, and as no extension of time was given by the board of public works for this purpose, the conclusion, appellant argues, is

irresistible that the assessment is void. The conclusion, however, does not necessarily follow. It is at least a reasonable construction of the declaration that "like proceedings shall be had as in the case of an original assessment" to say that it has reference to the new assessment when completed, and that "like proceedings" therefore mean the proceedings that are or may be taken after the return of the new assessment to the council, the appeal, notice of the hearing of the appeal, the determination thereof, and the like. But aside from this, and in full recognition of the fact that the proceedings for the improvement of streets are proceedings in invitum, we are of the opinion that, even if it be held that the time limit is applicable to the new assessment, still the language fixing this time limit is directory and not mandatory.

[2] It is a general rule of construction that the word "shall" when found in a statute is not to be construed to be mandatory, unless the intent of the Legislature that it shall be so construed is unequivocally evidenced. This evidence, found in the statute itself, may be of different kinds. It may be found in a declaration that the word is of mandatory import, as we find in our own Constitution; that its declarations are all mandatory and prohibitory unless the contrary is expressly declared. Const. art. 1, § 22. It may be evidenced by negative words forbidding the doing of the act after the time fixed. Or it may be evidenced by words withdrawing the power to do the act after the time fixed. Or, finally, it may be evidenced by a showing that a right dependent upon the doing of the act within the time fixed is lost or impaired by the nonperformance of that act. *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736; *Pond v. Negus*, 8 Mass. 232, 3 Am. Dec. 131; In the Matter of Broadway Widening, 63 Barb. (N. Y.) 579; *Fay v. Wood*, 65 Mich. 390, 32 N. W. 614. A reading of the statute here under consideration discloses that there are no negative words denying the power to return the new assessment after the indicated time; that no undue advantage is gained to the city or to the contractor, and no benefit either to the public or to any individual thereof is impaired or lost by the return of the assessment after the indicated time, and, under these circumstances, in accordance with the rules of construction above announced, it is held that the provision is directory.

[3] Plaintiffs' next objection to the validity of the assessment rests upon the allegation of her complaint that it was not made in accordance with the free and uninfluenced judgment of the board of public works, but was made solely under the memorandum of instructions furnished to the board by the city council. If this were true, it would be no ground for overthrowing the assessment. The city council sits as a quasi court of appeal to pass upon the complaints and objections which the interested parties, contrac-

tors, or property owners may make to the assessment. Having found that certain objections are well taken, and, on account of them, having ordered the board of public works to prepare a new assessment, it is not only unobjectionable, but quite commendable, for the council, in so ordering the new assessment, to direct the form which it shall take. It is precisely what a court of appeals is called upon to do in many of the matters which come before it. Thus a court of appeals is enjoined by the laws of this state, in the event that an appeal is deemed well taken and a new trial ordered, to discuss all objections presented upon the appeal, and that may arise in the course of a new trial, to the end that the inferior tribunal may avoid the repetition of error. It does not appear that the city council did more than this in the present instance, and the property owner still had his right of objection and protest to the new assessment when returned to the council.

Appellant's third objection is to the effect that, even if the council had authority to instruct the board upon the manner of making the assessment, it lost jurisdiction in the matter upon May 24th; that is to say, that its authority was lost when it made its order sustaining the objections and ordering the new assessment. We see no force to this objection. The council had heard the objections of the property owners, weighed them, and passed upon them. Nothing in the statute forbids, and no right of a property owner is impaired by the giving of information or instruction upon the subject of the new assessment to the board of public works at any time after the date of sustaining the protest to the original assessment.

[4] Plaintiff's allegation that the assessments upon her two lots were inequitable was a matter upon which she had the right to be heard, and was heard before the council. She makes no charge of fraud in connection with the assessment of her property, and, without such a charge, the determination of the council is final. *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 121 Pac. 384.

[5] 2. The second count is based entirely upon the following facts: Plaintiff, having allowed her assessment to become delinquent, became liable for the 5 per cent. penalty, with costs, provided by the law. Street Opening Act, § 22. Plaintiff concedes that she thus became liable for this penalty, but insists that the penalty should be imposed upon the net amount due from her to the city; or, in other words, that it should not be estimated upon the sum of \$13,618.10, but should be estimated upon the difference between that sum and the amount of the award in her favor in the condemnation proceeding. But the answer to this is that

whatever be thought to be plaintiff's equity in this regard, the whole matter is under statutory control, and a reading of the statute discloses that it contemplates that the 5 per cent. delinquency shall be estimated upon the total of the assessment. A reading of sections 22 and 24 of the act discloses that the penalty attaches immediately upon the failure of the property owner to pay within the time limited, and that this penalty, since it thus attaches, is to be estimated upon the total amount of the assessment. The only provision for an offset is found in section 21, which provides that the property owner may demand of the street superintendent that there be offset against the assessment the amount to which he is entitled under any award for his property taken, and the section then proceeds: "Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessments shall be marked 'Paid by offset'; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to the street superintendent in money and the assessment shall on such payment be marked paid, the entry showing what part thereof is paid by offset and what part in money." It is thus made doubly plain that the 5 per cent. penalty was to be imposed upon the total amount of the assessment.

For these reasons the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(164 Cal. 712)

ANDERSON v. MUTUAL LIFE INS. CO.
OF NEW YORK. (S. F. 6,093.)

(Supreme Court of California. Feb. 19, 1913.)

1. INSURANCE (§ 175*) — CONSTRUCTION — COMMENCEMENT OF RISK — "DATE OF THIS POLICY" — "ISSUANCE OF THIS POLICY" — "ISSUANCE."

Insured on May 21, 1908, applied to defendant for insurance, and on June 24, 1908, signed an amended application. A medical examiner's report, dated May 22, 1908, was attached to the first application, and on July 6, 1908, defendant "caused to be executed and issued" the policy sued upon, dated May 22, 1908, and to which a copy of the first application was annexed. Each application provided that "for one year following the date of issue" insured was not to engage in certain occupations without permission, or die by his own act during the year following "said date of issue," and the policy was conditioned to be free from restriction as to occupation "after one year from its date as set forth in the provisions of the application * * * attached hereto," and that the insurer should not be liable in case of suicide within "one year after the issuance of this policy." On May 21, 1909, insured paid the second premium, and on June 12, 1909, committed suicide. *Held*, that the expressions "date of this policy" and "issuance of this policy" were not in ordinary acceptance synonymous, that the word "issuance" standing alone would probably mean ei-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ther the signing (without delivery) of the contract by the insurer's officers or the delivery of a fully written and signed policy, and that from the entire policy, read in the light of the circumstances, the risk commenced May 22, 1908, so that, as insured did not commit suicide within a year, the insurer was liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1830-1831; vol. 4, pp. 3778-3782; vol. 8, p. 7693.]

2. INSURANCE (§ 175*)—COMMENCEMENT OF RISK—ANTEDATED POLICY.

It is competent for the parties to an insurance policy to agree that it shall be antedated, and thereupon it takes effect by relation from the dating agreed upon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.*]

3. INSURANCE (§ 175*)—ACTION ON POLICY—PRESUMPTION—COMMENCEMENT OF RISK.

In the absence of evidence to the contrary, a policy will be presumed to take effect from its date.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.*]

4. INSURANCE (§ 146*)—CONSTRUCTION—CONSTRUCTION AGAINST INSURER.

Policies of insurance are to be construed against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Laura A. Anderson against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Bert Schlesinger, of San Francisco, and Guy R. Kennedy, of Chico, for appellant. Chickering & Gregory, of San Francisco, for respondent.

SLOSS, J. This is an action based upon a policy of life insurance, insuring the life of Philip M. Anderson, in favor of the plaintiff, his wife, in the sum of \$2,000. Judgment went in favor of the defendant, and the plaintiff appeals therefrom and from an order denying her motion for a new trial.

The material facts are undisputed. The issuance of the policy, the payment of premiums, the death of the insured, the due presentation of proofs, and nonpayment are all conceded. The defense was that the insured died by his own hand, and that thereby the policy was avoided. On May 21, 1908, Philip M. Anderson made a written application to defendant for insurance. The application, as the court finds, was returned by the company to the applicant for amendment, and on the 24th day of June, 1908, Anderson signed a second application. A medical examiner's report, dated May 22, 1908, was attached to the first application. No such report was attached to the second. On July 6, 1908, the defendant "caused to be executed and issued" the policy sued upon. It bore date the 22d day of May, 1908,

and referred to the first application, a copy of which was annexed. The policy recited that it was issued in consideration of a premium of \$44.50, receipt whereof was acknowledged, and the payment of a like sum upon the 22d day of May in succeeding years. Each of the applications contained the following statements: "During the period of one year following the date of issue of the policy of insurance for which application is hereby made, I will not engage in any of the following extra-hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, * * * unless written permission is expressly granted by the company. I also state that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue." Among the conditions of the policy itself were these: "Occupation. This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after one year from its date as set forth in the provisions of the application endorsed hereon or attached hereto. Suicide. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application endorsed hereon or attached hereto." On or about May 21, 1909, Anderson paid the defendant the second premium upon said policy. On June 12, 1909, he committed suicide. His death consequently occurred less than one year after the day when the policy was in fact signed by the officers of the company, but more than one year after the day designated in the policy as its date.

[1-3] On these facts the single question is whether the insured violated the condition of the policy regarding suicide. More specifically, the issue is defined, with sufficient accuracy, in the following language, taken from respondent's brief: "If the date of the policy determines its issuance, the insured did not commit suicide within one year following the issuance of the policy, and the defendant is liable. If the issuance is a physical fact of execution, independent of the date of the policy, the insured committed suicide within one year after the issuance of the policy, and the defendant is not liable." The court below adopted the latter view.

The contention of the appellant is that the 22d day of May, 1908, was "adopted by both parties" as the day of issuance of the policy, and that the year within which Anderson's death by his own act would avoid the policy commenced to run on that day. We think this position is correct. It must, of course, be admitted, in accordance with the respondent's claims, that the expressions "date of this policy," and "issuance of this policy,"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are not, according to the ordinary acceptance of the terms, synonymous. The word "issuance," as applied to a contract like a policy of insurance, would, if standing alone, probably be taken to mean either the signing (without delivery) of the contract by the authorized officers of the insuring company (*Kan. Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, 54 S. W. 388; *Stringham v. Mut. Life Ins. Co.*, 44 Or. 447, 75 Pac. 822), or, perhaps, the act of delivery of a fully written and signed policy (*Logsdon v. Supreme Lodge*, 34 Wash. 666, 76 Pac. 292; *Homestead F. Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463; *Sisk v. Cit. Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804). But in construing any writing the usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found. We must endeavor to ascertain, from an examination of the entire instrument, read in the light of the circumstances surrounding its execution, the sense which the parties employed the particular phrase in question.

Here we find that the policy incorporates, as a part of the contract, the application of May 22d. Unquestionably the words "issuance of this policy" in the policy itself were intended to mean the same thing as "date of issue" in the application. The insurer, acting, so far as the record shows, with full knowledge of all the facts, elected to base its policy upon the first application, to date its policy May 22, 1908, the day upon which the medical examination of Anderson had taken place, to make the premiums payable on the 22d day of May of successive years, to make the principal sum payable in the event of death within 20 years from the apparent date of the policy, and to make dividends payable on the 22d day of May of each year. In all these particulars the company expressed its intention to fix the rights of the parties with reference to the 22d day of May in just the same way that these rights would have been fixed if a policy had been actually signed and delivered on that day. It is perfectly competent for the parties to agree that a policy shall be antedated, and, when this is done, the policy takes effect by relation from the date agreed upon. 1 *Cooley*, Brief on Ins. 831, 844; *City of Davenport v. Peoria M. & F. I. Co.*, 17 Iowa, 276; *Lightbody v. N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *Phil. Life Ins. Co. v. Am. L. & H. Ins. Co.*, 23 Pa. 65. In the absence of evidence to the contrary, a policy will be presumed to take effect upon its date. 1 *Cooley*, Ins. 844; *Union Ins. Co. v. Am. F. Ins. Co.*, 107 Cal. 328, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140. "And, after it has been issued and delivered, it takes effect from the date stated by its terms, and not from the date of delivery." *Id.*; *Gordon v. U. S. Casualty Co.* (Tenn. Ch. App.) 54 S. W. 98.

The policy here sued upon, therefore, must

be construed as effecting an insurance upon the life of Anderson for a period beginning May 22, 1908. The day upon which, by the agreement of the parties, the risk attached, may reasonably be taken to be the day which was meant to be designated, in the clause under consideration, as that of the "issuance" of the policy. The company inserted in the policy the various provisions above referred to, securing to itself various benefits which would naturally pertain to an insurance issued on the 22d day of May, rather than one issued at a later time. It thus became entitled to an earlier payment of premiums. It also received payment for insuring the life of Anderson during a period which had already elapsed when the policy was actually signed and delivered. The policy, then, having been written so as to take effect for its main purpose and its principal incidents, as of the 22d day of May, a clause which speaks of the time of "issuance" of the policy is fairly to be taken to refer to that date. The clause in question has been given the construction just indicated in the case of *Harrington v. Mut. L. Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373, decided by the Supreme Court of North Dakota since the rendition of the judgment here under review. In holding that the period during which suicide would avoid the policy began at the date of the policy, the court used this language: "The company took premiums for that period, fixed the date of the payment of the premiums as of that date, and made no provision in the contract limiting the dating back solely to the payment of the premiums. It is well settled that, where there is any uncertainty in the terms of an insurance policy, the policy will be construed most favorably for the insured, as the language used in the policy is the language of the insuring company." But, beyond these considerations, there is a further ground upon which the plaintiff's right to recover should be sustained.

The clause in the application relative to suicide speaks of a period of one year "next following said date of issue." The expression, "said date of issue," must obviously be referred back to some prior clause in which the term "date of issue" is employed. Such prior clause is the one limiting the right of the insured to engage in certain extrahazardous occupations. In it the application states that "during the period of one year following the date of issuance of the policy * * * I will not engage in any of the following * * * occupations." Clearly the date marking the beginning of the period must be the same in each case. Coming to the policy itself, we find corresponding provisions covering the two subjects of occupation and suicide. The clause of the policy entitled "occupation" states that as to occupations other than military or naval service, the policy is free from any restriction "after one year

from its date as set forth in the provisions of the application endorsed hereon or attached hereto." Here the period during which the insured's choice of occupations is to be limited is plainly declared to commence at the date of the policy, and the concluding words ("as set forth in the provisions of the application") afford a clear indication that the period so designated was understood by the framer of the policy (i. e., the defendant) to mean the same period as that described in the application. The clause covering suicide varies the language to "one year after the issuance of this policy," and continues with the same reference "as set forth in the provisions of the application." * * * Apparently, then, there was no intent in either case to make a provision which should differ from that indicated by the terms of the application. With reference to occupations, the company, in its policy, gave its own interpretation to the phrase "one year following the date of issue," appearing in both clauses of the application, and we see no good reason for believing that any other interpretation was intended to apply to the suicide provision, regarding which the application followed, in terms, the language used in restricting occupations. Reading the various clauses of the policy with those of the application as parts of one contract, it seems clear that the three expressions "date of issue," "date of this policy" and "issuance of this policy," were used interchangeably to express a single point of time.

[4] If this be so, no further argument is needed to establish the conclusion that, under the settled rule that policies of insurance are to be construed against the insurer, the point of time beginning the restricted period of one year must be taken to be the date appearing upon the face of the policy. It follows that, the defendant having failed to establish the only defense relied upon, the plaintiff was, upon the facts found, entitled to recover.

The judgment and the order appealed from are reversed, with directions to the court below to alter its conclusions of law in accordance with the views here expressed, and thereupon to enter judgment in favor of the plaintiff for the amount of the policy, with interest at the legal rate from the time when the loss was payable, together with costs.

We concur: SHAW, J.; ANGELLOTTI, J.

(65 Or. 160)

DECKENBACH et al. v. DECKENBACH.
(Supreme Court of Oregon. March 11, 1913.)

1. DEEDS (§ 211*) — VALIDITY — SUFFICIENCY OF EVIDENCE — MENTAL CAPACITY.

Evidence, in a suit to set aside a deed, held to show that defendant's grantor had mental capacity to comprehend the nature of his deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

2. DEEDS (§ 211*) — VALIDITY — SUFFICIENCY OF EVIDENCE — UNDUE INFLUENCE.

Evidence, in a suit to set aside a deed, held insufficient to show that its execution was due to any undue influence of defendant over her husband, the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

3. QUIETING TITLE (§ 7*) — RIGHT OF ACTION — "CLOUD ON TITLE."

A "cloud on title" arises by virtue of an instrument apparently valid upon its face, and which would put plaintiffs on their proof as against such instrument if it were admitted in evidence to support adverse title; but no cloud arises upon an instrument void upon its face.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1233-1235.]

4. LIFE ESTATES (§ 1*) — NATURE AND EXISTENCE IN GENERAL.

An estate for life, although one of freehold, is not one of inheritance.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 1, 4; Dec. Dig. § 1.*]

5. DEEDS (§ 138*) — "EXCEPTION" AND "RESERVATION" — DISTINGUISHED.

A "reservation" differs from an "exception," in that the latter is a part of the thing granted and of the thing in esse at the time, but the former is of a thing newly created or reserved out of a thing demised that was not in esse before; and no technical words are necessary in order to create either.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2538-2544; vol. 8, p. 7656; vol. 7, pp. 6140-6144; vol. 8, p. 7787.]

6. WILLS (§ 88*) — NATURE OF INSTRUMENT — DEED OR WILL — PRESENT ESTATE.

An instrument, by which the owner of land, using the words, "have bargained and sold, and by these presents do grant, bargain, sell and convey" it, excepted and reserved to himself therein a freehold estate for the term of his natural life, with full power of control and management as such tenant for life, which was actually delivered and recorded, showed the intent of the grantor to convey a present estate in fee to the grantee, and was a valid deed, and not an instrument of testamentary character.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.*]

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by John Deckenbach and others against Johanna Deckenbach. Judgment for defendant, and plaintiffs appeal. Affirmed.

About 1876 Jacob Deckenbach deserted his wife and children in New Jersey and came to this state, accompanied by another woman, with whom he lived as his wife until her death in 1901. His first wife died in 1882. In 1902, for about six weeks, he visited his children in New Jersey, but returned to this state and married the defendant April 5, 1904. On February 5, 1906, he made, executed under seal in the presence of two subscribing witnesses, acknowledged so as to entitle it to record, and delivered to the defendant, the following instrument: "Know all men by these presents that I, Jacob Deckenbach, of Portland, in the county of Mult-

nomah and state of Oregon, in consideration of love and affection for and relationship to my beloved wife, Johanna Deckenbach, of Portland, Multnomah county, state of Oregon, have bargained and sold, and by these presents do grant, bargain, sell and convey unto the said Johanna Deckenbach, her heirs and assigns, excepting and reserving to myself therein a freehold estate for the term of my natural life, with full power of control and management as such tenant for life, all the following bounded and described real property situated in the city of Portland, county of Multnomah and state of Oregon, to wit: Lots one and two in block one hundred and twenty-five in the original town site of East Portland as the same appear on the duly recorded plat of the said town site in the county clerk's office in the said county and state. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and also all my estate, right, title and interest in and to the same except as hereinbefore excepted and reserved. To have and to hold the same unto the said Johanna Deckenbach, her heirs and assigns forever. And I, Jacob Deckenbach, the grantor above named, do covenant to and with Johanna Deckenbach the above-named grantee, her heirs and assigns, that I am lawfully seised in fee simple of the above-granted premises, and that the same are free from all incumbrances except as hereinbefore created, and that I will and my heirs, executors and administrators shall warrant and forever defend the above-granted premises and every parcel thereof against the lawful claims and demands of all persons whomsoever. In witness whereof I, the grantor above named, have hereunto set my hand and seal this fifth day of February, A. D. 1906. Jacob Deckenbach. [Seal.]

On February 7, 1906, the defendant caused this deed to be recorded in the deed records of Multnomah county. Jacob Deckenbach died July 16, 1906, and the plaintiffs, his children by his first wife, instituted this suit, claiming to be the owners of the property described in the instrument quoted, and asking that it be removed as a cloud on their title; that they be adjudged to be the owners of the property in fee simple, subject to the dower right of defendant; and that she account to them for the rents and profits of the same from the date of her husband's death. One cause of suit alleged in their complaint was that the conveyance mentioned was accomplished by the undue influence of the defendant, exercised over her husband to such an extent that the transfer of title was not in any sense his own doing, but, in effect, the act and deed of the defendant. The second cause of suit, the relations of the parties and the execution of the conveyance being described, is summed up in this allegation: "That said instrument purporting to be a deed and set out in paragraph 4 of the

first cause of suit herein, and by reference made a part of this second and further and separate cause of suit, is inoperative as a deed of conveyance, for the reason that by said instrument purporting to be a deed no present or vested interest in the real property described in said instrument was conveyed or transferred to or vested in the defendant, and that said defendant acquired no interest in or to said real property by reason of said instrument purporting to be a deed, and the same was and is inoperative as a deed of conveyance." The answer traverses all the allegations of undue influence, as well as the second cause of suit, above quoted. The circuit court, after hearing the testimony, rendered a decree dismissing the suit, and the plaintiffs have appealed.

Leroy Lomax, of Portland (Sinnott & Adams, of Portland, on the brief), for appellants. Thad. W. Vreeland and Chas. H. Carey, both of Portland (Carey & Kerr, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] Concerning the first cause of suit, a careful reading of all the testimony discloses that the decedent deserted his first wife and his children, the plaintiffs, in 1876. He afterwards came to this state and lived for some years with the woman alluded to as his second wife until her death, never having had any communication with his real wife or his children. After his marriage with defendant he continued to attend to his business, having amassed considerable property, both real and personal. He is described by all the numerous witnesses who knew him as a very determined man, not easily influenced by any one. He made a will some time after his marriage with the defendant, in which he bequeathed to her \$10,000 and made sundry bequests to his children, the plaintiffs. Afterwards, and a few days before the date of the deed in question, he visited the office of his attorney alone and gave him directions about preparing the conveyance of the realty in question to the defendant, reserving to himself the use and enjoyment of the same during his life. After the deed was prepared, he arranged a meeting between himself, the attorney, and the other subscribing witness at his home, where he executed the document in legal form and at once delivered it to the defendant, at the same time destroying the will already mentioned. While the testimony shows that, on account of the marital relations existing between him and the defendant, there was opportunity for her to beguile him into executing the deed, there is no word in the evidence showing that she ever intimated to him that he should make the conveyance in question. On the contrary, she testified that she had never asked for such a conveyance, and knew nothing whatever of his intentions to execute until the

very time when he signed it and delivered it to her. All that is attempted to be shown directly by the testimony is that during their married life he was ill on several occasions, and at the time of making the deed he was in declining health; but it is clearly proved that the next day after the transaction the decedent and the defendant went to California on a pleasure trip lasting for several weeks, and after their return to Portland, where they resided, he superintended the erection of a brick building on the property involved, and continued actively in that employment until a short time before his death. The testimony impresses us with the belief, and we so find, that he had the mental capacity to know and comprehend the nature of the business in which he was engaged, and that the allegation of undue influence exerted over him falls for want of proof. As against that charge the deed is valid, within the meaning of the following authorities: *Carnegie v. Divan*, 31 Or. 366, 49 Pac. 891; *Swank v. Swank*, 37 Or. 439, 61 Pac. 846; *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039; *Hamilton v. Holmes*, 48 Or. 453, 84 Pac. 154; *Pickett's Will*, 49 Or. 127, 91 Pac. 377; *Reeder v. Reeder*, 50 Or. 204, 91 Pac. 1075; *Ames v. Moore*, 54 Or. 274, 101 Pac. 769; *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; *Stevens v. Myers*, 121 Pac. 434.

[3] As to the second cause of suit, we observe that the allegation, above quoted, contains nothing more than legal conclusions respecting the construction to be placed upon the instrument in question. If these deductions are correct, the invalidity of the deed is apparent upon its face, and would prove no obstacle against the plaintiffs, in an action at law, to recover possession of the property descending to them from their ancestor. A cloud upon one's title arises by virtue of an instrument apparently valid upon its face, and which would put the plaintiffs upon their proof as against such an instrument if it were admitted in evidence to support an adverse title; but no cloud arises upon an instrument void upon its face.

[4-6] Passing, however, to the principal dispute on this branch of the suit, it is contended, in substance, by the plaintiffs that the document in question conveyed no present estate out of the grantor, but attempted to create an interest which would come into being at some future time, and hence was void as a deed of conveyance. They argued that because of these words, "excepting and reserving to myself therein a freehold estate for the term of my natural life, with full power of control and management as such tenant for life," the grantor kept for himself the entire estate, passing nothing at the time to the defendant, and maintained that he was still seised and possessed of the property, which after his death descended to them unaffected by the instrument.

Section 7100, L. O. L., reads thus: "Con-

veyances of lands, or of any estate or interest therein, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age or by his lawful agent or attorney and acknowledged or proved, and recorded as directed in this chapter without any other act or ceremony whatever." This comprises the whole formula for conveyancing, and dispenses with the common-law livery of seisin.

As we construe this deed, the grantor conveyed at the time the fee-simple estate in the realty mentioned, subject to his own life estate therein. As indicating a grant in presenti, we have only to look at the words of the instrument, "have bargained and sold, and by these presents do grant, bargain, sell and convey." These are words of present grant, and consequently indicate an intention of the grantor to convey at the time a then actual interest in the lands mentioned. Indeed, he retains "the control of the estate for the term of my natural life, with full power of control and management as such tenant for life." An estate for life, although one of freehold, is not one of inheritance, and it will be observed that it does not reserve the right to convey the property, but only the power to control and manage; and not only so, but those functions are to be exercised only as such tenant for life. If Deckenbach and the defendant had been divorced after the execution and delivery of the deed in question, without any adjustment of their holdings in realty, no one would contend that a clear title to the property described in the instrument could have been acquired without a conveyance from Johanna Deckenbach.

It is argued that because the exception and reservation appear in what is technically known as "the premises" in the deed it must be construed as retaining the whole estate, postponing all title to the grantee until after the death of the grantor; but, as said in *Bryan v. Bradley*, 16 Conn. 474, 481: "A reservation differs from an exception in this: That the latter is ever a part of the thing granted and of the thing in esse at the time; but the former is of a thing newly created or reserved out of a thing demised that was not in esse before. No technical words are necessary in order to create either; and the real sense of the instrument is to prevail; and in several of the cases put in the Touchstone the word 'reserve' is used. And Comyn says: 'An exception may be made by the word "reserving," which has sometimes the force of an exception or saving.'" No advantage to the plaintiffs, therefore, can be predicated on a technical distinction between a reservation and an exception as against the real intent of the grantor as revealed by a consideration of the entire instrument.

The canon of construction in cases like this is thus laid down by Mr. Justice Eakin

in *Sappingfield v. King*, 49 Or. 102, 108, 89 Pac. 142, 144 (8 L. R. A. [N. S.] 1066): "Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper, or, upon the other hand, did he intend that all the interest or estate should take effect only at his death? If the former, it is a deed; if the latter, it is testamentary and revocable."

Taking it by its four corners, considering the words of present grant, remembering that the grantor retained only the control and management of the property as tenant for life, not as owner of the fee, and taking into account its actual present delivery and record, the effect of the instrument in question was to convey a present estate to the grantee; and it must be construed as a valid deed. *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329; *Cone v. Cone*, 118 Iowa, 458, 232 N. W. 665; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Christ v. Kuehne*, 172 Mo. 118, 72 S. W. 537; *Stamper v. Venable*, 117 Tenn. 557, 97 S. W. 812; *Sibly v. Somers*, 62 N. J. Eq. 595, 50 Atl. 321; *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224; *Kytile v. Kytile*, 128 Ga. 387, 57 S. E. 748; *White v. Willard*, 232 Ill. 464, 83 N. E. 954; *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854; *Thomas v. Sewing Mach. Co.*, 105 Minn. 88, 117 N. W. 155; *McIntyre v. McIntyre's Estate*, 156 Mich. 240, 120 N. W. 587; *Tansel v. Smith* (Ind. App.) 93 N. E. 548; *Pruett v. Cow-sart*, 136 Ga. 756, 72 S. E. 30; *Mays v. Fletcher*, 137 Ga. 27, 72 S. E. 408; *Spencer v. Razor*, 251 Ill. 278, 96 N. E. 300; *Timmons v. Timmons* (Ind. App.) 96 N. E. 622; *Beebe v. McKenzie*, 19 Or. 296, 24 Pac. 236; *Prindle v. Iowa Soldiers' and Orphans' Home*, 153 Iowa, 234, 133 N. W. 106.

With the iniquity of the grantor in deserting his family and leaving them dependent on their own resources for so many years, or with the propriety of his conveying to his wife the great bulk of his property, leaving to his children only about \$3,800 worth of personal property, as disclosed by the record, we have nothing to do, any more than if he had wasted his substance in riotous living in a far country. The property was his in fee simple, and it could make no difference in the decision of this case what he did with it, so long as he was competent to act as he chose.

The decree of the circuit court is affirmed.

(65 Or. 11)

WHITE et al. v. PROEBSTEL et al.

(Supreme Court of Oregon. March 18, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 45*) — EVIDENCE—INTEREST OF PLAINTIFF.

In a suit to reform a deed executed by defendant so as to include lot 5 in section 21, where it was shown that lot 5 was subsequently conveyed to G., that G. prepared and filed a

plat of a tract described as the "G. tract" in section 21, and subsequently conveyed lots therein to plaintiffs by reference to the plat, it was sufficiently shown that plaintiffs' lots were in lot 5 to enable them to sue for a reformation of defendant's deed, especially where defendant had himself conveyed land by reference to the plat of the G. tract.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. ESTOPPEL (§ 32*)—DESCRIPTION OF PROPERTY—REFERENCE TO PLAT.

A person who conveys lots described by reference to a plat prepared and recorded by another is bound by such plat.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 81; Dec. Dig. § 32.*]

3. REFORMATION OF INSTRUMENTS (§ 45*) — MISTAKE—SUFFICIENCY OF EVIDENCE.

In a suit to reform a deed, evidence held to show that a reference to the northwest quarter of the southwest quarter of a section was inserted by mistake for "northwest quarter of the southeast quarter."

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Amanda F. White and others against Frederick Proebstel and Media Proebstel, his wife, and others. From a judgment for plaintiffs, Media Proebstel, individually, and as executrix of Frederick Proebstel, deceased, appeals. Affirmed.

This is a suit to reform a deed from Frederick Proebstel to Wendel Proebstel, executed on the 24th day of September, 1857, and to cancel a deed made by Frederick Proebstel to W. J. Snodgrass, and one by W. J. Snodgrass to Frederick Proebstel, both relating to the same property, also to quiet the titles of the plaintiffs to parts of the property misdescribed in the first-named deed, and for other relief. It appears that on March 16, 1854, Frederick Proebstel located upon and gave notice to the Surveyor General of Oregon of his claim as a donation land claimant for 160 acres of land described as follows in his notice: "Fractional northwest quarter of southeast quarter of section 21; fractional northeast quarter of southwest quarter of section 21; fractional northwest quarter, section 21; fractional northeast quarter of northeast quarter of section 20." Thereafter, on the 13th day of March, 1857, there was issued to him by the register and receiver of the United States Land Office, at Oregon city, a certificate of proof of residence and payment for said land, in which the land is described as: "River lot No. 1 in section 20; river lots Nos. 1 and 2 in section 21; and fractional river lots No. 3 in section 21. The east half of the northwest quarter of section 21, fractional northwest quarter of the southeast quarter of section 21 in township No. 1 north of range No. 1 east of the Willamette meridian, containing 159.29 acres." Thereafter, on the 11th day of September, 1865, a patent was issued by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

the United States to the said Frederick Proebstel for said land described in the patent as: "Lot one in section twenty; lots one, two, three and five and the east half of the northwest quarter twenty-one, all in township one north of range one east in the district of lands subject to sale at Oregon city, Oregon, containing one hundred and sixty acres and fourteen hundredths of an acre." Prior to the issue of the patent, namely, on the 24th day of September, 1857, Frederick Proebstel conveyed to Wendel Proebstel the following described land: "River lot No. 1 in section 20, river lots No. 1 & 2 in section 21, and fractional river lot No. 3 in section 21. The east half of the northwest quarter of section 21, fractional northwest quarter of the southwest quarter of section 21 in township No. 1 north of range No. 1 east of the Willamette meridian, containing one hundred and fifty nine 29/100 acres (159.29/100)." It will be noticed that the description in this deed by Frederick Proebstel to Wendel Proebstel follows literally the description contained in the register and receiver's receipt, except that the description of the tract last named is given as, "Fractional northwest quarter of the southwest quarter of section 21," instead of "northwest quarter of the southeast quarter." The property was never fenced, but thereafter was used for stock purposes by Wendel Proebstel until January 20, 1872, when he conveyed it to P. T. Smith and C. W. Burrage, in which conveyance he describes the land as situated in "sections twenty and twenty-one of township one north of range one east of the Willamette meridian, the same being the Frederick Proebstel land claim more particularly described as follows: [Using the description given in the patent to Frederick Proebstel]." On January 4, 1875, Smith and Burrage conveyed to M. S. Griswold: "Lot five (5) of section twenty-one (21) of township one (1) north of range one (1) east of the Willamette meridian. The same being part of the Frederick Proebstel donation land claim. * * * Containing 8.66 acres." This description of lot 5 of section 21, it will be noted, is the same as that used in the patent, and refers to the same tract described in the register and receiver's receipt as the "fractional northwest quarter of the southeast quarter of section 21." On the 13th day of February, 1883, the said Griswold platted into lots and streets 950 feet by 286 feet of the east part of said lot 5 as: "Plat of Griswold tract, being part of 'City View addition to Albina,' situate in sec. 21, T. 1 N., R. 1 E., near Albina"—and filed said plat in the county clerk's office of Multnomah county; there being no other description on the plat disclosing the ground platted from which it can be located. Accompanying the plat there was also filed and recorded at the same time a deed of dedication executed by Griswold and his wife on February 13, 1883; the dedication being in the following words: "Plat Book 1, page 68.

Griswold to the public. Know all men by these presents, that we, M. S. Griswold and Jennie F. Griswold, do hereby make, establish and declare this map and plat to be the plat of the 'Griswold tract,' being a part of the City View addition to Albina, in Multnomah county, Oregon. The lands represented therein being upon a part of the donation land claim of Frederick Proebstel, situate, lying and being in the county of Multnomah and state of Oregon. And we do hereby dedicate to the use of the public as streets, alleys, avenues and public grounds all such portions of said land upon said map and so represented as the same are thereupon laid down and mapped. * * *

Thereafter the plaintiffs separately, in the years 1892, 1893, and 1894, purchased from said Griswold, and received deeds therefor, lots in said Griswold tract as follows: Amanda F. White, lots 4 and 5, block 11; Elizabeth M. Cadwell, lots 6 and 7, block 11; Lettie Lyons, lot 1, block 13; and Mary I. Norton, lot 8, block 11, and lot 8, block 13. Plaintiff Clara E. Morey withdrew from the case before trial, and seeks no relief here.

It appears from the maps and testimony that the Willamette river meanders through the southwest quarter of said section 21, so as to cover the whole of said northwest quarter of the southwest quarter; and therefore that there is no fractional northwest quarter of the southwest quarter of section 21, or if there be that it was not a part of the Frederick Proebstel donation land claim. On October 8, 1908, Frederick Proebstel conveyed to W. J. Snodgrass a part of said lot 5 in section 21, not platted by Griswold, and certain lots and blocks in the Griswold tract, described with reference to the "Griswold plat," thus making Frederick Proebstel a party to the plat, and he is bound by it. Oregon City v. Oregon & California R. Co., 44 Or. 165, 74 Pac. 924; Kuck v. Wakefield, 58 Or. 549, 115 Pac. 428.

There was admitted in evidence a decree of the circuit court of the state of Oregon for Multnomah county, rendered on the 26th day of January, 1909, in the case of David Goodsell as administrator of the estate of M. S. Griswold, deceased, et al. v. Frederick Proebstel et al. to reform this deed of Frederick Proebstel to Wendel Proebstel, in which suit Proebstel appeared and the court decreed the reformation of the description in the said deed to make it include lot 5 of section 21, township 1 north, range 1 east, Willamette meridian, instead of reading: "Fractional northwest quarter of southwest quarter of section 21." The Snodgrass heirs having filed a disclaimer here, they are eliminated from the case; and Frederick Proebstel testifies that the deed to Snodgrass was only a trust to help Proebstel get the title straightened out, and in his answer asks to have the deed to Snodgrass canceled. Frederick Proebstel died since the trial of the case, and the suit was ordered continued against Med-

ia Proebstel, administratrix of his estate. The plaintiffs paid taxes on their respective lots continuously from the dates of their respective purchases, beginning about 1892 or 1893, until the time of the trial. Upon the trial, findings were made sustaining the contention of plaintiffs, and Media Proebstel individually and as administratrix, appeals.

Martin L. Pipes and Henry St. Rayner, both of Portland, for appellant. George J. Perkins, of Portland, for respondents.

EAKIN, J. (after stating the facts as above). Counsel claims to have offered the decree in the case of *Goodsell v. Proebstel* in evidence only to show an admission on the part of Frederick Proebstel in allowing the decree to go against him reforming the deed; and, plaintiff claiming no more, it is not necessary to consider whether the reformation of the deed operated to actually reform the deed, or was only a quieting of the title of the plaintiffs in that suit.

[1, 2] Defendants contend that the deeds from Griswold to the plaintiffs are void, because the plat to which they refer is too indefinite to identify the property or to connect them with the alleged error in the deed from Frederick Proebstel to Wendel Proebstel; but the deed and plat, taken together, are not void for failure to identify the property. That is certain which can be made certain. *Bogard v. Barhan*, 52 Or. 121, 96 Pac. 673, 132 Am. St. Rep. 676, where it is said that if a tract or lot has acquired a name to distinguish it, and by which it is known, the same may be conveyed without reference to the boundaries. This tract is known as "plat of the Griswold tract," being a part of the City View addition of Albina, in section 21, township 1 north, range 1 east, near Albina, and the deed of dedication describes it as upon a part of the donation land claim of Frederick Proebstel, and lot 5 of said section 21 was conveyed to Griswold; therefore we now have the "plat of the Griswold tract" located as part of said lot 5. By Proebstel's deed to Snodgrass, he conveys by metes and bounds the west 406.3 feet of said lot, and "also lots 1, 2, and 8 in block 13 and lots 4, 5, 6, 7, and 8 in block 11 of the Griswold tract." Thus by Proebstel himself we have further identity of the platted ground as lot 5, section 21. If the 40-acre tract were just 80 rods long, that would make it 1,320 feet in length. The plat includes 950 feet east and west of the Griswold tract, and the part described by metes and bounds in the Proebstel deed to Snodgrass is 408.9 feet, which takes the whole of the said lot 5. First, we have a name that identifies the platted ground as the "Griswold tract," and extrinsic evidence may be resorted to to locate it. Proebstel also is bound by the plat, as he conveyed lots described by reference thereto. *Oregon City v. Oregon & California R. Co.*, supra; *Kuck v. Wakefield*, supra. So far as the identity

of the plat is concerned, this case is almost identical with *Jaeger v. Harr*, 62 Or. —, 123 Pac. 61. There was no occasion to locate the several lots of the plaintiffs other than as part of lot 5, section 21, their title being in question only so far as relates to the error in the Proebstel deed; and we hold that the description is sufficient for that purpose. However, there is sufficient extraneous evidence here as to the particular location of the lots of these plaintiffs to locate them where that necessary.

[3] This brings us to the real question in the case, Was there a mistake made in the deed from Frederick Proebstel to Wendel Proebstel of date September 24, 1857? The deed from Frederick Proebstel to Wendel Proebstel was executed in Portland before a justice of the peace; and by the fact that the description of the property in the deed follows so closely the exact words and expressions of the register and receiver's receipt, except in using the word "west" instead of "east," it is plain that the scrivener had the register and receiver's receipt before him, and attempted to copy therefrom the description. This, taken in connection with the fact that there is no northwest quarter of the southwest quarter of section 21, in the township mentioned, shows that it was a mistake to include such. There is another circumstance that had great weight in bringing us to this conclusion, namely, on March 9, 1901, the Title Guarantee & Trust Company, with a view to insure the title to the "Griswold tract," wrote to Frederick Proebstel, the letter being Exhibit U, as follows: "[Letter head.] Portland, Oregon, March 9th, 1901. Frederick Proebstel, Esq., Baker City, Oregon—Dear Sir: In examining the title to a tract of land within the boundaries of the donation land claim covered by your patent from the United States dated February 11th, 1865, and recorded in this county, we find that on the 24th day of September, 1857, you made a deed to Wendel Proebstel, your brother, for certain property which we think was intended as your entire donation land claim. This deed has been recorded in Book A, page 488, of our records. The description in this deed is evidently erroneous, for part of the property mentioned is in the Willamette river, instead of within the boundaries of your claim. Of course at this time you cannot recall the exact description of the property which you conveyed to your brother, Wendel, but will you write us whether or not it was your intention to convey your entire claim. Yours very truly."

Proebstel answered: "La Grande, Oregon, 4-20th, 1901. T. G. & T. Co., Portland, Oregon—Gentlemen: If the numbers are wrong on the deed I made to the property you mention, I will try and make it right for a reasonable consideration. Very respectfully, Fred Proebstel."

This was evidently the first information Frederick Proebstel had of the mistake in

the deed, and the first time he attempted to profit by it. His letter must be considered with reference to the letter from the Title Guarantee & Trust Company to him, and, so considered, is a practical admission that it was his intention to convey his entire donation land claim to his brother, and that at that time his only interest in it was to find how much there was in it for him. That feature of the situation seems to have grown on him with time, and the possibilities thereafter developed. This is shown in his own testimony. On October 8, 1908, he conveyed by warranty deed to W. J. Snodgrass the parts of this lot 5 which had not been transferred by Griswold; but in his testimony he says that he made the deed to Snodgrass in trust. "He was going to see that— He was going to take it to law, and see if there was any law against it. * * * I sold it to Snodgrass in that way; that he was to see it through and see if they are going to sue it. * * * That land was mine. I had never sold it." Thereafter Snodgrass negotiated with some of these parties, asking \$250 a lot to settle. In attempting to make plausible his contention, Proebstel testifies: "I sold him [meaning Wendel Proebstel] what was in the bottom; what land I had in the bottom"—but it appears from the evidence of other witnesses that 40 acres additional of the Proebstel donation land claim is on the bluff. The decree reforming the deed from Frederick Proebstel to Wendel Proebstel in the suit of Goodsell v. Proebstel made the said conveyance include lot 5 of section 21. Defendant Frederick Proebstel was a party to that suit and appeared therein, which also tends to establish that the deed of 1887 was, in fact, a mistake in not including lot 5 of section 21, and that it should be reformed as prayed for. We are well satisfied that the decree of the circuit court is an equitable one.

The decree is affirmed.

(64 Or. 371)

SHARP v. KILBORN.

(Supreme Court of Oregon. March 18, 1913.)

1. DEEDS (§ 56*)—DELIVERY—WHAT CONSTITUTES.

Where a grantor delivered a deed to a third person, with instructions not to deliver it to the grantee unless the purchase price was paid, a delivery contrary to such directions passed no title, whether the third person was an agent of the grantor or whether the deed was an escrow.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

2. PRINCIPAL AND AGENT (§ 124*)—EVIDENCE OF AUTHORITY—QUESTIONS OF LAW OR FACT.

Where the only evidence of agency was a letter from the principal to the agent, which was established, the scope of the agency was a question of law for the court.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. § 124.*]

3. DEEDS (§ 56*)—DELIVERY—WHAT CONSTITUTES.

A grantor mailed a deed to a bank, with a direction that it should not be delivered to the grantee until the purchase price was paid the bank for the grantor's use. The bank delivered the deed to the grantee in exchange for a check drawn on itself and payable to its own order. The check was not charged to the grantee's account, and neither sent to the grantor nor credited to him. A few days later the bank failed. *Held*, that there was no delivery of the deed; the grantee having made the bank its own agent to pay the money to the grantor, and no such payment having been made.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by W. L. Sharp against Warren Kilborn. Judgment for defendant, and plaintiff appeals. Reversed, and decree entered for plaintiff.

This is a suit to cancel a deed alleged to have been delivered by a third party out of escrow, contrary to the conditions of the deposit, to wit, without payment of the purchase price of the realty described in the conveyance. The answer admits the lodgment of the deed with the third party, to be delivered on the proviso named, but alleges affirmatively that the defendant paid to the depository the purchase price of the property, as required by the conditions of the escrow, and so received the deed as regularly delivered. The payment pleaded in the answer is denied by the reply. At the hearing, when the plaintiff had introduced testimony and rested, the defendant moved the court for an order dismissing the suit because the complaint does not state facts sufficient to constitute a cause of suit, and further that the plaintiff had failed to produce sufficient testimony to sustain a judgment or decree against the defendant. The court allowed this motion, and dismissed the suit at the cost of the plaintiff, who appeals.

Arthur Clarke, of Corvallis (McFadden & Clarke and George W. Denman, all of Corvallis, on the brief), for appellant. W. S. Hufford, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). Only a question of law is involved in this suit, for the defendant by his motion admits the truth of the testimony, but says that it is not sufficient to sustain any decree against the defendant. The record discloses that about February 20, 1911, the plaintiff, a resident of Klamath Falls, was the owner of the real property in question, which is situated in Multnomah county. Some real estate agency in Portland, Or., had procured a purchaser for the premises, and so notified the plaintiff, who on the date last above mentioned addressed a letter to the Mt. Scott Bank at Lents, Or., as follows: "Gentlemen: Inclosed herewith I hand

you warranty deed of myself and wife to Warren Kilborn, also a certain deed from O. R. Additon and wife to me for the same property described in the deed first mentioned. I send you the deeds mentioned pursuant to instructions received by me from Bright Realty Co., Portland, Oregon, the agent who negotiated this sale. You will observe that the consideration stated in the deed made by myself and wife is ten dollars. That however is not the true consideration herein. The true consideration is \$625 which sum must be paid to you before the deed is delivered and you are hereby instructed not to deliver the deed I send you herewith or either of them until the consideration amounting to \$625 is paid you for my use. When you receive that sum then deliver the deeds I send you. The Bright Realty Co. of Portland, Oregon, who negotiated this sale, is to receive a commission of five per cent. out of the consideration of \$625. You may pay such commission out of the consideration and send the balance of \$625 to the First Trust and Savings Bank of Klamath Falls, Oregon, to be placed by such bank to my credit. Kindly attend to this matter according to instructions given you as soon as possible and oblige. Yours truly, W. L. Sharp." Prior to February 27, 1911, the defendant had deposited in the Mt. Scott Bank money in excess of \$625, which had not been repaid to him. Having received notice of the arrival of the deed, he went on that date to the bank and gave to the officer in charge of the institution his check in words and figures as follows: "Lents, Oregon, Feb. 27, 1911, No. ———. Mount Scott Bank. Pay to the order of Mount Scott Bank \$593.75 five hundred ninety three ⁷⁵/₁₀₀ dollars. Warren Kilborn." The amount of the check, it will be noticed, was \$625, less 5 per cent. presumably deducted for the real estate agent's fee. The bank took the check, and delivered the deed to the defendant, who placed it on record. The check was never charged to Kilborn's account, nor sent to the plaintiff, and no money whatever was paid by any one to plaintiff on account thereof or of the purchase price. Neither was he given credit by the bank in the transaction. The check remained in the bank until it closed its doors and failed on March 3, 1911.

[1, 2] It is needless to deal in refinements about whether the deed was an escrow, or whether the bank was merely the agent of the grantor named therein. In the first place the delivery of the deed in violation of the terms of the escrow passed no title, and in the other case if the agent delivered the deed contrary to his instruction it would still pass no title. The only evidence of the agency of the bank as the representative of the plaintiff is found in the letter quoted above, and, this being established, the scope

of the agency is a question of law for the court. *Baker v. Seaward*, 127 Pac. 961.

[3] In determining the legal effect of this letter, we must hold that the bank could not rightfully deliver the deed so as to bind the plaintiff unless it had first received the money called for by the instructions of the letter. At his own peril, the defendant dealt with the bank as the agent of the plaintiff. *Reid v. Alaska Packing Co.*, 47 Or. 215, 83 Pac. 139; *Rumble v. Cummings*, 52 Or. 203, 95 Pac. 1111; *Baker v. Seaward*, *supra*. Under the circumstances, giving to the bank a check drawn to its own order was not payment to the plaintiff, and the bank had no authority to receive that instrument for that purpose as binding on the plaintiff. The bank was indebted to the defendant in a sum of money larger than that required as a consideration for the deed. The legal effect of the giving to the bank the check mentioned was a direction by the defendant to his own debtor to pay the debt of the defendant to the grantor named in the deed. It was at best an abortive novation inaugurated by the defendant, in which was wanting one requisite essential to bind the plaintiff, namely, the consent of the plaintiff himself. He was not named as the payee of the check, and, being a stranger to that instrument in every respect, it would not affect him in any manner. In substance, the defendant made the bank his own agent to pay the money to the plaintiff, and must be bound by the failure of the agent thus appointed. So far as payment is concerned, therefore, the defendant stands in the same situation as if the plaintiff had personally demanded of him the payment of the money and he had refused it. The following authorities are instructive on the question of payment by check: *Black v. Sippy*, 15 Or. 574, 16 Pac. 418; *Johnston v. Barrills*, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717; *Stringham v. Mutual Ins. Co.*, 44 Or. 447, 459, 75 Pac. 822; *Steel v. Island Mill Co.*, 47 Or. 293, 297, 83 Pac. 783; *Klerman v. Kratz*, 42 Or. 474, 484, 69 Pac. 1027, 70 Pac. 506. That the delivery of a deed, contrary to the conditions annexed by the grantor when placing it in the custody of a third party, conveys no title the following authorities are applicable: *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127; *Bradford v. Durham*, 54 Or. 1, 101 Pac. 897, 135 Am. St. Rep. 807; *De Bow v. Wollenberg*, 52 Or. 404, 423, 96 Pac. 536, 97 Pac. 717; *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319. The act of giving up the deed without actual payment of the money, under the circumstances disclosed by the testimony, was not a delivery, and passed no title to the realty.

The decree of the circuit court is reversed, and one entered here in accordance with the prayer of the complaint.

(84 Or. 376)

HARPOLD v. ARANT.

(Supreme Court of Oregon. March 18, 1913.)

TAXATION (§ 684*) — TAX SALES — PLACE — "COURTHOUSE DOOR."

A sheriff's return on an execution for the sale of real property for taxes, reciting that the property was sold "at the front door of the courthouse," showed a sufficient compliance with Hill's Ann. Laws, § 2828, providing that all sales for delinquent taxes on real estate must be made "at the courthouse door."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1369-1374; Dec. Dig. § 684.*

For other definitions, see Words and Phrases, vol. 2, p. 1684.]

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by A. D. Harpold against W. F. Arant. Judgment for defendant, and plaintiff appeals. Affirmed.

John Irwin, of Klamath Falls, for appellant. C. C. Brower, of Klamath Falls, for respondent.

MOORE, J. This is an appeal by the plaintiff from a decree dismissing his suit to determine an adverse title to vacant and unimproved real property in Klamath county, Or. The facts are that on July 2, 1898, Roscoe R. Guillems obtained a warranty deed for the northeast quarter of the southeast quarter of section 11, in township 39 south, of range 11 east, of Willamette meridian. This land having been assessed to the owner, who failed to pay the tax imposed, the sheriff of that county published a notice to the effect that by virtue of a warrant attached to certain delinquent tax rolls of that county, commanding him to levy upon the goods and chattels of the taxpayers named, and if none could be found then upon the real property described in such rolls or so much thereof as might be necessary to satisfy the amount of taxes charged thereon, with costs and expenses, and, being unable to find any goods or chattels belonging to the taxpayers therein named, he had levied upon the real property set forth in such rolls, including that of R. R. Guillems, tax, \$2.85, describing the land as hereinbefore set forth, and that on Saturday, December 28, 1901, at the hour of 10 o'clock a. m., "at the front door of the courthouse" in said county and state, he would sell the above-described premises at public auction to the highest bidder for cash, subject to redemption, to satisfy taxes, costs, and accruing costs. The return of the sheriff is to the effect that at the time and place and in the manner stated in the notice he offered the premises for sale in separate parcels to the highest bidder for cash, and sold the same to W. F. Arant the defendant herein, for \$4.15, which was the whole price bid, being for taxes, \$2.82, and costs, \$1.30, on the property of R. R. Guillems, leaving in his hands a surplus of three cents. No re-

demption from such sale having been made or tendered, the sheriff executed to the purchaser a deed to the real property, which instrument was recorded December 4, 1905. Four months and 14 days thereafter, to wit, on April 18, 1906, A. D. Harpold, the plaintiff herein, commenced an action against Ross Guillems in the circuit court of Klamath county, Or., to recover \$1,277, the amount of the latter's promissory note, and \$150 as a reasonable attorney's fee. At the same time a summons was issued and returned by the sheriff with an indorsement thereon to the effect that he was unable to find the defendant within the state and county. Harpold also filed with the clerk an affidavit for an attachment and an undertaking therefor, whereupon a writ of attachment was issued, but the transcript does not contain a copy thereof nor of the return that should have been made thereto. The command of the writ and what the sheriff did in obedience thereto can only be inferred from Harpold's affidavit for the service of summons by publication, filed April 19, 1906. The entire sworn declaration in relation thereto reads as follows: "That on the 19th day of April, 1906, a writ of attachment was duly issued out of said circuit court in this cause, directed to the said sheriff and commanding him to attach and safely keep all property of the said defendant, Ross Guillems, within Klamath county, not exempt from execution, or so much thereof as might be necessary to satisfy the plaintiff's demand, viz., the sum of \$1,277 and \$150 attorney's fees and costs and disbursements of said action; that said writ of attachment was placed in the hands of said sheriff on the 19th day of April, 1906, for execution; that the property was attached by said sheriff on the 19th day of April, 1906, the northeast quarter of the southeast quarter, section 11, township 39 south, range 11 E., W. M., in Klamath county, Oregon."

The complete part of Harpold's affidavit with regard to the effort that had been made to find Guillems within the state and to determine his place of residence is as follows: "That said defendant cannot be found within the state of Oregon after due diligence, and that diligent search and inquiry has been made by this affiant of persons most likely to know of the whereabouts of said defendant, Ross Guillems, as follows, to wit: On April 11, 1906, affiant inquired of J. C. Rutenic of Klamath Falls, Or., and the said J. C. Rutenic informed the affiant that the whereabouts of the said defendant, Ross Guillems, was not known to him, the said J. C. Rutenic. That affiant likewise inquired of Crede McKindry, J. W. Brown, and Walter Broadsword, of Bonanza, Or., and all of said persons informed affiant that they did not know where the said defendant was, and also stated that they did not think he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
130 P.—47

within the state of Oregon. That I have repeatedly inquired of the postmaster at Bonanza, Or., the place where the said defendant, Ross Guilliams, formerly resided and where he was accustomed to get his mail, and was informed by the said postmaster that he did not know where the said defendant, Ross Guilliams, is. That all the parties of whom the affiant inquired, and who are mentioned herein, were formerly neighbors and acquaintances of the said defendant. Affiant therefore says that personal service of said summons cannot be made on said defendant, Ross Guilliams, and he asks for an order that service of summons may be made by publication thereof in the Klamath Falls Express, a weekly newspaper printed and published at Klamath Falls, Or., and a paper of general circulation and one most likely to reach defendant, Ross Guilliams. That said Ross Guilliams is a necessary party to said action. That said defendant is not now within the state of Oregon and that he has departed therefrom for the purpose of defrauding his creditors or to avoid the service of summons in this case. That said Ross Guilliams has a large number of creditors in this county and state, and that said Ross Guilliams has departed therefrom for the purpose of defrauding them. That this affiant is a creditor of the said defendant, Ross Guilliams, as will more fully appear from the cause of action hereinbefore set forth and to which reference is hereby made."

Based upon such affidavit, the judge of the court on September 12, 1906, or 146 days after the sworn declaration was filed, made an order reciting the substance of the affidavit and directing service of the summons by publication in the Klamath Falls Express, a weekly newspaper published in that county, once a week for six consecutive and successive weeks, the first publication to be made on Tuesday, September 20, 1906, and the last on November 1st of that year. The affidavit of the printer shows that the summons was published in the designated paper in its regular successive issues, beginning September 27, 1906, a week later than ordered, and ending at the time prescribed. Attached to the affidavit of the printer is a copy of the summons printed, which process required Guilliams to appear and answer the complaint on or before November 1, 1906, and as far as material herein the printed copy reads as follows: "This summons is published in the Klamath Falls Express, a weekly newspaper printed and published at Klamath Falls, Or., by order of Hon. Henry L. Benson, judge of the First judicial district of Oregon, and dated September 27, 1906. The first publication to be made on Thursday, the 27th day of September, 1906, and the last publication to be made on Thursday, the 1st day of November, 1906." Founded on such proof, the court on December 4, 1906, determined that Guilliams was in default, and on the next day further found

that his real property hereinbefore described had been attached, and thereupon gave judgment in favor of Harpold in the sums demanded in the complaint and also ordered the land so attached, or so much thereof as might be necessary, to be sold in the manner prescribed by law to satisfy the sums so awarded and the costs and disbursements of the action, and the accruing costs. An execution was issued on the judgment and pursuant to the command thereof the sheriff's return indorsed upon the writ shows that, after giving the required notice, he, on April 15, 1907, sold the real property in question "at the front door of the courthouse" in Klamath Falls to A. D. Harpold, the plaintiff herein, for \$1,442.

W. F. Arant, the defendant herein, as plaintiff, commenced a suit April 17, 1907, against Roscoe R. Guilliams in the circuit court of Klamath county, Or., to quiet his title to the demanded land under the tax sale. Harpold, however, was not made a party. In the suit last mentioned the court on June 17, 1907, found that the summons had been duly served upon Guilliams by publication for six successive weeks in the Evening Herald, a newspaper of general circulation published at Klamath Falls, in that county, the first publication having been made April 19, 1907, and the last May 31st of that year, as appeared by the affidavit of the printer of that paper, all done in pursuance of and in conformity with the order for the publication thereof, and that the time for answering having expired, and no appearance having been made by Guilliams, it was considered that he was in default, and thereupon a decree was given for Arant as prayed for in his complaint, to the effect that Guilliams had no estate or interest in the real property in question and enjoined him from asserting any claim thereto adverse to that of Arant. In the case of Harpold against Guilliams the sale of the real property so made upon execution was confirmed, and, no redemption having been made or tendered, the sheriff on November 17, 1906, executed a deed of the premises to the plaintiff in that action, reciting in the deed that the sale of the land was made at public auction "in front of the courthouse in Klamath Falls, in said county of Klamath."

The foregoing is a brief résumé of the means whereby the respective parties assert a title to the real property involved herein. Predicated upon such evidence the court found that the summons in the case of Harpold against Guilliams did not correspond with the order of the court therefor; that the affidavit for the publication of process in that case did not state that Guilliams was the owner of any real property within that county, or affirm that his post office address was unknown; that the order of publication did not direct a copy of the complaint and of the summons to be mailed to his last known address; that the real property was

publicly sold for delinquent taxes to Arant, the defendant herein, who thereafter secured a sheriff's deed pursuant to such sale; that the tax proceedings and the deed executed in conformity therewith were regular on their face; and that Arant had secured a decree against Guilliams quieting his title to the real property. Based on these findings, the court deduced as conclusions of law that the judgment so obtained by Harpold was void for want of jurisdiction of the subject-matter and of the person of Guilliams, that by reason thereof the sale of the land upon execution and the deed made in pursuance thereof were likewise void, and that Harpold was not the owner of the real property hereinbefore described or of any interest therein, or entitled to the possession thereof; but that Arant was the owner in fee of the land and entitled to its possession, and, having given a decree in accordance with such findings, the plaintiff undertakes to review such action.

It is argued by plaintiff's counsel that since it appears from an inspection of the sheriff's return, indorsed upon the tax warrant, that the real property so assessed to Guilliams was sold for delinquent taxes "at the front door of the courthouse," the sale was for that reason void, and, such being the case, an error was committed in rendering the decree now brought up for consideration. It is further insisted by plaintiff's counsel that though there may not have been a literal compliance with all the requirements of the statute in respect to the affidavit for the service of the summons by publication, or the order therefor, or the proof thereof, the trial court having originally held in the case of Harpold against Guilliams that the means adopted for that purpose were sufficient to confer jurisdiction of the subject-matter and of the person, the determination thus reached is controlling in the cases at bar, in which the defense is a collateral attack upon plaintiff's title to the land, and, this being so, errors were committed in concluding that the judgment rendered in that action was void for any reason, and in denying the relief prayed for in the complaint herein.

As the defense interposed was not maintained at the time, or in the manner, or by the person authorized by law to avoid or correct the judgment given in the case of Harpold against Guilliams, it will be taken for granted, without deciding the question, that the defense is not a direct attack, and for that reason it can be successful only upon showing either that Guilliams was divested of his title by the tax proceedings before the land was attached, or by proving that the judgment in the case of Harpold against Guilliams was void for a want of power in the court to proceed in that action. *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95.

It will be remembered that the tax deed

executed to Arant upon a sale of the land for delinquent taxes was recorded December 4, 1905, and that the real property was not attached until April 19, 1906. If therefore the tax proceedings were sufficient to divest Guilliams of his legal title, no lien upon the premises nor any estate therein could have been created by the attachment.

The law in force December 28, 1901, when Guilliams' land was sold for delinquent taxes, as far as involved herein, was as follows: "All sales for delinquent taxes, as provided in this chapter, upon real estate, must be made as otherwise made in selling real estate upon execution, at the courthouse door." *Hill's Ann. Laws Or.* § 2826.

The plaintiff's counsel in support of the principle contended for cites the case of *Rubey v. Huntsman*, 32 Mo. 501, 82 Am. Dec. 143, where a statute of Missouri required sales of land for delinquent taxes to be made "before the courthouse door," and, it appearing that a sale of land was made for delinquent taxes within the courthouse, it was held that the sale was void.

In the case at bar, the statute having commanded a sale of land for delinquent taxes to be made "at the courthouse door," was the sale herein void because it was made "at the front door of the courthouse"? Does the transposition of the language of the enactment and the employment of the word "front" to qualify the word "door" render the sale ineffectual? As we view the statute, since the sale of land for delinquent taxes is required to be held "at the courthouse door," the word "the" as thus used fairly implies the front door of that building, and not a side or any other door thereof. The purpose of the enactment evidently was to have the sale made in the most public place at the county seat, and, since such place is the space "at the front door of the courthouse," where persons visiting that building to transact business with the county officers or for any other purpose on the day appointed for the sale of land for delinquent taxes, they would necessarily see and hear what was transpiring, and, since no other place is as well calculated to attract the attention of visitors at the courthouse, the use of the word "front" and the change of the arrangement of the words, when their intended meaning remains, did not render the sale of the land for delinquent taxes void for that reason. Indeed, the sale of the land to the plaintiff herein upon execution was advertised by the sheriff to be made at the same place, and the return of that officer upon the writ of execution shows that the sale was conducted thereat.

The foregoing is the only objection of importance made to the tax proceedings, and, believing that it is not sufficient to defeat the title of Arant, it follows that no lien was created upon the premises by the attachment, and hence it is unnecessary to consider whether or not the judgment in the case of

Harpold against Guilliams is void for any reason.

The decree should be affirmed, and it is so ordered.

(64 Or. 384)

TAYLOR INV. CO. v. DEATSMAN et al.

(Supreme Court of Oregon. March 18, 1913.)

1. JUDGMENT (§ 204*)—COSTS AS SOLE RELIEF.

Costs are a mere consequence of a decree granting other relief, and cannot alone furnish the basis of a substantive judgment, so that a decree for costs against a defendant was void where no other judgment was rendered against it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 376; Dec. Dig. § 204.*]

2. EXECUTION (§ 317*) — CONVEYANCE BY SHERIFF—SETTING ASIDE—FRAUD.

Under L. O. L. § 215, subd. 1, requiring the sheriff to first resort to the judgment debtor's personality in levying execution, the sale of the debtor's realty, made pursuant to an understanding between the sheriff and the creditor, who was the purchaser, to ignore sufficient personality owned by the debtor, was a fraud justifying setting aside the sheriff's deed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 934; Dec. Dig. § 317.*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by the Taylor Investment Company against Wallace G. Deatsman and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a suit to declare void a decree alleged to have been heretofore rendered against plaintiff, and to annul a sheriff's deed made in pursuance of such decree. The complaint alleges, in substance, that at the date of such pretended decree the plaintiff was the owner of certain lots in Firland, Multnomah county, Or., which lots were of the value of \$3,000, or about \$800 each; that on September 22, 1909, the defendant Wallace G. Deatsman began a suit against the plaintiff in the present suit, joining with it the Firland Company, a corporation, and the Pacific States Telephone & Telegraph Company, a copy of the complaint in which suit is annexed to the complaint in this suit, from which it appeared that the town of Firland is in what is known as a restricted district, that is, all lots were conveyed with the restriction that they should be used for residence purposes only; that Deatsman was a purchaser of lots in that district; that the Taylor Investment Company was also the owner of other lots therein purchased, subject to the restrictions above noted; that the Taylor Investment Company had leased its lots to the telephone company for purposes of a poleyard; and that said company was actually using them for the purpose of depositing and sharpening telephone poles thereon, in violation of the restrictions in the deeds to Deatsman and other purchasers, whereby the property so occupied was rendered unsightly and noisy, and the value of

Deatsman's property impaired, and his lots rendered less desirable. The complaint concluded with a prayer for a decree enjoining the telephone company from using the said lots in violation of the terms and conditions of the deed by which the lots were conveyed, requiring the Firland Company to protect Deatsman from such violation, and revoking and canceling the contract between the Taylor Investment Company and the telephone company, and for a permanent injunction against the defendants, and for equitable relief and costs.

The complaint in the case at bar alleges: That a summons was served upon the Taylor Investment Company on September 22, 1909, and that this plaintiff immediately entered into negotiations with the telephone company looking to an adjustment of matters contained in the complaint filed by Deatsman, and was assured by the telephone company that it would put the matter in charge of its attorneys, and that this plaintiff need not give the suit any further attention. That thereafter the telephone company, in response to inquiries by plaintiff, assured plaintiff that the matter in suit had been adjusted, and that Deatsman would pay his own costs. That relying upon such assurance, and supposing the matter settled, plaintiff gave no further attention thereto, when, as a matter of fact, the telephone company agreed to remove its poles if Deatsman would not take judgment against it for costs. That on October 12, 1909, the Deatsman who was plaintiff in the suit first referred to took a default and decree, which reads as follows: "Wallace G. Deatsman, Plaintiff, v. Taylor Investment Co., Pacific States Telephone and Telegraph Co., and Firland Co., Defendants. B. 5847. Complaint having been filed herein on the 22d day of September, 1909, and a copy of said complaint and summons having been served on the defendant Taylor Investment Company on the — day of September, 1909, in Multnomah county, Or., and summons having been served on the defendant Pacific States Telephone & Telegraph Company on the — day of September, 1909, in Multnomah county, Or., and it appearing that neither of said defendants has answered or otherwise pleaded to said complaint, and that the time for so doing has not been extended: Now, therefore, on motion of M. B. Meacham, attorney for plaintiff, said defendants are hereby declared to be in default, and it is therefore ordered, considered, adjudged, and decreed that plaintiff's complaint be taken as confessed by said defendants, and the defendant Pacific States Telephone & Telegraph Company is hereby ordered to desist and refrain from storing and keeping telephone or telegraph poles on lots 7, 8, and 9, block 8, Firland, Multnomah county, Or., and from using said premises as a poleyard for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purpose of cutting, trimming, sizing, shaping, and preparing such poles for use, and the injunction heretofore made herein be and hereby is made perpetual. And it is further ordered and decreed that plaintiff have and recover from the defendant Taylor Investment Company his costs and disbursements herein, taxed and allowed at \$12.15." That on October 27, 1909, by authority of said decree, Deatsman caused an execution to issue for costs, and later the same was levied by the sheriff upon the lots in controversy, and the same were sold and bid in by Deatsman for the sum of \$39.60. That in regular course, the statutory period for redemption having expired, a sheriff's deed issued to Deatsman for the property. That plaintiff had ample personal property out of which the execution could have been satisfied, but that the attorney for the plaintiff in such execution requested the sheriff to immediately levy upon the real property without making search for personal property, and that the sheriff complied with such request. That plaintiff in this suit, before commencing the same, tendered to defendants the \$39.60 paid by him for the property, and demanded that he reconvey the same. The complaint is very voluminous, but the foregoing is all that is material to the decision of this case.

The defendants demurred generally to the complaint, and, said demurrer being overruled, refused to plead further. Whereupon a decree was rendered in favor of plaintiff, and defendants appeal.

M. B. Meacham, of Portland, for appellants. George F. Martin, of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] The decree for costs against the Taylor Investment Company in the original case was void. Costs are a mere incident or consequence which follow a decree for some other relief, and cannot alone furnish the basis of a substantive judgment. Freeman on Judgments (3d Ed.) § 16; Stewart v. Corbus, 15 Or. 68, 13 Pac. 647; Warren v. Shuman, 5 Tex. 441, 450. The default of the defendant being entered, the cause was then ripe for a final decree thereon; but no relief was given Deatsman as to the Taylor Investment Company, and no adjudication as to the respective rights of that company and Deatsman was ever made. That company is not enjoined from making any use of the property it may see fit. Its contract with the telephone company is not declared illegal or canceled, and, except for the purpose of getting costs out of it, and exempting the telephone company therefrom, it is difficult to see any reason why it should have been joined in the suit in the first instance.

[2] By the demurrer it is conceded to be

a fact that Deatsman, who was the execution plaintiff and purchaser of the property, instructed the sheriff not to search for personal property out of which to satisfy the execution, but to levy upon the realty in the first instance, and that the sheriff complied with this suggestion, and levied upon and sold the real property in question in spite of the fact that the Taylor Investment Company had ample personal property out of which the execution might have been satisfied. Subdivision 1 of section 215, L. O. L., requires the sheriff to resort first to the personal property of the judgment debtor; and for the plaintiff and purchaser at the execution sale to induce him to ignore this requirement and sell real property is a fraud which would in itself justify a court of equity in setting aside a sheriff's deed made pursuant to such a sale.

The decree of the circuit court is affirmed.

(64 Or. 359)

LANE v. WORD, Sheriff.

(Supreme Court of Oregon. March 18, 1913.)

1. HABEAS CORPUS (§ 85*)—RETURN—JUDGMENT ROLL IN ANOTHER PROCEEDING.

Where petitioner was arrested for non-payment of a debt alleged to have been fraudulently contracted, and the return to a writ of habeas corpus to determine the validity of his incarceration was not traversed, it was not necessary for the court to consider the judgment roll in the original action.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

2. HABEAS CORPUS (§ 76*)—ARREST IN CIVIL ACTION—FRAUDULENTLY CONTRACTED DEBT—RETURN.

L. O. L. § 218, provides that if the action is one in which the defendant might have been arrested as provided in section 259 an execution against his person may be issued after the return of an execution unsatisfied, and when the cause of action is also a cause of arrest as provided in section 259 such execution may issue of course, or when the defendant has been guilty of fraud in contracting the debt for which the action is brought or in concealing the property for the conversion of which the action is brought he may be arrested. Held, that where the return to a writ of habeas corpus to review the validity of petitioner's arrest on a judgment in a civil action alleged that the cause of action on which the judgment was rendered was a cause of arrest as prescribed by section 259, and that it appeared from the record that it was for money received by petitioner as agent in a fiduciary capacity, and that he had fraudulently converted the same and was guilty of fraud in incurring the obligation, it was sufficient to show that the arrest was proper.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 67; Dec. Dig. § 76.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Habeas corpus on petition of A. Lane against T. M. Word, Sheriff. From a decree dismissing the writ, petitioner appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The plaintiff secured a writ of habeas corpus to inquire into the legality of his imprisonment by the defendant, as sheriff of Multnomah county, Or. The return admitted having custody of the plaintiff and alleged that he was detained by virtue of a writ of execution issued in a civil action wherein one Ball was plaintiff and Lane, the petitioner, was defendant, upon a judgment rendered in that action in the circuit court of Multnomah county. The return states the execution according to its legal effect and also sets out a copy, which is as follows, after the title of the cause: State of Oregon, County of Multnomah—ss.: To the Sheriff of Multnomah County, Greeting: Whereas on the 26th day of November, 1910, by consideration of the circuit court of the state of Oregon for the county of Multnomah, in an action then pending in said court, W. F. Ball, plaintiff, recovered judgment against A. Lane, defendant, for the sum of \$2,800 with interest thereon at the rate of six per cent. per annum from November 26, 1910, and the further sum of \$62.30 costs and disbursements which judgment was enrolled and docketed in the clerk's office of said court in said county on November 26, 1910, and whereas execution upon the property of such defendant has been heretofore issued to the sheriff of Multnomah county, Oregon, and by him duly returned to this court wholly unsatisfied: Now, therefore, in the name of the state of Oregon, you are commanded and required to arrest the said defendant, A. Lane, and commit him to the jail of the said county of Multnomah until he shall pay the said judgment with interest or be discharged according to law and that you make due return of this writ of execution within sixty days after you receive the same." This is duly tested, sealed, and signed by the clerk of the court. In addition to the foregoing, the return states as follows: "That it appears from the record in said case of Ball v. Lane that the cause of action therein upon which the said judgment was rendered was and is a cause of arrest prescribed in section 259, L. O. L.; that it appears from the record in said action that the same was an action for money received by said defendant A. Lane as agent and broker in a fiduciary capacity and by said A. Lane fraudulently misapplied and converted to his own use and that defendant, A. Lane, was guilty of a fraud in incurring the obligation for which the action was brought, and that execution upon the said judgment in said action against the property of said defendant, A. Lane, had been issued directed to the sheriff of Multnomah county, state of Oregon, and by him returned wholly unsatisfied prior to the issuance of the said execution upon which said A. Lane is in my custody." This return was not in any manner traversed by the petitioner. At the hearing on the return day the petitioner was remanded to custody, and he appeals.

G. C. H. Corliss, of Portland (Corliss & Skulason, of Portland, on the brief), for appellant. C. M. White, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] It is necessary as a preliminary question to determine whether we shall consider the original judgment roll in the case of Ball against Lane alluded to in the statement. The bill of exceptions discloses that the judgment roll was relied upon at the hearing by the sheriff as justification for holding the petitioner, and that that document was considered by the court in making its decision and judgment as being part of the sheriff's return to the writ. It was also stipulated by the parties that, if this court should consider the record in the case of Ball against Lane, resort might be had to a copy of that record in another suit heretofore determined by this court, subject to the reservation of the defendant of the right to object to the consideration of the same on the ground that it is not properly a part of the record in the matter under consideration. At the hearing before this court, the defendant objected, as thus stipulated he might, contending that the validity of the return itself, that document not having been traversed, was the only question for us to determine. Although the circuit court may have considered the judgment roll referred to as a part of the sheriff's return, it does not appear what effect was given to it, nor is it material that we should inquire into that question, for the ultimate matter for us to decide is whether or not upon the face of the return, uncontradicted as it was, the circuit court rendered the proper judgment. The only purpose that could be served by the judgment roll referred to was to prove some controverted allegation in the return; but as we have seen, no traverse was made on anything alleged in the return; and hence there was no need to use the judgment roll as evidence or for any other purpose.

Section 639, L. O. L., says: "The court or judge before whom the party shall be brought on such writ shall immediately after the return thereof proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party whether the same shall have been upon commitment for any criminal or supposed criminal matter or not." Section 648, L. O. L., states that: "The plaintiff in the proceeding on the return of the writ may by replication verified as in an action controvert any of the material facts set forth in the return or he may allege therein any fact to show either that his imprisonment or restraint is unlawful or that he is entitled to his discharge, and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint or

against the same and to dispose of the party as the law and justice of the case may require."

[2] Having before us then an unchallenged return, the only question for us to determine is whether or not it shows sufficient facts to retain the petitioner in custody. The rule in section 218, L. O. L., is that: "If the action be one in which the defendant might have been arrested as provided in section 259 an execution against the person of the judgment debtor may be issued to any county within the state after the return of the execution against his property unsatisfied in whole or in part as follows: (1) When it appears from the record that the cause of action is also a cause of arrest as prescribed in section 259 such execution may issue of course." Section 259, L. O. L., provides that the defendant may be arrested in the following cases: " * * * When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought." The allegations of the return already quoted are substantially in the words of the statute. In the absence of any attack upon this language, it must be held sufficient for the purposes of this case on the reasoning adopted by this court in *Barton v. Saunders*, 16 Or. 51, 16 Pac. 921, 8 Am. St. Rep. 261, where it was held that an affidavit for a writ of arrest was sufficient which alleges only "that the defendant has been guilty of a fraud in contracting the said debt and that defendant has removed and disposed of his property with intent to defraud his creditors." By analogy the reasoning of this decision is sustained by *Crawford v. Roberts*, 8 Or. 324. In that case the court had under consideration the attachment law of 1876 (*Laws 1876, p. 86*), providing that a writ might issue on an affidavit showing that "the defendant is indebted to the plaintiff * * * upon a contract express or implied for the direct payment of money." The affidavit was in the very words of the statute. It did not pretend to set out any facts from which the court could draw the conclusion that the obligation in question was one for the direct payment of money, but this court held, in an opinion by Mr. Justice Prim, that the affidavit was sufficient "without undertaking to set out the probative facts necessary to establish the ultimate fact required by the statute to be shown as a basis of the writ." Measured by such standards, the unchallenged return is sufficient to support the detention of the petitioner. If in fact the cause of action and the cause of arrest were one and the same thing, and it so appeared by the record in the case of *Ball against Lane* and that *Lane* was guilty of fraud in incurring the obligations upon which that action was instituted, then it was permissible in

the first instance to issue a writ of arrest or an execution against the person when an execution against his property has been returned unsatisfied. On account of the state of the pleadings before us, we cannot inquire into the main question argued at the hearing.

The judgment of the court below is affirmed.

EAKIN, J., did not sit in the hearing of this case.

(72 Wash. 463)

INGERSOLL et al. v. GOURLEY.

(Supreme Court of Washington. March 15, 1913.)

1. ABATEMENT AND REVIVAL (§ 52*)—STATUTES—CONSTRUCTION.

Rem. & Bal. Code, § 193, providing that no action shall abate by the death, etc., of the party or by the transfer of any interest therein if the cause of action survive, but that the court may, within one year thereafter, allow the action to be continued by or against his representatives or successors in interest, and section 967, providing that all causes of action, other than those for wrongful death, survive to and against the personal representatives of the parties where the cause of action survives, and that their personal representatives may maintain an action at law thereon against a party against whom the cause of action accrued or after his death against his personal representatives, are not intended to define what causes of action survive, but refer to causes which do survive and merely direct in whose name their prosecution may be continued.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248-254; Dec. Dig. § 52.*]

2. ABATEMENT AND REVIVAL (§ 52*)—ASSIGNMENTS (§ 22*)—SURVIVORSHIP—PERSONS ENTITLED TO REVIVED ACTION—ASSIGNEES.

The test of the survivorship of a cause of action is its assignability, and, conversely, the test of assignability is survivorship.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248-254; Dec. Dig. § 52.* Assignments, Cent. Dig. §§ 35-39; Dec. Dig. § 22.*]

3. DESCENT AND DISTRIBUTION (§ 90*)—CANCELLATION OF INSTRUMENTS (§ 27*)—PARTIES ENTITLED TO CANCELLATION OF DEED.

The heir as well as the creditor of the victim of a forged or fraudulent deed may maintain an action to set it aside—the heir because the right survives, and the creditor because it is assignable.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 351-353, 368-381; Dec. Dig. § 90.* Cancellation of Instruments, Cent. Dig. §§ 39-42; Dec. Dig. § 27.*]

4. WILLS (§ 229*)—CONTESTS—RIGHT TO CONTEST—ADMISSIBILITY OF HEIR—"ANY PERSON INTERESTED."

Under Rem. & Bal. Code, § 1807, providing that "any person interested" in any will may, within one year after the probate or rejection thereof, contest its validity, any person acquiring an interest in the will within the year, including the administrator of an heir, who but for the will would have an interest in the estate, is entitled to contest the will within that time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 550-554; Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 1, p. 430.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

5. STATUTES (§ 236*)—CONSTRUCTION—REMEDIAL STATUTES.

In construing remedial statutes, that construction will be preferred, if the language of the statute permit, which will subserve the right rather than that which may perpetuate a wrong.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325: Dec. Dig. § 236.*]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding to contest a will by Miranda Crim and another against Thomas H. Gourley, as executor of the estate of Leslie L. Crim, deceased. Application of M. H. Ingersoll for substitution as the executor of Miranda Crim, deceased, denied, and proceeding dismissed, and contestants appeal. Reversed and remanded, with directions to reinstate the proceeding, and to permit substitution of the executor.

M. H. Ingersoll and Reynolds, Ballinger & Hutson, all of Seattle, for appellants. J. L. Corrigan and M. H. Van Nuys, both of Seattle (Milo A. Root, of Seattle, of counsel), for respondent.

ELLIS, J. Appeal from the dismissal of an action to contest a will. The facts found by the trial court were substantially as follows: On June 1, 1911, Leslie L. Crim died. His sole heir at law was his mother, Miranda Crim. On September 18, 1911, a paper, purporting to be his last will and codicil, was admitted to probate. The respondent, Gourley, was appointed and qualified as executor. On January 23, 1912, Miranda Crim and Leslie C. Travers, a nephew of Leslie L. Crim, commenced an action against the respondent as executor to contest the will and codicil on the grounds of incompetency and undue influence. The action was tried, and on March 16, 1912, the court announced an oral decision upholding the will and codicil, and deciding that Leslie L. Crim was neither incompetent nor under undue influence when he made them. It is conceded that no judgment was entered on this ruling. On March 23, 1912, pending motion for a new trial, the court, being advised that Miranda Crim had died pending suit, suspended proceedings until an administrator might be appointed and substituted as plaintiff in her place. Miranda Crim died on February 2, 1912, at Rochester, N. Y., leaving as her heirs Leslie C. Travers, her grandson, and certain others. On April 25, 1912, the appellant M. H. Ingersoll was by the court appointed and qualified as administrator of the estate of Miranda Crim, deceased. He applied for substitution. Upon these findings the court as conclusions of law held that the right to contest the will and codicil did not survive the death of Miranda Crim; that the administrator of her estate had no right to be substituted as a party in the contest; that Leslie C. Travers had no right to continue the proceedings;

and that the proceedings should be dismissed. Judgment went accordingly. It is apparently conceded that the original trial after the death of Miranda Crim was a nullity.

The sole question presented for our determination is: Does the death of a contesting heir of the putative testator terminate the contest of the will, or may the contest be revived and continued in the name of the administrator or heir of the deceased contestant? In other words, Does the right to contest a will survive to the heirs or personal representatives of the heir of the putative testator? The question was before us in the recent appeal in *Re Siebs' Estate*, 126 Pac. 912, upon the following facts: Dorothy Drury Siebs died, having willed all of her property to her sister Mrs. Moulton. The will was probated May 5, 1902. Her immediate relatives were her sister Mrs. Moulton, her brother George W. Drury, and her father, William C. Drury. Whether or not she left a husband did not appear, and, though that fact was adverted to by this court as an additional obstacle to the contest, the case was actually tried below and decided here upon the theory that her father, William C. Drury, was her sole heir at law. He died about six years after the death of Mrs. Siebs. George W. Drury, as an heir at law of William C. Drury, instituted proceedings to revoke Mrs. Siebs' will some seven years after its probate and some ten months after the father's death, on the ground that Mrs. Siebs was insane when she made the will. It was sought, to escape the bar of the statute by showing insanity of William C. Drury, who but for the will would have been Mrs. Siebs' heir, from a time prior to her death until his own demise. While on the merits the case was decided adversely to the contestant on other grounds, the question of the capacity of the heir of an heir to maintain the contest met us at the very threshold of the case as necessarily involved before proceeding with the merits of the contest. Upon this phase of the case, we said: "The respondents urge in this court the want of sufficient interest in the will in the appellant to enable him to maintain a contest thereof. They contend that a 'person interested in any will,' within the meaning of that phrase as it is used in the statute, must be a person who would himself, but for the will, have inherited the property devised and bequeathed thereby, and that the contestant is not such a person. But, without specially reviewing the reasons advanced to support the contention, we think it is not well founded. If it be true that William C. Drury would have inherited the property of Mrs. Siebs but for the will, and if it be true, further, that he was so far insane as to be incapable of managing his own affairs from a time preceding the death of Mrs. Siebs until his own death thereafter, then his heirs at law have, we think, such an interest

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the will of Mrs. Siebs as to enable them to maintain a contest thereof. We have found few cases directly in point, but the following may be consulted as bearing more or less strongly on the question: *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Brady v. McCosker*, 1 Comstock (1 N. Y.) 214; *Van Alen v. Hewins*, 5 Hun [N. Y.] 44; *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464; *In re Langevin*, 45 Minn. 429, 47 N. W. 1133." There can be no question that the case is authority for the right of the heir of an heir to contest a will adverse to his interest as such heir; that is to say, that the right of contest survives. Inasmuch as the case before us presents but the single question and has been submitted on exhaustive briefs supplemented by able argument on both sides, we are impelled to reconsider the question before adopting the rule in the *Siebs Case* as final.

[1] The statutory provisions relating to the survival of causes of action, citing by section number from Rem. & Bal. Code, are as follows:

"Sec. 193. No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest."

"Sec. 967. All other causes of action than those enumerated in section 183, supra, by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives."

Section 183, referred to in section 967, relates merely to the right of action for wrongful death, and has no bearing upon the present inquiry. These quoted sections have been construed as not intended to define what causes of action survive, but as referring to causes which already survived, and as merely directing in whose name the prosecution of such surviving causes may be continued. *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 787, 31 Pac. 329, 31 Am. St. Rep. 948; *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687. Whether the right to contest a will does survive must, therefore, be determined upon the same principles as govern in other causes of action. If, under such principles, the right survives, then under the statutes quoted the action may be revived and prosecuted in the name of the personal representatives or successors in interest of the person originally entitled to contest.

[2] It is a general rule, and one to which this court has adhered, that the test of sur-

vivorship of a cause of action is its assignability, and, conversely, the test of assignability is survivorship; that is to say, they are always concomitant. 3 *Pomeroy's Eq. Juris.* (3d Ed.) § 1275; *Pomeroy's Code Remedies* (3d Ed.) § 147; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

[3, 4] Our statute governing the right of contest (Rem. & Bal. Code, § 1307) is as follows: "Sec. 1307. If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representation, or for any other cause affecting the validity of such will." While not in so many words declaring that the right of contest is assignable, the courts of several other states in effect have under analogous statutes so decided. The earliest case bearing upon the subject to which we have been cited is *Smith v. Bradstreet*, 16 Pick. (Mass.) 264. In that case the Supreme Judicial Court of Massachusetts held that a mere general creditor of an heir at law of a testator has an interest too remote and contingent to entitle him to contest the will as a party aggrieved; but that, where the creditor of an heir had secured a lien by attachment upon the interest of the heir in real property, such creditor had the right to contest the will by which the heir was disinherited of such property. This is on the ground that by the attachment he secured a direct interest in the will. The court said: "If the will is proved, it defeats his title; if rejected, it establishes it." The obvious effect is that the interest of the heir is subject to involuntary assignment, and that such assignment carries with it the right to contest in aid of such interest.

In *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478, 69 Am. St. Rep. 615, a leading case upon the same question, under a statute allowing a contest to "any person interested in the probate of any will," within five years after such probate, the Supreme Court of Missouri held the same way. The Missouri statute is not essentially different from our own save as to the time within which the contest may be instituted. In the *Watson-Alderson Case* the levy of the execution of the judgment creditor of the heir and sale of the heir's interest under the execution were both subsequent to the disinheriting testator's death. The court said: "That she,

the judgment creditor, has a direct pecuniary interest in the final and conclusive determination of the question of fact, whether or not said instrument is the last will of said deceased, is self-evident, since upon such determination depends her title to valuable real estate. If determined in the affirmative, she has no title; if in the negative, she has title, and it would seem to follow necessarily, if the words, 'any person interested in the probate of any will,' are to 'be taken in their plain, ordinary and usual sense,' that she is such a person, and, as such, authorized to institute this proceeding, in which only can that question of fact be conclusively determined." The logical effect of this holding is that any one becoming directly and peculiarly interested in the devolution of the estate at any time within five years after the probate of the will has such an interest in the "probate of the will," or, to use the words of our statute, is so "interested in the will," as to entitle him to maintain a contest under the statute.

In *Bloor v. Platt*, 78 Ohio St. 46, 84 N. E. 604, 14 Ann. Cas. 332, under a statute providing that "a person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest the validity thereof," the court held that a creditor of the heir having obtained a lien by levy on the interest of the heir after the testator's death was entitled to contest a will disinheriting the heir. The court said: "Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'" In *Re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133, the Supreme Court of Minnesota, under a statute providing that "all persons interested" may contest the probate of a will, held that a judgment creditor of an heir who was disinherited by the will could contest it because he was a person interested, in that his judgment lien would be defeated by the will if established. The court said: "This right to resist the probate is not materially different in principle from that of a judgment creditor to assail a prior, forged, or fraudulent deed apparently conveying the lands of the judgment debtor." The analogy seems perfect, and it can hardly be doubted that the heir as well as the creditor of the victim of a forged or fraudulent deed may maintain an action to set it aside, in the absence of the bar of the statute of limitations or estoppel by laches. The heir may maintain the action because the right survives; the creditor because it is assignable. *Pomeroy's Eq. Juris.* (3d Ed.) § 1275. In *Davis v. Leete*, 111 Mo. 659, 64 S. W. 441, under a statute using the words "persons interested," in defining who are proper or necessary parties to the probate proceedings, the

Supreme Court of Kentucky held that the purchaser from an heir of the testator might resist the probate and by appeal contest the will. This is upon the obvious principle that the right, being assignable, carries with it the remedy. See, also, *Foster v. Jordan*, 130 Ky. 445, 113 S. W. 490; *Brooks v. Paine's Ex'rs*, 123 Ky. 271, 90 S. W. 600.

In *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668, it was held that the grantee of the heir of a testator has such an interest in the controversy as entitles him to contest a will found and filed for probate after the grant. The fact that the will was found and filed subsequent to the grant seems unimportant, since the will, if valid, by relation took effect on proof as of the date of the testator's death. The court placed no stress upon this fact. It said: "The demurrer was properly overruled. The allegations of the bill show such an interest in the subject-matter as entitles the appellees to impeach the will. Controversies of this character usually arise between persons claiming as heirs at law on the one hand and as devisees under the contested will on the other. George L. Savage, as heir of Ann C. Savage, would have had the right to impeach the will, and no reason is perceived why those claiming under and through him are not entitled to his rights in that respect." In *Rainey v. Ridgway*, 148 Ala. 524, 41 South. 632, the facts were as follows: The testatrix died, leaving a son as her sole heir at law. Thereafter the son died, leaving a widow as his only heir. It was held that she, as "a person interested therein," could contest the will. The court said: "In other words, contestant's husband was the sole heir of the testatrix, and contestant is his sole heir and sole devisee and legatee. She is certainly the party interested, or person who standing in the place of her son, as his sole heir, would be a distributee of the estate if there were no will." In *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329, the material facts were these: John McCosker died leaving as his only heirs at law two sons, John the younger and Thomas. He devised the bulk of his estate to John the younger, with an annuity to Thomas. John McCosker the younger thereafter died, leaving no other heirs than Thomas and Thomas' son, John Andrew McCosker. John the younger left a will devising his estate to others than Thomas and his son. Thomas brought suit to set aside John the younger's will on the ground of incompetence and undue influence. While this suit was pending Thomas died and his son John Andrew, as devisee of Thomas, commenced another action for the same purpose. The court held that while John Andrew could maintain an original bill the bill filed by John Andrew was in reality a bill to revive and continue the proceedings instituted by his father; and, as such, the bill could be maintained. The court said: "If the original bill, however, was properly filed, for

the purpose of having the question as to the invalidity of the pretended will of John McCosker the younger, settled under the direction of this court, there is nothing to deprive the devisee of the right to continue the suit for that purpose." While this was an action in equity to set aside the will, it is certainly authority for the view that the right to contest a will survives. In *Van Alen, Ex'r, v. Hewins et al., Ex'rs*, 5 Hun (N. Y.) 44, it was held that the right to contest the probate of a will survives to the executors of the original contestant who died pending the proceedings.

The net result of the foregoing authorities is that the courts of Massachusetts, Missouri, Ohio, Minnesota, and Kentucky, and it would seem Virginia, also, hold the right or interest of the disinherited heir the subject of voluntary or involuntary assignment, which would, as we have seen, carry with it the survivorship of the right to contest the disinheriting will; while in Alabama, and apparently in New York, it is held that the heir of the disinherited heir may contest the will or revive a contest already commenced. On the other hand, the courts of Illinois alone, under a statute according the right of contest to "any person interested" providing he appear within three years after the probate, hold that the right or interest of a disinherited heir is not assignable so as to give the assignee the right of contest, and hence that the right does not survive. *McDonald v. White*, 130 Ill. 493, 22 N. E. 599; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; *Staudé v. Tscharnier*, 187 Ill. 19, 53 N. E. 317; *Selden v. Illinois Trust & Sav. Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; *Selden v. Illinois Trust & Sav. Bank*, 184 Fed. 872, 107 C. C. A. 196. The controversy in the last case having arisen under the laws of the state of Illinois, the federal court adopted and followed the construction placed upon those laws by the courts of that state. The decision has no significance except as determining the effect of the decisions of the Illinois courts.

The respondent invites us to follow the Illinois rule; the argument being that, the right of contest being purely statutory, the words of our statute "any person interested in any will" should be construed as meaning a person having an interest at the time the will goes into effect; that an interest arising subsequently is not an interest in the will; and that a will cannot impair, destroy, or affect any property interest acquired after the death of the testator. This seems to us to beg the question, which is merely one of assignability and consequent survivorship. Looking beyond the mere surface of the thing, the heir of an heir has, on descent cast, exactly the same direct pecuniary interest that the deceased heir had. In either case, but for the will, the same prop-

erty rights would have descended first to the heir, then to the heirs of the heir. We can see no sound reason, either in equity or in the words of the statute, for limiting the right to protect this interest by contest to the person in whom it is vested at the date of the testator's death. The nature of the interest is in no sense changed in passing from the heir to his successor. It is a property right in no sense purely personal to the heir of the testator, else it could not descend to the heirs of such heir even if there were no will. The statute does not in express terms, nor by necessary implication, fix a specific time when the interest shall accrue in the contestant. It does fix a limit of one year within which the contest shall be instituted. It seems to us, therefore, that any person acquiring an interest within that year, which but for the will would accrue to his pecuniary advantage, should have the right to contest the validity of the will within that time.

[5] It may be stated as a sound postulate that in construing remedial statutes that construction will be preferred, if the language of the statute permit, which will subserve the right rather than that which may perpetuate a wrong. Assume that a will disinheriting the heir is forged, or procured by undue influence. The heir institutes a contest and dies pending suit, leaving children. The Illinois doctrine would deprive these children of any remedy, and thus perpetuate the wrong. We cannot subscribe to a construction fraught with such possibilities, in the absence of a clear legislative mandate. We are not impressed with the argument that will contests are avaricious and should not be encouraged. Fraudulent wills are also avaricious, and should not be encouraged. While this argument may be sound to the extent of requiring clear proof of fraud or undue influence, it should not close the courts to the righting of wrongs. That is the very purpose for which courts were instituted. We are constrained to adhere to the rule announced in the *Siebs Estate*, *supra*.

The judgment is reversed, and the cause remanded, with direction to reinstate it and to permit the substitution.

CROW, C. J., and FULLERTON, MAIN, and MORRIS, JJ., concur.

(72 Wash. 444)

CAFFREY v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. March 14, 1913.)

SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—TEACHERS—DISCHARGE—REVIEW.

Where a complaint by a discharged school teacher alleged that she had been discharged without notice or hearing, and that the county superintendent had prejudged her case, and dictated the proceedings, and for that reason she had no adequate remedy by appeal from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the board of directors to him and from his decision to the state superintendent of public instruction, who has no authority to take evidence, but could only decide the appeal on the record made before the county superintendent, the complaint stated facts sufficient to entitle plaintiff to relief in the courts, and was not demurrable on the ground that she had an adequate remedy by proceedings before the superintendent.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 301-304; Dec. Dig. § 141.*]

Department 1. Action by Marie Caffrey against the Superior Court of King County and others. From a judgment dismissing the action, plaintiff sued out a writ of review. Reversed, with directions.

Dudley G. Wooten, of Seattle, for relator. John F. Murphy, of Seattle, for respondent.

MOUNT, J. This action was brought in the superior court of King county to review an order of the board of directors of school district No. 175 in that county which order discharged the plaintiff as a teacher in the public schools. The trial court sustained a general demurrer to the complaint and dismissed the action. Thereupon the relator sued out this writ to review that order of the superior court.

No question is raised as to the jurisdiction of this court to review the order in this manner and we have concluded that the showing made in the petition is sufficient to confer jurisdiction upon this court. The question presented here is: Did the trial court have jurisdiction to review the order of the board of school directors in discharging the relator as a teacher? The relator relies upon the allegations in her complaint, to the effect that she had entered into a contract with the board of directors to teach in said school district for the school year 1912-13 for the stipulated salary of \$75 per month; that she was qualified and authorized to teach in this state, and that in April, 1912, she entered upon her duties under her contract and continued thereafter to perform the same; that on November 4, 1912, a meeting of the board of directors was held in said school district; that Mr. Burrows, county superintendent of schools for King county, was present at said meeting, and directed and dominated the proceedings thereof; that certain persons were permitted to make oral charges against the plaintiff; that said meeting was without notice to the plaintiff, and she was not permitted to be present or hear said charges and no record was made thereof; that, after said charges had been made against her, Mr. Burrows "said that she must resign, and upon plaintiff's replying that she would not resign under such circumstances, without being given an opportunity to know what she was charged with, and without being allowed to defend herself, or to have a fair and impartial trial, the said Burrows again

announced that she must resign and that if she did not he would make the board of directors discharge her and would cancel her teacher's certificate; * * * that thereafter, to wit, on November 8, 1912, another meeting of said board of directors was held, at which said Burrows was again present, and directed and controlled all that was said and done; * * * that at said second meeting no further investigation or examination of witnesses or hearing of testimony was had, nor was plaintiff any further or differently advised and notified of the charges against her than as before described at the first meeting of November 4th, but, when said second meeting convened, said Burrows demanded of plaintiff why she had not resigned, and again declared that, if she did not resign, he would have her discharged and cancel her certificate; that no record of any proceedings against the plaintiff was made or kept; that on November 18, 1912, plaintiff was served with a copy of the resolution, as follows: "At a regular meeting of the board of directors of school district No. 175 of King county, Washington, held at the Duwamish school on the 16th day of November, 1912, at 7:30 o'clock p. m., it appearing to the board of directors that it will be impossible to retain the services of Miss Marie Caffrey as a teacher, it having been first shown to the entire satisfaction of the board of directors by evidence introduced at two different meetings held for the purpose of making an investigation into the conduct of said Marie Caffrey, as teacher, one meeting being held on the 4th day of November, and the other on the 8th day of November, 1912, at the Duwamish school, and evidence having been introduced at said meetings to the effect that, together with other things, Miss Caffrey had been guilty of using improper language before the pupils toward the principal, and also of degrading a pupil without the consent of or without consulting the principal. Therefore, in view of the above facts, it is resolved that the services of Miss Marie Caffrey be dispensed with, and she is hereby discharged, said discharge to take effect on the 2d day of December, 1912. O. G. Rosberg and P. P. Brandon, Directors of School District No. 175." The complaint then alleges that the statement in the resolution to the effect that evidence was heard was false, that no evidence was offered to prove plaintiff guilty of using improper language to the principal, or that plaintiff had degraded a pupil without consent of the principal, and denies that she ever at any time or place committed either of said offenses. The complaint, after setting up other matters showing prejudice of the county school superintendent and that the order of discharge was without cause, proceeds: "That by the law and rules governing school matters in the state of Washington plaintiff had the right of appeal from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any adverse decision of the said board of directors to the superintendent of schools in King county, who is the said Burrows, and from the latter, in case of his adverse judgment, to the superintendent of public instruction of the state of Washington, with the period of 30 days in each instance within which to prosecute her appeal; and, in case of an appeal to the county superintendent, he is by law authorized to take evidence, summon witnesses, and call for all records affecting the case, but in case of an appeal to the superintendent of public instruction no new testimony can be introduced or heard by him, but he must try and decide the appeal upon the record already made"; that the plaintiff's right of appeal in lawful order in this case has been completely taken away because of the disqualification of the county superintendent as aforesaid.

It is upon these and other allegations of like character that the relator here insists that the lower court had jurisdiction to review the order of the board of school directors in discharging the relator. The respondents insist that the superior court had no jurisdiction because the jurisdiction to try this class of cases is vested by law in the county school superintendent from whom an appeal lies to the superintendent of public instruction. *Van Dyke v. School Dist. No. 77*, 43 Wash. 235, 86 Pac. 402, is relied upon to sustain this position. This case no doubt would be in point where the county superintendent was not disqualified by active participation in the controversy; but in this case it is alleged that the county superintendent dominated the school board and took an active interest in the controversy, and, without giving the plaintiff an opportunity to be heard or to know the charges against her, and without any record of the proceedings being made, demanded her resignation and threatened her with discharge, and to cancel her certificate authorizing her to teach in the state, unless she resigned. She demanded that she be informed of the charges against her and the right to be heard. These demands were denied, and she was discharged without cause. To say that she must now appeal to the officer who dominated these proceedings and made, or at least directed, the order, is to say that the county superintendent may be the accuser and the judge in the same controversy. Neither the statutes nor the decision in the *Van Dyke* Case, *supra*, was intended to bring about that result. In *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706, this court, speaking through Judge Dunbar, said upon this point: "To compel a litigant to submit to a judge who has already confessedly prejudged him and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so

farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression 'administration of justice.'" The allegations in the complaint were sufficient to show that the county superintendent was utterly disqualified to hear an appeal in this case, and, since there is no provision for any other person to hear it, the plaintiff is without remedy except in the courts. The superior court, therefore, had jurisdiction to review the order of the board of directors, and determine whether the order was made with or without cause.

The judgment of the trial court dismissing the complaint is therefore reversed, with directions to overrule the demurrer.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(72 Wash. 454)

STATE ex rel. SCHOOL DIST. NO. 25, WALLA WALLA COUNTY, et al. v. BOARD OF COM'RS OF COLUMBIA COUNTY.

(Supreme Court of Washington. March 15, 1913.)

SCHOOLS AND SCHOOL DISTRICTS (§ 39*) — JOINDER OF DISTRICTS — REVIEW — COUNTY COMMISSIONERS — JURISDICTION.

Rem. & Bal. Code, § 4427, provides for the formation of new school districts, and section 4448 declares that when the public good requires it a school district may be formed of contiguous territory lying in two or more counties, which districts shall be known as joint school districts. Section 4457, after referring to a hearing by the county superintendents of the counties interested and the adjustment of matters contained in the prior sections, declares that such superintendents shall make a full record of all their findings and terms of adjustment, and their decision shall be final. *Held* that, where school districts in adjoining counties were consolidated, the determination of the county superintendents could not be reviewed by the county commissioners of either of the counties.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 68, 69; Dec. Dig. § 39.*]

Department 2. Appeal from Superior Court, Columbia County; Chester F. Miller, Judge.

Certiorari by the State, on relation of School District No. 25 in Walla Walla County and No. 100 in Columbia County, against the Board of County Commissioners of Columbia County. From a judgment dismissing the writ, relators appeal. Reversed.

T. P. Gose, of Walla Walla, and Milton O. Pickett, of Waitsburg, for appellants. R. M. Sturdevant and Hardy E. Hamm, both of Dayton, for respondent.

MORRIS, J. In January, 1912, the county school superintendents of Columbia and Walla Walla counties, upon a petition duly presented to them and after due hearing, joined school district No. 4 of Columbia county and school district No. 3 of Walla Walla

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

county into a joint district, known as school district No. 100 of Columbia county and school district No. 25 of Walla Walla county. Thereafter a resident of the joint district within Columbia county appealed from the order of the county superintendents joining the two old districts into the new joint district, to the board of county commissioners of Columbia county, which board accepted jurisdiction and reversed the order of the county superintendents. The joint district then, through an interested party, sued out a writ of certiorari, attacking the jurisdiction of the county commissioners of Columbia county to hear and determine the appeal. Upon a hearing the jurisdiction of the commissioners was upheld, and the writ dismissed. The relators appeal.

The appeal presents a simple question of law: Did the county commissioners of Columbia county have any jurisdiction to hear and determine the appeal? We answer, No. All questions relating to schools in this state are determined by the act of 1909, known as the School Code, and are found in Rem. & Bal. Code, § 4302 et seq. Section 4427 provides for the formation of new districts. Section 4433 provides for the alteration of boundaries of districts. Section 4436 provides for the alteration of boundaries of school districts by the extension of city limits. Section 4440 provides for the formation of consolidated districts. Each of these sections covers territory lying wholly within the same county, and in each case the right of appeal is expressly given from the decision of the county school superintendent to the board of county commissioners of the county in which the territory affected is situate. Provision is then made for joint school districts lying in two or more counties, under section 4448, providing: "When the public good requires it, a school district may be formed of contiguous territory lying in two or more counties, and such districts shall be known as joint school districts. They shall be designated by a separate number for each county in which any portion of their territory may lie." Subsequent sections contain provisions for petitions, notice, and hearing appointment of boards of directors, filling of vacancies in such boards, transfers of territory, apportionment of funds, and adjustment of property. Section 4457 then provides, after referring to the hearing by the county superintendents of the counties interested and the adjustment of the matters contained in the previous sections: "They shall make a full record of all such findings and terms of adjustment, and the decision of said county superintendents shall be final."

It seems to us there is little more to be said. There can be no question but that the whole matter was within the power of the Legislature to determine, and it had the right to say when and under what circumstances the action of county superintendents

should or should not be final. We can see good reason for granting the right of appeal to the county commissioners when the territory affected was wholly within one county, and denying it when that territory was embraced within two or more counties. In the first case, a finality of decision as to all the territory affected could be determined by the appeal. In the second case, it could not; for, if an appeal would lie on behalf of the territory in one county, it would lie on behalf of the territory in the other counties, each appeal being taken to the respective boards of county commissioners, each board reaching its own conclusion, with the possibility of as many conflicting decisions as there were boards of county commissioners. There could be no finality in such a procedure. In fact, it would border on the absurd. Evidently the Legislature foresaw this when it provided that, in cases affecting property in two or more counties, the decision of the county superintendents should be final. The whole matter was to be determined by the requirement of "the public good," as provided in section 4448, and the Legislature determined that the "public good" could best be served by giving the right of final decision to the county superintendents rather than risking a ridiculous situation and giving each board of county commissioners the opportunity of determining how the joinder should be formed and the other attendant questions determined. For it is manifest that, in cases of territory within different counties, no board of county commissioners could have jurisdiction over territory in other counties. So that, if any appeal was to be taken as in the other instances in which the right is granted, the persons interested in each fraction of the whole territory would appeal to its own board; and, with the possibility of conflicting determinations, the joinder would be as effectually dead as if the right was withheld in the first instance. The discretion vested in the respective county superintendents must, of course, be exercised in such a manner as to be free from fraud, abuse, and other kindred evils. The courts are always open for the determination of such matters. The county superintendents must act according to law and within the law. When they so act, their determination of the merits of the questions submitted to them is final. When they do not so act, their findings may be reviewed by any court of competent jurisdiction. *State ex rel. McCallum v. Superior Court*, 129 Pac. 900.

Section 4457, before referred to, is as follows: "At the hearing for the formation of a joint school district, the county superintendents shall, in case the petition is granted, hear testimony offered by any person or school district interested therein, for the purpose of finding and determining the amount and value of all school property of whatever nature involved in the proposed

action, the nature and amount and value of all bonded, warrant and other indebtedness of the original school district or districts out of whose territory such joint district is formed, including all legal uncompleted obligations then existing, and in so doing shall consider the amount of such outstanding indebtedness incurred for current expenses, the amount incurred for permanent improvements, and the location of such improvements, and shall make an equitable adjustment of all property, debts and liabilities among the districts involved. They shall make a full record of all such findings and terms of adjustment and the decision of said county superintendents shall be final." Under this reading respondent contends that the final "findings and terms of adjustment," spoken of in the last sentence, refer only to "an equitable adjustment of all property, debts and liabilities among the districts involved," and that as to these matters only was it intended to make the findings of the county superintendents final. This is too nice a distinction. The section, it will be noted, refers to "the hearing for the formation of a joint school district," the granting of the petition, and matters subsequently to be determined. There could be neither law nor logic in holding that the finding of the county superintendents was in part final and in part not final; final as to the adjustment of property rights between the districts, but not final as to the establishment of the joint district. In other words, by an appeal to the county commissioners, the action of the county superintendents in forming the joint district could be reversed, but the adjustment of "all property, debts and liabilities" could not be. Such a holding would lead to this result: A joint district is formed out of several old districts in adjoining counties, and the aggregate property and liabilities of these several old districts is adjusted and proportioned among the new districts. Upon appeal the county commissioners annul the order forming the joint district; but, having no power to disturb the adjustment of the property and liabilities, that finding remains as fixed by the county superintendents, and the several old districts find themselves sharing their property and liabilities with contiguous school districts in adjoining counties, with no added benefits on the one hand nor increased burdens on the other. To state such a theory is to refute it. It is plainly apparent that no such absurd result was ever intended by the Legislature, and that the last sentence of the section giving finality to the action of the county superintendents was intended to cover all their authorized acts and doings in the formation of joint school districts from contiguous territory in two or more adjacent counties.

The judgment is reversed, and the cause remanded to the lower court, with instructions to grant the writ as prayed for and

enter its decree in accordance with the rule here announced.

CROW, C. J., and ELLIS, MAIN, and FULLERTON, JJ., concur.

(72 Wash. 448)

STATE v. GRUNE

(Supreme Court of Washington. March 15, 1913.)

1. CRIMINAL LAW (§ 578*)—CONTINUANCE—DISCRETION OF COURT.

Although, under Rem. & Bal. Code, § 2312, requiring that a defendant be brought to trial within 60 days after the information is filed or the action dismissed, unless good cause to the contrary is shown, defendant is entitled to a speedy trial, yet within that time the prosecution may bring a case to trial or have it postponed from time to time in the discretion of the court without a showing, and where an information was filed on May 8, 1912, and defendant was arraigned and the case set for trial on May 22d, a continuance of the case until June 10, 1912, because of the absence of a material witness is not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1306; Dec. Dig. § 578.*]

2. LARCENY (§ 62*)—SUFFICIENCY OF EVIDENCE—FRAUDULENT REPRESENTATIONS.

Evidence in a trial for grand larceny committed by false and fraudulent representations held sufficient to prove that the representations made by accused were false.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 153, 162; Dec. Dig. § 62.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Paul Grune was convicted of grand larceny, and appeals. Affirmed.

Alfred Gfeller, of Seattle, for appellant. John F. Murphy and H. B. Butler, both of Seattle, for the State.

MOUNT, J. The appellant was convicted of the crime of grand larceny committed by false and fraudulent representations. He appeals from a judgment entered upon the verdict of a jury. Two points are argued, which we shall notice.

[1] 1. After the appellant had been arraigned and had entered a plea of not guilty, the case was set for trial on May 22, 1912. On the day previous to that date, the prosecuting attorney served upon appellant's counsel a notice of motion for a continuance, upon the ground that an essential witness whose name was indorsed upon the information was then in Honolulu, Hawaiian Islands, and could not be reached with a subpoena. The court, after hearing the motion, granted a continuance of the trial until June 10, 1912.

The appellant argues that the granting of this continuance was error, because the appellant was entitled to a speedy trial, and because the affidavit in support of the motion did not state that a subpoena had been issued for the witness, and did not state the substance of the evidence which the witness

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would give. The granting of a continuance is discretionary with the trial court. *Thompson v. Territory*, 1 Wash. T. 547; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557. The defendant, no doubt, was entitled to a speedy trial. When a defendant is not brought to trial within 60 days after the information is filed, the court is required to order the action dismissed, unless good cause to the contrary is shown. Rem. & Bal. Code, § 2312. Within that time it would seem the prosecution might bring the case to trial or have it postponed from time to time, in the discretion of the court, without a showing. In this case the information was filed on May 8, 1912. Defendant was arraigned and the case was set for trial on May 22d. On that day it appeared to the court that a material witness for the state, whose name was indorsed upon the information, was temporarily absent from the state. It seems plain under these circumstances that the court did not abuse its discretion in ordering the continuance upon motion of the prosecuting attorney.

[2] 2. The appellant next contends that the evidence is not sufficient because it is not proved that the representations made by the appellant were false. The facts are these: On March 25, 1912, the appellant, at Seattle, represented to Frank S. Warner that he—appellant—had 300 tons of potatoes which he desired to sell. After some negotiations, Mr. Warner agreed to purchase 250 tons of potatoes from appellant at \$30 per ton f. o. b. Everson, Wash., where appellant resided. Five hundred dollars was to be paid at once, and the balance was to be paid as the potatoes arrived in Seattle. "Shipments were to be made about two cars per week." A written contract was entered into to that effect. Mr. Warner, relying upon appellant's statements that he had the potatoes, gave to appellant a check for \$500. Appellant immediately cashed this check at a saloon in Seattle. Thereafter, on April 2, 1912, when the potatoes were not shipped to him, Mr. Warner mailed a letter to the appellant at Everson, and, not hearing therefrom, on April 5th, Mr. Warner mailed another letter to the appellant at the same place. These letters were not claimed, but were returned to the writer. Mr. Warner then employed a detective to find the appellant. He was found in Portland, Or., on April 13, 1912, and brought back to Seattle. While the appellant was in the custody of the officer, he admitted that he had no potatoes, but said that he had agreed to purchase some from a farmer, and had paid \$1 thereon. Appellant's counsel insists that there is no evidence that the appellant did not own or control the potatoes at the time the contract was made. It is true that no witness testified or had any knowledge about what potatoes the appellant had at the time the

contract was made, but the fact that the appellant did not ship the potatoes as he had agreed to do, or at all, and the fact that he had left the place where he resided and afterwards confessed that he had no potatoes, is almost conclusive that he had none at the time the contract was made or afterwards. We are satisfied that the evidence made a plain case for the jury.

Judgment affirmed.

CROW, C. J., and CHADWICK, GOSSE, and PARKER, JJ., concur.

(72 Wash. 480)

STATE ex rel. LUEDINGHAUS et al. v.
SUPERIOR COURT OF LEWIS
COUNTY et al.

(Supreme Court of Washington. March 18, 1913.)

EMINENT DOMAIN (§ 11*)—RIGHT TO EXERCISE POWER—INDIVIDUALS.

Private individuals cannot exercise the power of eminent domain to acquire land for a logging road.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 49, 50; Dec. Dig. § 11*]

Certiorari by the State of Washington, on the relation of F. W. Luedinghaus and others, against the Superior Court of Lewis County and Meskill & Columbia River Railway Company, to review an order in condemnation proceedings by the Railway Company adjudging it a sixty-foot right of way. Judgment affirmed.

J. A. Shackleford and F. D. Oakley, both of Tacoma, for relators. Dysart & Ellsbury, of Centralia, and Forney & Ponder, of Chehalis, for respondents.

CROW, C. J. The Meskill & Columbia River Railway Company, a public service corporation, commenced an eminent domain proceeding in the superior court of Lewis county against G. F. Luedinghaus, Mary Luedinghaus, his wife, and F. W. Luedinghaus, to condemn a right of way for a logging road. On the preliminary hearing an order was entered adjudging a public use and finding that a right of way 60 feet in width through defendants' land was required therefor. Thereupon the landowners as relators applied to this court for a writ of certiorari, and the order is now before us for review.

Relators are the owners of the southeast quarter of section 8, township 13, range 4 west of the Willamette meridian, across which condemnation of the right of way is sought. They also own a sawmill at Dryad, Wash., to which they assert they intend to remove timber from their land and from the lands of others by constructing a railroad to haul the same, charging reasonable rates, the 60-foot strip of land which the trial court found necessary for respondent's use is located to a considerable extent in and along

a gulch or canyon, and relators contend that, if the respondent is permitted to condemn to the full width of 60 feet, space will not remain in the gulch or canyon for their contemplated road; that they cannot construct their road to advantage along any other line; that if respondent be confined to one side of the gulch, and if the width of the strip to be taken be decreased, space will remain for the construction of their separate road. Relators' controlling contention is that, the condemning company cannot and should not be permitted to appropriate more land than it actually needs for the purpose of constructing its road. This presents the question of fact: What amount of land is necessary for the right of way and the construction and maintenance of respondent's road? Relators as private individuals cannot exercise the power of eminent domain to acquire land for their proposed logging road, while respondent as a public service corporation is empowered to acquire by eminent domain proceedings such land as may be necessary for its right of way. The only issue presented is whether, in seeking an appropriation of a strip of land 60 feet in width, respondent is asking more than the public use requires. We have carefully examined the record and conclude that the findings of the trial court must be sustained. The evidence shows that a right of way 60 feet in width will be required for respondent's use in order that it may make necessary fills and cuts, construct switches and side tracks, and protect its property and roadbed from fire and falling timber.

The judgment is affirmed.

PARKER, GOSE, and MOUNT, JJ., concur.

(72 Wash. 478)

STATE ex rel. BOARD OF COM'RS OF KING COUNTY v. SUPERIOR COURT OF KING COUNTY.

(Supreme Court of Washington. March 18, 1913.)

APPEAL AND ERROR (§ 458*)—SUPERSEDEAS BOND—RIGHT TO ROAD SUPERVISOR—SELECTION BY COUNTY COMMISSIONERS.

County commissioners were not entitled to mandamus to compel the superior court of the county to fix a supersedeas bond, pending an appeal from an order directing the commissioners to select and appoint a road supervisor from a list of names furnished by the Mercer Island Good Roads Association; the application for such appointment being made as authorized by Rem. & Bal. Code, § 5578.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. § 458.*]

Department 1. Application for writ of mandate by the State, on the relation of the Board of County Commissioners of King County, against the Superior Court of King County. Writ denied.

John Murphy and Robt. H. Evans, both of Seattle, for relator. Vince H. Faben, of Seattle, for respondent.

PER CURIAM. Relators have applied for a writ of mandate commanding the superior court for King county to fix a supersedeas bond, pending an appeal from the order of the superior court, directing the county commissioners of King county to select and appoint a road supervisor from a list of names furnished by the Mercer Island Good Roads Association; the application for such appointment being made under section 5578, Rem. & Bal. Code.

We think this case is controlled by Cooper v. Hindley, 126 Pac. 916. In denying the application for a writ it may be understood that we do not pass upon the merits of the controversy. The right of the commissioners to litigate the questions raised in the principal proceeding is not foreclosed, but pending that determination it is their duty to abide the judgment of the lower court. A statute declaratory of public interest should not be construed so as to defeat or suspend its operation pending an appeal, unless the right of the parties litigant can be kept in statu quo or the damages, if ascertainable, compensated in money.

Writ denied.

(72 Wash. 482)

FARRAR v. ANDREW PETERSON & CO.
(Supreme Court of Washington. March 18, 1913.)

1. LANDLORD AND TENANT (§ 134*)—USE OF PREMISES — CONTAGIOUS DISEASE — DESTRUCTION BY PUBLIC AUTHORITIES — KNOWLEDGE.

Where plaintiff rented his corral and barn to defendant, and defendant innocently sheltered a glandered horse therein, resulting in the destruction of the barn by public authorities, plaintiff could not recover the value of the barn from defendant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 482-485; Dec. Dig. § 134.*]

2. LANDLORD AND TENANT (§ 134*)—USE OF PREMISES — INJURY — HOUSING DISEASED ANIMALS.

Where plaintiff rented a barn to defendant in which to house horses which might become injured or incapacitated in certain work, the fact that defendant innocently placed a glandered horse in the barn, resulting in destruction thereof by public authorities, did not constitute a trespass.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 482-485; Dec. Dig. § 134.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by C. P. Farrar against Andrew Peterson & Co. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

Herchmer Johnston, of Seattle, for appellant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—48

PARKER, J. This is an action to recover damages which the plaintiff alleges resulted to him from the defendant placing in the plaintiff's barn a horse afflicted with the contagious disease called glanders, and thereby causing the barn to become so infected that it was destroyed by the public authorities. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff in the sum of \$226.50, from which the defendant has appealed.

[1] Appellant had a street grading contract with the city of Seattle, upon which it was working a large number of horses. The respondent had a corral and barn near where this work was being carried on, and at the request of appellant's foreman permitted their use, to place a few of the horses in. It is evident that the purpose on the part of the foreman was to have a suitable place in which to put such of the horses as might become injured upon the work, or otherwise temporarily incapacitated. Respondent alleges in his complaint that permission was given to the foreman to occupy the corral, "and including a barn thereon, for the purpose of permitting certain alleged injured horses to run therein and to be sheltered in said barn." The substance of all of the evidence given in behalf of the respondent tending to show any agreed restricted use of the barn is contained in his own testimony, as follows: "Q. State to the court the circumstances of this permission to use that barn? * * * A. He [the foreman] said he would like to have the use of the barn for three or four horses, and wanted the barn so in case it should rain they could go under cover. Q. Did he refer to any special horses? A. No. Q. What did he say was the matter with the horses? A. Well, he said the horses had been hurt on the grading. * * * Q. To whom did you give that permission to use the barn? A. Mr. Espeland. Q. What was his position with the company? A. He was foreman." On the following day, about July 1, 1911, one of the horses became indisposed, "off his feed," as termed by some of the witnesses, but apparently not seriously ill. It was then placed in respondent's corral and barn. It is not alleged in the complaint, nor is there any evidence whatever tending to show, that any of the officers or servants of appellant had any knowledge or reason to believe that the horse at that time was afflicted with glanders. About a week later, the horse not improving, a veterinary surgeon was called to attend it, and even then the surgeon did not discover that the horse was afflicted with glanders. A few days thereafter it was so discovered, when the barn was quarantined by the public authorities, and a short time thereafter the public authorities, deeming it impractical to disinfect the barn, caused it to be burned, resulting in plaintiff's damage for which he seeks recovery from appellant. Not only is there no allegation or proof of knowledge

which could be imputed to appellant that the horse was afflicted with glanders when placed in the barn, nor for more than a week thereafter, but there is quite convincing affirmative evidence that appellant had no such knowledge.

An examination of the authorities convinces us that the undisputed facts shown by this record do not render appellant legally liable for respondent's damage resulting from the destruction of his barn. This court has had occasion to consider the question of damages resulting from the acts of vicious animals, and in each case where damages were awarded against the owner of such animals, the actual or imputed knowledge of the owner, of the vicious propensities of the animal, was regarded as one of the controlling facts fastening liability upon such owner. *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50; *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958; *Harris v. Carstens Packing Co.*, 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164. It seems to us the principle here involved is the same, and so recognized by the authorities. 2 Cyc. 333, 368. In the case of *Hawkes v. Locke*, 139 Mass. 205, 208, 1 N. E. 543, 545 (52 Am. Rep. 702), Justice Holmes, speaking for the court, in discussing the liability of owners of diseased animals for damages resulting from the placing of such animals by permission on the property of another, said: "No decision, so far as we know, has gone further than to hold persons answerable if they knew that the animals were diseased, which neither the defendant nor his agents did in the case at bar." In an exhaustive note to *Hurst v. Warner*, 47 Am. St. Rep. 525, 550, the learned editor, after reviewing numerous cases, observes: "It must be remembered that in all these cases knowledge of the condition of the diseased animals was brought home to their owner; and he cannot be held answerable where this knowledge did not exist, except perhaps where its absence could coexist only with gross inattention to his business and property. Even when the right to recover is founded on a statute forbidding the driving of diseased animals, through any part of the state, and declaring that any person violating the statute shall be liable to any person injured for all damages that may arise from the communication of the disease, it has generally been held that the plaintiff must fall unless the defendant knew, or by the exercise of reasonable diligence should have known, of the existence in his animals of disease or of their capacity to communicate disease to others." The comparatively recent decision of the Supreme Court of Idaho in *North v. Woodland*, 12 Idaho, 50, 85 Pac. 215, 6 L. R. A. (N. S.) 921, is in harmony with this view. See note on page 922, to the same case in 6 L. R. A. (N. S.). We are of the opinion that the failure to allege or prove knowledge or

facts showing imputed knowledge on the part of appellant that the horse was afflicted with glanders until after the cause of respondent's damage had occurred rendered the judgment of the trial court erroneous. It seems to us this—one of the principal controlling facts to sustain appellant's liability—is clearly wanting in this case.

[2] Some contention is made that appellant is liable upon the ground of trespass, upon the theory that the placing of the horse in the barn of respondent, which was not injured, but otherwise afflicted, was a trespass. But we think, taking respondent's own version of the contract or permission, it does not show that there was any agreement or understanding that the use of the barn was to be thus restricted. We think, therefore, that the placing of this horse in the barn was not a trespass.

The judgment is reversed, with directions to the trial court to dismiss the action.

CHADWICK, GOSE, and MOUNT, JJ., concur.

(72 Wash. 459)

SAMARDEGE v. HURLEY-MASON CO.

(Supreme Court of Washington. March 15, 1913.)

1. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—QUESTION FOR JURY.

Where a servant injured by the fall of a pile of bags containing cement alleged that the pile was made too high, and was piled in a negligent manner, so that it would not support its own weight, a mere showing that the pile was about 35 feet long and 10 or 11 feet high, and that it fell, did not present a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

2. NEGLIGENCE (§ 119*) — PLEADING AND PROOF.

Where negligence is alleged as a fact, it must be proved as a fact.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

3. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where an employé engaged in piling bags of cement had had some experience in work of that character, and for three years had been employed in iron works where much of his work consisted in piling iron, he must be held to have assumed the risk of injury from the falling of a pile of cement bags 10 or 11 feet high; the danger being open and apparent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

4. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

In the absence of evidence of negligence in the piling of cement bags in a pile 10 or 11 feet high and 35 feet long, the mere fact of the falling of the pile did not call for the application of the doctrine *res ipsa loquitur*.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by George Samardege against the Hurley-Mason Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause ordered dismissed.

Peters & Powell, for appellant. Philip Tworoger, of Seattle, for respondent.

MORRIS, J. Respondent in January, 1911, was engaged by appellant as a common laborer in piling up cement packed in bags weighing about 90 pounds. Some days before respondent went to work, other laborers had built a pile about 35 feet long and 10 or 11 feet high. Respondent and two other laborers were building up other piles in front of this old pile, when it is alleged that it fell and injured respondent. The negligence charged and the cause of the fall was in permitting the old pile "to be piled too high," and "piled in a negligent manner, so that the same would not support its own weight."

[1] Counsel for respondent contented himself with showing the fall of the old tier and the consequent injury. No attempt was made to show the cause of the fall, that it was improperly piled, or too high; it being contended that, having shown the height of the pile and that it fell, it was a question for the jury to say whether or not the pile was too high, and, further, that the doctrine of *res ipsa loquitur* applies, and it was the duty of appellant to absolve itself from negligence. Neither of these contentions can be sustained. The jury could not by their verdict establish a fact until there was some evidence to support it. If, therefore, appellant desired a verdict based upon a finding that the cement was "piled too high," or "piled in a negligent manner," as he had alleged in his complaint, he must furnish the jury some proof of that fact. We have too many cases holding that juries may not speculate as to causes of injury where negligence is alleged to even make reference to them helpful.

[2] When negligence is alleged as a fact, it must be proved as a fact. If this cement was piled too high or otherwise negligently piled, it seems to us it would have been a simple matter to prove it or offer some testimony from which a jury could so find.

[3] If we were to look for causes for the falling of the bags of cement, we might find one in the testimony of appellant that two other laborers who were engaged in the same work were throwing the bags up against the pile that he says fell. Respondent had some experience in work of this character. For three years he had been employed in some iron works at Chicago, where much of his work consisted in piling up iron. We held in *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615, that an experienced man could not recover for injuries from the falling of a pile

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of 4-foot slabs, 18 feet high, upon the ground that, if the pile was dangerously high, the danger was so open and apparent that any man ought to know it, and the risk was therefore assumed. Much that is said in that case is applicable here.

[4] The doctrine of *res ipsa loquitur* cannot be applied to cases of this character. That rule, as applied to falling objects, covers cases where the occurrence is of such an unusual and extraordinary character that it would not happen except for want of due care, or that the cause of the fall was something over which the defendant had absolute and complete control; and that in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the defendant. Here, as we have before said, there was no evidence showing how the accident happened; whether the cement was piled too high or in an unusual manner, or in an unsafe place, or in a dangerous manner, or whether it was due to the act of fellow employes in throwing bags of cement up against the pile. "The circumstances, therefore, leaving room for different presumptions, the rule called for had no application." *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D, 433. Many cases are there referred to which are authoritative here.

We therefore hold it was error to deny appellant's motion for judgment notwithstanding the verdict, and for such error the judgment is reversed, and the cause ordered dismissed.

CROW, C. J., and FULLERTON, ELLIS, and MAIN, JJ., concur.

(72 Wash. 473)

FIRST NAT. BANK OF EVERETT v. WILCOX.

NORTH COAST DRY KILN CO. v. SAME.
(Supreme Court of Washington. March 17, 1913.)

SALES (§ 474*)—CONDITIONAL SALES—FILING OF CONTRACT—RESIDENCE OF CORPORATION.

Under Rem. & Bal. Code, § 3670, providing that conditional sales of personal property accompanied by delivery shall be absolute as to subsequent creditors, unless a memorandum of the sale be filed in the county where the buyer resides, a conditional sale contract to be effective as to creditors of a corporation buyer must be filed in the county specified in the articles of incorporation as the principal place of business of the buyer, and where it maintains its head office, and it is not sufficient that it be filed in another county where the buyer's mill is located, and where it mainly keeps and sells the products of its mill; the place designated in the charter of a local corporation as its principal office or place of business being the residence of such corporation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Consolidated actions by the First National Bank of Everett and by the North Coast Dry Kiln Company against T. F. Wilcox, receiver of the Syverson Lumber & Shingle Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Cooley & Horan and R. Mulvihill, all of Everett, for appellant First Nat. Bank of Everett. Paul B. Phillips, of Seattle, for appellant North Coast Dry Kiln Co. B. G. Cheney, of Montesano, and Hayden & Langhorne, of Tacoma, for respondent.

MOUNT, J. These two actions were begun independently by the petitioners against the receiver of the Syverson Lumber & Shingle Company, an insolvent corporation, to obtain possession of certain machinery, or to have the contract price of the machinery adjudged a preferred claim against the insolvent estate. The actions were consolidated for trial. The trial court denied the prayers of the petitions, and these appeals followed.

Both cases are based upon the same facts. There is no substantial dispute upon the facts. It appears that in the year 1911 appellants, under separate conditional sales contracts, sold and delivered to the Syverson Lumber & Shingle Company certain mill machinery. These contracts provided for certain stated payments, and that, if payments were not made as agreed, the vendors might retake the property. These contracts were filed for record in Chehalis county, where the mill of the Syverson Lumber & Shingle Company and the machinery in question were located. The Syverson Lumber & Shingle Company was a corporation organized under the laws of this state. Its articles of incorporation provided that its "principal place of business is at Tacoma, Pierce county, state of Washington." It maintained its head office in Tacoma, but its mill was located at Montesano in Chehalis county. The products of the mill were kept and sold at Montesano. Some few sales, however, were made from the Tacoma office. After the execution of the conditional sales contracts above mentioned, the Syverson Lumber & Shingle Company made default in their payments, and subsequently that company became insolvent, and T. F. Wilcox was appointed a receiver thereof for the benefit of all the creditors. He qualified as such receiver, and took possession of all the property of the corporation, including the machinery sold under the conditional sales contracts above referred to. The appellant afterwards brought these proceedings as above stated. It will be noticed that the contracts were filed for record in Chehalis county, while the principal office of the vendee, Syverson Lumber & Shingle Company, is designated in its articles of incorporation as Tacoma in Pierce county. The question in the case, therefore, is whether the conditional sales contracts are valid as

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig.-Key-No. Series & Rep'r Indexes

to creditors. The statute provides, at section 3670, Rem. & Bal. Code: "All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers, and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." It is argued by the appellants with much force that, inasmuch as the mills of the vendee and the machinery sold were located in Chehalis county and the principal business done there, Chehalis county should be held to be the residence of the corporation. Such holding would render the statute relating to corporations uncertain and of no substantial force. The statute, at section 3679, Rem. & Bal. Code, provides what the articles of incorporation shall contain, and among these provisions that "the name of the city, town, or locality and county in which the principal place of business of the company is to be located" shall be stated. Articles of incorporation are required to be executed in triplicate, one to be filed in the office of the Secretary of State, one in the county designated as the principal place of business, and one kept by the corporation. The object of these provisions is to give the corporation a certain known place of residence, and to give notice of the principal place of business to all who may have dealings with the corporation. As indicating that the principal place of business as stated in the articles of incorporation is a material provision, section 3708½ provides: "The formation or corporate acts of any corporation hereafter formed under this chapter shall not be rendered invalid by reason of the fact that its principal place of business may not have been designated in the certificate of incorporation: Provided, that within three months from the passage of this chapter, such corporation shall cause publication to be made once a week for at least four weeks in the newspaper published nearest the city, town, or locality, and where the principal place of business of such corporation has been in fact located, designating the city, town, or locality and county where its principal place of business shall be located. On compliance with the provisions of this section in the several cases herein mentioned, the principal place of business of any corporation shall be deemed established or removed at, or to any designated city, town, or locality and county in the state." It will thus be seen that corporations are required to fix their principal place of business in their charter. This principal place of business

must be held to be the residence of the corporation. "It is often necessary to ascertain the residence or domicile of a corporation within the state by or under whose laws it was created, not only for the purpose of determining the jurisdiction of the state courts in actions by or against the corporation, but also for the purpose of determining the application of statutes in relation to taxation and various other matters. The question is sometimes settled by express statutory provision, but this is not always the case. The general rule is that the residence or domicile of the corporation within the state is in that county, city, or town, and that one only, in which it has its general or principal office and conducts its business. * * *" 1 Clark & Marshall, Priv. Corp. § 122. See, also, Union Steamboat Co. v. Buffalo, 82 N. Y. 351; Cohn v. Railroad Co., 71 Cal. 488, 12 Pac. 498; Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196; Pelton v. Transportation Co., 37 Ohio St. 450. In the last case cited the court said, at page 455 of 37 Ohio St.: "For many purposes, a corporation is regarded as having a residence—a certain fixed domicile. In this state, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicile or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicile, is not to be determined by the amount of business transacted here or there, but by the place designated in the certificate. True, several offices may be established at the place specified in the certificate, as it is sufficient, under this statute, to specify the 'county or place.' But where a single office is established in the county, or township, or city, or other place designated, no further inquiry as to the identity of the principal office is admissible." We are clear, therefore, that the place designated in the charter of local corporations as their principal office or place of business must be held to be the residence of such corporations. This being true, it follows that the conditional sales contracts were of no effect as to creditors of the vendee, because the contracts were not filed in the auditor's office of Pierce county where the vendee resided.

The judgment is therefore affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(14 Ariz. 423)

PATTY v. GREENLEE COUNTY.

(Supreme Court of Arizona. March 6, 1913.)

1. COUNTIES (§ 70*)—OFFICERS—SALARIES—POWER TO FIX.

Const. art. 12, § 4, empowering the board of supervisors to fix salaries for all county officers for whom no compensation is provided by law, to remain in effect until changed by gener-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

al law, did not authorize the board of supervisors to fix the compensation of officers, such as the sheriff, whose salary was fixed under the territorial laws; Const. art. 22, § 2, and Civ. Code 1901, pars. 2600, 2602, providing compensation by way of salary for sheriff, so that they were not officers "for whom no compensation was provided by law," within the meaning of the Constitution.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 104–113, 115–117; Dec. Dig. § 70.*]

2. OFFICERS (§ 100*)—SALARIES—CHANGE.

Any power given to county boards of supervisors by Const. art. 12, § 4, authorizing them to fix all salaries of county officers for whom no compensation is provided by law, which salaries shall remain in force until changed by general law, was only intended to be exercised temporarily during the time between admission to statehood and the enactment of legislation "by general law"; article 4, § 17, prohibiting the change of compensation of public officers during their term of office, not applying to compensation fixed by the board of supervisors.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152–157; Dec. Dig. § 100.*]

Appeal from Superior Court, Greenlee County; F. B. Laine, Judge.

Action by John D. Patty against the County of Greenlee. From a judgment for defendant, plaintiff appeals. Affirmed.

L. Kearney, of Clifton, for appellant. E. V. Horton, of Clifton, for appellee.

ROSS, J. The appellant is the sheriff of Greenlee county, having been elected thereto at the December 12, 1911, election, under the provisions of the Enabling Act and the laws of the territory of Arizona. Arizona was admitted into the Union as a state February 14, 1912, on which date appellant was inducted into the office of sheriff. Sheriffs, under the laws of the territory of Arizona, had been compensated for their services by fees and salary. However, the salaries were nominal, and in first, second, and third class counties were allowed by the board of supervisors, and were not to exceed \$600. Paragraph 2600, R. S. Arizona 1901. In fourth, fifth, and sixth class counties they were allowed, in addition to fees, a salary not less than \$300, nor more than \$600, per annum, payable quarterly. Paragraph 2602, Id.

The Constitution, which became effective February 14, 1912, by section 17, art. 22, abolished the fee system, and provided that all state and county officers and all justices of the peace and constables, whose precinct includes a city or town or part thereof, should be paid fixed and definite salaries.

Section 4, art. 12, Constitution, provides that "the duties, powers and qualifications of such officers [county officers] shall be as prescribed by law. The board of supervisors of each county is hereby empowered to fix salaries for all county and precinct officers within such county for whom no compensation is provided by law, and the salaries so fixed

shall remain in full force and effect until changed by general law."

On February 16, 1912, the board of supervisors of Greenlee county, presuming to act under the provisions of section 4, art. 12, supra, by their order fixed the salary of the sheriff of that county at \$4,500 per annum, payable in equal monthly installments.

The first Legislature of Arizona (Session Laws, c. 93, p. 591, effective May 31, 1912) classified the counties of the state, and regulated and fixed the compensation of all county and precinct officers. According to this act Greenlee county belongs to the fifth class, and the salary of the sheriff is fixed at \$3,600 per annum. Sections 1, 2, and 7, Id.

It is the contention of appellant that he should be paid the salary of \$4,500, as fixed by the board of supervisors, and not the salary as fixed by the Legislature. He accordingly instituted his suit against the county for his salary for the month of September, 1912, alleging an indebtedness of \$375. Judgment went against him in the trial court, from which he appeals.

The appellant, to sustain his position, argues that the Constitution delegated the power, by section 4, art. 12, supra, to the board of supervisors to fix the salaries of county and precinct officers "for whom no compensation is provided by law," and, the board having acted and fixed the salary of appellant, the act of the Legislature was ineffective to change such salaries, because of the inhibition contained in section 17 of article 4 of the Constitution. That section is as follows: "The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office."

The compensation of many of the county officers under the territorial laws was a fixed and definite salary. Such was the case as to the county recorder, assessor, superintendent of schools, and members of the board of supervisors and district attorney. The sheriff's compensation consisted of fees and salary.

[1] It can hardly be contended that section 4 of article 12 of the Constitution empowered the boards of supervisors to fix the compensation of those officers whose salary was fixed under the territorial laws. Under that section they were empowered to fix the salaries of officers "for whom no compensation is provided by law." It was probably the intention of the framers of the Constitution that those officers who, under the territorial laws, were compensated by salaries should continue, under statehood, to be paid the same salaries; and, under a line of decisions of which *Gross v. Kenfield*, 57 Cal. 626, is the first to announce the rule, it is doubtful

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

If the Legislature, because of the constitutional inhibition against the enlargement or diminution of the compensation of public officers during their term, could pass any law affecting the salary of such officers. The power of the board of supervisors being limited by section 4, art. 12, to fixing salaries where "no compensation is provided by law," the question is: Did they have the power to fix the salary of appellant, as was attempted by their order of February 16, 1912? The territorial laws compensated sheriffs both by salary and fees. R. S. 1901, pars. 2600, 2602. The Constitution (section 17, art. 22) took from them the fees; but by section 2, Id., left in force the territorial law providing compensation by way of salary. Sheriffs were not, therefore, officers "for whom no compensation was provided by law." Treasurers of counties, under territorial law, were paid salaries and fees; but, unlike the sheriff, their principal compensation was the salary. If the board of supervisors had the power to fix, increase, or decrease the salary of the sheriff, they could take the same action on the salary of the treasurer. The adequacy or inadequacy of the compensation is no element of the board's power or lack of power to act. They are limited and confined by the very terms of the Constitution to the fixing of salaries "for whom no compensation is provided by law."

[2] But granting that the boards of supervisors were given the power, by section 4, art. 12, to fix the salaries of sheriffs, we think it was to be exercised temporarily, and only during the interim between the dates of admission to statehood and proper legislation "by general law."

The power of fixing, increasing, and decreasing the salaries of all officers of the state is made a legislative function by the Constitution, and its power in that respect is not limited or qualified, except that the compensation shall not "be increased or decreased during his term of office." One, and only one, time is the power granted boards of supervisors to fix the salaries of certain designated officers, "and the salaries so fixed shall remain in full force and effect until changed by general law." That is, the board, once having fixed a salary, could not thereafter itself change it; but it must remain in full force and effect until changed by general law.

The prohibition against the increasing or decreasing of the compensation of public officers has reference to "compensation" that is "fixed" by the Constitution or by legislative act, and not to compensation fixed by an order of the board of supervisors; for that compensation is only temporary and "until changed by general law."

The Constitution, in other places, has empowered functionaries to fix temporarily the salaries of subordinate officials, as in the case of the reporter of decisions (section 14,

art. 6), the clerk of the Supreme Court (section 17, art. 6), and the clerk of the superior court (section 18, art. 6), "until such salaries shall be determined (or fixed) by law." We think that in each one of these provisions, authorizing the Supreme Court and the boards of supervisors to fix salaries, there is contained an express reservation of power in the Legislature to regulate and fix the compensation of county and precinct officers; and that chapter 93, Session Laws 1912, as it affects the salary of appellant, is valid legislation. The salary of appellant, if ever properly fixed by the board of supervisors, was made at the first session of the Legislature, "by general law," "fixed and definite." It is a provision of the Constitution that the Legislature shall fix, "by general law," the salaries of county and precinct officers; and it was not contemplated that that general scheme devised for uniformity, stability, and regularity should be suspended or postponed or nullified for any length of time, except the interim between admission to statehood and action by the Legislature.

Most of the states of the Union have provisions in their Constitutions similar to ours, prohibiting the increasing or decreasing of the salary of a public officer during his term, and the courts have many times construed the provisions under varying facts and conditions; but no case has been cited by counsel, nor have we been able to find any case, wherein the question before us has been decided. The language of the Constitutions of Pennsylvania and West Virginia differs so slightly from our Constitution in the particulars involved in this case that we think their decisions thereon very persuasive. In *County of Crawford v. Nash*, 99 Pa. 253, 260, the court said: "In *Rucker v. Supervisors*, 7 W. Va. 661, which arose under section 9 of article 8 of the Constitution of West Virginia, which provides that the compensation of public officers shall not be increased or diminished during their term of office, it was held that this language in the Constitution applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law, either by the Constitution of the state, or by some statute made in pursuance thereof. If the ordinances of a city are not laws, within the meaning of this clause in the Constitution, much less so are the orders or agreements of the county commissioners and county auditors in regard to the treasurer's salary. The obvious meaning of the Constitution is that the General Assembly should regulate (that is, ascertain and establish) the compensation which should be paid to the respective county treasurers; and that thereafter 'no law' (that is, no act of assembly) should increase or diminish their respective salaries during the term for which they were elected."

We think the "orders and agreements" of the board of supervisors were intended by the Constitution to fill in the hiatus pending legislation; and that the salary fixed "by general law" is the salary to which appellant is entitled.

Judgment of the trial court is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(35 Nev. 447)

CLARK v. MITCHELL et al. (No. 1,984.)

(Supreme Court of Nevada. March 11, 1913.)

1. FRAUDS, STATUTE OF (§ 56*)—CONTRACT TO RELOCATE MINING CLAIM.

An oral agreement between plaintiff, a part owner of a mining claim, and one defendant, by which the latter was to perform the assessment work on the claim for 1909, and plaintiff was to convey to him an undivided one-fourth of the claim, and defendant was also to relocate another claim in the joint names of plaintiff and defendant in consideration of plaintiff's refraining from performing assessment work on the claim, is not void under Rev. Laws, § 1069, providing that no interest in lands shall hereafter be created, granted, or assigned unless by act or operation of law, or by deed of conveyance in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.*]

2. MINES AND MINERALS (§ 46*)—AGREEMENT TO RELOCATE MINING CLAIM—FAILURE TO PERFORM AGREEMENT.

Where there is an oral agreement between plaintiff, a part owner of a mining claim, and one defendant, by which the latter was to perform the assessment work on the claim for 1909, and plaintiff was to convey to him an undivided one-fourth of the claim, and defendant was also to relocate another claim in the joint names of plaintiff and defendant in consideration of plaintiff's refraining from performing assessment work on the claim, a trust relation is created, and if defendant fails to perform the assessment work, and the first claim reverts to the public, and in relocating the second one he does not include plaintiff as one of the relocators, plaintiff can enforce the trust and recover the share which he would have received had defendant performed the contract.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 132; Dec. Dig. § 46.*]

3. MINES AND MINERALS (§ 46*)—AGREEMENT TO RELOCATE MINING CLAIM—ESTOPPEL TO DENY RIGHTS IN CLAIM.

Where, under an agreement by defendant with plaintiff to relocate a mining claim in their joint names, defendant relocates the claim but omits plaintiff's name, defendant, in an action by plaintiff to recover his share of the claim under the agreement, is estopped to deny plaintiff's rights in the claim and cannot question the validity of the location.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 132; Dec. Dig. § 46.*]

Appeal from District Court, Esmeraldo County; Peter J. Somers, Judge.

Action by H. E. Clark against M. Mitchell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Thompson, Morehouse & Thompson, of Goldfield, for appellants. Frank J. Hanga, of Cripple Creek, Colo., and Augustus Tilden, of Goldfield, for respondent.

TALBOT, C. J. This is an action brought by the respondent to obtain a judgment declaring him to be the owner and to have possession of an undivided one-half interest in a certain mining claim named the Helen, situate in Hornsilver mining district, Esmeralda county. The court found the following facts substantially in accordance with the allegations of the complaint, and as a conclusion of law therefrom determined the plaintiff to be entitled to judgment as prayed for.

"(1) That at all times hereinafter mentioned and until midnight of the 31st of December, 1909, J. M. Russell, Howard Russell, and Elmer J. Chute were the owners of the Whirlwind No. 4 lode mining claim, situate in Hornsilver mining district, Esmeralda county, Nev.

"(2) That at the time of the making of the contract hereinafter mentioned, plaintiff Clark and Mr. E. L. Stingley were the owners of the Silver King Fraction lode mining claim, situated in the above-mentioned district, county and state, and lying adjacent to and contiguous with said Whirlwind No. 4 lode mining claim.

"(3) That at the time of the making of said contract plaintiff had the right, by virtue of an agreement with said Elmer J. Chute, to enter upon said Whirlwind No. 4 lode mining claim in the place of said Chute and perform the assessment work thereon for the year 1909, and thereby acquire the interest of said Chute in said claim.

"(4) That between the 23d and 29th days of December, 1909, inclusive, plaintiff and defendant Mitchell entered into a contract, not in writing, whereby defendant Mitchell agreed to perform the assessment work upon the said Silver King Fraction for the year 1909, in consideration whereof plaintiff agreed to convey to him, said Mitchell, the undivided one-fourth of said claim; and whereby defendant Mitchell agreed to relocate said Whirlwind No. 4 in the joint names of plaintiff and said Mitchell, each to have one-half thereof, in consideration whereof plaintiff agreed to refrain from performing the assessment work for the year 1909 upon said Whirlwind No. 4, and permit the same to revert to the public domain so as to make the relocation thereof as aforesaid possible.

"(5) That the terms and conditions of said contract were fully kept and performed on plaintiff's part, but defendant Mitchell, contrary to the terms of said contract on his part to be kept and performed, and with the fraudulent purpose of dispossessing the plaintiff of said ground, willfully failed to perform the assessment work upon said Silver King Fraction for the year 1909, and be-

cause of such failure the same reverted to the public domain and was lost to plaintiff; and said Mitchell in relocating said Whirlwind No. 4 as the Helen lode mining claim, as by the pleadings established, omitted to include plaintiff as one of the relocators thereof, and in violation of the faith and confidence reposed in him by plaintiff, and with the fraudulent purpose aforesaid, relocated said premises in the sole names of himself and defendants Shannon and Carlon.

"(6) That plaintiff wholly relied upon defendant Mitchell's promise to perform said assessment work upon said Silver King Fraction lode mining claim and to relocate said Whirlwind No. 4 as aforesaid, and, because of his faith in and reliance upon said Mitchell to perform his part of said contract, refrained from performing said assessment work and making said relocation.

"(7) That said Helen lode mining claim laps over, upon, and includes part of the territory comprising the said Silver King Fraction lode mining claim, and the area so overlapping said Silver King Fraction contains the principal discovery of said Helen lode mining claim, and from it defendants have extracted large quantities of mineral-bearing rock and quartz of commercial value.

"(8) That defendants Shannon and Carlon acquired their respective interests in said Helen lode mining claim only by virtue of the relocation made by defendant Mitchell, as aforesaid in violation of the contract with and trust and confidence reposed in him by plaintiff Clark as above set forth. That said defendants did not purchase said interests for value or otherwise or acquire the same in good faith or without notice of plaintiff's rights in the premises, but took the same with full notice of all of the foregoing facts."

This case was argued and submitted to this court together with case No. 1,987, entitled *H. E. Clark and E. L. Stingley v. the same defendants*, 130 Pac. 764, appellants herein. The two cases are so related that they will be considered together. The latter action was brought by Clark and Stingley to recover judgment for the possession of an undivided three-fourths interest of a certain described piece of ground alleged to be a part of the Silver King Fraction lode mining claim, included between the exterior boundaries of the said Helen lode mining claim involved in case 1,984, *supra*. In the latter case the findings and decision of the court was as follows:

"That said location of the Silver King Fraction lode mining claim was made for the purpose of claiming a certain piece of vacant ground lying between the Deyling claim, near the westerly end thereof, and the Lime Point No. 3 claim, near its easterly end line; also extending northerly between the end lines of the Deyling claim and the Lime Point No. 1 claim, to a point about 350 or

375 feet northerly from the southwest corner of the Deyling claim and the Lime Point claim No. 1, to a point where said end lines intersect and cross each other. The plaintiffs also, by virtue of said location, claim the piece of ground described as adjoining the west end of what was known as the Whirlwind No. 4 lode mining claim, lying about 250 feet northerly from the northerly point of the fractions above described. The location monument of the said Silver King Fraction was placed upon the vacant ground sought to be located, about 75 feet north of the southwest corners of the Deyling and Lime Point No. 1 claims, and the discovery work was done about 150 feet northerly from the location monument. That on the 23d day of December, 1909, the plaintiff H. E. Clark made an agreement with the defendant M. Mitchell to perform the annual labor upon the Silver King Fraction lode mining claim, for an undivided one-fourth interest in the same. In compliance with said contract, the defendant Mitchell did, or caused to be done, some work upon the ground claimed by the plaintiff as the Silver King Fraction. The evidence fails to show, however, that a sufficient amount of work was done by the defendant Mitchell to meet the requirements of the law relative to the annual labor upon mining claims. That the defendant A. A. Carlon had knowledge of the agreement which had been made between the plaintiff Clark and the defendant Mitchell; but there is no evidence which, in my judgment, was sufficient to show that the defendant G. N. Shannon had any knowledge of the agreement made between the plaintiff, Clark, and the defendant Mitchell. That on the 1st day of January, 1910, the defendants Mitchell, Shannon, and Carlon located the Helen lode mining claim, taking in the ground which had, prior to that time, been claimed as the Whirlwind No. 4 lode mining claim, and also including the ground first above described, and which was claimed by the plaintiff to be a part and portion of the Silver King Fraction mining claim. It is claimed by the plaintiffs that the defendants, in view of the agreement above mentioned, were occupying a fiduciary relation to and with the plaintiffs, and that they could not occupy and claim any portion of the ground claimed by the plaintiffs as the Silver King Fraction, to the exclusion of the plaintiffs, and to deprive them of their rights and interest in said ground as a portion of the Silver King Fraction mining claim.

"As conclusions of law, I find that a fiduciary relation did exist between the plaintiffs and the defendants Mitchell and Carlon, and that the plaintiffs should be entitled to recover an undivided three-fourths interest in any property which the defendant located, as against the defendant Mitchell and Carlon, provided that any portion of the ground so located by them as the Helen claim shall

be found to be a portion of the Silver King Fraction claim, lawfully claimed and held by the plaintiffs herein. The evidence relative to the amount of ground alleged to have been vacant at the westerly end line of the Whirlwind No. 4 is very conflicting, but, with the views entertained by the court as to the law of this case, it will not be necessary to reconcile the conflicting evidence, nor to pass upon the amount of ground which was included in that fraction. From the facts above found, the conclusion of the court is that the plaintiffs acquired no rights to that vacant fraction of ground lying west of the Whirlwind No. 4 lode mining claim, by virtue of the location of the Silver King Fraction. This last-mentioned fraction was not contiguous to the fraction upon which the location was made, and the discovery work performed, and was situated at least 250 feet away from the nearest point of the located fraction, and it was an attempt on the part of the plaintiffs to include in their location two several and distinct pieces of ground, separated from each other by a distance of at least 250 feet covered by other and prior located claims.

"It does not appear that any location work was done upon the premises in controversy. No location notice and no monuments were erected anywhere in the vicinity of this fraction to indicate that any claim whatever was made for that fraction. In fact, it appears from the evidence that all of the boundary monuments of the so-called Silver King Fraction lode were placed upon prior and existing mining claims and a considerable distance from the fractions which were open to location, and were sought to be claimed as the Silver King Fraction. Mr. Lindley, in discussing this proposition, uses the following language: 'If the lode of the junior locator on his course reaches or crosses the properly established surface boundaries of a prior location, the right to pursue the vein beyond that point cannot be asserted. The end line of the junior must either conform to the cross boundary of the senior, or he must, at the expense of abandoning a portion of the lode, so construct his end lines that no part of them shall be on territory previously appropriated.' No case has been tried by me in which the same questions have been presented as those that are involved in this case, and no authorities have been cited upon the points involved, but it is unquestionably the law that no two separate mining claims can be held by one location. It would seem equally true and logical that no two separate fractions of ground could be held by one location.

"If my conclusions are correct in this respect it follows that the defendants in locating the Helen lode mining claim did not in any manner encroach upon the legal rights of the plaintiffs. The complaint of the plaintiffs should be dismissed, and the de-

fendants have judgment for their costs herein expended, and it is ordered that judgment be entered accordingly."

Case No. 1,984 was tried before Judge Somers, while case No. 1,987 was tried by Judge Stevens.

On behalf of the defendants it is contended that the oral agreement made between Clark and Mitchell was void under the statute of frauds; that the Silver King Fraction, being in two pieces, which were divided by other mining locations, only the piece having the location point can be held, and that the other piece, in which is included the valuable ground in controversy on the Whirlwind No. 4, relocated as the Helen, is not a valid part of the Silver King Fraction.

[1] We are unable to agree with the contention that the contract between Clark and Mitchell was void because not in writing, under section 1069, Revised Laws, which provides: "No estate, or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing." This statute was intended to prevent, and was never designed to encourage, fraud. The agreement, supplemented by the conduct of the parties, makes the case very different from one involving only the right to recover on an unwritten agreement for the sale of real estate, for here a fiduciary relation was created by reason of which Clark trusted and delegated Mitchell to protect Clark's interests. If it had been merely an oral agreement to sell or exchange mining property or other real estate, and Mitchell had declined to perform, the contract would not be enforceable. In such a case Clark would not have lost, nor Mitchell acquired, the title. The evidence and findings indicate that, if the agreement had not been made, Clark would have done the annual assessment work to prevent forfeiture of the Silver King Fraction and would have gone out himself to relocate the Whirlwind No. 4.

[2] In answer to the contention that Clark paid or gave nothing as a consideration, it is sufficient to say that by the oral agreement of Mitchell to do the work on the Silver King Fraction for a one-quarter interest, and to relocate the Whirlwind No. 4 for himself and Clark, and by his starting the work and representing that he was doing it, Clark was prevented from doing or having the work done and from going out to make the relocation himself, and unless protected by the court lost the ground by reason of Mitchell's failure to do the work and make the relocation for himself and Clark. Under these cir-

circumstances, it would be inequitable to allow Mitchell to take advantage of his own wrong and retain for himself and others, and cause Clark to lose, the title which Clark had or would have acquired and retained if Mitchell had not made and broken the agreement to protect Clark's interests, and lulled Clark into believing that the work would be and was being done. There was a trust relation, and quite as much obligation and reliance upon Mitchell for the doing of the annual work and the making of the relocation as if he had been employed as an ordinary agent or had been a co-owner in the Silver King Fraction. Under the conditions shown, by operation of law the interest in the locations agreed to be acquired and held for Clark belong to him in trust, and he is as much entitled to them as he would have been if Mitchell had done the assessment work and made the relocation with Clark's name.

In the case of *Hunt v. Patchin* (C. C.) 35 Fed. 816, there were three owners as tenants in common of three mining claims, and by failure to do the annual work there was a forfeiture. The relocation by one of the owners was adjudged to be in trust for the others. In the course of the opinion, Judge Sawyer said: "I am entirely satisfied that these claims were relocated under the new names at the time for the benefit of all the original owners, or else they were located in bad faith by defendant, after giving his associates, by his conduct, the right to believe, and when they did believe, that the location was for the benefit of all. Under this state of facts, I am clearly of the opinion that a trust arises in favor of complainant under the operation of law. * * * It was his duty not to permit a forfeiture for the purpose of relocating and acquiring the whole for himself without their knowledge and consent. By conferring with them and arranging to forfeit, and relocate for the benefit of all, he misled them, and violated the confidence reposed in him, if he relocated clandestinely for the benefit of himself alone. By his act and this breach of faith he threw his associates off their guard, and prevented them from taking other means to protect their interests. * * * In *Lakin v. Mining Co.* [C. C.] 11 Sawy. 238, 25 Fed. 337, a case similar, but not exactly like this, it was held that 'where one party, wrongfully, obtains the legal title to land, which in equity and good conscience belongs to another, whether he acts in good faith, or otherwise, he will be charged in equity as a constructive trustee of the equitable owner.' Can it be doubted, on the facts as they appear in the pleadings and evidence, that defendant got whatever title he has to the interest of complainant and James in the mines in question through a breach of faith and confidence? It seems to me not. He must therefore be charged as trustee of their interests."

In the case of *Royston v. Miller* (C. C.)

76 Fed. 50, involving the Kingston mines in Lander county, Judge Hawley held that a co-owner who undertakes to do the work necessary to hold mining claims cannot acquire any interest in them as against his co-owners because of the failure to do such work.

In *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943, it was held that an agreement to locate a mining claim for the benefit of others is valid although not in writing.

In *Book v. Justice Mining Co.* (C. C.) 58 Fed. 108, the locating of claims at Virginia City by individuals in their own names and the doing of the annual assessment work thereon for a corporation was held to be for the benefit of the corporation.

In the case of *Trice v. Comstock*, before the Circuit Court of Appeals, 121 Fed. 622, 57 C. C. A. 648, 61 L. R. A. 176, it is said in the opinion: "For reasons of public policy, founded in a profound knowledge of human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate, from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. * * * And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and cestui que trust, principal and agent, client and attorney, employer and an employé, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his cestui que trust, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. 2 Sugden on Vendors (8th Am. Ed.) 406-409; Mechem on Agency, pp. 455, 456; *Tisdale v. Tisdale*, 2 Sneed [Tenn.] 596, 608, 64 Am. Dec. 775; *Ringo v. Binns*, 10 Pet. 269, 280, 9 L. Ed. 420; *McKinley v. Williams*, 74 Fed. 94, 95, 20 C. C. A. 312, 313; *Lamb v.*

Evans (1893) 1 Chan. Div. 218, 226, 236; Connecticut Mutual Life Insurance Co. v. Smith, 117 Mo. 261, 295, 22 S. W. 623, 38 Am. St. Rep. 656; Van Epps v. Van Epps, 9 Paige [N. Y.] 237, 241; 1 Lewin on Trusts, 246, 180; Davis v. Hamlin, 108 Ill. 30, 49, 48 Am. Rep. 541; Winn v. Dillon, 27 Miss. 494, 497; People v. Township Board, 11 Mich. 222, 225; Grumley v. Webb, 44 Mo. 444, 454, 10 Am. Dec. 304; Lockhart v. Rollins, 2 Idaho [Hsb.] 503, 511, 21 Pac. 413; Eoff v. Irvine, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; Robb v. Green (1895) 2 Q. B. 315, 317, 318, 319, 320; Louis v. Smellie (1895) 73 Law Times (N. S.) 226, 228; Gardner v. Ogden, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192."

[3] Extensive consideration is given in the briefs as to whether under conflicting or later decisions two noncontiguous pieces of ground, separated by prior claims, may be held under one location, and as to boundaries, and whether monuments or distances control. As under the agreement Mitchell was the trusted agent or representative of Clark, for the doing of the work on the Silver King Fraction and for relocating the Whirlwind No. 4, and Mitchell was in duty bound to protect Clark to the extent of the interests agreed upon in the Silver King Fraction and in the relocation of the Whirlwind No. 4, Mitchell as a tenant in common is estopped from denying the rights of Clark in the claims, as recognized by their agreement. Whether the relocation made by Mitchell contains more or less ground, and whether the Silver King Fraction may hold a piece of land segregated from its location point, are not questions properly in issue in these cases. These parties being in equity tenants in common, whatever rights Mitchell acquired by location or by possession, or otherwise, in the ground, would inure to the benefit of Clark to the extent of the undivided interest to which he is entitled. Whether one or more of the locations are valid or subsequent to others is not material. The undivided interests of Clark and Mitchell stand on a common basis, differently than if a stranger were seeking to recover the land on the claim that their location was void and that he had made the first valid one.

In Trice v. Comstock, *supra*, the court said: "It is contended that no trust arose because Trice and Beamer had no interest in or control over the lands. But no interest or control of the property to which the agency relates is essential to the raising of the trust. The fiduciary relation and a breach of the duty it imposes are sufficient in themselves. Winn v. Dillon, 27 Miss. 494, 497; People v. Township Board, 11 Mich. 222, 225; Grumley v. Webb, 44 Mo. 444, 454, 10 Am. Dec. 304; Lockhart v. Rollins, 2 Idaho, 503, 511, 21 Pac. 413. If one employs and pays an agent to investigate the title or the character of

land for the purpose of purchasing it, and the agent uses the knowledge he acquires in this way to forestall his principal and obtain a title to the property for himself, it is no answer to the suit of the former to recover the land from his agent that the employer never had any title or interest in it, or that he was not injured by the action of the agent."

In this case, of Clark alone against the defendants, the judgment will be affirmed. A different order will be made in the other case.

NORCROSS, J., concurs.

NOTE.—McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

(35 Nev. 464)

CLARK et al. v. MITCHELL et al.
(No. 1,987.)

(Supreme Court of Nevada. March 11, 1913.)

PRINCIPAL AND AGENT (§ 177*)—RELOCATION OF CLAIM—EFFECT OF NOTICE TO AGENT.

Under an agreement between plaintiff and defendant M., by which the latter was to relocate a mining claim in their joint names, defendant M. relocated the claim but omitted plaintiff's name as a relocater and included the name of defendant S. Held, that the ignorance of S. as to the agreement will not affect the right of plaintiff to enforce the agreement, as the location was made by M., and notice to an agent is notice to the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670-679; Dec. Dig. § 177.*]

Appeal from District Court, Esmeraldo County; Peter J. Somers, Judge.

Action by H. E. Clark and another against M. Mitchell and others. Judgment for defendants, and plaintiffs appeal. Reversed, and judgment rendered.

Frank J. Hangs, of Cripple Creek, Colo., and Augustus Tilden, of Goldfield, for appellants. Thompson, Morehouse & Thompson, of Goldfield, for respondents.

TALBOT, C. J. The findings of fact in this action are set out with the findings in the case of H. E. Clark, one of the plaintiffs herein, against the same defendants, 130 Pac. 760, in the opinion this day filed in that case, which relates to the same property and agreement. Under the facts and the law as determined in that case, the judgment in this case must be reversed.

The claim and recovery by Clark in that action being for an undivided one-half interest in the Helen mining claim, which was a relocation of the Whirlwind No. 4, and the claim in this action being for an undivided three-fourths interest in the ground with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(35 Nev. 495)

STATE v. MIRCOVICH. (No. 2,032.)

(Supreme Court of Nevada. March 14, 1913.)

in the lines of the Silver King Fraction, and lapped by the Helen, the further question has arisen as to the extent of the recovery in this action. The Helen having been located in the names of the three defendants, instead of in the names of Clark and Mitchell, as agreed by Clark and Mitchell, it is said that there is no evidence in the statement showing that Shannon had any knowledge of the agreement between Clark and Mitchell, and consequently it is argued that Shannon is entitled to hold a one-third interest which could not be affected by the agreement of which he was not aware. If Shannon had made the location for himself, or by an agent who was not aware of the agreement, there might be some force in this contention; but, according to the evidence of Mitchell and Shannon, the location was made by Mitchell, who placed Shannon's name on the location notice, and consequently any rights Shannon obtained in the property were acquired through an agent who had knowledge, binding upon Shannon, that Mitchell had agreed to do the work on the Silver King Fraction for a one-quarter interest, so as to preserve the rights of Clark and Stingley to the remaining three-quarters interest in that claim. On the theory that notice to the agent is notice to the principal, and the agent being well aware that he had agreed to perform the work to protect from forfeiture the rights of Clark and Stingley, they are entitled to a judgment for an undivided three-fourths interest accordingly.

In remanding a case it is seldom that this court will order the entry of a reverse judgment without a new trial, which should always be allowed when there is any probability that new facts might be established which would materially affect the rights of litigants. After the trials in these two cases, the findings are so well supported by the evidence, and by the testimony of the parties themselves, that we conclude that a new and expensive third trial could not in any way change the result, and would be only an unnecessary expense and hardship. Consequently, the district court is directed to enter a judgment in favor of the plaintiffs for an undivided three-fourths interest in the piece of ground claimed by them which was within the boundaries of the Silver King Fraction, and described or demanded in the complaint. If desired or requested by any of the parties, the court may take evidence for the purpose of making a description of this piece of ground more specific in the judgment.

NORCROSS, J., concurs.

NOTE.—McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

1. CRIMINAL LAW (§ 518*)—EVIDENCE—CONFESSION—NECESSITY OF CAUTION.

Voluntary statements made by accused while in custody, without the use of force, threats, inducements, or promises, or hope of reward, were not inadmissible in evidence merely because he was not first informed that they might be used against him; there being no statutory provision in this state that confessions shall not be admitted unless it appears that accused was warned that what he should say might be used against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157-1162; Dec. Dig. § 518.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

Where the evidence showed conclusively and was undisputed that accused killed deceased with a knife, the admission of his statements as to his possession of the knife by which deceased was killed, even if erroneous because he was not warned that they might be used against him, did not require a reversal in view of Rev. Laws, § 7302, requiring the court, after hearing the appeal, to give judgment without regard to technical error or defect not affecting the substantial rights of the parties, and section 7469 providing that no judgment shall be set aside or new trial granted on the ground of misdirection of the jury or improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless the court, after an examination of the entire case, is of the opinion that the error has resulted in a miscarriage of justice or has actually prejudiced the defendant in respect to a substantial right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

3. CRIMINAL LAW (§ 723*)—TRIAL—ARGUMENT OF COUNSEL.

A remark of the district attorney in arguing in favor of the death penalty that if the jury could not pronounce by their verdict the death penalty upon defendant, "Let's resurrect old Casey that killed Mrs. H. and let him live again," without stating the facts in regard to the commission of the crime for which Casey was hanged, and evidently with the assumption that the jurors were aware of the punishment suffered by him, was not beyond the bounds of legitimate argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. § 723.*]

4. CRIMINAL LAW (§ 724*)—TRIAL—ARGUMENT OF COUNSEL.

On a trial for murder, where there was evidence that accused had stated that he was an anarchist, a reference to him by the district attorney in his argument as an anarchist was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1679; Dec. Dig. § 724.*]

5. CRIMINAL LAW (§ 724*)—TRIAL—ARGUMENT OF COUNSEL.

Prosecuting attorneys are not justified in their argument in accusing a defendant with being guilty of offenses against the statutory or moral law, as to which there is no evidence; mere abuse or the application of vile epithets not being proper argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1679; Dec. Dig. § 724.*]

6. CRIMINAL LAW (§ 723*)—TRIAL—ARGUMENT OF COUNSEL.

On a trial for murder, where a state's witness on cross-examination had denied that he had advocated "swinging" accused, but admitted that he thought that the crime was such that the county should be saved the expense, it was not error for the district attorney to refer to such testimony as an argument in favor of the death penalty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.*]

Appeal from District Court, Nye County; M. R. Averill, Judge.

Andrinza Mircovich was convicted of murder in the first degree, and he appeals. Affirmed.

J. E. McNamara, of Tonopah, for appellant. Cleveland H. Baker, Atty. Gen., for the State.

TALBOT, C. J. Defendant was convicted of the crime of murder in the first degree under an indictment charging him with the killing of John Gregovich by stabbing with a knife at Tonopah on the 14th day of May, 1912. Upon the trial, the case was submitted to the jury upon the evidence introduced on the part of the state.

[1] Two errors are assigned as grounds for reversal of the judgment. It is contended that the court erred in admitting certain statements and admissions in the nature of confession made by defendant to certain officers in Nye county shortly after the assault and while he was in custody. The proof shows that these statements were made voluntarily by the defendant, and without the use of force, threats, inducements, or promises, or hope of reward; but there is no showing that, previous to making such statements, the officers having defendant in custody informed him that, if he made any statements, they might be used against him. This assignment of error is without merit, as there is no statute in this state, as there is in a few states, forbidding the admission of a confession made by a defendant in custody, unless it appears that he was warned that what he should say might be used against him. Cyc. vol. 12, p. 463, treating this question, says: "The fact that a voluntary confession is made without the accused having been cautioned or warned that it might be used against him does not render it incompetent, unless a statute invalidates a confession made where the accused is not first cautioned. In Texas, by statute, a confession made by a prisoner while in custody is inadmissible, unless he was warned that what he should say might be used against him; and there are similar provisions in other states. It is not the duty of a police officer, in the absence of a statute, to caution a prisoner as to the consequences of making a statement, if the statement is voluntary, but merely to refrain from inducing him to make a statement."

[2] If we had a statute providing that

statements made by a person under arrest cannot be proven unless it is shown that they have been made after he has been warned that they may be used against him, still the admission of the testimony to prove the declarations of the defendant in regard to the knife would be error without prejudice, because without this testimony it is conclusively shown that the defendant killed the deceased with a knife. If there were nothing to indicate the commission of the offense, except circumstantial evidence which left a doubt, the question as to whether it was error to admit evidence that the defendant made admissions or said that he had the knife with which the deceased was killed, without first showing that he had been warned that any declarations he might make could be used against him, might be material, while it is not so in the face of the direct and undisputed evidence that the accused killed the deceased with a knife. The same may be said regarding evidence of other declarations. The Revised Laws provide at section 7302 that, "After hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties;" and at section 7469 that, "No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right." These provisions have been slightly modified or broadened by the new Code, but are substantially similar to the one passed at the first session of the territorial Legislature and in force for more than 50 years; and they are nearly the same as the one more recently recommended by the American Bar Association. Statutes 1861, p. 499, § 589; Compiled Laws 1900, § 4534.

This court has often applied this statute in murder and other cases, and refused to set aside convictions or remand actions for new trials which did not affect the substantial rights of the accused. *State v. Williams*, 31 Nev. 360, 102 Pac. 974; *State v. Jackman*, 31 Nev. 511, 104 Pac. 13; *State v. Skinner*, 32 Nev. 70, 104 Pac. 223; *State v. Simpson*, 32 Nev. 138, 104 Pac. 244, Ann. Cas. 1912C, 115; *State v. Petty*, 32 Nev. 384, 108 Pac. 934, Ann. Cas. 1912C, 223; *State v. Martel*, 32 Nev. 395, 108 Pac. 1097; *State v. Depolster*, 21 Nev. 107, 25 Pac. 1000; *State v. Vaughan*, 22 Nev. 285, 39 Pac. 733; *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33; *S. N. M. Co. v. Holmes M. Co.*, 27 Nev. 108, 73 Pac. 759, 103 Am. St. Rep. 759; *State v. Smith*, 33 Nev. 459, 117 Pac. 19.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In *State v. Buster*, 23 Nev. 348, 47 Pac. 194, it was held that the failure of the trial court to make the proper order striking out the testimony of a witness concerning a confession was harmless error, because the same confession was conclusively established by several other witnesses whose testimony was not contradicted. As the evidence was clear and undisputed that Mircovich killed Gregovich by stabbing him with a knife, in the presence of numerous people, at the railroad station, the jury could not have found otherwise, regardless of whether testimony relating to a confession or statements concerning the knife were properly or improperly admitted. The closing argument of the district attorney was an appeal to the jury to uphold the law and fix by their verdict the death penalty. Upon the conclusion of this argument, exception was taken thereto by counsel for defendant. No particular portion thereof was at the time pointed out as objectionable; nor was any request made that the court instruct the jury to disregard the same or any portion thereof. The court, in the course of its instructions, admonished the jury as follows: "You should bear in mind that it is your duty to determine what the facts in this case are from the evidence, and not from the statements of the judge, or from the statements made by any attorney during the progress of the case or in his argument."

The objectionable portions of the argument pointed out in the brief are as follows: "Why, gentlemen of the jury, if you cannot pronounce by your verdict the death penalty upon this defendant, I say, let's resurrect old Casey that killed Mrs. Hislop in Goldfield and let him live again. * * * There is another feature. You have the society of this country to uphold and maintain. If you can't do it, who will? If the jurors of this county cannot uphold the law, who will? If it is not guarded and protected and maintained, how long will it be before anarchists take possession of this country? What is an anarchist? He is worse than the black hand, because an anarchist does not believe in government or in law. That is the proposition you must consider. When old Tom was asked whether he advocated the swinging of this man without a trial, and if he did not go up and down the streets of Tonopah making such remarks, he said, 'No,' but he thought that the crime was such that this county should have been saved the expense. There is no excuse in this county for mob law; as long as we have courts, as long as we have men of courage, as long as we have men of honest consciences who have the good of the community at heart, there is no necessity of mob law in this western country, and there is no necessity for it in any country. * * * We don't want it. We will not have it, gentlemen; but, if you don't enforce the law, I say that you cannot deter crime. You can-

not keep these anarchists from coming into this country, killing our Presidents, and killing honest, honorable men. Think of that. Oh, but he committed this crime while there were dozens of people around. When you go to your jury room to consider your verdict, gentlemen, that fact, and that fact alone, will show you that this man sought the time and the place and the opportunity to do what he did do. Wasn't McKinley killed in a crowd, and wasn't Garfield killed at a railroad station amidst a rush of people? I say that he deliberately sought the time, the place, and the opportunity to do what he did."

[3] We do not think that the reference by the district attorney to "resurrecting poor old Casey" was beyond the bounds of legitimate argument to the jury. He did not state the facts in regard to the commission of the crime for which Casey had been hanged, and apparently made the remark more by matter of comparison, and evidently with the assumption that the members of the jury were already aware of the punishment suffered by Casey.

[4, 5] If the accusation by the prosecuting officer that the defendant was an anarchist had not been supported by evidence that the defendant had so stated himself, it might have been prejudicial error, as was the accusation by the district attorney in his argument before the jury in the case of *State v. Rodriguez*, 31 Nev. 345, 102 Pac. 863, that he was a "macque," when there was no evidence to support it. Prosecuting officers are not justified, in their zeal to convict, in accusing persons on trial charged with crime with being guilty of offenses against the statutory or moral law when there is no evidence to substantiate their assertions. Mere abuse or the application of vile epithets, unsupported, is not proper argument.

[6] The comment of the district attorney on, and in accordance with, the testimony given by a witness on the trial, who stated that he had not advocated on the streets of Tonopah the swinging of the accused, but he thought that the crime was such that the county should have been saved the expense, is not deemed reversible error, under the circumstances. Whether the witness thought that the expense should be saved by hanging the accused without a trial, or by dismissing the charge against him, is not made certain. If such testimony had been offered by the state, and objection made, it would have been properly excluded; but as it was brought out by cross-examination on the part of the defendant, apparently for the purpose of showing the feeling of the witness, it was not error for the district attorney to quote the testimony after it had been elicited by the defendant, even if it be inferred from the language used by the witness that he favored the lynching of the accused. It is a different situation than it would be if such tes-

timony had been introduced by the state, under the objection and exception of the defendant, and thereafter the district attorney had made the comment and the defendant had taken specific exception.

The judgment and order denying the motion for a new trial are affirmed, and the district court is directed to fix a time and make the proper order for having its sentence carried into effect by the warden of the state prison.

NORCROSS, J. I concur in the judgment and in the opinion of the Chief Justice generally. The closing argument of the district attorney, to which serious objection has been urged upon the appeal, in some particulars I think is not to be commended. This argument was directed entirely to an appeal for the infliction of the death penalty. In view of the record in this case, however, I am of the opinion that the argument did not violate the substantial rights of the defendant.

NOTE.—McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

(47 Mont. 75)

MONAHAN v. ALLEN.

(Supreme Court of Montana. Feb. 28, 1913.)

VENDOR AND PURCHASER (§ 16*)—INCOMPLETE CONTRACT.

An offer to sell certain land for \$43,800, payable \$5,000 on execution of the deed, and \$38,800 "on such terms and subject to such agreements as we may hereafter make," with an acceptance thereof, followed by an agreement as to times and amounts of deferred payments, and that they should be secured, the character of the security, however, being left open for determination at a future meeting, does not make a complete contract, so as to be binding; the material term of security not being agreed on.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.*]

Appeal from District Court, Park County; Frank Henry, Judge.

Action by B. L. Monahan against F. W. Allen. Judgment for defendant; plaintiff appeals. Affirmed.

E. M. Hall, of Helena, and J. A. Poore, of Butte, for appellant. Fred L. Gibson, of Livingston, for respondent.

HOLLOWAY, J. This is an action for damages for the breach of a contract. The complaint alleges that on September 30, 1909, the defendant gave to the plaintiff an option in writing to purchase the Allen ranch, comprising 4,380 acres, at \$10 per acre; that the option was to continue for 30 days, but within that period it was extended until December 1st. A copy of the writing referred to is attached to the complaint. After

reciting that the option to purchase is given to Monahan, and describing the land, the writing contains this principal clause: "It is hereby agreed that if the option for the purchase of the above property be exercised, that the terms for which shall be a payment of five thousand dollars (\$5,000) cash at the time of the signing of deeds of conveyance and the remainder of the purchase price of \$10.00 per acre shall be paid on the terms and under such agreements as may hereafter be made." It is further alleged: That after this writing was executed and delivered the defendant instructed plaintiff to deposit the first installment of the purchase price in any bank in Livingston. That thereafter, and on or about November 12, 1909, plaintiff notified defendant that he accepted the offer to sell "upon the terms set out in said option." That on November 29th plaintiff caused to be deposited in the National Park Bank of Livingston the first installment of \$5,000, notified defendant thereof, and demanded a deed conveying the property to a named purchaser, to whom plaintiff had resold the property. That on the 23d day of December, 1909, plaintiff and defendant agreed upon the terms and dates for the payment of the balance of the purchase price, as follows: \$5,000 on January 1st of each year for six years, beginning with 1911, and the balance on January 1, 1917; deferred payments to be made at the National Park Bank of Livingston, and to draw interest at the rate of 7 per cent. per annum. The plaintiff's readiness and willingness to perform all the terms of the alleged contract, a breach by the defendant, and the special circumstances tending to show the amount of plaintiff's damages are then set forth. The answer is a general denial. Upon the trial, at the conclusion of plaintiff's case, the court granted a nonsuit and entered judgment for defendant for costs. From that judgment, and from an order denying him a new trial, plaintiff has appealed.

1. That the writing, a copy of which is attached to the complaint, is not a contract for the sale of the Allen ranch, both parties are agreed. While it bound Allen to sell, it did not bind Monahan to purchase. If anything, it was an option, by the terms of which Monahan had a right to purchase the Allen ranch on or before December 1, 1909. Snider v. Yarbrough, 43 Mont. 203, 115 Pac. 411; Ide v. Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17. Since an option, in legal effect, is a continuing offer to sell, which is capable of being converted into a valid contract by acceptance, by the tender of the purchase price, or by the performance of the conditions named in the option, within the time stated and before the offer is withdrawn (Ide v. Leiser, above; Gordon v. Darnell, 5 Colo. 302), it follows that, to constitute a particular instrument an option, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terms of the offer must be such that, when accepted, the offer and acceptance will constitute a binding contract. The peculiar characteristics of an option are not involved here; and neither are we concerned with all the essentials of a valid contract for the sale of real property. Speaking broadly, every express, executory contract, upon analysis, resolves itself into an offer by one party and an acceptance by the other (7 Am. & Eng. Ency. of Law [2d Ed.] 125); and since an option is a continuing offer convertible into a contract by acceptance, it is subject to the same rules of law for determining its sufficiency as any other offer made in anticipation of the formation of a binding contract.

Our first inquiry, then, is: Was the offer made by Allen sufficient, so that, when accepted by Monahan, a binding contract for the sale of the Allen ranch resulted? The option was executed and delivered on September 30th. Monahan testified that he accepted the offer, and notified Allen of his acceptance, about November 17th. Paraphrased, Allen's offer is this: "I will sell you my ranch (describing it) for \$43,800, payable \$5,000 upon the execution of the deed, and \$38,800 upon such terms and subject to such agreements as we may hereafter make." Monahan alleges that he accepted this offer "upon the terms set out in said option." In other words, Monahan agreed to purchase the Allen ranch for \$43,800, agreed to pay \$5,000 in cash upon the execution of the deed, and the further sum of \$38,800 upon such terms and under such agreements as he and Allen might thereafter make. Allen did not offer to agree to any terms which Monahan might suggest, and neither did Monahan agree to submit to any terms which Allen might see fit to impose. Even the time for the execution of the deed and the payment of the first installment is not fixed. Nothing whatever is said as to whether Allen should be secured for the payment of the balance due, whether he should receive interest on the deferred payments, or whether the deed should be delivered to Monahan or to the named purchaser, when it was executed. Indeed, aside from fixing the price of the ranch and the amount of the first installment, all other terms were left for future negotiations. The recital that \$5,000 was to be paid upon the execution of the deed, and the balance thereafter upon such terms as might be agreed upon, negatives the idea that either party contemplated that the entire balance of \$38,800 should be paid at once upon the execution of the deed; or, in other words, the idea that a cash transaction was in contemplation is completely disavowed. Viewed in the light most favorable to the appellant, the best that can be said is that Allen agreed to execute a deed within a reasonable time after receiving notice of Monahan's acceptance and upon receiving

payment of the first installment of \$5,000. But from any point of view Allen's offer to sell was conditional upon the ability of himself and Monahan to agree upon the terms for the payment of the balance of the purchase price. Such an offer is too vague, indefinite, and uncertain to form the basis for a contract.

In 1 Page on Contracts, the author gives a critical analysis of a contract, enumerates the essential elements of an offer and discusses the subject of completeness, in section 27, as follows: "An offer, even if intended to create legal relations, must be so complete that, upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not." And by way of illustrating the same rule from the negative point of view the author says: "An offer which leaves the amount of compensation to be determined by subsequent negotiation, fixing only the extreme limits within which the negotiations are to range, or one which leaves to a future valuation between the parties the price to be paid for realty or personality, or one which leaves the quantity of material to be furnished, or the character of buildings to be erected, or the terms of payment and security for the purchase price, to be determined by future negotiation, is not complete." To the same effect is the decision in *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4, where it is said: "Until an offer is made by one party, complete and definite in all material terms, it is not possible for another to make a valid contract by the mere acceptance of a proposition. In other words, so long as there remains any of the material conditions of a contract to be settled and agreed upon, no binding agreement exists."

The acceptance, if of any efficacy whatever, must be coextensive with the offer. 1 Page on Contracts, § 45. "An acceptance, to be good, must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed." *Knowlton's Anson on Contracts*, 22; *Brophy v. Idaho P. & P. Co.*, 31 Mont. 279, 78 Pac. 493. This being true, Monahan's acceptance must be construed to mean: "I will purchase the Allen ranch for \$43,800 and pay \$5,000 upon the execution of the deed, provided we can hereafter agree upon the terms for the payment of the balance." If, then, the offer is indefinite, and material terms are left for future negotiation, the acceptance, which must correspond with the offer, cannot aid it.

In 1 Story on Contracts, § 490, it is said: "In order to create a contract, it is essential that there should be a reciprocal assent to a certain and definite proposition. So long as any essential matters are left open for further consideration, the contract is not complete; and the minds of the parties must assent to the same thing in the same sense."

In *Long v. Needham*, 37 Mont. 408, 96 Pac. 731, this court stated the rule as follows: "An agreement to be finally settled must comprise all the terms which the parties intend to introduce. An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled."

In *Bissinger v. Prince & Blackman*, 117 Ala. 480, 23 South. 67, it is said: "It is an elementary principle that there can be no valid contract without the mutual assent of the parties. Their minds must meet and concur as to all the essential elements of the contract involved, as to the subject-matter, and as to the respective rights and duties." See, also, 7 Am. & Eng. Ency. of Law (2d Ed.) 113; *Etheredge v. Barkley*, 25 Fla. 814, 6 South. 861; *Watson v. Bayliss* (Wash.) 128 Pac. 1061.

That Allen's offer and Monahan's acceptance of it did not conclude the negotiations was thoroughly understood by both parties. The writing, on its face, provides for further treaty arrangements, and some of these negotiations were subsequently carried on. But if a contract for the sale of the Allen ranch was made between these parties at all, it was made when Monahan communicated his acceptance of Allen's offer; for the record discloses that there were not any other arrangements had prior to that time and none subsequently made, except as will be noted hereafter. That the terms left open for future negotiations were deemed important by both parties is apparent. Provision was made for the payment of only \$5,000 of the \$43,800 representing the purchase price of the ranch. Assuming that it sufficiently appears that Allen was to execute and deliver a deed to the property within a reasonable time after receiving notice of Monahan's acceptance and upon the payment of the first installment of \$5,000, he would be required to transfer the title to a stranger, and that, too, without any security for the balance of \$38,800, unless the question of security was comprehended within the terms which were left open for future negotiations; and that this was so, or, at least, was Monahan's understanding, is very clear, for he testified that the subject of security was discussed, but its determination was left open for negotiations to be had at a meeting to be held in January, which meeting never took place, and therefore the question of security was never settled. At the time of Monahan's acceptance the only terms agreed upon were the upshot price and the amount of the first installment. The other terms were left open for future determination, and because of this fact the offer and acceptance did not constitute a binding contract for the sale of the ranch. Upon principle, the following cases are in point: *Brown v. New York Central*

R. R. Co., 44 N. Y. 79; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415; *Mattoon Mfg. Co. v. Oshkosh, etc., Ins. Co.*, 69 Wis. 564, 35 N. W. 12; *Santa Rosa L. Co. v. Woodward*, 119 Cal. 30, 50 Pac. 1025; *Peet & Co. v. Meyer*, 42 La. Ann. 1034, 8 South. 534.

In *Krum v. Chamberlain*, 57 Neb. 220, 77 N. W. 665, there was presented the case of an offer to sell real estate with the entire price fixed, but the terms of payment and the security were left for future treaty. In speaking of the situation thus presented, the court said: "So at this stage of the negotiations it is perfectly clear that both parties understood that the only things definitely determined upon were the price of the property, the rate of interest on the deferred payment, and the time when the transaction should be closed. A court could not enforce specific performance at the suit of either party, because it could not ascertain from the evidence how much of the purchase money should be paid in cash, for what amount a mortgage should be given, nor when the security should become enforceable."

In *Gunn & Co. v. Newcomb*, 82 Iowa, 468, 48 N. W. 989, the court was considering an offer to sell a stock of goods for an amount equal to the invoice price, to be determined by an inventory thereafter to be taken. It was held that an acceptance of this offer did not constitute a contract for the sale of the goods.

In *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814, there was under consideration a question somewhat similar to the one now before us. Williams owned land which had been subdivided into lots. He offered to sell to Wardell the entire tract for a named amount, part cash and the balance secured by a mortgage upon the entire tract. In the offer there was contained a provision that the parties would thereafter fix a price for each lot, so that whenever the fixed value of a particular lot was paid it could be released from the mortgage. This offer was accepted, and in an action for damages for a breach of the alleged contract the question was presented: "Was there a valid contract between the parties?" The court answered the question in the negative, and in the course of the opinion said: "The offer, upon its face, looks to future action and negotiation between the parties to determine and agree upon the valuation to be placed upon the lots, which were to be released as their value so agreed upon should be paid upon the mortgage. * * * The memorandum shows, upon its face, that the minds of the parties had not met, and that it was not evidence of a completed agreement, but stated terms which, if accepted, would be the foundation of further treaty between the parties with reference to essential particulars, which, when agreed upon, would form part of the contract of sale and purchase."

In order to determine whether Monahan's acceptance of Allen's offer constituted a contract for the sale of the Allen ranch, it is only necessary to inquire what effect the failure of the parties thereafter to agree upon the terms for the deferred payments, or the security to be given Allen, would have upon the transaction. Neither agreed to subscribe to any particular terms, and if their subsequent negotiations had failed neither could have been charged with a breach of the contract. So long as the minds of the parties did not meet upon all the material terms of the contract, the contract was incomplete. *La Compania, etc., de Bilbao v. Spanish-Am. L. & P. Co.*, 146 U. S. 483, 13 Sup. Ct. 143, 36 L. Ed. 1054.

In *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10, the court had before it an instrument executed by parties owning certain industries, looking to a consolidation of their business. The written instrument, after reciting the purpose to be accomplished and enumerating certain terms, provided that a complete plan of unification should thereafter be prepared and agreed upon. In speaking of this transaction the court said: "It is clear that on some things the minds of the parties had met, and on others they had not. The scheme or plan was not completed, and until it was there was no complete or final contract. Until then it was provisional and incomplete, and failure to agree upon the details or upon a complete plan would render all the preliminary agreements void."

Until all the material terms were agreed upon between Allen and Monahan, either party was free to withdraw from the negotiations and terminate the transaction. *Dietz v. Farish*, 53 How. Prac. (N. Y.) 217; *Deshon v. Fosdick*, 1 Woods (U. S.) 286, Fed. Cas. No. 3,819; 7 Am. & Eng. Ency. of Law (2d Ed.) 139, note.

In *Ridgway v. Wharton*, 6 H. L. Cas. 238, it is said: "An agreement to be finally settled must comprise all the terms which the parties intended to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled upon between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain." This language is quoted with approval in *Brown v. New York Central R. R. Co.*, above, and a portion of it in *Long v. Needham*, above.

The distinction is to be made between an agreement to enter into a specific contract, whose terms are fixed in advance, and an agreement to enter into some sort of a contract, if its terms can thereafter be agreed upon. In discussing this subject the Supreme Court of Minnesota, in *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906, said: "A contract between two persons, upon a valid con-

sideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding; and upon a breach thereof the party having the election or option may recover as damages what such particular contract, to be entered into, would have been worth to him, if made. But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations."

Monahan testified that in December, 1909, he and Allen met and agreed upon the amounts and maturities of the remaining installments of the purchase price; that they agreed that Allen should have security for the deferred payments, but the character of the security was left open for determination at a meeting to be held in January following. The January meeting was never held, and the character of the security was never agreed upon. Allen refused to proceed, and since there was not any binding contract he could do so without incurring liability. If the January meeting had been held, but the parties had failed to reach an agreement as to the character and extent of the security which Allen should receive, all the prior negotiations would have ended with nothing accomplished.

2. It is beside the question to inquire whether the written option is a sufficient note or memorandum to meet the requirements of the statute of frauds. Since there was not any contract, there could not be a note or memorandum of a contract, within the meaning of those terms as employed in the statute of frauds.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 85)

MISSOULA STREET RY. CO. v. CITY OF MISSOULA.

(Supreme Court of Montana. Feb. 28, 1913.)

1. MUNICIPAL CORPORATIONS (§ 330*)—CONTRACTS—LETTING TO LOWEST BIDDER.

Even though the city council does not exceed its power by the provision of a street railway's franchise that the city, taking up

any tracks for the purpose of installing a sewer, shall remove and replace them at its own expense, yet the city's contract with the railway company that the company shall take them up and replace them at the city's expense is void, not having been let, as required by Rev. Codes, § 3278, to the lowest responsible bidder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.*]

2. MUNICIPAL CORPORATIONS (§ 350*)—CONTRACTS—RECOVERY FOR WORK—ESTOPPEL.

Recovery may not be had of a city, under the doctrine of equitable estoppel, for taking up and replacing the tracks of a street railroad, for the purpose of installing a sewer, where the contract for the work was void, because not let, as required by the statute, to the lowest bidder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879, 880, 882; Dec. Dig. § 350.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by the Missoula Street Railway Company against the City of Missoula. Judgment for defendant, and plaintiff appeals. Affirmed.

W. M. Bickford, V. S. Kutchin, and Wm. F. Wayne, all of Missoula, for appellant. Frank Woody, of Missoula, for respondent.

BRANTLY, C. J. This action was brought by the plaintiff to recover the sum of \$5,507.13 alleged to be due from the defendant upon two express contracts, under the terms of which the defendant agreed to pay to plaintiff the cost of moving and relaying its tracks on two of defendant's streets. The complaint declares upon these contracts in separate counts. The court below sustained a general demurrer to each of them. Plaintiff having declined to amend, judgment was rendered dismissing the action. In all essential particulars, the contracts are identical. The same objection is urged to both. The statement of the circumstances out of which the second grew will therefore be sufficient to present the questions which it is necessary to examine and determine.

The fifth section of the franchise granted by the defendant to the plaintiff, and under which it constructed and is operating its railway, reserves to the defendant, and to persons, companies, and corporations having authority from the defendant to use the streets, the right to take up the plaintiff's tracks and move the rails for the purpose of laying or repairing water and gas pipe, electric wires, sewer pipe, etc., or for any purpose that may be deemed necessary by the city council, without liability to the plaintiff for interruption of its business, "provided, however, that such work shall be done without any unnecessary delay, and that whenever the said rails or tracks are taken up or removed, the same shall, upon completion of said work, be relaid by the person, company or corporation taking up or removing the same, as soon as possible, and replaced in as

good condition as the same were in prior to the taking up and removal thereof." During the year 1911 it became of public concern that a sewer be constructed by the defendant along Cedar street. This rendered it necessary that plaintiff's tracks be removed until the work could be completed. Thereupon "it was agreed by the defendant, acting through its mayor and city council, that, if plaintiff would remove its said track and line and replace the same and keep an account of the actual cost thereof and present a bill for same, the city would pay the cost of the removal and replacement of the tracks aforesaid." The plaintiff removed and replaced its tracks, expending in that behalf a total of \$2,716.65. The plaintiff also removed and replaced its tracks on Higgins avenue to permit a line of sewer to be laid therein, at a total cost of \$2,790.38. When bills for these amounts were presented to the council, payment was refused. The special ground of refusal does not appear; but the following are urged in justification of it: (1) That it was not competent for the city council, when it granted the franchise to plaintiff, to relieve it of the burden of the expense incident to the removal and replacement of its tracks whenever this became necessary in order to enable the city to install a sewer or to construct any other improvement along a street upon which the tracks had been laid, in that, by so doing, the city council undertook to abridge the police power of the city; and (2) that the contracts are void because it is apparent that they were entered into without observance by the city council of the requirements prescribed by the statute, and therefore no liability was cast by them upon the city.

Counsel for plaintiff contend: (1) That the franchise is a contract between the plaintiff and the city, and that, though it may be repudiated by the city at any time by legislative action, until this is done it is binding upon both parties; (2) that, since the contracts have been executed, the city is estopped to question its liability under them; and (3) that in any event the city will be required, upon the principle of equitable estoppel, to pay the reasonable value of the work.

[1] For present purposes it may be conceded that the city council did not exceed its power by incorporating in the franchise the provision found in section 5 thereof. We incline to the view that it did not. The purpose of it was to adjust the mutual rights and obligations of the parties with reference to the expense which it was anticipated would be necessary for some one to bear when the city came to install its sewer system or otherwise to improve the streets, and to settle definitely all question as to who should bear the loss incident to the interruption of plaintiff's business pending the installment of any improvement in course of construction. The adjustment of such questions, it would seem,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has no direct connection with the safety and welfare of the public, but is connected rather with the fiscal policy of the city. So regarded, it does not fall within the governmental functions of the municipality, but rather within what are termed its private functions, in the exercise of which it is free to contract at its discretion; it not being prohibited from doing so by the law of its creation or the general law of the state. But be this as it may, if, in incorporating in the franchise the provision in question, the council exceeded its power, the plaintiff has no claim against the city. From this point of view, the burden of expense and loss incident to the removal and replacement of its tracks and the interruption of its business must be borne by plaintiff. If the council did not exceed its power, the plaintiff still cannot recover on the contracts, because, assuming that they were entered into by the city in strict conformity with the law in other respects, they are void because they were let to the plaintiff in total disregard of the statute requiring such contracts to be let to the lowest responsible bidder.

Assuming that the plaintiff was freed, by the terms of the franchise, from any duty to remove and replace its tracks, when they were removed by the city, the expense of the work required fell upon the city as a part of the expense of installing the lines of sewer. The plaintiff, in contracting to do this part of the work, occupied the same relation to the city as any other person who might have contracted to do it. Section 3259 of the Revised Codes provides: "The city or town council has power: * * * (63) To make any and all contracts necessary to carry into effect the powers granted by this title and to provide for the manner of executing the same." Section 3278 declares: "All contracts for work, or for supplies, or material, for which must be paid a sum exceeding two hundred and fifty (\$250) dollars, must be let to the lowest, responsible bidder, under such regulations as the council may prescribe. * * *" The mode of exercising the power granted by the former section is subject to the limitation prescribed by the latter. Some of the courts hold that such a limitation is directory; but by the great weight of authority it is held to be exclusive and to apply to all municipal bodies. It falls within the general rule that, when the Legislature has prescribed the mode by which a given power is to be exercised by a municipality, this mode must be pursued. It is the measure of power on that subject; and any attempt to pursue any other mode falls to bind the municipality at all. Contracts entered into in disregard of the limitation are void. Similar provisions have frequently been examined by this court, with the result that the rule, as above stated, has become firmly established as the rule of decision in this jurisdiction. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13

Pac. 249; *Lebcher v. Board of Commissioners*, 9 Mont. 315, 23 Pac. 713; *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092; *Williams v. Commissioners*, 28 Mont. 360, 72 Pac. 755; *McGillie v. Corby*, 37 Mont. 249, 95 Pac. 1063, 17 L. R. A. (N. S.) 1263; *Carlson v. City of Helena*, 39 Mont. 82, 102 Pac. 39, 17 Ann. Cas. 1233; *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286. Any further discussion of it would serve no useful purpose. Tested by it, the contracts are void and cannot furnish the basis of recovery.

[2] In support of their last contention, counsel for plaintiff cite several cases which, in effect, hold that it is only when the subject-matter of the contract is entirely outside of the scope of the corporate powers, or the contract is clearly prohibited, that the municipality will be permitted to escape liability; and they insist that, notwithstanding the contracts in question are void, the plaintiff upon equitable grounds ought to be permitted to recover the reasonable value of such benefits as have been received by the defendant. As already observed, the complaint declares upon the contracts according to their express terms. It is therefore doubtful whether its allegations are sufficient to support a judgment for the reasonable value of the work done. But, assuming that they are sufficient, still we do not think the plaintiff entitled to recover. The result of such a holding would establish a rule which would abolish completely all limitation upon the power of the council to bind the city, and thus defeat the very purpose had in view by the Legislature in enacting the statute, viz., to promote economy and to protect the taxpayers from fraud and favoritism on the part of the council or the officers of the city. The equitable doctrine of estoppel can have no application to such a case. In entering into the contracts, the plaintiff was dealing with an artificial person, a creature of the law, whose authority to contract is conferred and limited by law. The facts were all known to it. There was no misrepresentation made to it. It knew the extent of the power of the council and how it must be exercised. It dealt with the council at its own peril. *Lebcher v. Board of Commissioners*, supra; *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485; *State ex rel. Lambert v. Coad*, supra. If, when it began to work, the contracts were illegal, it knew it. It did the work with full knowledge of this fact. It was therefore not misled, and is not now in a position to allege that the defendant is estopped to question its own liability.

In *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96, in considering the question involved here, Mr. Justice Field said: "To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no

restrictions imposed by the law upon the party sought to be charged against making, in direct terms, a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment." We are aware that in subsequent cases the Supreme Court of California has apparently departed to some extent, if not entirely, from the rule applied in this case, notably in *Sacramento County v. Southern Pacific Co.*, 127 Cal. 217, 59 Pac. 568, 825, *City of San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923, and *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189. In these cases the court applied, to the contracts of a municipality, the principle of estoppel under the rules which are applicable to contracts between natural persons and private corporations, but, as was remarked by Chief Justice Beatty in his dissenting opinion in *Sacramento County v. Southern Pacific Co.*: "This doctrine sweeps away at once all limitations upon the power of the board, for it can readily be seen that the contractor must always have it in his power to commence work just as soon as he has induced the board to enter into a contract in defiance of the regulations intended to govern their action; and it is also apparent that the board, which desires to make contracts in disregard of the law, will have the same motive to allow the commencement of work that they have to enter into the illegal contract." These cases are distinguished in their facts from the case at bar; but the rule contended for by plaintiff's counsel is recognized in all of them.

It may well be said that, in cases in which the municipality has acquired property which is still in specie, it may not be allowed to retain it and at the same time refuse to pay its reasonable value. In such a case, however, its liability would rest upon different principles. The contract being void, the title to the property would not vest under it, and the seller would be in a position to reclaim it, or, if restoration of it should be refused, to recover the reasonable value of it. But even in such a case the liability would not arise out of the contract. The rule declared in the *Zottman Case* was expressly recognized by this court in *State ex rel. Lambert v. Coad*, supra, in announcing the following conclusion: "Nor do we think the defendant is precluded from asserting the illegality of the

action of the board in defense of his action in refusing plaintiff access to the records for the purpose of indexing them. The board's action in letting the contract was simply void for want of compliance with the law. Under the authorities cited, the execution of such a contract, or payment for work done under it, will be enjoined at the instance of a taxpayer; and when mandamus is resorted to to compel recognition of it by the auditing officer, whose duty it is to audit the accounts of the municipality and pay them, no relief will be granted."

For these reasons, we think the action of the court in sustaining the demurrer was correct. The judgment is accordingly affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur

(42 Utah, 377)

HUDSON v. MOON et al.

(Supreme Court of Utah. Feb. 24, 1913.)

1. **BILLS AND NOTES (§ 493*)—ACTIONS—BURDEN OF PROOF.**

Under Comp. Laws 1907, § 1576, providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, the production of the note and proof of the signature make a prima facie case of a valuable legal consideration, placing the burden on defendant of producing evidence to overcome such case, but, when such evidence is produced, the burden is on plaintiff to show by a fair preponderance of all the evidence a legal and valuable consideration.†

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

2. **PLEADING (§ 49*)—REPLY—CONSTRUING IN CONNECTION WITH COMPLAINT.**

The complaint and reply should be taken together in determining the cause of action stated.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 100-102; Dec. Dig. § 49.*]

3. **BILLS AND NOTES (§ 478*)—ANSWER—MATTERS IN AVOIDANCE.**

In an action on a note, allegations in the answer that the consideration was an illegal one, growing out of a gambling transaction, was not new matter by way of confession and avoidance.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1522, 1523; Dec. Dig. § 478.*]

4. **BILLS AND NOTES (§ 489*)—ACTIONS—BURDEN OF PROOF.**

While a party suing on a negotiable instrument need not allege a specific consideration, where he does particularly allege the consideration, it must be proved as alleged.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.*]

5. **GAMING (§ 19*)—NOTE AND MORTGAGE—VALIDITY.**

Plaintiff, through defendant as broker, sold stock short, to be delivered within 30 days. The broker, without authority from plaintiff and before the stock had increased in price, delivered stock to the purchasers. Thereafter, and before the expiration of the 30 days, the stock al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† *Leavitt v. Thurston*, 33 Utah, 351, 113 Pac. 77.

most doubled in value. The broker then settled with plaintiff on the basis that it would be necessary to purchase stock at the then price for delivery to the purchasers, and took a note and mortgage from plaintiff for his loss on this basis. *Held*, that the note and mortgage were void for want of consideration; there being no necessity to purchase stock, as the purchasers had already received their stock, and the effect of the transaction being to enable the broker as against his principal to make a profit amounting to the difference in the market price.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 89-43; Dec. Dig. § 19.*]

6. GAMING (§ 19*)—GAMBLING CONTRACTS—SPECULATIVE TRANSACTIONS.

A short sale of stock by a customer to a broker without any deliveries being made or intended, the intention being to receive or pay the difference between the contract price and the future market price, was illegal, and a note and mortgage given to cover such difference in price were void.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 89-43; Dec. Dig. § 19.*]

7. CONTRACTS (§ 138*)—EFFECT OF ILLEGALITY—RECOVERY OF TAXES.

Where a mortgage was void because based on no consideration or on an illegal consideration, the mortgagee was entitled to recover taxes paid by him on the property.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Charles E. Hudson against A. T. Moon, Lillian M. Moon, and others. From the judgment, the defendants named appeal. Reversed and remanded, with directions.

C. S. Patterson and E. A. Walton, both of Salt Lake City, for appellants. Edwards & Ashton, of Salt Lake City, for respondent.

LOOFBOUROW, District Judge. Respondent brought this action in equity to foreclose a real estate mortgage of \$2,750 and interest from March 28, 1902, and to recover a judgment on another note of \$1,341 and interest. Both notes were signed by appellant Moon, and were payable to respondent. They together represent a single transaction.

The complaint, in two counts—the first on the note and mortgage, and the second on the other note—was in the usual form. Moon, answering, averred that the only consideration for the notes was an illegal one growing out of a gambling transaction between him and respondent. He set up with much detail the particulars of the claim, which, briefly stated, is in effect as follows: Between February 28 and March 15, 1902, Moon, for the purpose of gambling with Hudson on the future market price of Daly West Mining Company stock, and without any intention on the part of either that there should be a delivery of the stock, "shorted" 200 shares of such stock to Hudson, evidencing the transaction by the making of the instruments, Exhibits D and E, herein-after set forth. Respondent, in his reply, specifically set forth what he claimed to be the consideration for the notes. The substance of his allegations in that respect is:

On February 28, 1902, Moon gave him, as a stockbroker doing business in his own name and also in the name of Hudson & Sons, an order to sell on the Salt Lake Stock Exchange 100 shares of such mining stock for delivery at any time within 30 days from the sale, at the option of Moon. In pursuance of such order, respondent on February 28th sold 50 of such shares for the account of Moon at \$19.65, 30 days; and on March 8d he similarly sold the other 50 shares. On March 15th Moon gave him a similar order to sell an additional 100 shares, and, in pursuance thereof, respondent in the same manner sold 100 shares at \$18.75, 30 days. Respondent further alleged that Moon was notified of such sales, and that he deposited with respondent \$400 as a margin for the same; that the stock rapidly advanced between March 20th and 28th; that on March 28th Moon ordered respondent to close the deals, and to purchase 200 shares of the stock; that, in pursuance thereof, respondent purchased 200 shares, and delivered them to the parties to whom he had theretofore sold such stock; and that the notes and mortgage were given to respondent in settlement of the balance due him on account of the difference between what the stock was sold for and the price of it on March 28th.

The court made findings in favor of respondent in conformity with the allegations of his complaint and the reply, and entered judgment and decreed a foreclosure accordingly. Moon appeals. He assails the findings.

[1] This being an equity case, and the appeal being on questions of both law and fact, it is important at the outset to determine whether respondent or Moon had the burden of proof with respect to the consideration of the notes. Each contends that the other had the burden. Respondent argues that by reason of the negotiability of the notes there is a presumption, under Comp. Laws 1907, § 1576, of a valuable consideration. That section provides: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." Respondent urges that "there can be no question but what the burden of proof of establishing the illegal consideration under the issues of the case were upon the defendant." But the authorities cited by him (1 Ency. Pl. & Pr. 848; 81 Cyc. 678) do not go to this extent. They only are to the effect generally that, where a defense proceeds by way of confession and avoidance, the burden as to such defense is upon the defendant. Respondent further argues in his brief: "And the defendant is only entitled to rely upon those defenses set forth in his answer; therefore, if the plaintiff in the case by all the evidence introduced shows by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a preponderance of the evidence substantially the consideration alleged in the complaint and reply, then he is entitled to recover in this action, unless defendant proves by the preponderance of the evidence the truth of the allegations set forth in the answer, to wit, that the consideration was an illegal one as growing out of a gambling transaction." Just what respondent means by this is not clear. While he has asserted that on the issue of consideration the defendant has the burden, yet he, in effect, seems to concede that the plaintiff has the burden to show the consideration as alleged by him in the complaint and reply, and, if he does so show it by a preponderance of "all the evidence introduced," he is entitled to prevail, unless the defendant by "the preponderance of evidence" proved an illegal consideration. Thus, according to this notion, the plaintiff has the burden to prove the consideration as alleged by him in his complaint and reply, and the defendant to prove it as he alleged it in his answer. This apparently on the assumption that the defense of consideration pleaded here is not inconsistent with, and is not in denial of, respondent's allegations concerning consideration, but consists of new matter avoiding the effect thereof. But immediately following this quotation from respondent's brief appears the following: "And in this connection it is but proper to remark that, if the plaintiff in the case by a preponderance of the evidence supported the allegations of the complaint and reply, in the very nature of things, the defendant must fail in establishing by a preponderance of the evidence the allegations of the answer." Certainly; for, if the respondent by a preponderance of all the evidence supported his allegations of consideration as alleged by him in his complaint and reply, it is somewhat difficult to perceive how the appellant's allegations of consideration could also be supported by a preponderance of the evidence. But by this confession the respondent has destroyed his claim that the defense of consideration as pleaded was new and affirmative matter, and not merely in denial of or inconsistent with respondent's allegations.

Appellant insists that the respondent having alleged a particular consideration for the notes, and the appellant that there was no consideration except an illegal one, a gambling transaction, such defense is not new matter by way of confession and avoidance, but is in denial of respondent's allegations because inconsistent therewith; and hence that the burden of proof in the first instance was upon and continued to remain with the respondent.

[2, 3] The complaint and reply, of course, should be taken together in determining the cause of action stated. *Barrett v. Butler*, 5 Kan. 355. The pleaded defense was not new matter by way of confession and avoidance. *Corby v. Weddle*, 57 Mo. 452.

[4] In this case it was not necessary for

respondent to allege the specific consideration, because, under the statute referred to by him, a consideration was implied from the negotiable quality of the notes sued on. But it seems that when such a particular allegation is made it must be proved as alleged. *Gould, Pleadings*, 152, 154; *Stephen on Pleadings*, star page 423; *Dickensheets v. Kaufman*, 28 Ind. 251, 253.

An instructive case directly in point on the question of burden of proof is *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726. There the suit was upon a promissory note given by defendant to plaintiff. The plaintiff put the note in evidence. The defendant then offered evidence tending to show no consideration. The plaintiff then put in evidence for the purpose of showing the particular consideration. The court, holding that the burden of proof was upon the plaintiff, said: "While the burden of proof in an action upon a promissory note, as between the original parties, is upon the promisee to establish the fact that it was given for a valuable consideration, the production of the note and proof of the defendant's signature establish a prima facie case which entitles the plaintiff to a verdict. But the burden of proving a consideration still remains upon the plaintiff, notwithstanding the presumption, and, if there is any evidence in the case on this point on behalf of the defendant, the plaintiff must show, by a preponderance of the whole evidence, that the note was given for a valuable consideration. [Citing cases.] Where a party having the burden has given competent prima facie evidence of consideration, and the adverse party seeks to meet it, not by producing proof that would negative this proposition, but by establishing another and distinct proposition, the burden is upon him. Thus, if the defendant should seek to meet the prima facie case made by the production of the note by evidence of payment, the burden would be upon him to show it. * * * But evidence on behalf of the defendant may distinctly meet and tend to disprove the evidence of consideration of the plaintiff, even if it also tends to establish an entirely different state of facts from that on which the plaintiff seeks to base his proof of consideration. In such case the effect of proof of consideration by the plaintiff is not avoided, but is met and encountered; and, even if the evidence of the defendant tends to establish a different proposition from that asserted by the plaintiff, it is still for the plaintiff to sustain the burden which rests upon him of proving the consideration, and not for the defendant to show that it does not exist, by satisfying the jury that his own proposition is correct." In *Huntington v. Shute*, 180 Mass. 371, 62 N. E. 380, 91 Am. St. Rep. 309, that court again said: "The rule is well settled in this commonwealth that, in an action on a promissory note, the burden of proof is

upon the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note, with the admission of proof of the signature, makes a prima facie case, yet if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury, by a fair preponderance of the evidence, that the note was for a valuable consideration." The same proposition is also well stated and well reasoned in *Delano v. Bartlett*, 6 Cush. (Mass.) 364. In the case of *Atlas Bank v. Doyle*, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219, the court said: "The burden of proof is indeed on the plaintiff to prove a valuable consideration, but by presenting the paper he makes a prima facie case; that is, a case sufficient to justify a verdict for him if the defendant does not rebut it. But, if the defendant does produce evidence to rebut this presumption, the burden is still on the plaintiff, taking all the testimony together, to show a valuable consideration by a preponderance of the evidence on his side." The following cases are also to the same effect: *Search v. Miller*, 9 Neb. 26, 1 N. W. 975; *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356; *Gutta Percha, etc., Co. v. City of Cleburne* (Tex. Civ. App.) 107 S. W. 157; *Small v. Clewley*, 62 Me. 155, 16 Am. Rep. 410; *Goodenough v. Huff*, 53 Vt. 482; *Mauntee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Bogle v. Nolan*, 96 Mo. 85, 9 S. W. 14; *Campbell v. McCormac*, 80 N. C. 491; *Conney v. Macfarlane*, 97 Pa. 361; *Best v. Rocky Mt., etc., Bank*, 37 Colo. 149, 85 Pac. 1124, 7 L. R. A. (N. S.) 1035; *F. L. & T. Co. v. Siefke*, 144 N. Y. 354, 39 N. E. 358; *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102. And in principle to the same effect are *Leavitt v. Thurston*, 38 Utah, 351, 113 Pac. 77; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; 1 *Daniel Neg. Inst.* 164; 4 *Wig. Ev.* § 2493.

Respondent has cited no case or authority which makes against these authorities. He has only cited 1 Pl. & Pr. 848, and 31 Cyc. 678. But they are to the point that the burden is on the defendant on pleas of payment or other affirmative matter in avoidance or set-off or counterclaim. He has cited no case that upon issues as here the burden of proof—the onus probandi—was not on the plaintiff to show a valuable consideration, but on the defendant to show an illegal or no consideration. There are, however, a number of cases which seemingly hold that on a plea of a want, failure, or illegal consideration the burden of proof is on the defendant to prove it. 8 Cyc. 225. But on an examination of them it will be seen that many of them refer only to the "burden of evidence," the duty of proceeding or going forward and producing or bringing forward evidence in support of the proposition of a want of or illegal consideration, and not the onus

probandi, the necessity of establishing the existence of such fact or proposition by evidence which preponderates to a legally required extent as against all counter evidence. Hence in many of them, and as is illustrated in *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627, and cases cited in 7 Cent. Dig. Bills & Notes, § 1654, we find it said that where a consideration is expressed, or there is a presumption of consideration, the burden of showing want or failure of consideration is on the defendant; but, when he has given evidence tending to impeach the consideration of a negotiable instrument, the burden is shifted to the plaintiff to show a valuable consideration. Now that is not in conflict, but in harmony, with the Massachusetts and other cases heretofore cited. So, when we once understand what the court means by the term burden of proof, the cases are not in conflict to such an extent as may appear on first blush. At any rate, we think the rule laid down by the Massachusetts courts to be the logical one. So on this point we hold: That in a suit on a negotiable instrument the instrument is deemed prima facie to have been given for a valuable consideration, and every person whose signature appears thereon to have been a party thereto for value; that upon an issue of an illegal consideration the plaintiff makes out a prima facie case of a valuable and legal consideration by the production of the note and proof of signature, and may then rest on the presumption of a valuable consideration; that the burden of evidence, or duty of proceeding, if he chooses to overcome such presumption, then devolves on the defendant to bring forward evidence tending to show an illegal consideration, which, if done by him, dissipates or overcomes the presumption, then if the plaintiff seeks to overcome the effect of, or encounter, the evidence so adduced by the defendant, he is required to support the presumption by producing evidence showing a valuable and legal consideration, but in such case, and upon such proof, the plaintiff on the whole case has the burden, the onus probandi, of showing by a fair preponderance of all the evidence a legal and valuable consideration; and where he, as here, has specifically alleged a particular consideration to so prove it as alleged.

In the case at bar the evidence of both parties was directed to the single question of the consideration for the notes. There was nowhere in the appellant's pleadings or evidence anything by way of confession and avoidance of respondent's claim of consideration. And from what we have said it follows that the burden of proof is on the respondent to satisfy the court by a preponderance of the evidence, not only that there was a valuable consideration for the notes, but that the consideration was as alleged by him.

[6] This brings us to an examination of the evidence adduced by the parties relative to the consideration. The respondent testified that the stock was sold in three lots on the Salt Lake Stock & Mining Exchange, 2 of 50 shares each and 1 of 100 shares. He further testified that Moon did not deliver the stock within the 30 days for delivery, and that he bought the stock about March 28th at \$42.25 per share, and let Moon have the same at that price to cover his short sales and with which to make such deliveries. As to the first parcel of 50 shares the respondent testified that that was sold to one Marix at \$19.65. Shorten, another witness for respondent, testified that he was assistant secretary of the Exchange, and that from the records of the Exchange of February 28, 1902, it appeared that on that date Hudson sold to Marix 50 shares of Daly West stock at \$19.65, seller 30. Marix testified on behalf of respondent that on that date he purchased from Hudson 50 shares of Daly West stock for future delivery, a 30-day transaction, and that the stock was delivered March 15th. Respondent, when asked when he delivered the Marix stock, said he could not remember. No testimony was given in any wise tending to show the particulars of any sale of the next 50 shares, nor of its delivery, except the general statement of the respondent that to the best of his recollection he sold 200 shares, and that he settled with Moon on March 28th, and let him have 200 shares of his own stock to fill the entire 200 shares of short sales. As to the other 100 shares respondent testified that this sale was made to one Bamberger, a 30-day sale; that he did not know whether he made the delivery to Bamberger before or after the settlement with Moon, March 28th. But Bamberger testified on behalf of respondent that he bought on March 15, 1902, 100 shares of Daly West stock from respondent at \$18.85 per share; that he thought it was a 30-day sale; that his book or record showed that on March 19th there was an entry indicating that it was delivered March 19th; that the delivery as indicated by the book was made by one Oberndorfer's I-O-U for 100 shares of Daly West stock. Oberndorfer, called by respondent, testified that on March 18, 1902, he borrowed 250 shares of Daly West stock from Hudson, and gave him an I-O-U for it; that he afterwards took it up, and that he took up 100 shares of it for Bamberger March 18, 1902, by delivering to him the stock on that date. Respondent further testified that the stock was worth about \$19 on March 15th; that the price was fluctuating back and forth, and not until about the 20th did it go higher; that it advanced very rapidly between the 20th and 28th of March, practically doubling in that time.

Now, plaintiff does not claim that he had any authority whatever or any order to close

any of these deals prior to March 28th; and it does not appear that there was any substantial loss, or, indeed, any loss, on the 150 shares sold and delivered to Marix and Bamberger. Yet the evidence without dispute shows that the settlement for which the notes were given proceeded on the theory that there had been a loss of over \$22 a share on 200 shares of the stock, a theory utterly inconsistent with the evidence put in by the plaintiff. That is, the theory alleged by him and on which he tried the case was that he, as Moon's broker, for him and on his order, sold "short" 200 shares of the stock at \$19.65 and \$18.85, delivery 30 days, and that to meet such deliveries he alleged that Moon on March 28th gave him an order to buy 200 shares; that on that day respondent, for such purpose, bought 200 shares at \$42.25 and delivered them to the parties to whom the 200 shares had theretofore been sold on Moon's account; and that for this difference, and in settlement of it, were the notes and mortgage given. But respondent's own evidence does not sustain his theory, for he testified that he sold the first 50 shares to Marix; Marix, his own witness, that he on February 28th bought 50 shares of Hudson at \$19.65, but that such shares were delivered to him on March 15th. Respondent further testified that on or about March 15th he sold 100 shares to Bamberger. Bamberger, his own witness, testified that he then bought 200 shares of Hudson, 100 at \$18.85 and 100 at \$19; and he and Oberndorfer, another of respondent's witnesses, testified that that stock was delivered on the 18th. The respondent himself testified that the stock did not advance, but fluctuated until the 20th, and between the 20th and 28th it took a phenomenal leap and doubled, or more than doubled. So plaintiff's own evidence clearly shows that on March 28th there was no occasion to purchase stock to meet deliveries of stock sold on Moon's account, for the evidence indisputably shows that such deliveries were made days before, and at no substantial loss to respondent. And, too, let it be noted that the plaintiff had \$400 of Moon's money for a margin.

Nor did respondent sustain his allegation that Moon gave him an order on March 28th to purchase 200 shares of the stock. Respondent himself in such respect on his direct examination testified: "I bought the stock on the board and curb, and in Boston and I think in Michigan, along about the 28th of the month, and part of that stock had cost me less than the market value on March 28th. I also bought some on the market of March 28th, how much I don't remember. When Mr. Moon came in in the evening of March 28th, I told him about the stock that I had, and consented to let him have the 200 shares to cover his short sale at \$42.25, which was below the market value, and very satisfactory to Mr. Moon at that

time. I knew that Mr. Moon had made a very serious loss, and I had repeatedly tried to get him to cover his stock, but he would not do it. He thought the market would go down again, and after it was found out what the trouble was then everybody was clamoring for stock, and he was anxious to close his account. Q. What did he say in substance upon that? A. He was owing me the 200 shares of stock, and I consented to let him in at \$42.25. Q. When you say he was owing you 200 shares of stock, what do you mean? A. I mean he was owing on those contracts 200 shares of stock, for which I was liable to others, and had to deliver, and he consented to accept the stocks I had bought that day, and close his account at the basis of \$42.25 a share, so that I could use this stock to make the deliveries on the contract." The evidence on behalf of the respondent further shows that he was speculating in Daly West stock, buying and selling for himself as well as for others, and speculated on the difference between the Boston and the local market of such stock. Had the stock depreciated, as Moon anticipated it would, and had it depreciated say one-half, instead of advancing its full value as it did, Moon by reason of his agent's conduct, would have been entirely deprived of his profit; for, had the stock depreciated within the 30 days to \$5 or \$8, and had Moon tendered it, or caused it to be tendered, to his supposed purchasers, they could well have answered that they already had the stock purchased by them. The transaction was worth nothing to Moon, even though the stock within the 30 days might have depreciated until it was valueless. And so, by his supposed agent's conduct and manipulation, Moon stood to gain nothing, but to lose everything. Notwithstanding the respondent, without the knowledge of Moon, had, in violation of his orders, long before the expiration of the 30 days, and at about the time of the sales, delivered the stock, nevertheless, when the stock was advancing and had about doubled in value, he demanded of Moon more margin. And in pursuance of that the notes and mortgage were given. But as soon as respondent had secured them, and on the same day, he closed the account with Moon, and then loaned him stock at \$42.25 per share to meet the deliveries to Marx and Bamberger—so the respondent testified—when they, days before, already had their stock so purchased by them from the respondent. Was the respondent, on the transactions with Marx and Bamberger, out the difference between \$42.25 and 18.85 or \$19.65 on each share sold to them? He makes no such claim, and the record shows that he substantially was out nothing as to those transactions. What, then, does he seek to do? To himself make the difference as against his principal between the market price of the stock on the

days when he pretended to his principal to have sold short and when he closed the deal with his principal, March 28th, a difference of about \$22 a share, or about \$4,400 on the 200 shares. This the law will not tolerate. It exacts fidelity and loyalty, not disloyalty and personal aggrandizement, in fiduciary relations between principal and agent.

So, under the issues, the respondent was required to show what he alleged, that he, as Moon's agent, sold the stock short, and, as his agent, on or about March 28th, on his order, purchased and delivered the stock to those to whom he had theretofore sold it, and that the sale and purchase resulted in the loss claimed. This, as has been seen, he failed to do, and thus failed to establish the consideration alleged by him; and therefore the findings made by the court in such respect, if not wholly unsupported, are clearly against the manifest weight of the evidence.

We have thus reviewed the case on respondent's evidence, and on his theory of the case, and on the theory of the legality of the transaction. Let us now look at the case from the appellant's theory, that of an illegal transaction.

[8] Evidence was given by Moon which, if believed, tended to show that the transaction was a gambling and illegal transaction. In some particulars he was contradicted by the respondent. In others, he was corroborated to some extent by facts and inferences. His evidence tends to show that he was speculating on the future market of the stock, in the fall of prices, by making sales of stock not in fact to be or intended to be delivered, he only to receive or pay the difference between the contract price and the future market price of the stock within a stated period. Such a transaction, of course, is illegal. Now, he did give the respondent orders to sell for him short 200 shares of the stock, delivery 30 days. But Moon's contention is that the respondent, though he sold Daly West stock on the market to Marx, Bamberger, and, divers other persons, yet, in fact, sold none on his, Moon's, account; but that the respondent in fact himself bought the stock from Moon which he had ordered sold, and that in the transaction Moon became and was the seller and the respondent, in fact, was and became the buyer. So that their relation, in fact, was not that of principal and agent, but that of buyer and seller; and that, as such, the respondent well knew that no stock was in fact to be delivered, but that only the difference between the contract price and the future market price was to be accounted for. In support of Moon's theory and testimony the following exhibits, referred to in the record as "D" and "E," were put in evidence. Exhibit D is: "Salt Lake City, Utah, March 1st, 1902. I have this day sold to

Charles E. Hudson one hundred (100) shares of the capital stock of the Daly West Mining Co. at Park City, Utah, \$19.60 per share, seller thirty (30) days, according to the by-laws of the Salt Lake Stock and Mining Exchange. Certified checks for the necessary twenty per cent. of the purchase price are deposited in escrow with — by each party to this contract, the terms and conditions of which are hereby acknowledged and accepted. A. T. Moon, Seller. Charles E. Hudson, Buyer. Reverse. March 20, 1902. Deposit as margin, two hundred dollars." Exhibit E is similar, except the date, which is March 15th, and the price \$18.70, instead of \$19.60. It is upon all sides conceded that these documents refer to the transactions in question. That is conceded by the respondent himself. They are consistent with the appellant's theory, and are inconsistent with the respondent's. They on their face show the relation of the respondent and Moon in the transaction to be that of seller and buyer and not of agency. And the record, without dispute, shows that as between them no stock was in fact delivered, and a fair inference that no stock was intended to be delivered, and the undisputed fact—the most prominent one in the case—is that a settlement was made, not by a delivery of any stock, but merely by computing the difference between the contract price as evidenced by Exhibits D and E and the market price of the stock on March 28th, for which the notes in suit were given. So, whether the respondent's or the appellant's theory of the case be adopted, it is clear the respondent on neither is entitled to prevail.

[7] There, however, is a finding by the court as to one item alleged in the complaint, on which we think the respondent is entitled to recover. The court found that the respondent, for the use and benefit of appellant, paid taxes on the property covered by the mortgage amounting to \$277.48. This transaction is entirely separable from the other. We think the respondent is entitled to judgment for that, together with interest.

Our conclusion therefore is that the judgment of the court below should be reversed and the case remanded with directions that the findings and judgment be vacated; that the court make findings in accordance with the views herein expressed; that the notes and mortgage be canceled and surrendered; and that the respondent be given a judgment for the taxes paid amounting to \$277.48, together with interest at the rate of 8 per cent. per annum from the 10th day of March, 1906, and costs in the court below, each party to pay his own costs on appeal. Such is the order.

McCARTY, C. J., and STRAUP, J., concur.

(42 Utah, 366)

GOTTSEGAN CIGAR CO. v. LEVY et al.

(Supreme Court of Utah. Feb. 8, 1913.)

1. GUARANTY (§ 72*)—RECITALS IN BOND—CONCLUSIVENESS.

A guarantor is estopped to dispute the recitals of his own contract, so far as they are material and not violative of law or public policy; and hence a trust company which guarantees payment for goods furnished under a contract of sale is estopped to deny that such a contract was entered into.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 82; Dec. Dig. § 72.*]

2. GUARANTY (§ 61*)—RELEASE OF GUARANTOR—ACCEPTANCE OF NOTES.

A guarantor of payment for goods sold on four months' credit is not released by the seller's accepting notes for the price maturing within that time.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 71; Dec. Dig. § 61.*]

Appeal from District Court, Salt Lake County; George G. Armstrong, Judge.

Action by the Gottseگان Cigar Company against J. R. Levy and others. From the judgment, plaintiff appeals. Affirmed as to defendants Levy; reversed and remanded as to defendant the Utah Savings Trust Company.

Stephens, Smith & Porter, of Salt Lake City, for appellant. Richards, Richards & Ferry, of Salt Lake City, for respondents.

FRICK, J. This action was brought to recover the value of merchandise, which, in the complaint, it is alleged was sold and delivered to J. R. Levy & Bro. at Salt Lake City, Utah, the appellant residing at New York City, the payment of which, it is averred, was guaranteed by the respondent Utah Savings & Trust Company, hereafter called Trust Company.

There is no dispute with regard to the facts, which, so far as material, are substantially as follows:

It seems that the appellant prior to December, 1907, had sold certain goods to the firm of J. R. Levy & Bro., a partnership doing business under that name in Salt Lake City, Utah, and that at about that time the appellant refused to extend further credit to said firm. Pursuant to such refusal, J. R. Levy & Bro. on the 20th day of December, 1907, wrote a letter to appellant, in which considerable surprise is expressed at appellant's refusal to extend further credit to said firm. After stating that the firm had entered into business arrangements whereby it became necessary for it to obtain certain goods from appellant, an offer was made by the firm whereby the payment for further purchases of goods for the coming year should be guaranteed by the mother of the Levys, who, at the time, was in New York City. In the letter the mother's telephone number in New York was given appellant, and it was requested to take the matter of extending further credit up with her. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mother some days thereafter called on appellant at its place of business in New York City, and an arrangement was entered into whereby appellant agreed to sell upon credit certain merchandise to the Levys during the year 1908 upon the condition that the credit should not exceed \$2,500 at any one time, and that payment for goods should be made in four months from the time any particular consignment of goods arrived at Salt Lake City. In making the arrangement with the mother, it was agreed that appellant would advance the amount of \$25 to pay the premium for a surety or guaranty bond to be obtained from some reputable surety or guaranty company whereby the payment of the goods to be purchased as aforesaid should be guaranteed. It seems that the arrangement between the appellant and the mother was by her communicated to her sons at Salt Lake City, and that on the 16th day of January following they informed appellant that a surety bond in the sum of \$2,500 had been obtained from a surety company, whereby said company had guaranteed the payment of that amount if credit were extended by appellant to said firm for the period of one year upon the conditions named in the bond, and that said bond would be forwarded by the Surety Company to appellant. In that letter the firm also reminded appellant of its promise to the mother to pay the premium for the bond, which was \$25, and asked that the same be remitted at once, which was accordingly done. In the same letter the firm also ordered some merchandise, which was purchased and sold pursuant to the agreement aforesaid. The bond aforesaid was prepared by the Surety Company at the request of J. R. Levy & Bro. and the terms and conditions therein contained were inserted as requested by them without the knowledge of appellant. The bond was duly executed by both J. R. Levy & Bro. and the Surety Company, and the material parts thereof are as follows: That the firm of J. R. Levy & Bro., composed of J. R. Levy and H. S. Levy as principals, and the Trust Company as surety, are firmly bound in the sum of \$2,500, payment of which is to be made to the appellant upon the following conditions, namely: "Whereas, the said J. R. Levy & Brother have entered into a contract with the Gottseگان Cigar Company for the term of one year from and after January 1, 1908, wherein and whereby the said J. R. Levy & Brother have agreed to purchase from the said Gottseگان Cigar Company certain assignments of cigars and pay for the same within four months after the said consignments have arrived in Salt Lake City, and whereas, the said Gottseگان Cigar Company have agreed to sell the said consignment of cigars as the same may be ordered by the said J. R. Levy & Brother, providing the said J. R. Levy & Brother will give a bond in the sum hereinbefore named. Said bond to guarantee the payment for said con-

signments of cigars within four months from the date of their arrival in Salt Lake City as aforesaid: Now, therefore, the condition of this obligation is such that if the above bounden, J. R. Levy & Brother, shall keep all and singular the covenants and agreements of said contract, and shall pay for the said consignments of cigars within four months from the date of their arrival in Salt Lake City, Utah, according to the true intent and meaning of said contract, then this obligation shall be void, otherwise to remain in full force and virtue." At the time the bond was forwarded to appellant, J. R. Levy & Bro. informed it by letter that the contract referred to in the bond would forthwith be reduced to writing, and forwarded to it also. The contract, however, did not arrive, so the attorneys for the appellant on the 24th day of February, 1908, prepared a contract which they thought conformed to the conditions named in the bond. The proposed contract was forwarded to Salt Lake City for execution by the firm. The firm, however, failed, to execute the same, but a similar contract was executed by J. R. Levy and H. S. Levy personally, but not by the firm, which was dated on the same day and was forwarded to appellant at New York City. Considerable time having elapsed before said contract reached appellant, its attorneys suggested that a new bond be executed in which the contract, as reduced to writing, should be recited or referred to in terms so as to avoid any controversy that might arise with respect to the identity of the contract which was mentioned in the bond. The Trust Company agreed to issue such a bond on payment of a second premium, and upon being again indemnified by the mother of J. R. Levy and H. S. Levy. The mother, however, insisted that she had already indemnified the Trust Company, and refused to further indemnify it. The manager of the Trust Company therefore returned the additional premium which appellant had forwarded for a new bond, and in closing the letter he referred to the bond matter as follows: "We understand from your Mr. Simons that the whole matter will rest as it is." In reliance on the bond, appellant during the year 1908 sold and shipped to the firm of J. R. Levy & Bro. a considerable amount of merchandise, of which there remained unpaid when this action was commenced the sum of \$1,209.25. Among the consignments shipped there were four of \$225 each, and one of \$229, for which notes were given by the firm of J. R. Levy & Bro., signed thus: "Sam Levy Sons by Joe Levy." All of the foregoing consignments were shipped within the year mentioned in the bond, and the notes given as aforesaid were made payable in four months from the dates thereof; that is, the debt or account was evidenced by the notes aforesaid. Why they were signed "Sam Levy Sons" is not made to appear, except that J. R. Levy & Bro. were

the successors of Sam Levy Sons. We only mention this manner of the signature because it appears in the record, not because it is controlling or even material in arriving at the result. Appellant it appears made efforts to collect the notes aforesaid, but without success. The action is, however, not based upon the notes which were in appellant's possession at the time of trial, and were introduced in evidence by it and are made a part of the record, but the action is based upon the original claim or demand.

The court made findings in which the foregoing facts are stated with much detail and at great length. Notwithstanding the fact that the evidence is without dispute and the conditions of the bond sued on are fully set forth in the findings of the court in which it is recited that a contract was duly entered into between appellant and the firm of J. R. Levy & Bro. respecting the sale of the merchandise in question and the credit that was to be given, the court, nevertheless, found that "there was no agreement, either oral or written, existing between the plaintiff (appellant) and the defendants J. R. Levy and H. S. Levy or J. R. Levy & Bro. for the sale of merchandise of any kind to said defendants, on credit or otherwise." It was also found that J. R. Levy & Bro. never acted under the bond sued on; that the several amounts we have herein set forth "were settled for with notes as aforesaid signed by the Sam Levy Sons Cigar Company, which the plaintiff (appellant) accepted in settlement for said goods and still holds." The court found as conclusions of law that appellant was entitled to judgment against J. R. Levy and H. S. Levy for the amount sued for, which, with interest, at the time of trial, amounted to \$1,334.85, and that appellant was not entitled to judgment against the Trust Company. Judgment was entered accordingly, from which this appeal is prosecuted.

[1] The findings of fact and conclusions of law are strenuously assailed by the appellant. We cannot see how the findings of fact or conclusions of law can be sustained under the undisputed evidence. In the very teeth of the recitals in the bond the court found that no contract was ever entered into between appellant and the firm of J. R. Levy & Bro. The Trust Company is therefore relieved from the effect or consequences of its own recitals without assigning sufficient or any cause therefor. If the Trust Company had any cause to urge why the recitals in the bond should not be considered, or that it should be relieved from the effects or consequences thereof, such cause should have been fully pleaded. The appellant would thus have had an opportunity to either admit or deny the claim, and the court could then have disposed of such issue before it proceeded to set aside and disregard the recitals in the bond. The Trust Company, under the undisputed facts of this case, is estopped

from questioning its own recitals which it inserted in the bond. No attempt was made to plead or prove fraud, and yet the Trust Company was permitted to escape the consequences of its own recitals, and this, too, where such recitals were made at a time and place when and where appellant had no opportunity whatever either to suggest or prevent any statements or recitals that were contained in the bond. That the surety or guarantor may not dispute his own recitals which are material and relate to the subject-matter of the transaction, where such transaction is not unlawful or is not prohibited by public policy or some statute, is, we think, well settled. In 1 Brandt on Suretyship and Guaranty, § 52, the author says: "The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts, they cannot afterwards be heard to deny it." In that and the succeeding sections the author gives many concrete instances where the courts have held sureties and guarantors estopped from denying the recitals contained in their bonds. The author of Child's Suretyship and Guaranty, after stating that a surety or guarantor may assail his contract for fraud practiced upon him, at page 262, says: "A surety, as a rule, cannot vary or contradict, by oral evidence, the recitals in a bond which he has signed, although they are false." To the same effect is Stearns on the Law of Suretyship, § 19. See, also, 20 Cyc. pp. 1421, 1423. In *Brown & Haywood Co. v. Ligon* (C. C.) 92 Fed. 855, in passing upon the question now under consideration, it is said: "This bond recites the making of the contract between Long and Pierce county, the due execution of the Addison bond by Addison and the other sureties, and their obligations to Pierce county thereunder; and the defendants ought to be estopped from asserting the contrary." In *Remsen v. Graves*, 41 N. Y. at page 475, the New York Court of Appeals, speaking through Mr. Justice Mason, expresses the same thought as follows: "The defendant (the guarantor) cannot be permitted to show that his bond is invalid on the ground that it was issued by the corporation for a purpose not authorized by its charter. The guaranty of payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers."

So here the Trust Company most solemnly asserted in its bond that a certain contract existed in which merchandise was to be sold by appellant to the firm of J. R. Levy & Bro., and further asserted that it would guarantee the payment of the merchandise that was to be sold if sold as conditioned in the contract, which conditions were also set

forth in the bond itself, in case the firm did not pay therefor within the time set forth in the bond. Appellant in New York had agreed upon terms and conditions with the mother of J. R. Levy and H. S. Levy, and they had accepted the terms and ordered a bond drawn and executed by the Trust Company in conformity with that agreement, which was done. Appellant sold the merchandise relying on the bond. True, it attempted to have a new bond issued after it discovered that the original contract had not been reduced to writing in order to prevent the very controversy which arose at the trial. Appellant, however, failed to obtain a new bond for the sole reason that the Levys were either unable or unwilling to again indemnify the Trust Company for such new bond. The general manager of the Trust Company, with full knowledge of all the facts, then assured appellant that matters could rest as they were. In addition to the foregoing authorities, we refer to the following, all of which in some way illustrate concrete instances where the courts have held that sureties or guarantors were estopped from questioning the material and lawful recitals in their bonds: *McLaughlin v. McGovern*, 34 Barb. (N. Y.) 208; *Duffee v. Mansfield*, 141 Pa. 507, 21 Atl. 675; *Hauser & Son v. Ryan*, 73 N. J. Law, 274, 63 Atl. 4; *City of Madison v. American Sanitary, etc., Co.*, 118 Wis. 480, 95 N. W. 1108; *Red Wing S. P. Co. v. Donnelly*, 102 Minn. 192, 113 N. W. 1, 120 Am. St. Rep. 619; *Fidelity & Deposit Co. v. Mobile County*, 124 Ala. 144, 27 South. 388. We are of the opinion, therefore, that the court committed grievous error when it found contrary to the recitals in the bond that no contract had been entered into for the sale of the merchandise in question.

[2] The conclusion of law that the Trust Company is not liable upon its bond is no doubt, in part at least, based upon the finding that notes were given in "settlement" as it is found for the merchandise. It will be observed that the period of credit provided for in the bond was that payment should be made in four months from the date of the arrival of the goods in Salt Lake City. None of the notes was given for a longer time than four months. The time of credit, therefore, was not extended beyond the time provided for in the bond. In view of this fact, we are unable to conceive how the taking of the notes could have affected appellant's right to rely upon and enforce the bond. There was no proof that the notes were either given or received as payment for the merchandise. The only possible effect these notes could have had was to evidence the actual amount due; that is, the notes, in legal effect, amounted to no more than to make that transaction the same as an account stated between the parties. The general rule with regard to whether the taking of promissory notes constitutes payment of

the original demand or claim is well stated in 30 Cyc. 1194, thus: "In the absence of an agreement between the parties that it is to be received as payment, the common-law rule which prevails in England and has been adopted without question in nearly all of the states in this country is that a draft or bill of exchange, acceptance, order, or promissory note of the debtor is not a payment or an extinguishment of the original demand. And the same rule applies to the bill, note, order, or acceptance of a third person given by the debtor to the creditor."

This seems to be the accepted doctrine in all of the states except Indiana, Maine, Massachusetts, and Vermont, where the common-law rule, for some reason not material here, does not prevail. In 32 Cyc. 169, the rule with respect to the effect the taking of a promissory note has upon surety contracts is stated thus: "In the absence of agreement, a note given for a debt by the principal, or by a surety, does not as a general rule constitute payment of such debt." There is no evidence whatever that the notes in this case were given or received in payment of the original demand or account, but there is abundant evidence to the contrary. In the following cases it is held that notes taken under circumstances like those in the case at bar do not affect the liability of the surety or guarantor, and that the taking of notes under such circumstances does not affect their liability, unless the time of payment or credit is extended. *Penny v. Crane Bros. Mfg. Co.*, 80 Ill. 244; *Best Brewing Co. v. Vinterum*, 67 Ill. App. 555; *Fifth Nat. Bank v. Woolsey*, 31 App. Div. 61, 52 N. Y. Supp. 827; *Page Belting Co. v. Parker*, 21 App. Div. 160, 47 N. Y. Supp. 400; *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 646. In the last case cited the legal effect of taking notes under circumstances somewhat similar to those in the case at bar is stated to be: "The notes were given for leather, and we do not perceive what difference the change in the form of the indebtedness made with regard to the plaintiff's contract although as a matter of bookkeeping the notes may have been charged on a separate page." In the case of *Page Belting Co. v. Parker*, supra, notes were given, as in this case, by the same firm signed by a different name, yet it was held, as it always should be, that the giving of notes under such circumstances could not affect the liability of the surety or guarantor. We think that, under the undisputed facts, the court's findings cannot be permitted to stand, nor can its conclusions of law that the Trust Company is not liable upon the bond in question prevail. We are, however, again reminded that sureties are the favorites of the law. But, after granting that as an abstract proposition, what is there in this case upon which the doctrine can be given any effect? Sureties no doubt have the right, not only of imposing the precise conditions upon

which they will be bound, but they also have the right to insist that those conditions be not departed from in a material matter. In what way have the conditions contained in the bond in question been violated or departed from by appellant? Where a surety, as here, guarantees the payment of a debt, certainly the creditor is not prohibited from attempting to collect the same from his principal debtor, and to that end the creditor may act in accordance with known and established business methods unless forbidden to do so in the bond. In this case the district court, so far as we can discover, absolved the Trust Company from its obligation to pay upon the sole ground that appellant demanded and received the notes evidencing the debt which it attempted to collect in the regular and usual way, but which notes did not extend the credit or time of payment beyond the time limited in the bond. If this is sufficient to avoid a surety contract, we fear it must be placed upon the ground that sureties are more than the mere favorites of the law.

The findings of fact and conclusions of law in favor of the Trust Company, so far as they are in conflict with the views stated herein, are hereby vacated and set aside, and the judgment in favor of said Trust Company is reversed and the cause is remanded to the district court of Salt Lake county, with directions to grant a new trial as against said company, and to proceed with the case in accordance with the views expressed in the foregoing opinion.

The judgment against J. R. and H. S. Levy is affirmed, appellant to recover costs.

MCCARTY, C. J., and STRAUP, J., concur.

(23 Idaho 485)

SIMMONS v. SIMMONS.

(Supreme Court of Idaho. Feb. 28, 1913.)

COSTS (\$ 61*)—APPORTIONMENT.

Record examined in this case, and held, that the costs in the lower court should have been divided between the parties, and taxed equally against each of the parties to the action.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 272; Dec. Dig. § 61.*]

Appeal from District Court, Fremont County: James G. Gwinn, Judge.

Replevin by A. H. Simmons against Charles C. Simmons. Judgment for plaintiff, conditioned on the payment of a lien adjudged to exist against the property in favor of defendant, and plaintiff appeals. Modified and affirmed.

A. S. Dickinson, of Blackfoot, for appellant. Soule & Soule, of St. Anthony, for respondent.

AILSHIE, C. J. This case presents a rather novel situation. The plaintiff com-

menced his action in the probate court of Fremont county in claim and delivery. Plaintiff alleged ownership and right of possession. Defendant answered, denying the allegations of the complaint, and alleged that he was the owner of the property and entitled to the possession thereof. He further alleged that during his ownership of the animals he had cared for the animals, fed them, and made certain expenditures on account thereof, amounting to the aggregate sum of \$221, and closed with the prayer that, if the court should find and determine that the defendant was not the owner of and entitled to the possession of the animals, he be allowed to have the said amount "declared to be a first lien on the said animals to secure the payment of the same." The probate court entered a judgment in favor of the plaintiff for the possession of the animals and for his costs in the sum of \$28.95, "and that he pay the defendant the sum of \$55." The defendant appealed to the district court, where the case was again tried, and a jury found for the plaintiff for the recovery of the property mentioned in the complaint, and that the plaintiff pay the defendant the sum of \$140. Each party thereupon filed a cost bill, claiming his costs, and the court finally denied the plaintiff's application for his costs, and allowed the defendant to recover costs. The plaintiff thereupon appealed to this court from an order denying a motion for a new trial, and from the order of the court in sustaining the objection of the defendant to certain portions of plaintiff's notice of motion for a new trial, and from the order of the court in sustaining the defendant's motion to strike the reporter's transcript from the files.

The proceedings throughout this case seem to have been irregular and informal. We are unable to find any reason or excuse for the court striking the reporter's transcript from the files. In view, however, of the fact that this case seems to have been transformed from an action in replevin to a suit in equity to determine the respective rights of the parties, and there being no controversy in this court over the judgment on the merits as between the parties, allowing the one to have the property and the other compensation for his services as rendered in feeding and keeping the animals, we have decided to affirm the judgment, except as to costs.

In the matter of costs, it seems to us clearly inequitable and unjust to compel the plaintiff to pay his own costs, and tax up the costs of the defendant against him also, where the court and jury have all found that he is the owner of the property and that the defendant has no title to the property. The defendant has denied at all times the plaintiff's ownership and right of possession, and alleged that he was the owner himself. It was necessary, therefore, for the plaintiff to establish his ownership before the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

feudant could establish an agister's lien. We are satisfied that justice in this case would demand that the whole costs of the case be equally divided between the parties.

The cause will therefore be remanded, with direction to the trial court to ascertain the costs incurred by each party that would be chargeable and taxable under the law, and to divide the total legal costs incurred by both parties equally between the plaintiff and defendant, and tax the same accordingly. The costs of this appeal will be taxed equally against the appellant and respondent.

SULLIVAN and STEWART, JJ., concur.

(23 Idaho 534)

ELLIOTT v. McCREA.

(Supreme Court of Idaho. March 6, 1913.)

1. CONSTITUTIONAL LAW (§ 74*)—DISTRIBUTION OF GOVERNMENTAL POWERS — ENCROACHMENT ON EXECUTIVE POWER.

The provisions of House Bill No. 92, passed by the twelfth session of the Legislature, and approved February 21st, entitled, "An act to provide for the establishment of drainage districts, and the construction and maintenance of a system of drainage, and to provide for the means of payment of the costs thereof, and declaring an emergency," authorizing the district judge of the judicial district in which a drainage district is located to appoint the drainage commissioners for the district, is not in violation of the Constitution, and is not an infringement by the judicial department of the state government upon the functions of the executive branch of the government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.*]

2. OFFICERS (§ 5*)—APPOINTMENT—CONSTITUTIONAL PROVISION.

Section 6, art. 4, of the state Constitution provides that the Governor "shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for," and this provision of the Constitution leaves it to the discretion of the Legislature, when creating any office by legislative act, to prescribe the method of filling the office, and to designate the officer, board, or body that shall make the appointment, and in case of failure on the part of the Legislature to do so the Governor is vested by the Constitution with the appointive power.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 6; Dec. Dig. § 5.*]

3. OFFICERS (§ 2*)—APPOINTMENT—CONSTITUTIONAL PROVISION.

Under the provisions of House Bill No. 92, approved February 21, 1913, the Legislature has "otherwise provided" for the appointment of drainage commissioners, and has directed that such appointment shall be made by the district judge. This was a legitimate exercise of the constitutional authority conferred upon the Legislature.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. DRAINS (§ 67*)—ASSESSMENTS—UNIFORMITY—VALIDITY—"TAX."

The assessment of benefits provided for in House Bill No. 92, approved February 21, 1913,

is not a "tax" within the purview and meaning of the Constitution. Section 5, art. 7. The assessment made under this act is dependent wholly upon the benefits to accrue; and, where no benefits will accrue, no assessment can be made, and the charge is one in rem against the specific tracts of land assessed for benefits and to the extent of the assessment only.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 73, 76, 91; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886.]

5. WATERS AND WATER COURSES (§ 230*)—IRRIGATION DISTRICTS—BONDS.

The provisions of House Bill No. 92, approved February 21, 1913, for the bonding of a drainage district without a vote of the people within the district, is not in violation of section 3, art. 8, of the state Constitution. The indebtedness there provided for is not a municipal indebtedness contemplated by the Constitution.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. § 230.*]

Original proceeding for mandamus by Edwin E. Elliott against Robert S. McCrea, clerk. Demurrer to petition overruled, and peremptory writ granted.

Richards & Haga, of Boise, for plaintiff.
Perky & Crow, of Boise, for defendant.

AILSHIE, C. J. This action involves the constitutionality of House Bill No. 92, passed by the twelfth session of the Legislature and approved by the Governor on the 21st of February last, and entitled, "An act to provide for the establishment of drainage districts, and the construction and maintenance of a system of drainage, and to provide for the means of payment of the costs thereof, and declaring an emergency."

The parties have specifically waived all question as to the procedure adopted for the purposes of raising the constitutional questions involved, and for the purposes of this case both parties agree upon the procedure.

This act authorizes the creation of drainage districts, provides for the selection of the necessary officers, and the procedure to be adopted and pursued in carrying out the objects and purposes of the act. It might well be termed the complement of the irrigation act. The one provides for bringing water onto the land so as to render it productive; the other provides for getting water off of land so as to render it productive and habitable.

It seems that a petition in due form, signed by the requisite number of landowners in the district, has been presented to the clerk of the district court in and for Bonner county, with the request that he file the same, and that such further proceedings be taken as required by the act for the formation and organization of a drainage district. The clerk has refused to file the petition, or to take any action thereon, upon the ground that the act under which the proceeding is instituted is unconstitutional and void.

[1] The first point urged is that the act is in conflict with the Constitution, for the reason that section 5 of the act provides for the appointment of "drainage commissioners" for the district by the judge of the district court of the judicial district in which the drainage district is located, and that the act of appointing officers is purely an executive or ministerial duty, and is not a judicial function. This objection overlooks the primary and fundamental question underlying the whole proposition, namely, that the Legislature has in fact spoken and acted, and has designated the officer who shall make the appointment. The fact that this officer is a judge of a court does not render it any more of a judicial act than if such act were performed by some executive or ministerial officer.

[2, 3] Again, the Constitution (section 6, art. 4), provides that the Governor "shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for." The Constitution itself provides the method of selection of the legislative, executive, and judicial officers named in the Constitution. The framers of the Constitution, however, could not foresee what offices might "be created by law" subsequently enacted, and so they provided that such offices should be filled by the Governor, unless the appointment or election should be "otherwise provided for." The Legislature in this case has "otherwise provided." They have clearly exercised their constitutional right in naming and designating the person or officer who shall make these particular appointments. This question has received frequent consideration by the courts, and they have almost invariably reached the conclusions we have indicated. *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, and note at page 125; *State ex rel. Sherman v. George*, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, and note, 29 Am. St. Rep. 586; *Ross v. Board*, 69 N. J. Law, 291, 55 Atl. 310; *In re Terrett*, 34 Mont. 325, 86 Pac. 266; *In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88.

[4] It is next argued that the collection of assessments and taxes for benefits under the scheme provided in the act in question does not afford due process of law, or the equal protection of the laws, and is therefore in violation of section 5, art. 7, of the state Constitution. The first reply that may be made to this contention is that the assessments to be levied and collected under the provisions of the act here in question do not constitute a tax within the purview of the Constitution. This is rather an exercise of the power of the state for the general welfare. *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Fall-*

brook Irri. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *McGilvery v. City of Lewiston*, 13 Idaho, 347, 90 Pac. 348. Under this act, the assessment is made only according to *benefits* to be received. *Where no benefits will accrue, no assessment can be made.* No question of taxation for governmental purposes or for the maintenance of the governmental functions of the state is imposed. This assessment is made in proportion to benefits to be acquired, and is intended primarily to serve and advance the proprietary interests of the landowners within the district, and to that end serve and advance the interests and general welfare of the state at large. Incidentally this may and often will serve and improve the public health of the inhabitants of the district or render a district habitable which otherwise would be uninhabitable. To our minds, the same principles of law which would sustain and uphold the irrigation statute should sustain and uphold this statute. *Pioneer Irri. Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho, 474, 83 Pac. 499; *Bissett v. Pioneer Irri. Dist.*, 21 Idaho, 98, 120 Pac. 461; *Pioneer Irri. Dist. v. Stone*, 130 Pac. 382.

[5] Lastly, it is contended that the plan provided for bonding a district is violative of section 3, art. 8, of the state Constitution. This objection must fail for the same reason that a like objection failed in *McGilvery v. City of Lewiston*, 13 Idaho, 347, 90 Pac. 348, *Byrns v. City of Moscow*, 21 Idaho, 403, 121 Pac. 1034, and *Hickey v. City of Nampa*, 22 Idaho, 46, 124 Pac. 280, namely, that the assessment here authorized to be levied runs against each specific tract or parcel of land to be benefited, and the amount thereof is ascertained, determined, and assessed in advance so that every property owner can know just how much he is to pay, and the bondholder can ascertain just the extent of the claim he has against each tract of land. In such case, there is no municipal liability, and no municipality to be rendered liable for the payment of the indebtedness.

The foregoing covers all the objections that have been raised against the constitutionality of this act. We find no constitutional objection to the act on any grounds urged. The demurrer to the petition will be overruled, and a peremptory writ will issue.

SULLIVAN and STEWART, JJ., concur.

(23 Idaho 473)

Ex parte DAVIS.

(Supreme Court of Idaho. Feb. 27, 1913.)

1. HABEAS CORPUS (§ 109*)—PROCEEDINGS—DUTY OF JUDGE.

Section 8353 of the Revised Codes of this state, in prescribing the duties of a court or judge upon a hearing on return to a writ of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

habeas corpus, provides, among other things, as follows: "The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody: * * * 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree."

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. § 109.*]

2. HABEAS CORPUS (§ 105*)—PROCEEDINGS—DETERMINATION OF ISSUES.

Where a return to a writ of habeas corpus shows that the petitioner is detained by the chief of police of Boise City in the city jail thereof, under and by virtue of a commitment issued by the police magistrate of Boise City, which commitment is in due form, regular on its face, and recites that the prisoner has been convicted of the violation of a city ordinance and sentenced to imprisonment, *held* that, under the provisions of section 8353 of the Revised Codes, it is the duty of the court to remand the prisoner; and that the court has no authority to go back of the commitment or process on which the prisoner is held and examine the sufficiency of a complaint upon which the prisoner was tried, or the validity and regularity of a warrant that was issued thereon, and upon which the prisoner was arrested in the first instance.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 93, 94; Dec. Dig. § 105.*]

3. HABEAS CORPUS (§ 4*)—NATURE OF REMEDY—REVIEW OF PROCEEDINGS.

Habeas corpus cannot be resorted to or employed as an appellate remedy, or for the purpose of reviewing or correcting errors.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

4. HABEAS CORPUS (§ 4*)—NATURE OF REMEDY—REVIEW OF PROCEEDINGS.

Errors committed in the ruling upon the sufficiency of a criminal complaint or upon the legality or regularity of a warrant of arrest, and errors committed upon the trial in a criminal case, must be reviewed and corrected on appeal, and cannot be availed of by the defendant on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Original application by Daisey Davis for writ of habeas corpus. Writ issued, and hearing had on return thereto. Writ quashed, and prisoner remanded.

Charles Clifton, of Boise, for petitioner. J. H. Peterson, Atty. Gen., and J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., for the State.

AILSHIE, C. J. Petitioner seeks her discharge from imprisonment through means of a writ of habeas corpus, and alleges that she is detained and restrained of her liberty wrongfully and unlawfully.

It appears from the application of petitioner that on the 2d day of January, 1913, W. N. Reeves, chief of police of Boise City, filed a criminal complaint against the petitioner, charging her "on information and belief" with the crime of vagrancy, and alleging that she had violated the ordinances of Boise City in relation thereto. She was tak-

en before the police magistrate, and was convicted of the violation of a city ordinance, and was sentenced to 30 days' imprisonment in the city jail and to pay a fine of \$100 and costs taxed at \$19, and was thereupon committed to jail.

The chief question urged here for the release of the petitioner is that the original complaint filed in the police court was based on "information and belief," and not upon any knowledge of the complainant himself; and it is alleged that a warrant issued on such a complaint deprives the person arrested of his liberty, in violation of the fourth amendment to the Constitution of the United States, and also in violation of section 17 of the Bill of Rights of the Idaho Constitution.

[1, 2] This is an application for discharge on habeas corpus, and in such a case the court is admonished by section 8353 of the Revised Codes that on the return to a writ after the court has inquired into the cause of detention it must remand the prisoner, "if it appears that he is detained in custody: * * * 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree." The application itself shows that the prisoner is not now held upon the original warrant of arrest issued out of the police court. The return made by the chief of police, to whom the writ was directed, shows that he is detaining the petitioner by virtue of a certain commitment issued January 28, 1913, and signed by R. H. Dunlap, police judge of Boise City, commanding him, as keeper of the city prison of Boise City, to receive the said Daisey Davis into his custody, and to detain her until the sentence and judgment of the court is satisfied, which sentence consisted of a fine of \$100, together with \$19 costs and imprisonment of 30 days in the city jail, or, in case of failure to pay fine, a total imprisonment not exceeding 60 days.

The commitment attached to the writ herein comes from a court of competent criminal jurisdiction in such cases, namely, the police court of Boise City. That court is a court of criminal jurisdiction in cases charging a violation of the ordinances of Boise City. It shows, upon its face, that a conviction was had in that court for a violation of the ordinance defining the crime of vagrancy. The question arises as to whether the court has a right, on habeas corpus, to go back of the commitment and inquire into the regularity of the previous proceedings which might have been reviewed upon appeal. The statute (section 8353), above quoted, would seem to be conclusive on that question, and to forbid the court going back of the judgment or process issued upon such judgment.

In *Re Knudtson*, 10 Idaho, 676, 79 Pac. 641, this court had occasion to consider the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

provisions of the foregoing section of the statute, and said: "Section 8353, Revised Statutes, prescribes the duty of the court or judge upon such a hearing as follows: 'The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody: * * *

2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.' It appears to us that under the foregoing statutory provisions we are without authority to examine the evidence taken upon the preliminary examination, for the purpose of determining whether or not it discloses any offense as having been committed by the petitioner. There is no question in this case but that the district court is a court of competent jurisdiction for the trial of the offense charged, nor is there any question as to the venue; consequently there is no occasion for examining the record for the purpose of ascertaining those facts."

In the Knudtson Case the court quoted with approval from 15 Am. & Eng. Ency. of Law (2d Ed. p. 201), wherein the author says that in such cases "the inquiry is limited to the question whether the court in which the prisoner is convicted had jurisdiction in the premises, and the validity of the sentence or process on its face."

Section 2032 of the Code of New York appears to be substantially the same as section 8353 of our Code. In *People v. Wilson*, 88 Hun, 258, 34 N. Y. Supp. 734, the Supreme Court of that state, in passing upon this same question, said: "We are inclined to the opinion that it was the duty of the county judge, by virtue of section 2032 of the Code, to make an order to remand the prisoner, as it appeared that he was detained in custody 'by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction,' and that it is not necessary upon this appeal to consider the questions urged by the learned counsel for the respondent as to the nature and character of the complaint filed in the justice's court."

In *Ex parte Clark*, 85 Cal. 203, 24 Pac. 726, the Supreme Court of California was considering a kindred question, and said: "The sheriff makes return of the judgment of the superior court of San Francisco, above mentioned, and that he holds the petitioner by virtue of a commitment thereunder. This, it seems to us, is a complete answer to the writ. No matter whether the superior court of San Francisco had the right to order the prisoner out of the custody of the warden of the state prison or not, he was produced. An information charging him with an offense within the jurisdiction of that court was filed, and the court thereby became and was vested with the power

and jurisdiction to try him, and its judgment is valid and binding."

The petitioner has placed great reliance on *State v. Gleason*, 32 Kan. 245, 4 Pac. 363. In that case the Supreme Court of Kansas, speaking through Mr. Chief Justice Horton, on appeal from a judgment of conviction, held that the trial court erred in not sustaining a motion to quash and set aside the warrant of arrest, on the ground that the information filed in the case, and upon which the warrant had been issued, was not made upon the knowledge of the county attorney or informant, but merely upon his "information and belief." The court there held that a warrant issued upon such a complaint and an arrest made under such a warrant were a violation of the fourth amendment to the Constitution of the United States and of section 15 of the Bill of Rights of the state of Kansas. The question there presented, however, was raised in the lower court and presented on appeal as an error committed in course of the trial.

The same question was raised in a different manner in *State v. Blackman*, 32 Kan. 615, 5 Pac. 173, and the court distinguished the latter case from the *Gleason* Case, and held that there was no constitutional objection to trying a defendant on a complaint made on information and belief. Mr. Chief Justice Horton, who had written the opinion in the *Gleason* Case, points out in a concurring opinion the distinction to be drawn between the two cases, and also calls attention to the fact that in the *Blackman* Case the question was not raised in the lower court.

[3, 4] However sound the position taken by petitioner may be as a proposition of law, we are satisfied it cannot be maintained on habeas corpus. Those errors should have been presented to the proper court in the regular course of procedure on appeal; that is the method prescribed for correction of errors. Habeas corpus cannot be employed as an appellate remedy; it is an extraordinary remedy only.

The prisoner should be remanded to the custody of the chief of police of Boise City; and it is so ordered.

SULLIVAN and STEWART, JJ., concur.

(23 Idaho 433)

LINCOLN COUNTY v. TWIN FALLS
NORTH SIDE LAND &
WATER CO.

(Supreme Court of Idaho. Feb. 25, 1913.)

1. RECORDS (§ 5*)—FEES—AMOUNT—DUTY TO CHARGE.

Under the provisions of section 2124 of the Revised Codes, the county recorder is allowed, and it is his duty, to charge and collect

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

20 cents per folio for every instrument, paper, or notice recorded by him.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

2. RECORDS (§ 5*)—RECORDER'S FEES—CONTRACT.

Neither the board of commissioners nor the county recorder has any power or authority to enter into an agreement or contract with any person or corporation for recording any instrument, contract, or other paper or document for a less price or at a less rate than that prescribed by statute, namely, 20 cents per folio.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

3. RECORDS (§ 5*)—FORM—PRINTED FORMS.

The fact that the county recorder has a blank book containing printed forms in which he records certain contracts, instruments, or documents that conform to the printed forms in his record book does not justify him in making any less or different rate than 20 cents per folio for the recording of the same, and it is his duty to make a folio charge for every word contained in the instrument, whether the same be printed, written, or typewritten in such record book.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

4. RECORDS (§ 1*)—"RECORDING INSTRUMENT"—WHAT CONSTITUTES.

To record an instrument means to transcribe it, repeat it, or recite it in a book of record kept for the purpose of perpetuating the terms and recitals contained in the instrument or document so recorded.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, p. 6014.]

5. RECORDS (§ 5*)—FEES FOR RECORDING—CHANGE.

The fees prescribed by the statute to be charged by the county recorder are arbitrary charges fixed by act of the Legislature, and no officer has any right to change the same or depart from the terms thereof as prescribed by the Legislature.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

6. RECORDS (§ 5*)—FEES—FAILURE TO COLLECT—SUIT BY COUNTY.

Where a county recorder has recorded papers and written instruments, and has not collected the full amount of fees prescribed by the statute therefor, and has thereafter rendered his accounts, and settled with the board of county commissioners without accounting for the uncollected portion of such fees, the county has such an interest in the unpaid fees as to enable it to prosecute an action directly against the party for whom the work was done and to recover the same.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

7. LIMITATION OF ACTIONS (§ 28*)—STATUTORY LIABILITY.

Where a county recorder has recorded instruments and has not collected the full amount of the fees prescribed, by statute, and the county thereafter commences an action against the person for whom such recording is done, the question as to whether the action is barred by the statute of limitations is to be determined by the provisions of section 4053 of the Rev. Codes, as the same is an action upon a con-

tract, obligation, or liability not founded upon an instrument in writing.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 135; Dec. Dig. § 28.*]

Sullivan, J., dissenting.

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by Lincoln County against the Twin Falls North Side Land & Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel H. Hays and P. B. Carter, both of Boise, for appellant. James R. Bothwell and Harlan D. Helst, County Atty., both of Shoshone, for respondent.

AILSHIE, C. J. This action was brought by the county of Lincoln against appellant for the purpose of recovering the sum of \$9,336.35, together with interest thereon, alleged to be due as a balance for fees for recording certain instruments designated as water contracts. The case was heard on a stipulation of facts and judgment entered in favor of the county and against appellant.

The appellant is a corporation organized under the laws of the state of Delaware, and has complied with the laws of this state, and is doing business in this state as an irrigation company. It is admitted that the county recorder recorded instruments for appellant, as alleged in the complaint, and that the balance due for fees, if charged at the rate of 20 cents per folio, as prescribed by the statute, for both the written and printed words thereon, would amount to the sum claimed, namely, \$9,336.35. The appellant sought to defend and avoid liability upon the following grounds: That the appellant was engaged in the construction of what is known as a Carey act project in Lincoln county in this state, and that, after completing full negotiations with the state board of land commissioners, the company entered into negotiations with the board of commissioners of Lincoln county, and proposed that the company would furnish printed record books to the county free, and that the county recorder should, in turn, charge appellant a flat rate of 75 cents per instrument recorded; that the county commissioners favored the proposition submitted to the county and consented to the recorder making such an arrangement; and that the county recorder accordingly entered into the agreement, and the company supplied the recorder with necessary blank books, containing printed pages corresponding with the printed forms of water right contracts the company had prepared for its use, and that all that was left for the recorder to do was to fill in the written part which the company might write into the blank form of its contracts. It also appears that the sum of 75 cents per instrument was ample and sufficient to pay

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the regular folio charge for the number of words which were actually written into these instruments as printed in the record book furnished by the company, and which it was necessary for the recorder or his clerks to transcribe into the record books. This state of facts presents the question as to whether the county officers could fix upon a different rate, or charge any less fee for recording an instrument than that prescribed by statute. Section 2124 of the Revised Codes, which contains the schedule of fees to be charged and collected by the county recorder, provides, *inter alia*, as follows: "The county auditor and recorder is allowed, and may receive for his services, the following fees, to be paid him by the party procuring his services as recorder: * * * For recording every instrument, paper or notice, for each folio, twenty cents. * * *" Section 7 of article 18 of the Constitution (sixth amendment to the state Constitution) provides that all county officers shall receive fixed annual salaries, and that all fees received by such officers over and above their actual and necessary expenses allowed by law shall be turned into the county treasury.

[4] The only question to be determined on this appeal is one of law. It was the duty of the county recorder to duly record the contracts and instruments which he did record, designated as water contracts.

[3] Whether the record was written with a pen, a typewriter, or printed made no difference so long as it was a true and correct copy and record of the instrument presented.

[4] To record an instrument means to transcribe it, repeat it, or recite it in a book of record kept for the purpose of perpetuating the terms and recitals contained in the instrument or document so recorded. *Anderson, Law Dictionary*; *Montgomery Beer-Bottling Works v. Gaston*, 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42; *Cady v. Purser*, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; 34 Cyc. 585. Whether the recorder had a printed copy of the greater portion of the instrument in his record book and filled in the written portion or transcribed the whole document is immaterial, for the reason that it was necessary for him to verify the same and satisfy himself that his record was a true and literal copy of the instrument presented for record, and he must verify the same and satisfy himself before he can so certify.

[5] The fee of 20 cents per folio is an arbitrary fee established by the Legislature. In most cases it more than pays for the service performed, and the county makes a profit out of the business. In other cases it might not pay for the service performed. If a county only had a very small amount of recording to do, and still had to employ a clerk or deputy at a regular salary to do such work, the fees collected for recording might not be sufficient to pay for the service and the coun-

ty might lose. Upon the other hand, where there is a great deal of this work to do, the county can hire clerks for a great deal less than 20 cents per folio, and thereby make a profit out of the business. Indeed, the auditor might procure record books containing printed forms of deeds, mortgages, and other instruments, and he might likewise procure blank deeds and mortgages and other instruments printed to conform to his record books, and supply these blanks to the people generally doing business with his office, and thereby save a large amount of the work of his office in transcribing or recording such instruments. No one could complain of such a course. On the other hand, the person presenting such an instrument for record would be obliged to pay full folio charge for recording the instrument, and it would be no injury or damage to him that the recorder already had a printed record book which saved him the larger part of the work of transcribing the instrument. Suppose, on the other hand, people doing business with the office were allowed to get record books printed and furnish them to the recorder, as was done in this case, and then pay fees for transcribing only the written part of their conveyances, such a practice would prove demoralizing to the business of the recorder's office. If one man or one corporation has the right to do this, every other individual or corporation has the like right. This practice would result in every real estate firm in the county getting up a record book of its own and a blank form of deed, mortgage, or other conveyance, to correspond with the record, and every firm would have its own record book. The mere statement of this proposition is sufficient to show that it is contrary to law, and could not be allowed or tolerated.

[2] It has been argued, however, that the county commissioners considered this proposition, and approved the same, and entered into an agreement, and that the county is thereby estopped from attempting now to collect a greater sum than that agreed upon. This contention cannot be sustained, for the reason that neither a county officer nor any one else has a right to set aside or ignore a statute or to change the fees prescribed by a statute that shall be charged for any given public service. The statute is plain, and both the commissioners and the irrigation company had full notice of its provisions. Any contract which ran counter to the statute was clearly void. Neither can the fact that the commissioners subsequently accepted and approved the recorder's report and settled with him upon the basis of the former agreement entered into with the water company avail the company here, or relieve it from payment of the balance due on account of the recording of such instruments. *McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054. The fact that the board of commissioners have certain powers with refer-

ence to the settlement of claims against the county and compromising and adjusting accounts does not extend to the changing of fees and salaries fixed by statute.

[6] A brief has been filed in this case by M. J. Sweeley, an attorney of this court, as amicus curiae, in which it is suggested that the county cannot maintain this action, that such fees must be paid to and collected by the county recorder, and that the county can only look to the officer and his bondsmen for the same. We have no doubt but that the county recorder could have maintained his action for the recovery of these fees. We are equally well satisfied, on the other hand, that the county itself has such an interest in these fees as to be able to maintain its action for the recovery of the same, and this is especially true where, in a case like this, the county has already settled with the county recorder, and he has presumably already retained out of fees in his hands his actual expenses as authorized by the Constitution. After settlement has been made with the recorder, he may have no further interest in the fees, unless the county charges them up against him. On the other hand, the county is directly interested. It may pursue the officer and his bondsmen, or it may pursue directly the party who had the service performed.

[7] Finally, it is argued that a part of this claim is barred by the provisions of subdivision 1, § 4054, Rev. Codes. That statute provides: "An action upon a liability created by statute, other than a penalty or forfeiture," shall be commenced within three years after the cause of action accrued. We cannot agree that this is the kind of an action contemplated by subdivision 1, § 4054. This cause of action was not created by statute. On the contrary, we think it is governed by the provisions of section 4053, which provides that "an action upon a contract, obligation, or liability not founded upon an instrument of writing" shall be commenced within four years from the accrual thereof. This is clearly an action upon contract. It will be necessary, therefore, to remand the cause, with direction to the trial court to eliminate all items where the service was performed more than four years prior to the date of the commencement of this action, and to enter a judgment accordingly.

The contention made by respondent that this is an open and current account within the purview and meaning of section 4058, and that the statute only runs from the date of the last item appearing in the account, is not sound, and cannot be sustained. Neither the recorder nor the county had any right to extend credit to the appellant, and there were no "reciprocal demands" in this case within the purview and meaning of section 4058. It appears that the irrigation company furnished the blank forms of record books used by the county in recording these instruments, and it should now be allowed a

credit in an amount equal to the sum it would have cost the county to get these or similar records. We find no error in the record, except as to the amount of the judgment entered. The judgment will therefore be affirmed except as to the amount thereof, and the cause is hereby remanded, with direction to the trial court to ascertain the amount to be credited on account of the books furnished and the amount barred by the statute of limitations, and to enter an amended judgment for such an amount as he finds has accrued within four years immediately preceding the filing of the complaint, less the proper credit for record books as herein suggested. Costs of this appeal will be divided equally between appellant and respondent.

STEWART, J., concurs.

SULLIVAN, J. I am unable to concur in the conclusion reached by my Associates. Under the facts of this case, the judgment ought to be reversed. The appellant is a corporation, and was engaged in the construction of what is known as a Carey act reclamation project in Lincoln county, embracing about 250,000 acres of land, and the estimated cost of the reclamation works and system is \$5,700,000. I will not go into detail here as to the operations of this company in making contracts for the sale of water rights. It is sufficient to say that the disposal of the water rights held by the company would require several thousand instruments which would contain about 200 folios each, and under the stipulated facts in this case each instrument did not contain more than three folios of written matter, on an average, printed forms being used. Many of the purchasers who held more than 40 acres of land desired a water contract for each 40-acre tract for their own convenience in the future transfer of their lands and water rights, and the company was willing to execute the number of contracts that each landowner might desire, provided he would pay the recording fee for all of the contracts except one. In order to make the recording fee as light as possible upon the purchasers, the appellant company took the matter up with the board of county commissioners of Lincoln county, and, after thoroughly investigating the same, the board made the following order: "Shoshone, Idaho, April 30, 1907. The board of commissioners of Lincoln county, state of Idaho, met in regular adjourned session this 30th day of April, 1907, pursuant to adjournment. Present: I. H. Imes, Chairman; F. E. Grosse, Commissioner, and Harry W. Anderson, Clerk. Upon the application of the Twin Falls North Side Land & Water Company requesting the board to establish a flat fee for the recording of all water contracts between the Twin Falls North Side Land & Water Company and the settlers, it was ordered by the board, after due investigation, that the recorder

charge said company a fee of seventy-five cents for recording all regular contracts for land and water and a fee of one dollar for recording all land and water contracts accompanied by the railroad contract, upon condition that said Twin Falls North Side Land & Water Company shall furnish to the county free of cost, all necessary books for the recording of said contracts, with the regular form of the contracts printed therein, and all necessary indexes for same. All records so furnished to be approved by the county recorder. No further business appearing at this time, the board adjourned the regular meeting until Monday, the 13th day of May." No appeal was taken from said action of the board. Thereupon the appellant company furnished to the county, free of cost, all necessary books for the recording of said contracts, with regular form of contracts printed therein, and all necessary indexes for the same, which records so furnished were approved by the county recorder.

It is contended by counsel for appellant, and we think correctly, that no charge can lawfully be made by a county recorder for recording an instrument where a printed record is used, except for recording the words which are actually written; in other words, that no one can be required to pay a constructive fee, instead of a fee for the actual services rendered. The recording fee is fixed as follows by section 2124, Rev. Codes: "For recording every instrument, paper or notice, for each folio, twenty cents." And a "folio" is defined by section 2132 to mean 100 words, counting every three figures necessarily used as a word. "Recording means the writing down or copying of the document in the proper book by the recorder." *Cady v. Purser*, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; *Vidor v. Rawlins*, 93 Tex. 259, 54 S. W. 1026. In *Anderson's Law Dictionary* the term "recording" is defined as: "Copying an instrument into the public records in a book kept for that purpose, by or under the superintendence of the officer appointed therefor." Section 2062, Rev. Codes, relating to the duties of the recorder, is as follows: "He must, upon the payment of his fees for the same, record separately, in large and well-bound separate books, in a fair hand: 1. Deeds, grants," etc. When that statute was enacted, it was expected that the instrument would be written "in a fair hand" in the proper record book. At the time of the original enactment of that statute, no printed record books were in use, and the law contemplated a fee of 20 cents per folio for all of such instruments as were required to be written "in a fair hand." Section 2124, Rev. Codes, in speaking of the recorder's fee, provides: "The county recorder and auditor is allowed, and may receive for his services, the following fees," etc. It will be observed from said provisions of the statute that it was contemplated that 20

cents per folio would be paid for the service of recording the instrument in longhand. Now, where the record is printed, as it was in the case at bar, and furnished by the appellant, without expense to the county, the recorder performs only the service of properly filling the blanks in the record, and he is entitled to receive payment for whatever he writes at the rate per folio specified by the statute, and, as appears from the record, that fee has been fully paid, the judgment should be reversed.

And, again, I think the county is estopped from maintaining this action, for the reason that no appeal was taken from said order of the board, and the appellant is now placed in a position where it cannot recover the recording fee for the contracts given the settler at his request for each 40-acre tract, as appellant would no doubt have required those who wanted more than one contract to pay for the recording of all others given them. In the case at bar, where only one contract was made to the settler, the fee was paid by the appellant. Where more than one contract was given, as frequently happened, the additional recording fee of \$1 was collected from the settler because the additional contracts were made for his particular benefit. This method of computing the fee which was agreed to by the county commissioners continued for some years—from April 30, 1907, until this suit was brought in 1911—and by the action of the board it is now too late for the appellant to go back and collect from the settlers the amount of the recording fee which they should have paid in case they were required to pay 20 cents per folio for all printed matter for each contract after the first. Having agreed to the method of computation provided by said order of the board, and no appeal having been taken therefrom, and regular settlements having been made by the county recorder with the county, and no appeal having been taken from those settlements, it would be most unjust and inequitable to compel the appellant now to pay the amount of the judgment rendered against it. Under the provisions of section 1917, Rev. Codes, the county commissioners have power to supervise the official conduct of all the county officers charged with the custody of the public revenues and see that they faithfully perform their duties, to examine and audit their accounts, and generally to do and perform all other acts and things which may be necessary to the full discharge of their duties. Under the authority given by the statute, we think the county commissioners had power to settle the amount of the fee to be charged for recording said instruments. While perhaps they could not provide a less fee than 20 cents per folio for the services rendered in writing down whatever there was to be written in said printed contracts, it was within their power

and authority to make the order above quoted.

In this case there was a claim honestly made, which claim was fairly and honestly considered by the board, and the board finally adopted said resolution and order. Had the board refused to adopt said order, the appellant would no doubt have made changes in its business method and could and would have reduced the recording fee, which has already been paid, and required the settler to pay the recording fee for each contract except the first. But the company was anxious to favor the settler, and give him as many contracts as he desired, and make the recording fee as light as possible. Where more than one contract was to be recorded, appellant collected only the fee of \$1 from the settler for each additional contract, instead of the fee of \$4 now claimed by the county. The \$4 fee which is charged in this suit amounts to a charge of 10 cents per acre against each 40-acre subdivision, which would be at least four times the value of the services rendered by the recorder for recording each instrument. Any person deeming himself aggrieved by said order of the board might have taken an appeal. And, again, he might also have taken an appeal from the order of the board settling the quarterly accounts of the recorder. But no such appeals were taken. The remedy by appeal was complete and adequate.

There was a dispute between the county recorder and the appellant, and it was within the power of the board to settle that dispute, and it did settle it, and, the settlement having been accepted and acted upon for several years, the county ought not now to be permitted to repudiate the board's action. Good faith and fair-dealing should characterize the conduct of county boards in their dealings with individuals and corporations, and there is no reason in morals or law that will exempt them from the doctrine of estoppel. *State of Ind. v. Milk* (C. C.) 11 Fed. 389; *U. S. v. Wallamet Val. & C. M. W. R. Co.* (C. C.) 44 Fed. 234. The statement in the majority opinion that, if this company were permitted to furnish its own records, each real estate agent ought to be permitted to furnish his, seems ridiculous to me, as such agents sell lands for others, and do not pay for recording deeds. There is no parallel or comparison between the case suggested and the one at bar. Here was a reclamation company, which it was known would execute several thousand contracts, which contracts would fill a number of volumes of records, which records, if furnished by the county, would cost it no doubt several hundred dollars, and, because of the number of such contracts and the extent of such records, it seems to me it was better for all concerned to have those contracts in records especially provided for their recordation,

without expense to the county, and have uniform records of all such contracts. In accordance with said resolution of the board, said fees were duly paid and received into the county treasury. The accounts of the recorder were regularly settled in accordance with the law. The money being received under said facts and circumstances and the account being settled, the transaction amounted to a final receipt closing said transaction. As bearing on this question, see *Wilcox v. Perkins County*, 70 Neb. 139, 97 N. W. 236, 113 Am. St. Rep. 779. It was held in *Douglas County v. Bennett*, 61 Neb. 660, 85 N. W. 833, that where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is final and conclusive, unless there is fraud, mistake, or imposition in making the same, and we think that is true in this state where no appeal is taken from the action of the board in settling such accounts. There is no charge of fraud, mistake, or imposition in this case. Said order was passed by the board on April 30, 1907, and this action was not brought until August 25, 1911.

The judgment ought to be reversed.

(23 Idaho 296)

JOYCE et al. v. RUBIN et al.

(Supreme Court of Idaho. Jan. 30, 1913. On Rehearing, March 5, 1913.)

1. WATERS AND WATER COURSES (§ 152*)—ACTIONS TO DETERMINE WATER RIGHTS—QUESTION FOR COURT.

In an action to determine and settle the priorities and amount of water to which each party to a suit is entitled from a certain stream, it is left to the court to determine from the evidence such priorities and amounts.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*)—ACTION TO DETERMINE PRIORITIES—AMENDMENT TO CONFORM TO PROOF.

Each party, by way of complaint or cross-complaint, is required to set up the ultimate facts upon which his claim of right is based, and it is the duty of the court to make its finding of facts upon the evidence; and if the allegations of the pleadings do not conform to the proof offered the court may direct the pleadings to be amended to conform to such proof.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

3. ACTION TO DETERMINE WATER RIGHTS—THEORY OF TRIAL.

Held, that the trial in this case was conducted as is customary in water suits, and upon the theory that all parties submitted to the court evidence of the dates of the appropriation of water and of the amounts to which they were entitled.

4. PLEADING (§ 398*)—VARIANCE—MATERIALITY.

Under the provisions of section 4225, Rev. Codes, no variance between the allegations of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1338; Dec. Dig. § 398.*]

5. PLEADING (§ 232*)—TRIAL (§ 349*)—DIRECTING SPECIAL FINDING—AMENDMENT TO CONFORM TO PROOF—EFFECT OF VARIANCE.

Section 4226, Rev. Codes, provides that where the variance is not material the court may direct the fact to be found according to the evidence, or may order an immediate amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 593; Dec. Dig. § 232.* Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

6. PLEADING (§ 409*)—WAIVER OF OBJECTIONS—ANSWER TO CROSS-COMPLAINT.

Where the cross-complaint is not answered, and the cross-complainant proceeds to trial without objection, as though an answer had been filed, he thereby waives the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1375-1383, 1386; Dec. Dig. § 409.*]

7. ACTION TO DETERMINE WATER RIGHTS—THEORY OF TRIAL.

Held, the record shows that the action was tried upon the theory that all of the material allegations of the complaint and cross-complaints were put in issue.

8. JUDGMENT (§ 126*)—DEFAULT—TAKING PROOF.

Under the provisions of section 4360, Rev. Codes, in an action to determine the priority and amount of water to which each party to the action is entitled, if default is taken against any of the parties, evidence must be taken to establish the material allegations of the complaint or cross-complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. § 126.*]

9. PLEADING (§ 121*)—ANSWER—DENIAL.

Held, that certain denials were sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

10. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—ACTION TO DETERMINE RIGHTS.

Where it is alleged that it requires 1,000 inches of water to irrigate a tract of land consisting of 320 acres, and the court finds that the party is not entitled to water for more than 162.65 acres, and awards 610 inches, or about 4 inches to the acre, therefor, and such award is sustained by the evidence, the action of the court will not be reversed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

11. WATERS AND WATER COURSES (§ 139*)—APPROPRIATION OF WATER RIGHTS—FILING NOTICES.

Where a party has constructed his ditches and diverted water and irrigated his land for a number of years, and thereafter posts and files for record location notices, his right dates from the time of his appropriation, and not from the date of posting such notices.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 139.*]

12. APPROPRIATION OF WATER RIGHTS—EXTENT.

Held, under the evidence, that the cultivated area of the Bennett ranch was increased from year to year, and that they were entitled to the full amount of water awarded them by the trial court.

13. WATERS AND WATER COURSES (§ 145*)—APPROPRIATION OF WATER RIGHTS—FORFEITURE OR ABANDONMENT.

Under the provisions of section 3247, Rev. Codes, a person entitled to the use of water may change the point of diversion, if others are not injured by such change; and such change does not work a forfeiture or is not an abandonment of such right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.*]

14. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—AMOUNT OF WATER REQUIRED.

Where it is alleged by one cross-complainant that it requires 400 inches of water to properly irrigate her land, that being about 4 inches to the acre, and another cross-complainant alleges that it requires only five-eighths of an inch to properly irrigate such land, the amount actually required is put in issue by such pleadings.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

15. WATERS AND WATER COURSES (§ 152*)—ACTIONS TO PROTECT RIGHTS—FACTS IN ISSUE.

The ultimate facts to be established under the pleadings were the priority and the amount of water to which each of the parties to the suit is entitled.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

16. PLEADING (§ 129*)—ANSWER—ADMISSIONS—FAILURE TO DENY.

Immaterial allegations or averments in a pleading are not admitted by failure to deny them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

17. WATERS AND WATER COURSES (§ 152*)—ACTION TO DETERMINE RIGHTS—DECREE.

The respondents Joyce acquired title to certain land, formerly owned by their father, who had appropriated water for the irrigation of such land; and, where they do not ask in their complaint to have the water to which they are entitled allotted to each separately, it is not error for the court to decree to them jointly the entire amount of water necessary for the irrigation of their land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

18. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATER RIGHTS—EXTENT.

Held, that the respondents Joyce are entitled only to the amount of water awarded to them at the head of their ditch, less the amount of water which flows from a certain spring situated on their land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

19. WATERS AND WATER COURSES (§ 152*)—ACTION TO DETERMINE RIGHTS—DECREE.

Held, that the decree must provide that when the natural flow of the stream is not sufficient to furnish the respondents with the full amount of water awarded to them they should have only the amount furnished from the natural flow of the stream; each taking according to the priority of his right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

20. WATERS AND WATER COURSES (§ 135*)—
RECLAMATION OF LAND—DILIGENCE OF OCCUPANTS.

Held, under all of the facts of this case, that the respondents have proceeded with reasonable diligence to reclaim the land for which water has been decreed to them.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 157; Dec. Dig. § 135.*]

Appeal from District Court, Owyhee County; Alfred Budge, Judge.

Action by Matthew Joyce and another against Jacob Rubin and others. From the judgment, defendant Murphy Land & Irrigation Company, Limited, appeals. Modified.

C. S. Polk, of Boise, for appellant. Perky & Crow, of Boise, for respondents Joyce, Richards & Haga, of Boise, for respondents Bennett, Jackson & Walters, of Caldwell, for respondent Harder.

SULLIVAN, J. This action was brought to determine the priorities and amount of water to which each of the parties to the action was entitled from Sinker creek, in Owyhee county. The defendants, except Jacob Rubin and G. F. Lambert, appeared by answer and cross-complaint, and set up their respective claims and rights therein. The defendant Harder did not answer the cross-complaint of the defendant the Murphy Land & Irrigation Company. Thereupon the case was referred to a referee to take the testimony in the case and report the same to the court. It appears that certain testimony was taken, and the case was closed and a report made by the referee to the court. Subsequently an application was filed to reopen the case and take further testimony, which application was granted. Further testimony was taken before Honorable John F. MacLane, one of the judges, sitting at chambers, and, after the testimony was closed, was referred to Honorable Alfred Budge, judge of the Sixth judicial district, for decision, and on April 1, 1912, he filed his findings of fact and conclusions of law, and a decree of the court was entered thereon.

The court decreed to the plaintiffs Matthew and Anna Joyce 597.4 miner's inches, or 11.95 cubic feet of water per second of time, from April 1, 1867, and 30 inches, or .6 cubic feet, from April 1, 1876, for use on the Gilmore ranch, and 35 inches, or .7 cubic feet, dating from April 1, 1901; to the defendant Ella C. Harder, administratrix, 62.5 inches, or 1.25 cubic feet per second, from April 1, 1867, and 118.60 inches, or 2.37 cubic feet per second, from April 1, 1871; to the defendants Richard and Joseph Bennett 12.2 cubic feet from the following dates: 400 inches, or 8 cubic feet per second, from April 1, 1881; 210 inches, or 4.2 cubic feet per second, from April 1, 1892; to the defendant the Murphy Land & Irrigation Company 400 second feet of the waters of said creek from

December 28, 1906, and 60 inches, or 1.2 cubic feet per second, from the year 1865, and 20 inches, or .40 cubic feet per second, dating from April 1, 1865.

None of the parties appealed except the Murphy Land & Irrigation Company, and the appeal is from the judgment.

[1-3] (1) The first alleged error complained of is that the court erred in ordering all of the pleadings to be amended to conform to the facts as shown by the evidence. It must be remembered that a suit to determine the priority and amount of water that each user from a stream is entitled to is somewhat different from the ordinary action, and the general rules of pleading have never been technically observed or strictly enforced in this class of cases; for if they were, in many cases where there are a hundred or more parties to the action the pleadings would be very voluminous. In such actions the main object or purpose is to determine the priority and amount of water to which each party to the action is entitled, and it is left to the court to determine from the evidence whether each party has established a right to any of the water in litigation. Each party to the action is required to plead the ultimate facts upon which he claims a right to the use of a portion of the water of such stream. It is the duty of the court to hear proof before it can legally make its findings or enter its decree. It is not made to appear that the issues were greatly changed under said order of the court or that any additional testimony would be required to meet such amendments. The record fails to show that any evidence was objected to by appellant as being at variance with the pleadings, or as not being within the issues made by the pleadings. The record shows that the trial was conducted as is customary in water suits, upon the theory that each party submitted to the court evidence of the dates of his appropriation and amount of water claimed and his right and title to use it.

[4, 5] It is provided by section 4225, Rev. Codes, that no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. And in section 4226, Rev. Codes, it is provided that when the variance is not material the court may direct the fact to be found according to the evidence, or may order an immediate amendment.

[6-8] In *Conant v. Jones*, 3 Idaho (Hast.) 606, 32 Pac. 250, it is held that when a cross-complaint is not answered, and defendant proceeds to trial as though answer had been filed, he thereby waives the answer. It appears from the record that the appellant went to trial evidently upon the theory that the allegations of its cross-complaint were denied. The record fails to show that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant moved for judgment on its cross-complaint, and does show that appellant went to trial and introduced its proofs for the purpose of establishing the allegations of its cross-complaint. The case was evidently tried upon the theory that all of the material allegations of the complaint and cross-complaint were put in issue. The provisions of subdivision 2, § 4360, Rev. Codes, provides for default upon failure to answer in a case not arising upon contract. In that kind of a case the plaintiff, after taking default, must apply to the court for the relief demanded in the complaint; in other words, must establish by proof the material allegations of his complaint. As bearing upon the question here under consideration, see *Myers v. Holton*, 9 Cal. App. 114, 98 Pac. 197; *Stiles v. Hermosa, etc., Co.*, 8 Cal. App. 352, 97 Pac. 91; *Hedstrom v. Union Trust Co.*, 7 Cal. App. 278, 94 Pac. 386.

The court therefore did not err in directing the pleadings to be amended in accordance with the proofs offered.

[8] (2) The second error complained of is that the answer of the cross-complainants Bennett and Bennett does not deny the allegations contained in the cross-complaint of the appellant. It is contended that the answer to the cross-complaint of the appellant amounts to no defense whatever, and would entitle the appellant to judgment on the pleadings, and that such question would not be waived by failure to raise it in the lower court.

In a water case like the one at bar, the court would not be justified in entering a judgment in accordance with the prayer of the complaint without requiring the plaintiff to prove his case. Appellant, in its cross-complaint, was not content with setting up its own title or right to the use of the water of Sinker creek, but undertook to set up the title of all water users along the creek, and as to all of such allegations, except the paragraph setting up the claim of the Bennetts, the Bennetts answered as follows: "As to the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14 of said cross-complaint, these answering defendants have no knowledge, information, or belief on the subject, sufficient to enable them to answer the allegations contained in said paragraphs, or any of them; and placing their denials on that ground these answering defendants deny each and every of the allegations contained in said paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14." We think that denial is sufficient, under the requirements of our statute. Section 4183, Rev. Codes.

California has a similar statute, and in *Etchas v. Orena*, 121 Cal. 270, 53 Pac. 798, the court had under consideration the question here presented, and held in accordance with the views herein expressed.

There is another reason why appellant cannot at this time be held to question the suf-

ficiency of the respondents' answer. The case was tried upon the theory that the denials were sufficient to put each appropriator upon his proof as to his right to divert water from said creek, both as to priority and quantity; and no evidence was objected to during the trial, on the ground that such evidence was not within the issues made by the pleadings. See *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; 3 Am. & Eng. Ency. of L. & Pr. 1357. We think the answer of the Bennetts was sufficient.

[10] (3) The third assigned error is that by the cross-complaint filed by the Bennetts it is alleged that it requires 3 inches of water per acre to irrigate the land of the Bennetts. It is contended that the court found as a fact that the Bennetts had under cultivation and irrigation a total of 162.65 acres of land, for which the court found they were entitled to water, and at the rate of 3 inches per acre, which they admitted in their cross-complaint was sufficient to irrigate the same, the court should have given them 488 inches of water, and no more, but that the decree gave them 610 inches, or 122 inches more than they asked for in their cross-complaint. The court evidently concluded that the Bennetts had made a mistake in their cross-complaint in claiming only 3 inches of water per acre, as their evidence showed it required more than that to irrigate said land, and authorized them to amend their complaint to conform to the evidence, and thereafter awarded them the amount of water, with the date of priority, to which the evidence showed they were entitled. The court did not err in so doing.

[11, 12] (4) Under the fourth assignment of error it appears that the Bennetts posted water right notices on the 1st day of June, 1889, under which 1,000 inches of water were claimed for the irrigation of said Bennett ranch. The evidence shows that ditches for the conveyance of such water had been constructed years before the posting of said notices, and that water had been conducted through them from year to year up to the time of posting such notices; and after a patent from the government to said lands had been procured said water right notices were posted simply to give a record title, or to indicate on the county records that the Bennetts claimed a water right from said creek. The posting of such notices in no way deprived them of the date of priority to which they were entitled under their actual appropriation of such water. It appears from the evidence that the cultivated area of the Bennett ranch was increased from year to year, and that they were entitled to the amount of water awarded them by the court.

[13] (5) It is contended, under the fifth error assigned, that, while the grantors of the Bennetts had acquired rights to the use of the waters of Sinker creek, said rights

were abandoned by the Bennetts when, in 1907, they changed the point of diversion by taking the water out of the stream about 1,800 feet further up the stream than the point at which water had been at first diverted. This contention is without merit; for, under the law, they had a right to change their point of diversion, so long as it did not injure any other water user. Under the provisions of section 3247, Rev. Codes, a person entitled to the use of water may change the point of diversion, if others are not injured by such change; and if a change is made without proper application to the state engineer, as claimed in this case, that would not forfeit the right to the use of such water.

[14] (6) It is contended, under the sixth assignment of error, that the appellant alleged in its cross-complaint that it required only five-eighths of an inch of water per acre to irrigate the Harder ranch, and that no answer was filed by Harder, as administratrix, to the cross-complaint of appellant, and for that reason said allegation of the cross-complaint was admitted. As heretofore held, this case was tried upon the theory that each of the parties was required to establish the date of his priority and the amount of water required for the irrigation of the land. Harder alleged in her cross-complaint that it required 400 inches of water to properly irrigate her land. That allegation put in issue the amount required, regardless of appellant's allegation, in its cross-complaint, that it required only five-eighths of an inch per acre. The evidence sustains the finding of the court to the effect that the Harder land required $2\frac{1}{2}$ inches of water to successfully irrigate it.

[15] (7) The assignments of error from 7 to 12, inclusive, concern the rights of respondents Matthew and Anna Joyce. It is first contended that there is an admission in the pleadings on behalf of said respondents as to the amount of water required to successfully irrigate the Joyce ranch, in that said respondents alleged that all of the land of the Joyce ranch requires "at least 3 inches of water to the acre." An inspection of the pleadings shows that the respondents Joyce claimed 1,500 inches of water to be used upon 480 acres of land. Much of the land claimed by them is further away from the creek than the land to which water has been actually applied, and, as the evidence shows, less gravelly and less porous; and because 3 inches of water per acre would be sufficient to irrigate the entire tract it does not follow it would not require more than that to properly irrigate the more porous land nearer the creek. It might be well to observe here that the appellant has alleged that certain lands of the respondents require only a certain quantity of water, but in the answer and cross-complaint of the respondents they allege the quantities of water re-

quired for their lands. Where it is alleged in the cross-complaint that certain lands require only five-eighths of an inch of water, and it is averred in the cross-complaint of the respondents that it requires 3 inches per acre, an issue is clearly presented, although no negative words may be used. See *Perkins v. Brock*, 80 Cal. 320, 22 Pac. 194. The ultimate fact to be proved was the amount of water the respondents were entitled to divert; respondents claiming that they were entitled to divert a certain amount of water, and the cross-complaint averring that they were not entitled to that amount. The respondents, in their complaint, had already set up their right and title to water, which the appellant had denied in its answer. The only averments material to be made in its cross-complaint were as to its own right and title, and it was not required to set up the right and title of the plaintiffs.

[16] Immaterial averments in a pleading need not be denied, and are not admitted by failure to deny them. 1 Ency. Pl. & Pr. 791, and cases there cited. A sufficient answer to said assignment is that the case was tried upon the issue as to the amount of water necessary to irrigate the Joyce ranch. That there was a wide discrepancy between the amount claimed by the plaintiffs and the amount conceded by appellant is true. The plaintiffs asked for 1,500 inches of water for 480 acres of land, about 3 inches per acre, and the court decreed them 597.40 inches for the irrigation of 119.48 acres, which, we think, under the evidence, the court was justified in doing, as the evidence shows it requires much more water per acre to irrigate the 119.48 acres close to the creek than it does the land further away.

[17] (8) The point raised by the eighth assignment of error is that there is an admission in the pleadings to the effect that the plaintiffs did not jointly own the land to which the water is applied, but that Anna Joyce owns a certain portion, and that Matthew Joyce owns the remaining portion, and that the court erred in decreeing water for the Joyce ranch as a whole; that it should have segregated the portions of said ranch alleged to be owned by the different parties and apportioned the water between them. Under the facts of the case this contention is somewhat technical. The Joyce respondents asked in their complaint to have the water decreed to them jointly; they being the owners of the Joyce ranch. The testimony throughout refers to said tract of land as the Joyce ranch. The appropriation was made for the entire ranch of Matthew Joyce, Sr., which subsequently descended to the plaintiffs, and has always been farmed together, and is now in the possession and under the control of both the plaintiffs and their lessee, and the record contains a stipulation of the parties to this action as follows: "It is further stipulated and agreed by the parties

to this action that the lands described in the several complaints and cross-complaints are the properties of the parties alleging title thereto." Upon the whole record we conclude there is no merit in this contention. The water was appropriated for said entire ranch and has always been used on that ranch, and it does not appear that any one is injured by decreeing said water jointly to the owners of said ranch.

[18] (9) Under the ninth assignment of error it is contended that the court should have taken into consideration the springs that rise, either in the bed of the stream, or along its sides. The court evidently considered those springs as a part of the stream. It was expressly found by the court "that it appears that there is a certain spring in Sinker creek, where the same flows through the Joyce ranch, aforesaid, which is a part of the natural flow of said creek; that the waters of said spring, when used and diverted by plaintiffs, is a part of said waters so given to the land of plaintiffs." It is clear from the finding that the respondents Joyce are not entitled to the water flowing from said spring in addition to the water decreed to them, but that the amount of the flow of said spring must be deducted from the total number of inches of water awarded to the respondents Joyce. They are not entitled to the number of inches awarded to them at the head of their ditch and, in addition thereto, the flow of said spring. They are entitled only to the amount awarded to them at the head of their ditch, less the flow of said spring. From the record it appears they have about 50 acres of land below where said spring rises, and certainly can use the water from said spring in the irrigation of said land, so the decree in that regard must be amended in conformity with the views herein expressed.

[19] (10) Under the tenth assignment of error appellant contends that, while the waters of Sinker creek sink or disappear during the latter part of the season, so that during the months of July, August, and September the amount of water in the stream does not exceed 200 inches, and while this appellant is constructing a reservoir for impounding the waters of said stream for the purpose of irrigating certain lands, yet the decree makes no provision for the water shortage during the summer months, and no provision has been made for measuring the waters of the stream, but allows the plaintiffs and the several cross-complainants the full amount of water awarded to them, apparently for the entire season, which amount could only be supplied by drawing from the storage provided by the appellant for other lands; and under that state of facts it is contended that the decree should provide for measuring the waters of said stream above the dam of appellant, and when the waters are low the respondents should be entitled only to the flow of the stream, and not to

exceed the amounts they are allowed by said decree. That contention is well founded, and the decree should provide that, when the natural flow of the stream is not sufficient to furnish the respondents with the full amount of water awarded to them, each should have only the amount furnished from the natural flow of the stream, taking, of course, according to the priority of his right. The decree should have provided for the measuring of the water of the stream as it entered the reservoir of the appellant, and should also provide that the respondents should receive only the natural flow of said stream, when it is less than the entire quantity of water awarded to them, and in accordance with their priorities as established by the decree. Of course, as appellant has an 80-inch water right, with a priority of April 1, 1865, it would be entitled to that full amount as long as the natural flow of the stream amounted to 80 inches; its right being the oldest on said stream.

A measuring device ought also to be established at the dam of appellant, so that the water required to be turned down to the respondents could be measured. In order that justice may be done to all of the parties to this action, the decree must be modified as herein indicated.

[20] (11) Under the eleventh assignment of error it is contended that some of the respondents have not proceeded with reasonable diligence to reclaim all of their land for which they were allowed water by the trial court; and if the land had been situated in some parts of the state, where the increase in population and reclamation of land had been more rapid than in the Sinker creek region, this court would have been inclined, upon the facts appearing from the record, to hold that at least one or two of the respondents had not proceeded with reasonable diligence to reclaim their land. But, under all of the facts of this case, we are inclined to hold that the court did not err in decreeing to each of the respondents the amount of water decreed to him.

(12) It is contended, under the twelfth assignment of error, that the respondents at most are not entitled to more than 1¼ inches of water per acre; but, under all of the facts of this case, this court is not inclined to modify the decree entered in regard to the quantity of water awarded to each of the respondents.

It is therefore ordered that the decree be amended as above indicated; and it is also ordered that each of the parties hereto pay the costs of this appeal incurred by him.

STEWART, J., concurs.

On Petition for Rehearing.

SULLIVAN, J. A petition for rehearing and modification of the original opinion in this case has been filed by the respondents

Joyce, and it is contended that that part of the decision in regard to the water flowing from a spring situated on the Joyce land is susceptible of two constructions.

After quoting from the finding of the court in regard to said spring, we stated in the opinion as follows: "It is clear from the finding that the respondents Joyce are not entitled to the water flowing from said spring in addition to the water decreed to them, but that the amount of the flow of said spring must be deducted from the total number of inches of water awarded to the respondents Joyce. They are not entitled to the number of inches awarded to them at the head of their ditch and, in addition thereto, the flow of said spring. They are entitled only to the amount awarded to them at the head of their ditch, less the flow of said spring. From the record it appears they have about 50 acres of land below where said spring rises, and certainly can use the water from said spring in the irrigation of said land, so the decree in that regard must be amended in conformity with the views herein expressed."

The intention of the court was to give said respondents the amount of water decreed to them at the head of their ditch, less the amount of the flow of said spring, which could be used in irrigating respondents' land. If there were 50 acres of land on which the water from the spring could be used to irrigate, the number of inches of water which could thus be used should be deducted from the amount awarded to the respondents at the head of their ditch. And if there is sufficient flow from said spring to irrigate said entire 50 acres, so much of the water flowing from said spring as can be beneficially used on the lower end of the Joyce ranch is to be deducted from the amount required to be turned to the said respondents at the head of their ditch. In other words, the respondents Joyce are not to have what water they can use from the spring and also have turned in to them at the head of their ditch all of the water that they were awarded by the decree, and the land lying under the spring is to be irrigated entirely from the water of such spring, and should have no other water, unless the spring is insufficient to irrigate such land. A rehearing on said petition is therefore denied.

Counsel for the appellant, the Murphy Land & Irrigation Company, has also filed a petition for rehearing, and contends that the respondents Bennett were awarded 610 inches of water for 162.65 acres of land, and that the court having found that said respondents are entitled to no more than 3 inches of water per acre for said 162.65 acres, which would be 488 inches, and the court having allowed them by the decree 610 inches, it allowed them 122 inches of water more than the findings of fact would warrant or support.

On a re-examination we ascertain that the court found, among other things, in its twenty-fourth finding of fact, that the 162.65 acres of the 320 acres of land owned by the Bennetts is supplied with water from their ditches; and by the twenty-sixth finding of fact the court found that it required "approximately 3 inches" per acre to properly irrigate said land. If it only requires 3 inches per acre, it would require but 488 inches to properly irrigate all of the land that the Bennetts had properly irrigated or reclaimed. By the twenty-sixth finding the court finds that the defendants have applied to a beneficial use in the irrigation of said lands 610 inches. If it required only 3 inches per acre, and the Bennetts had only reclaimed 162.65 acres, all the water they would be entitled to would be 488 inches, and we are satisfied, on a re-examination of the evidence, that that is all they are entitled to; hence the original opinion in this case will be modified to the extent of allowing the Bennetts 488 inches instead of 610 inches, and the judgment of the trial court will be modified to the extent herein indicated.

It is next contended that the court erred in granting to respondents Bennett a priority over the appellant, the Murphy Land & Irrigation Company, for said 162.65 acres; that 66 acres of said land was not irrigated until 1907 or 1908; and that the appellant's right to the water attached from December, 1906. On a review of all of the evidence in regard to the Bennetts' right, we are satisfied that they are entitled to three inches of water per acre for said 162.65 acres.

With the above noted modifications, the petition for rehearing will be denied and the cause remanded, with directions to the trial court to make the changes indicated in this and the original opinion.

STEWART, J., concurs. AILSHIE, C. J., did not sit at the hearing, and took no part in the decision.

(23 Idaho 423)

**SOUTHWEST NAT. BANK OF KANSAS
CITY v. BAKER et al.**

(Supreme Court of Idaho. Feb. 22, 1913.)

**1. BILLS AND NOTES (§ 327*)—LIABILITIES
ON TRANSFER—"HOLDER IN DUE COURSE."**

A holder in due course is a holder who has taken the instrument under the following conditions: First, that the instrument is complete and regular upon its face; second, that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such were the fact; third, that he took it in good faith and for value; fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.*

For other definitions, see Words and Phrases, vol. 4, p. 3320.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

2. BILLS AND NOTES (§ 365*)—RIGHTS AND LIABILITIES ON TRANSFER — HOLDER IN DUE COURSE.

A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce the payment of the instrument for the full amount thereof against all parties liable thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. § 365.*]

3. BILLS AND NOTES (§§ 370, 373*) — BONA FIDE HOLDERS—DEFENSES AVAILABLE.

Under the provisions of section 3514, Rev. Codes, fraud, misrepresentations, and no consideration are not available as a defense, where the evidence clearly shows, and is in no way contradicted, that the plaintiff is the holder of the note sued upon, free from any defect of title of prior parties, and free from defenses available to prior parties among themselves.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 864, 963, 966-970; Dec. Dig. §§ 370, 373.*]

4. BILLS AND NOTES (§ 525*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, and held, that the evidence is positive, certain, and uncontradicted that the instrument is complete and regular upon its face, and that the plaintiff purchased the note in controversy in the usual course of business of the bank in good faith and for value, before maturity, and at the time of the purchase, without notice that said note had been dishonored or of any infirmity in the instrument or defect in the title of the person negotiating it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by the Southwest National Bank of Kansas City against H. D. Baker and others. From a judgment for defendants, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Soule & Soule, of St. Anthony, for appellant. Millsaps & Moon, of St. Anthony, for respondents.

STEWART, J. This is an action to recover the sum of \$1,423, with interest, upon a promissory note dated October 17, 1907, and executed by the defendants in favor of McLaughlin Bros., and by McLaughlin Bros. indorsed and sold to plaintiff for value. The defendants filed an answer and admitted the execution of the note and that such note was given as a part of the purchase price of a certain stallion sold by McLaughlin Bros. to the defendants, and that such sale was made upon misrepresentation and fraud upon the part of McLaughlin Bros., and that said note was acquired by plaintiff subsequent to maturity and without value, and that said note is held by plaintiff for collection only and for the purpose of defrauding the defendants, and that the plaintiff was not the bona fide owner or holder in good faith or in due course. Upon the issues thus

presented, the cause was submitted to a jury, and a verdict was rendered in favor of the defendants. This appeal is from the judgment.

The first error assigned is that the evidence is insufficient to sustain or support the verdict of the jury. Two questions are involved: First. Was the note sued upon in this action secured and obtained from the defendants through fraud and misrepresentation? Second. If the evidence in this case shows that the note was obtained through fraud and misrepresentation, did plaintiff become the purchaser and holder of the note in due course under the provisions of section 3509, Rev. Codes, and is he protected as provided by section 3514, Rev. Codes?

[4] The evidence is positive, certain, and in no way contradicted that the plaintiff purchased the note in controversy on the 1st day of February, 1909; that he paid for said note the sum of \$1,228.19; that the purchase of the note was in the usual course of business of the bank for the profit that would arise by reason of the purchase; that, at the time the note was purchased, it was the first transaction that the appellant bank had ever had with McLaughlin Bros., and was a part of a transaction between the bank and McLaughlin Bros., which in the aggregate amounted to over \$93,000; that the only information plaintiff had as to the signers of the note was a letter from the Ashton State Bank, of Ashton, Idaho, signed by F. X. Dolenty, dated October 19, 1907, directed to McLaughlin Bros., in which the writer of such letter stated: "At request of your representative, Mr. W. H. Homer, I have examined three promissory notes given to your firm, each in the sum of \$1,200, signed by Messrs. H. D. Baker, Morgan Knapp, J. H. Rankin, Perry D. Grube, Atcherly, Sharp, et alia, and believe same to be good responsible men, and the paper worth its face value at any time. These men are all representative men in this community and have always been able to fulfill their contracts." The bank, however, made no inquiry as to the consideration for which the note was given, or the responsibility of the makers of the note, but did know that McLaughlin Bros. was a responsible concern. The note was not overdue, and would not be due until about two years thereafter; and no complaint whatever had been made by the defendants or any person on their behalf, and no notice had been given to plaintiff or McLaughlin Bros. of any infirmity in the instrument or defect in the title of either the plaintiff or McLaughlin Bros., or that there was any bad faith in the purchase of such note. The evidence also shows that the defendants did not make any complaint until February, 1910, more than a year after the appellant had purchased the note. Under this evidence, there can be no question whatever as to the plaintiff's being a pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

chaser and holder in due course of the note, notwithstanding the fact that there was fraud and misrepresentation in the execution of said note.

[1] Section 3509, Rev. Codes, provides: "A holder in due course, is a holder who has taken the instrument under the following conditions: First. That the instrument is complete and regular upon its face. Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. Third. That he took it in good faith and for value. Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The proof clearly brings the plaintiff's cause of action within the provisions of this statute, and such proof is uncontradicted and in no way denied.

[2] Section 3514, Rev. Codes, provides: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

[3] Under this latter section, fraud, misrepresentation, and no consideration are not available as a defense, as the plaintiff is the holder of the note sued upon, free from any defect of title of prior parties, and free from defenses available to prior parties among themselves.

This court has in a number of cases considered many questions arising where notes have been given in payment of the purchase price of stallions, where fraud and misrepresentations were relied upon as a defense. The rules of law laid down in those cases applied to the facts in each particular case; and in most of those cases evidence upon the question of good faith of the purchaser in purchasing the note, and knowledge of the fraud and infirmity of the instrument, was conflicting, and in that respect such cases are distinguishable from the case at bar. The present case is determined solely upon the statutes referred to, which define a holder in due course and the right of such holder to enforce payment of the instrument for the full amount against parties liable thereon.

We hold, therefore, in this case that the evidence does not support the verdict of the jury, and that the plaintiff is a holder in due course of the note sued upon in this action. This being true, we think it is unnecessary to review the other errors assigned and discussed in the brief of counsel, and that a new trial could be of no service to the defendants in this action.

The judgment, therefore, is reversed, and judgment is directed to be entered in favor

of the plaintiff, in accordance with this opinion. Costs awarded to appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

(23 Idaho 479)
WHEELER v. GILMORE & P. R. CO.,
Limited.

(Supreme Court of Idaho. Feb. 28, 1913.)

1. PLEADING (§ 166*)—NEW MATTER IN ANSWER—COUNTERCLAIM—DENIAL.

Under the provisions of Rev. Codes, § 4217, the plaintiff is deemed to have denied any and all allegations of new matter contained in the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321½-328; Dec. Dig. § 166.*]

2. PLEADING (§ 166*)—NEW MATTER IN ANSWER—COUNTERCLAIM—DENIAL.

Where new matter is contained in an answer in avoidance or constituting a defense or counterclaim, and no denial is pleaded, such defense is deemed denied; and it is not error to give an instruction upon the law with reference to such defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321½-328; Dec. Dig. § 166.*]

3. APPEAL AND ERROR (§ 699*) — REVIEW—INSTRUCTIONS—RECORD.

Where an instruction is requested by counsel for defendant, such defendant, on appeal to this court, cannot urge error on the part of the trial court to the effect that the trial court had added certain words to the instruction requested, when the record fails to show that such change was made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.*]

4. APPEAL AND ERROR (§ 215*)—QUESTIONS REVIEWABLE—OBJECTIONS NOT RAISED AT TRIAL.

Where an instruction is given to a jury by the court, and it is admitted that such instruction is correct and is not excepted to at the time of the giving of such instruction, and counsel for one of the parties requests an instruction which is contradictory to the instruction given by the court, such party cannot claim in this court, for the first time, that the giving of the two instructions was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

5. APPEAL AND ERROR (§ 1002*)—CONFLICTING EVIDENCE—REVIEW.

Where the insufficiency of the evidence is assigned as error, and the specific reasons for such contention are assigned, and the evidence is conflicting upon the specific issues assigned, and the cause is submitted to the jury, and they have found generally, this court will not reverse or disturb the verdict of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from District Court, Lemhi County; J. M. Stevens, Judge.

Action by John R. Wheeler against the Gilmore & Pittsburg Railroad Company, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
130 P.—51

John H. Padgham, of Salmon, and Arthur O. Fording, of Pittsburg, Pa., for appellant. E. W. Whitcomb, of Salmon, for respondent.

STEWART, J. This action was instituted by the plaintiff to recover compensation for services performed for the defendant upon two causes of action: The first for legal services rendered by plaintiff to the defendant between July 1, 1910, and the 16th day of January, 1911; the second for money paid out for the use and benefit of defendant between the 1st day of July, 1910, and the 16th day of January, 1911. An itemized statement of such services and expenses is made a part of the complaint, showing a total amount of \$2,804.70. The defendant in its answer admits that certain services were rendered by plaintiff, but denies the correctness of the statement, and alleges that the value of such services had been paid by the defendant to the plaintiff, and denies that the different items of services specified were performed or that the values are correct. The defendant alleges also that prior to the 1st of July, 1910, and since September, 1909, the plaintiff was employed by defendant, and was to receive a salary of \$150 per month; that on July 1, 1910, there was due plaintiff \$150 for the month of June, 1910; that on the 26th of November, 1910, there was a settlement and adjustment between plaintiff and defendant of all items of account between them, including all charges for services rendered by plaintiff in behalf of the defendant; that such settlement involved moneys of the defendant in the hands of the plaintiff; that the defendant paid plaintiff \$600 in full and complete settlement of his account against the defendant; that the defendant also paid plaintiff the \$150 due him as salary for the month of June, 1910; and that the defendant is not indebted to plaintiff for any other services or for any money advanced by plaintiff or expended on behalf of defendant. Upon the issues thus formed, the cause was submitted to the jury, and a verdict rendered for the plaintiff in the sum of \$1,999.70. Judgment was rendered accordingly. This appeal is from the judgment.

Errors Nos. 1 and 2, as presented in the appellant's brief, have no merit and will not be discussed. Error No. 3 involves the refusal to give an instruction. The record does not show any request was made to the court to give such instruction; nor does the record show any exception to the refusal to give such instruction, and no error is shown upon the record.

[3] Error No. 4 assigns as error the adding of certain words to an instruction requested by the defendant. The record on appeal, however, shows that the defendant requested the instruction with the words added, and that the words were not added after the request was made. Upon this record there was no error.

[1, 2] Error No. 5 relates to the giving of a certain instruction. Appellant's counsel admit that the instruction is correct in the abstract, but contend that it does not relate to the case. This court, however, has held to the contrary in several cases, and the question is clearly covered by section 4217, Rev. Codes, which provides: "Every material allegation of the complaint not controverted by the answer, must, for the purpose of the action, be taken as true. The statement of any new matter in the answer in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party." This statute has been construed and applied in the case of Knowles v. New Sweden Irrigation District, 16 Idaho, 217, 101 Pac. 81; Ludwig v. Ellis, 22 Idaho, 475, 128 Pac. 769.

The appellant also contends that the contract referred to in the instruction has not been pleaded. The answer alleges a full settlement and adjustment on November 26, 1910, and covers the very subject referred to by this instruction. The allegations thus set forth in the answer are denied under the statute above referred to; and the defendant introduced evidence to establish the facts alleged; and certainly the respondent had a right to introduce evidence upon the same subject as to whether such contract was made and carried out, or whether it was rescinded; and such evidence was introduced without objection on the part of the appellant.

[4] Error No. 6 is based upon the instruction referred to in error No. 5 given by the trial court, and an instruction given at the request of the defendant. Counsel for appellant argues that the two instructions are inconsistent and contradictory; and, because of that fact, it was error to give both of them. The instruction referred to in error No. 5 is admitted to be correct, and is a correct principle of law, and applies to the facts in the present case. There was no error, therefore, in the court's giving such an instruction. The instruction which it is claimed is inconsistent and contradictory to such instruction was given at the request of the defendant; and the defendant should not be allowed to take advantage of an error, if any, committed by the trial court at the request of the defendant. The instruction referred to in error No. 5 was based upon the theory of the plaintiff, as shown by the plaintiff's evidence. The other instruction was requested upon the theory of the defendant upon evidence the defendant offered in support of the allegations in its answer; and we think the rule in such cases is correctly announced by the authorities as follows: "An instruction stating the law applicable to one theory of the case, and substantially covering all the facts upon which the correctness of such theory depends, is proper, if there is any evidence in the case tending to prove such facts, al-

though it ignores other facts put in issue as part of another and different theory, which, if true, leads to a different conclusion and result, when another instruction has been given in the case covering such conflicting theory." *Rhoades v. Chesapeake & O. R. Co.*, 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. Rep. 826; *Tucker v. Baldwin*, 13 Conn. 136, 33 Am. Dec. 384.

[5] The next error, and the one to which counsel for appellant have devoted many pages of their brief and much of their oral argument, is, in effect, that the evidence does not sustain the verdict. The errors assigned are: (a) The verdict is against the weight of the evidence as to values. (b) The verdict is against the weight of the evidence on the question of varying the written accord and satisfaction. (c) The verdict is contrary to all the competent evidence offered. (d) The verdict was contrary to the instruction quoted at "B" under error No. 6. (e) The verdict is so excessive as to appear to have been given under the influence of passion and prejudice.

The evidence is somewhat conflicting as to the services rendered by plaintiff to defendant, the compensation he should receive from defendant, whether any settlement was made between plaintiff and defendant, the correctness of plaintiff's account, whether the services were to be continued to be rendered to the defendant thereafter, and the compensation the plaintiff was to receive for such services. We shall not undertake to detail the evidence upon these various controverted facts. The jury has determined each and all of these issues, and the evidence in the record supports the verdict of the jury; and the evidence being in conflict upon these various issues of fact, and the jury having found upon the questions, we will not disturb the verdict of the jury.

Counsel for appellant make the contention that parol evidence was received which varied and contradicted a written accord and satisfaction had between appellant and respondent. An examination of the record, however, shows that no exception was taken to this evidence. The trial court evidently treated the writing to which the evidence was offered as a mere receipt for services, and that such receipt was only prima facie evidence of the things contained in it, and that parol evidence was admissible to show that it was only a part of the contract. The matter was covered by the instructions of the court, and there was no error in the court's permitting such testimony. *Wigmore*, Ev. § 2430; *Stein v. Fogarty*, 4 Idaho, 702, 43 Pac. 681; *Barghoorn v. Moore*, 6 Idaho, 531, 57 Pac. 265. Counsel for appellant also contend "the court erred in charging the jury in language unintelligible to the jury." We have examined the instructions, and are satisfied that, when the instructions are all taken to-

gether, they did not mislead or misdirect the jury. The jury seems to have understood the instructions and reached a verdict supported by substantial evidence.

The judgment is affirmed. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

(35 Okl. 672)

MIDLAND VALLEY R. CO. v. STATE et al.
(Supreme Court of Oklahoma. Jan. 28, 1913.
Rehearing Denied March 18, 1913.)

(Syllabus by the Court.)

CARRIERS (§§ 11, 12*)—LIVE STOCK SHIPPERS—DIPPING OF CATTLE—COMPENSATION —"PUBLIC SERVICE."

The dipping of cattle in its vats by a railroad company engaged in transporting cattle over its line from points below the quarantine line, to points above the quarantine line, before the same were turned loose in pastures, when such dipping was pursuant to quarantine regulations prescribed by law, is so cognate to and involved in the carriage and delivery of such cattle by the railroad company to patrons along its line as to constitute a part of its public service.

(a) This service is a public service, within the meaning of the Constitution of this state, and is subject to the superintending power of the state.

(b) The Corporation Commission has the power, under section 18, art. 9, of the Constitution (section 234, Williams' Anno. Const.), to fix a reasonable charge to be paid by the patrons to the railroad for such service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3, 7-20; Dec. Dig. §§ 11, 12.*

For other definitions, see Words and Phrases, vol. 6, pp. 5822, 5823.]

Appeal from the State Corporation Commission.

Proceeding by the State and others against the Midland Valley Railroad Company. From the judgment, the railroad appeals. Affirmed.

Edgar A. de Meules and Sol H. Kauffman, both of Muskogee, for appellant. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for appellees.

WILLIAMS, J. This appeal seeks to review Order No. 563, made by the Corporation Commission, wherein it was "ordered that the defendant, the Midland Valley Railroad Company, so long as it engages in the dipping of cattle within the state of Oklahoma, shall for the first dipping charge not exceeding fifteen cents per head; all subsequent dipplings not to exceed ten cents per head." Appellant insists that the Corporation Commission was without jurisdiction to make this order.

Section 18, art. 9, of the Constitution, was borrowed from Virginia. See note to section 234, Williams' Anno. Const.

In *Norfolk & Portsmouth Belt Line R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39, it is said: "If the power of the Commission

is limited merely to fixing the rate for carriage, and it is without authority so to regulate that service as to render it ineffective, it is obviously wholly inefficacious with respect to this large class of consignees and shippers."

In that case the order of the State Corporation Commission of Virginia, fixing the charge of placing cars in position to be weighed on consignees' or shippers' individual track scales, located on sidings leading to industries along the line of appellant's railroad, at 25 cents per car for each car, loaded or empty, so placed in position and weighed, was assailed on the ground that said Commission had no authority to fix the charge. The court held that the Commission had authority to regulate the same.

Cattle transported by the appellant from certain points within the state below the quarantine line, but delivered and turned loose at points within the state above the quarantine line, are required to be dipped pursuant to certain quarantine regulations prescribed by law.

It is the custom for the appellant to provide for this dipping prior to said cattle being turned loose at such points of delivery above the quarantine line, and the furnishing of the facilities for the dipping of such cattle by said appellant, therefore, by custom, comes within its duty as a common carrier; and the order made by the Commission is appealable and reviewable in this court. Section 234, Williams' Anno. Const.; Norfolk & Portsmouth Belt Line R. Co. v. Commonwealth, supra.

The evidence discloses that prior to the making of this order by the Commission appellant had been charging 25 cents for the first and 15 cents for the second dipping, and that its dipping an animal costs less than 2 cents.

The order of the Commission is, in part, as follows: "The Commission finds that the defendant delivers to the Osage Nation approximately 75,000 head of cattle annually, which must be dipped before the owners thereof can permit them to run at large in the pastures north of the quarantine line. It appears, by request of the shippers, the railroad company established vats and draining pens adjoining their regular unloading or shipping pens, and by this means cattle could be dipped when they were unloaded and delivered to the shipper at less expense and inconvenience to the shipper than to be driven off of the railroad right of way and dipped at private vats, and, in fact, private vats were not available at all places where cattle were desired to be unloaded.

"The evidence also shows that the defendant charges twenty-five cents for the first dipping and fifteen cents for the second, and where cattle are dipped the third time it charges ten cents. The general manager of the defendant was requested to make a complete tabulated statement, which was by

agreement to be incorporated into the record, which is as follows:

"Statement of Cattle Dipped by Midland Valley Railroad and the Estimated Cost of Dipping, Year Ending June 30th, 1911.

Cattle Dipped.		
	Number of Head.	
First dip	76,794	\$19,199 40
Second dip	20,275	3,041 25
Third dip, total.....	91,548	31,544 80
Cost of Dipping.		
Cost of material and labor charged to dipping vats and dipping cattle.....		2,406 07
10% labor added account supervision.....		240 60
10% labor and account delays to trainmen vats		240 60
Total material, labor and repairs.....		\$ 2,887 28
Value of Dipping Plants.		
Neologany		\$ 2,040 49
Big Heart		836 00
Skiatook		990 31
Blackland		1,187 94
Myers		1,825 00
Total cost		\$ 6,879 74
Depreciation at 20%.....		1,375 95
Interest at 6%.....		412 78
Total cost		\$4,975 61
"Average cost per head \$.0474.		
"Accounting Department July 19, 1911.		
"Correct: F. N. Niles, Asst. Auditor. E. M. Alford, V. P. & G. M."		

"It appears from the evidence in this case that cattle are delivered to the shipper, and, as a matter of convenience, dipping vats have been established by the defendant adjoining its stock pens operated by the railroad company, for which it makes special charges as above set forth.

"If this is a part of common carrier's duties, it can have two objects in performing the service: One to encourage cattle feeders to ship cattle over its line; and, second, for the profit it derives from the dipping thereof. * * *

"Considering that at times there may not be more than two or three car loads to dip, and the necessity of preparing the dipping vat with the solution for small or large amounts, we are of the opinion that fifteen cents per head for the first dipping and ten cents for each additional dipping is sufficient remuneration to be charged, and will yield sufficient profit to pay all expenses and rebuild the vats new annually. * * *

Appellant insists that the order was entered by the Commission on the theory that section 8812 of the Compiled Laws of Oklahoma 1909 applied, and not pursuant to the grant of authority by section 18 of article 9 of the Constitution; and therefore the appellees are bound by that theory, and on that alone may this court sustain the same. That rule has no application in this case.

In Oklahoma Ry. Co. v. St. Joseph's Parochial School, 127 Pac. 1087, decided by this court on November 12, 1912, it is said: "An

order, on appeal, will not be vacated if the record shows proper ground to sustain same, though the Commission, in entering same, gives a ground therefor not tenable under the law. *Hancock v. Youree et al.*, 25 Okl. 460, 106 Pac. 841."

Appellant insists that it did not have 10 days' notice of the time and place, as contemplated by section 234, subd. 3, of Williams' Anno. Const. The record recites that: "Said complaint having been duly served upon said defendant railroad company, said cause was set down for hearing in the office of the Commission at Oklahoma City on the 14th day of June, 1911. And at said date, said cause coming on for hearing before the Commission, the following proceedings were had and testimony introduced therein as follows. * * *"

No objection to any defect in said notice having been interposed, but the defendant having appeared and participated in said hearing by cross-examining the witnesses, the appellant waived such notice. The record recites: "Mr. de Meules: This case was set for hearing on the first day of the last term, at which time we appeared. The complainants not appearing, the Commission entered an order continuing the case; whereupon the witnesses for the railroad departed, and it was opened the next day. The complainants appeared from some misunderstanding, and at that time the Commission took the testimony of the complainants in the absence of the railroad company. We have a transcript of the evidence, and we would suggest to the Commission that the state of evidence is such that we feel that it is only proper that we should be allowed to cross-examine these witnesses. We are here, however, to make what statement we can with reference to the matter now, and would ask at some convenient time that the witnesses be required to appear, so we may cross-examine on some matters. Commissioner Henshaw: Let me see a copy of that testimony. This is in reference to dipping cattle. I remember the case now. The testimony of the witnesses here, as I understand it, is largely a statement of facts, and we can get witnesses today from the agricultural department that know the same as these do, and in that way we can disregard any of the disputed parts of this testimony. I don't care to delay this case longer than this term, if possible, for the purpose of cross-examining these particular witnesses; but if there is any part of this evidence that you desire to contest, why you can do so, and we will either recall these witnesses, or we will call some other witness from the agricultural department. Proceed with your evidence in the case."

Mr. E. M. Alford, the vice president and general manager of the Midland Valley Railroad Company, was then introduced by appellant, and testified in its behalf.

Nowhere in the record was any objection

made on account of any defect in the notice; nor was any continuance asked. There is no merit in this contention. *Hine v. Wadlington et al.*, 27 Okl. 285, 111 Pac. 543; *St. Louis & S. F. R. Co. v. Williams et al.*, 25 Okl. 662, 107 Pac. 428.

The order of the Commission is affirmed. All the Justices concur.

(37 Okl. 85)

ST. PAUL FIRE & MARINE INS. CO. v. PECK.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 330*)—AVOIDANCE OF POLICY—INCUMBRANCE AND LEVIES.

The conditions in a policy of insurance which prohibit incumbrance and levies without the consent of the insurer, declaring the policy void in case of breach of such conditions, is not only legal and conformable to public policy, but reasonable and proper.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 330.*]

2. INSURANCE (§§ 330, 376*) — WAIVER OF RIGHT TO AVOID—POWER OF AGENT.

The conditions in a policy which provide that no local or soliciting agents of the company have power to change, modify, or waive any of the provisions in the policy, are valid as to all policies issued prior to statehood; and in an action on a policy, where it appears that after the issuance and acceptance of the policy, in violation of the express provisions of the policy, the property insured had been incumbered by two separate chattel mortgages, without the knowledge, consent, or implied waiver on the part of the insurer, such policy is void, and the insured cannot recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839, 952-955; Dec. Dig. §§ 330, 376.*]

3. COURTS (§ 150½, New, vol. 12 Key-No. Series)—COUNTY COURT — JURISDICTION—STATUTORY AND CONSTITUTIONAL PROVISIONS.

Section 2, art. 1, c. 27, *Sess. Laws 1907-08*, which gives exclusive, original jurisdiction to the county court in all matters where the amount involved exceeds \$200 and does not exceed \$500, exclusive of interest, is not in conflict with section 12, art. 7, of the Constitution (article 147, Williams' Ann. Const.), and is valid under section 57, art. 5, of the Constitution (article 197, Williams' Ann. Const.).

4. COURTS (§ 121*)—COUNTY COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

Interest forms no part of the amount in controversy, so far as affecting jurisdiction, when the statute defining the court's jurisdiction excludes it *eo nomine* from computation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-426, 428, 450, 452, 458, 459, 466; Dec. Dig. § 121.*]

5. COURTS (§ 121*)—COUNTY COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

A claim for an attorney's fee not provided for in the contract sued upon and not recoverable under the statutes cannot be added to the amount in controversy, so as to give the district court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-426, 428, 450, 452, 458, 459, 466; Dec. Dig. § 121.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Kingfisher County; A. H. Huston, Judge.

Action by S. E. Peck against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed, with instructions to dismiss action.

Houston & Brooks, of Wichita, Kan., and F. L. Boynton, of Kingfisher, for plaintiff in error. D. K. Cunningham and L. R. Weiss, both of Kingfisher, for defendant in error.

HARRISON, C. This suit was filed March, 1909, by S. E. Peck against the St. Paul Fire & Marine Insurance Company to recover on a \$500 policy, wherein defendant insured a certain stallion against loss by lightning. The cause was tried April 10th, and judgment rendered in favor of the plaintiff for \$543. From this judgment and order overruling motion for a new trial, defendant appeals.

Several questions of error are assigned, the most material of which is that after the policy was issued, and without the knowledge or consent of the company and against the express provisions of the policy, the property was incumbered by two separate chattel mortgages, one for \$350 and a later one for \$412. The plaintiff alleged the death of the horse by lightning, alleged a compliance with all the provisions of the policy and conditions precedent to an action, asked judgment for \$500, the face of the policy, and interest from the date of loss, and for an attorney's fee of \$150. Defendant answered upon three grounds: First. That, the amount in controversy being in excess of \$200 and not exceeding \$500, exclusive of interest, the district court had no jurisdiction; that under chapter 27, Sess. Laws 1907-08, exclusive original jurisdiction of the cause was in the county court. The second defense was a general denial. And for the third defense defendant denied any liability under the policy, for the reason that after the policy had been issued, and without the knowledge or consent of the company and against the express provisions of the policy, plaintiff had incumbered the insured property by two separate chattel mortgages, the first for \$350, the second for \$412; that the policy was therefore void, and defendant not liable thereunder.

The policy contained the following provisions: "This entire policy shall be void at the election of the company, if, without the consent of the secretary or general agent of the company indorsed hereon, other insurance is now or shall hereafter be taken out on any of the property above described; or if the property or any part thereof be or become incumbered by lien, mortgage or otherwise, * * * or if any change take place in the title or possession of said property (except by succession by reason of death of the insured) * * *"—and the further provision that no local or soliciting agent is

authorized to waive any of such provisions. Defendant set out these provisions in the answer; and also attached as part of the answer a copy of each of the chattel mortgages against the property, and alleged that both of said mortgages against the property were in force and constituted valid and subsisting liens against said property at the time of the loss, and alleged, further, that defendant had waived none of the provisions of said policy, and had no notice of the incumbrance until after suit was filed. Plaintiff demurred to the third defense, on the ground that it failed to state facts constituting a defense to the action. The demurrer was sustained, the plea to the jurisdiction overruled, and the cause tried upon the issues raised by the petition and general denial. Defendant excepted to the action of the court as to both rulings, and presents same as errors here.

[1, 2] As to whether the court erred in sustaining the demurrer to the third defense depends upon the validity of the provision in the policy prohibiting the incumbrance of the property without the consent of the company and the stipulation that none of the provisions of the policy shall be waived, except by order of the secretary and general manager indorsed on the policy. As to the validity of the incumbrance clause, especially in policies containing the stipulation that the policy shall become void if the property be incumbered without the consent of the company, and the further stipulation that none of the provisions of the policy shall be waived unless by consent of the company indorsed, etc., and that no local or soliciting agent shall have power to waive such provisions, there is very little conflict in the decisions. In fact, the courts, both state and federal, are practically in harmony on this question. In the case of *Atlas Reduction Company v. New Zealand Insurance Company*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, wherein the validity of such provisions is involved, it is said: "Stipulations, such as are contained in this policy, have frequently been subjected to consideration in the courts, and their validity is not open to question. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 512, 10 L. Ed. 1044, 1057; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 463, 14 Sup. Ct. 379, 38 L. Ed. 231, 236; *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 361, 364, 22 Sup. Ct. 133, 46 L. Ed. 213, 234, 236; *Hunt v. Springfield F. & M. Ins. Co.*, 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381; *Forbes v. Agawam Mut. F. Ins. Co.*, 9 Cush. [Mass.] 470; *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. [Mass.] 265, 59 Am. Dec. 145; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682, 691, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; *Meyers v. Germania Ins. Co.*, 27 La. Ann. 63; *Gir-*

ard F. & M. Ins. Co. v. Hebard, 95 Pa. 45; Hutchinson v. Western Ins. Co., 21 Mo. 97, 64 Am. Dec. 218."

Also in *Dover Glass Works v. American Fire Insurance Company*, 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 284, a leading case on the question of validity of such provisions, the Supreme Court of Delaware said: "It is competent for the insurer to prescribe the terms and conditions upon which it will take the proposed risk, provided they are not illegal nor contrary to public policy. The acceptance of these conditions consequently imposes upon the insured the duty of a substantial compliance therewith, and any neglect thereof in any material respect, unless waived or condoned, will relieve the insurer from liability in case of loss, whether it can be traced to such neglect or not. One reason for this is that he has, by agreeing to the terms upon which the insurance was made, shut the door against any inquiry as to the cause of the loss. Another and a more general reason is that, when a right and a duty springing from a contract are united in one of the parties thereto, he must show a performance of the one before he can assent to the other. Are the conditions referred to illegal or contrary to public policy? They are neither. They are not forbidden by any legal precept, either written or unwritten. Certainly, clauses or conditions inserted in a contract, which induce caution as to conduct of either party in respect to the subject-matter thereof, cannot be held as being repugnant to any of the rules and maxims relating to the broad subject of public policy, because anything that stimulates diligence and good faith between contracting parties is highly promotive of the general, as well as the individual, good. The tendency of such limitations upon the liabilities of insurance companies is to diminish the needless destruction of property, and obviate the necessity of increasing the rates of insurance to a point where they are intolerable, in order to cover the disbursements made to unworthy and dishonest persons. The increased cost of insurance, it must be admitted, is due in part to the increased risk occasioned by the fraud or neglect of a certain class of people owning insured property. The good have to suffer for the conduct of the bad. The honest and careful portion of every community have to pay for the carelessness and malafides of their imprudent and evil-minded neighbors. Those who insure, as the plaintiff in this case did, for protection against unavoidable loss and accident, can well afford to submit to the requirements of the most rigid conditions for the sake of curtailing losses which are the result either of gross neglect or the torch of the incendiary. The condition prohibiting incumbrances and levies without the consent of the defendant, declaring the policy to be void in case of a breach thereof, is not only legal and con-

formable to public policy, but reasonable and proper."

This rule is now followed by the great weight of authorities. It is obvious, also, that an adherence to such doctrine must ultimately redound to the benefit of the insured; and the sooner it becomes universal the sooner a menace to property will have been stamped out, and an unjust burden on those who became insured in good faith will have been removed. It must also be observed that, this policy having been issued prior to statehood, the clause, "that no local or soliciting agent of this company shall have power to change, modify or waive any of the provisions in the policy," is valid. See *Phoenix Ins. Co. v. Ceaphus*, 29 Okl. 608, 119 Pac. 583, *Sullivan v. Mer. Town Mut. Ins. Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761, *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325, *Home Ins. Co. of N. Y. v. Ballard*, 32 Okl. 723, 124 Pac. 316, following the rule in *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. It is very clear that under the foregoing authorities the allegations contained in defendant's third defense constituted a valid defense to the action—a defense which, if true, would defeat recovery.

[3] The jurisdictional question arising from the question of the validity of section 2, art. 1, c. 27, Sess. Laws 1907-08, was settled by this court in the case of *Poos v. Shawnee Fire Ins. Co.*, 130 Pac. 153, recently decided, but not yet officially reported. In that case it was held that the statute giving exclusive original jurisdiction to the county court in all matters wherein the amount involved exceeds \$200 and does not exceed \$500, exclusive of interest, is valid.

[4] In the case at bar, however, there are two other questions involved, which were not decided in the *Poos Case*, viz., whether the accrued interest and claim for attorney's fees should be included in determining whether the district court had jurisdiction. We think not. The statute in question specifically bestows exclusive, original jurisdiction on the county court in matters not exceeding \$500, exclusive of interest. It is evident from the language of the statute that accrued interest was intended to be excluded from consideration in determining the amount involved. The rule is well settled that interest is not to be considered in determining the jurisdictional amount, where, by that name, it is expressly excluded by statute. "Interest forms no part of the amount in controversy, so far as affecting jurisdiction when a statute defining a court's jurisdiction excludes it eo nomine from computation." 1 Pl. & Pr. 720, and authorities cited in notes.

[5] As to whether the claim for the \$150 attorney's fee should be included, and thereby give the district court jurisdiction, depends upon whether the attorney's fee was

provided for in the policy, and therefore recoverable under the law, or whether it was merely a fictitious claim, not recoverable under the statute. "It is a well-settled rule, and, of course, in harmony both with reason and justice, that one cannot knowingly allege a fictitious amount for the sole purpose of bringing his case within the jurisdiction of the court, as such would manifestly be a fraud upon that jurisdiction." 1 Pl. & Pr. 710, and authorities cited in support of the text.

In the case at bar the policy sued on makes no provision for attorney's fees; nor does the statute provide for the recovery of an attorney's fee in such case. It follows, therefore, that the claim for an attorney's fee, being one which could not be recovered under the statute, did not augment the amount involved, so as to give the district court jurisdiction.

Therefore the judgment of the court below is reversed, with instructions to dismiss the action without prejudice.

PER CURIAM. Adopted in whole.

(9 Okl. Cr. 84)

WADSWORTH v. STATE

(Criminal Court of Appeals of Oklahoma.
March 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—BRIEFS—CITATIONS OF AUTHORITY—STATE REPORTS.

In citing the decisions of the Supreme Court of Oklahoma or of this court in their briefs attorneys must give the page and volume of the state reports on which the cases relied upon can be found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. JURY (§§ 82, 114*)—PETIT JURY PANEL—CHALLENGE—JURY COMMISSIONERS—MISCONDUCT.

(a) A challenge to the panel of petit jurors upon the ground of misconduct of the jury commissioners must state distinctly what the jury commissioners did in the selection of the jurors which was not authorized by law.

(b) A challenge to the panel can only be founded upon a material departure from the directions of the law in respect to the drawing and the returning of the jury, or the intentional misconduct of the sheriff in the matter of summoning the same, and it must be shown in the challenge that the defendant has suffered some material prejudice thereby.

(c) A substantial compliance with the law as to the manner in which jurors shall be selected and summoned is all that is required.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 282, 307-309, 331, 332, 348, 359, 367, 380, 541-550; Dec. Dig. §§ 82, 114.*]

3. CRIMINAL LAW (§ 547*)—EVIDENCE—FORMER TESTIMONY OF WITNESS SINCE DECEASED.

(a) Where a witness has testified at an examining trial and has been cross-examined by the opposing party, and his evidence is taken down and signed by him, or is taken in short-

hand and transcribed without signing, and is filed with the clerk of the district court by the examining magistrate, such written statement upon proof of the death of such witness may be used as a deposition without further identification or verification.

(b) Where a witness has testified at an examining trial and has been cross-examined by the opposing party, and his testimony is taken down by a stenographer, but the provisions of section 6623, Comp. Laws 1909, have not been complied with, a purported copy of said testimony is not admissible in evidence unless the stenographer who took down the testimony of said witness testifies that such purported copy of the evidence is a true and correct copy of his notes of the testimony of such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237-1246; Dec. Dig. § 547.*]

4. CRIMINAL LAW (§ 312*)—HOMICIDE (§§ 14, 101, 114*)—SUDDEN AFFRAY—IMMINENT PERIL—INTENT—JUSTIFICATION.

(a) Where a defendant voluntarily and willfully enters into a mutual combat in which he intentionally takes the life of his adversary, such killing will be none the less murder or manslaughter because the difficulty arose suddenly, or because the defendant may have been reduced to imminent peril during the progress of said difficulty.

(b) It is the intention which prompts the act, and not the length of its duration, which makes the unlawful killing of a human being criminal.

(c) Every man is presumed in law to intend the natural and reasonable consequences of his acts, unless the circumstances raise a reasonable doubt as to what his intentions were.

(d) Next to honor, human life is the most precious thing this side of heaven. No man with unhallowed hands can be permitted to intentionally break into the sacred house of life and shed its priceless stream and then come clear upon the ground that he acted only upon a sudden impulse or difficulty.

(e) The intentional taking of human life can only be justified by the mandate of the law or upon the ground of necessity, but this necessity must not be caused by the intentional fault or wrongdoing of him who attempts to plead it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 28-28; Dec. Dig. § 312;* Homicide, Cent. Dig. §§ 19, 20, 131, 153, 154; Dec. Dig. §§ 14, 101, 114.*]

Appeal from District Court, McIntosh County; Preslie B. Cole, Judge.

Pude Wadsworth was convicted of manslaughter, and he appeals. Affirmed.

There are no questions involved in this case which require a statement of the testimony.

Claude A. Niles, J. B. Lucas, and Charles Buford, all of Checotah, for appellant. Charles West, Atty. Gen., for the State.

FURMAN, J. [1] First Counsel for appellant have filed an extensive brief in which they refer in general terms to a number of cases decided by this court, but they have not in a single instance cited the page and volume of the state reports on which these decisions can be found. We cannot consider such citations. The state has gone to the expense of officially publishing the reports of this court and of the Supreme Court, and these reports are conclusive as to what has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

been decided and can be purchased for the nominal price of \$1.50 each. No lawyer has the least excuse for being without these reports, and, if he wishes to practice in this court, when he cites any of its decisions or any of the decisions of the Supreme Court he must cite the page and volume of the state reports upon which such cases can be found. We have frequently called attention to this matter. We are too much crowded with work to enable us to have time for hunting through other books for what has been decided in Oklahoma. Our own reports are published under our personal supervision and are conveniently at hand, and when proper citations are made we can turn to them without the loss of a minute's time. When lawyers want their citations examined, they must conform to this rule.

[2] Second. When this cause was reached for trial, counsel filed what they call a challenge to the panel of petit jurors. This alleged challenge covers nearly five pages of typewritten matter, in which is set out minutely and in great detail their objections to the jury. They allege a great many things which they claim were not done by the jury commissioners, but they do not allege what the jury commissioners did do in selecting said jurors. They also object to certain jurors summoned from certain townships on account of prejudice existing in such townships against appellant. The matters of fact alleged in said motion are not verified by affidavit.

Sections 6794 and 6795, Comp. Laws 1909, are as follows:

"Sec. 6794. Challenge to panel.—A challenge to the panel is an objection made to all the trial jurors returned, and may be taken by either party.

"Sec. 6795. Cause for challenge.—A challenge to the panel can be founded only on a material departure from the forms prescribed by law, in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn, from which the defendant has suffered material prejudice."

This court has always held that a substantial compliance with the law directing the manner in which jurors shall be selected and summoned is all that is required. When this is done the law is satisfied. If any jurors selected on a panel are prejudiced, this matter cannot be inquired into on a challenge to the panel unless there was unfairness or prejudice in the selection or summoning of said jurors. Otherwise the prejudice of jurors can be reached by a motion for a change of venue or by a challenge to individual jurors when examined upon their voir dire. We think the trial court did not err in overruling the challenge to the panel.

[3] Third. In their brief counsel for appellant say: "The trial court erred in sustaining the objection of the state to the introduction of testimony offered by the plaintiff relative

to the testimony of a witness who testified at the examining trial and died before the trial in the district court." The record touching this matter shows that H. R. Reubelt was placed upon the stand as a witness for appellant. He testified that he attended the examining trial of appellant at Checotah; that he heard one Cal Backbone testify. It was admitted by the state that the witness Backbone had died before the final trial of appellant. The witness was then handed a typewritten statement and was asked if he recognized that as the testimony of said witness Backbone at the examining trial of this cause. He replied: "It appears to be; that he may have testified to some things in the statement and he may not have testified to others." The witness testified as remembering that the witness Backbone was sworn and testified in behalf of appellant at the preliminary trial and was cross-examined by the county attorney. He was of the opinion that the paper offered in evidence was a copy of the testimony of said witness Backbone, but was not absolutely certain of it.

J. B. Lucas, a witness produced by appellant, testified that he was present when the testimony of Cal Backbone was taken down by the stenographer; that the stenographer had given him this paper as the testimony of the witness Backbone; that he has had this paper in his possession ever since; that the stenographer prepared three copies of this evidence; and that the copy offered in court is the copy handed witness by said stenographer.

C. H. Tully testified that he was present at the examining trial and heard the testimony of Cal Backbone, but he could not to save his life say that the paper offered in court was the testimony of Cal Backbone. The court then ruled that the paper offered in evidence would not be admissible unless the stenographer who made it was present and testified to transcribing it from his notes; that, if the stenographer who made it identified it as being a true and correct copy of his notes, it would be admissible. The court excluded the written instrument offered as the testimony of the witness Backbone, to which appellant reserved an exception.

Where the testimony of a witness on an examining trial is taken down and signed by him, or is taken in shorthand and transcribed without signing, and is filed with the clerk of the district court by the examining magistrate, such written statement upon proof of the death of such witness may be used as a deposition, without further identification or verification.

Sec. 6623, Comp. Laws 1909, is as follows: "Preliminary examinations.—First, The witnesses must be examined in the presence of the defendant, and may be cross-examined by him. On the request of the county attorney, or of the defendant, all the testimony must be reduced to writing in the form

of questions and answers and signed by the witnesses, or the same may be taken in shorthand and transcribed without signing, and in both cases filed with the clerk of the district court, by the examining magistrate, and may be used as provided in section 6676 of this act. In no case shall the county be liable for the expense in reducing such testimony to writing, unless ordered by the county attorney."

Sec. 6676, Comp. Laws 1909, is as follows: "In the investigation of a charge for the purpose of presenting an indictment or accusation, the grand jury may receive the written testimony of the witnesses taken in a preliminary examination of the same charge, and also the sworn testimony prepared by the county attorney, without bringing those witnesses before them, and may hear evidence given by witnesses produced and sworn before them, and may also receive legal documentary evidence."

The paper purporting to be the evidence of the witness Backbone given at the examining trial, not being in compliance with section 6623, above quoted, could not have been received as a deposition and used for any purpose as evidence unless the stenographer who took the testimony of said witness at said trial in open court and under oath identified it as being a true and correct copy transcribed from his notes.

The court therefore did not err in excluding the testimony offered.

As to whether or not appellant might have proven, had he attempted to do so, what the testimony of said witness Backbone was at the preliminary trial, the said witness having died, by persons who were present and heard his testimony and could swear to the substance of it from memory, is not presented for decision, for no such offer was made in the trial court. Many authorities hold that this can be done. We do not now know of any reason why, upon a proper showing, it should not be permitted; but, as this question has not been discussed or brought before us, we will not attempt to decide it at the present time.

[4] Fourth. The court, among other things, instructed the jury as follows: "The defendant does not deny the killing of the deceased, as heretofore stated, at the time and in the manner charged in the information, but claims that if he did so then he was acting in self-defense, which in law means the right to protect one's person against an attack, injury, or danger produced by another. The right to defend one's self against any danger or attack not of his own seeking is an inherent right, and which the law not only concedes, but guarantees to all men. But the law does not permit a man to voluntarily seek or invite a combat. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the de-

fendant, by any willful act of his own, and where the accused voluntarily and of his own free will entered into it, no matter how imminent his peril may become during the progress of the difficulty. Nor is any one justified in using any more force than is necessary, as it may appear to him at the time." To this instruction appellant reserved an exception. In objecting to this instruction counsel for appellant in their brief say: "This instruction, boiled down, as we see it, deprives the defendant of the defense of excusable homicide; that is, if he voluntarily entered into the difficulty, no difference how suddenly it arose, nor how imminent his peril may have become during the progress of the difficulty, he could not avail himself of the right of self-defense. This it seems to us violates one of the most elementary rules of the law of homicide."

If appellant had been convicted of murder, the instruction given might have constituted reversible error, because it does not clearly draw the distinction between mutual combats and difficulties voluntarily sought, invited, and entered into by a defendant merely for the purpose of having a personal difficulty and without any intention of killing or inflicting serious bodily injury upon his antagonist, in which event the killing would only constitute manslaughter, or when such difficulty was entered into where the defendant knew or had reason to believe it might result in death or serious bodily injury to himself or to his antagonist, or where the defendant entered into the same with the intention of killing his antagonist, in which event the killing would constitute murder. The same principle of law largely controls the doctrine of mutual combat which controls in cases of provoking a difficulty.

In the case of *Koozer v. State*, 7 Okl. Cr. 336, 123 Pac. 554, this court said: "To prevent misapprehension from the first paragraph in this instruction, we desire to state that, although a defendant may not have any intention of provoking a difficulty with the deceased, yet if the jury should be satisfied beyond a reasonable doubt, from the language or conduct of the defendant, or from all of the facts and circumstances in evidence, that the defendant and the deceased voluntarily—that is, willfully and without real or apparent necessity—engaged in a mutual combat knowing, or having reason to believe, that it would or might result in death or serious bodily injury to either of such parties, and death ensued from such conflict, then the survivor could not plead self-defense and would be guilty of murder; but if such a combat took place, and the defendant did not know or have reason to believe that it would or might result in death or serious bodily injury to either or both of such parties, and if the defendant without intending to kill or inflict

serious bodily injury upon the deceased struck the fatal blow, then the defendant would be guilty of manslaughter, and in either case it would be immaterial as to who struck the first blow or made the first attack. It is the law that no man can take human life upon a necessity which he wrongfully and willfully assisted to create. * * * The greatest defect in this instruction is that it should have gone further and told the jury that, if they found from the evidence beyond a reasonable doubt that the appellant used such insulting language to the deceased for the purpose of provoking him into a difficulty and furnishing the appellant a pretext for killing or doing him serious bodily injury, and that thereby a combat ensued in which the appellant killed the deceased, then the appellant would be guilty of murder; but, if appellant used such language toward the deceased for the purpose of bringing on a difficulty without any intention on the part of appellant to kill the deceased or do him serious bodily injury, then the appellant would be guilty of manslaughter. * * * We desire to emphasize the fact that, in all trials for murder in which the doctrine of provoking the combat arises, the court should always clearly instruct the jury that, if they are satisfied from the evidence beyond a reasonable doubt that the defendant sought, provoked, or occasioned the difficulty with the deceased for the purpose of killing him or inflicting serious bodily injury upon him, then in all such cases such defendant is guilty of murder if he kills the deceased in such combat, it matters not how hard pressed he might have been himself therein, unless before the fatal blow was struck or shot was fired the defendant in good faith seeks to abandon or withdraw from such combat. But where a defendant seeks, provokes, or occasions a difficulty with the deceased without any intention of killing or inflicting serious bodily injury upon the deceased, but merely for the purpose of inflicting personal chastisement upon him, and such combat ensues in which the defendant kills the deceased, then his offense is manslaughter. The line of demarcation between murder and manslaughter is the character of the intention with which a defendant provokes a fatal difficulty, and this intention is to be gathered from the facts and circumstances in evidence. See *Boutcher v. State*, 4 Okl. Cr. 576, 111 Pac. 1006."

In cases in which a defendant voluntarily engaged in a mutual combat in which he kills his adversary, the line of demarcation between murder and manslaughter depends upon the character of the intention with which the defendant entered into such conflict as hereinbefore explained. It therefore might be possible that under this instruction a defendant might be convicted of murder when under the evidence he should not be

convicted of more than manslaughter. But this objection does not arise in the present case because the appellant was convicted of manslaughter.

Section 2288, Comp. Laws 1909, defines "excusable homicide" as follows: "Homicide is excusable in the following cases: (1) When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent. (2) When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat provided that no undue advantage is taken, nor any dangerous weapon used, and that the killing is not done in a cruel or unusual manner." This law cannot be invoked by appellant because he killed the deceased by shooting him with a double-barrel shotgun, which was a dangerous weapon.

Sections 2269 and 2270, Comp. Laws 1909, are as follows:

"Sec. 2269. Design to effect death inferred.—A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed.

"Sec. 2270. Premeditation.—A design to effect death sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution."

It would indeed be a monstrous doctrine, pregnant with danger to human life and utterly destructive of the peace and good order of society, for this court to hold that, because appellant killed the deceased in a sudden difficulty, he should be acquitted upon the ground of excusable homicide. This would be but to license desperate men to go around armed with deadly weapons and shoot down their fellow men upon the slightest provocation and escape punishment, provided only the shooting was done upon a sudden difficulty. This would be the rule of anarchy, not of law. It is good law and good morals that, if men unnecessarily and intentionally kill each other, it is none the less murder, because such intention may be formed instantly before the commission of the act. It is the intention which prompts the act, and not the length of its duration, which makes the act of killing murder in such cases. It is also good law and good morals that men are presumed to intend the natural and reasonable consequences of their acts, and that an intention to kill arises from the act of killing, unless the circumstances raise a reasonable doubt whether such design in fact existed.

We therefore cannot agree with counsel for appellant, upon the objection which they present, that the instruction complained of violates the most elementary rules of the law of homicide. On the contrary, we think that, if the doctrine for which they contend be conceded, it would place a premium upon

the most cowardly and cold-blooded kind of assassination, namely, shooting a man down in a sudden difficulty without giving him an opportunity to prepare to defend himself, or to even say, "God have mercy on my soul." This doctrine would make butchers of men and a human slaughterhouse of the state of Oklahoma. It would paint our state red with innocent blood and fill it with the cry of widowhood and the wail of orphanage. Next to honor, human life is the most precious thing this side of heaven. No man with unhallowed hands can be permitted to intentionally break into the sacred house of life and shed its priceless stream and then come clear on the ground that he acted only on a sudden impulse or difficulty. We feel that we cannot too strongly condemn this idea. The intentional taking of human life can only be justified by the mandate of the law, or upon the ground of necessity. This necessity must not be caused by the intentional fault or wrongdoing of him who attempts to plead it. This is the philosophy of the law of self-defense pressed into a nutshell. We know that the law of self-defense is often abused. This is true of every defense provided for by law. Perfection is not an attribute of human nature. Perfect laws cannot be made by imperfect men. Perfect men do not make the laws, and perfect courts and juries do not construe and enforce them. Under the very best system possible, individual instances in which there will be a miscarriage of justice will arise; but we believe that, if we recognize the doctrine now contended for by counsel for appellant, it would result in a wholesale miscarriage of justice in Oklahoma.

We therefore hold that, as applied to the evidence in this case, the instruction given does not constitute reversible error.

Fifth. It is not claimed by counsel for appellant in their brief that the verdict is contrary to the evidence. It is therefore not necessary to recite and discuss the testimony in detail, further than to say that from the testimony of the state we think that the evidence clearly sustains the verdict and that appellant should congratulate himself upon the fact that he escaped a conviction for murder.

We find no material error in the record.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 66)

CAUDILL v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1131*) — APPEAL — DISMISSAL.

An appellant has the right to dismiss his appeal whenever this can be done without prej-

udice to the rights of the state and the administration of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

2. CRIMINAL LAW (§ 1110*) — APPEAL — REMAND WITH DIRECTIONS.

Where there is a variance between the verdict of the jury and the sentence of the court, or whenever the judgment is incomplete, which can be corrected without depriving the appellant of a substantial right, it is the duty of the Attorney General to file a motion to remand the cause, with directions to the trial court to correct its judgment and make it conform to the verdict and the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903-2917, 2919; Dec. Dig. § 1110.*]

3. CRIMINAL LAW (§ 1208*) — CONVICTION — PUNISHMENT — EFFECT OF STATUTES.

A judgment of conviction and sentence must conform to the punishment prescribed, and be enforced in conformity with the statute. In cases of conviction for violating the prohibitory liquor law, the punishment must be both by imprisonment and fine, within the terms prescribed by the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.*]

Appeal from Custer County Court; J. C. McKnight, Judge.

W. M. Caudill was convicted of a violation of the prohibitory law, and appeals. Dismissed, with directions.

Henry Bulow and George T. Webster, both of Clinton, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. [1] The appellant has filed a motion to dismiss this appeal, which he unquestionably had the right to do. The state has filed a motion to remand the case, with directions to the trial court to correct the judgment, which it also had the right to do.

[2] In the case of *Wood v. State*, 4 Okl. Cr. 436, 112 Pac. 11, this court said: "All judgments and sentences of the court must follow and be based upon the verdict of the jury. Where there is a variance between the verdict of the jury and the sentence of the court, it must appear from the record that such variance cannot be corrected without depriving the defendant of a substantial right, before the conviction will be set aside, but the cause will be remanded to the lower court for resentencing."

In the case of *Ex parte Mingle*, 2 Okl. Cr. 710, 104 Pac. 69, Judge Doyle, speaking for the court, said: "It is apparent from the record before this court that there is a defect in the judgment and the sentence. It does not include imprisonment at hard labor, the penalty prescribed by the law. This should be corrected by a nunc pro tunc order. Courts in all civilized countries are established for the dispatch of public business, and are not to be circumscribed by legal technicalities in this rapid and advanced era by the rusty usages of the past, but, adapt-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing themselves to the progressive march of civilization, must conform their rules of procedure to meet the necessities of the age."

In the case of *Ex parte McClure*, 6 Okl. Cr. 241, 118 Pac. 591, Judge Doyle again said: "A judgment of conviction and sentence must conform to the punishment prescribed and be enforced in conformity with the statute."

In the case of *Stells v. State*, 7 Okl. Cr. 391, 124 Pac. 76, this court said: "It is an outrage on law and justice, and a crime against society, for appellate courts to turn criminals loose who have been legally proven guilty, or to send their cases back to be retried at the expense of the people upon legal quibbles which are without substantial justice, and which are only shadows, cobwebs, and flyspecks on the law."

In the case of *McCormick v. State*, 71 Neb. 505, 99 N. W. 237, the Supreme Court of Nebraska said: "Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment against him, it is the proper practice, and this court has the power, after setting aside the void or erroneous judgment, to remand the case and the accused, * * * with instructions to render judgment on the verdict in the manner provided by law. An ineffectual attempt of the district court to render a judgment on a verdict, according to the provisions of the law, does not deprive that court of the power to pronounce a valid judgment against the accused."

[3] Appellant was found guilty by the jury of having violated the prohibitory liquor law of the state; and the question of punishment was left to the court. By dismissing his appeal, the appellant has waived and abandoned all objections which he might have urged to the proceedings up to and including the verdict. Under the law, the judge had no alternative, but it was his imperative duty to assess the punishment of appellant at a fine of not less than \$50 nor more than \$500, and imprisonment for the period of not less than 30 days nor more than six months. Both such fine and imprisonment must be assessed, and no judgment in such cases complies with the law which omits either one or the other. We presume that the trial judge omitted to assess imprisonment against appellant as a part of his punishment from an oversight, for, if willful, it would have constituted such official misconduct as would justify proceedings for removal from office. It is therefore our duty to sustain the motion made by the appellant to dismiss the appeal, and also to sustain the motion made by the state to remand the cause, with directions to the trial court to correct its judgment.

It is therefore ordered that the appeal be dismissed, and the case be remanded to the county court of Custer county, with directions that the court assess the punish-

ment of appellant at both such fine and imprisonment, within the terms of the law, as in its discretion it may deem proper.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 55)

MILLER v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 18, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 28*) — DEFENSES — INTOXICATION.

A request for an instruction, to the effect that the defendant should be acquitted if the jury should believe from the evidence that at the time the fatal blow was struck the defendant was too drunk to form a criminal intent, was rightly refused.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 44-46, 133; Dec. Dig. § 28.*]

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

Where the instructions requested, so far as legal and pertinent, were fully and fairly covered by the instructions given, the instructions requested were rightly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. CRIMINAL LAW (§ 1174*)—TRIAL—TAKING INDICTMENT TO JURY ROOM.

A judgment will not be reversed because the jury were permitted to take to the jury room the indictment with the verdict of guilty, rendered at a former trial, indorsed thereon, where the attention of the court was not called to the fact until the jury returned their verdict, and where the affidavits of five jurors are to the effect that they did not see the verdict of the former trial on the indictment, and that this fact was not mentioned in the jury room during their deliberations, and that, so far as affiants know, no member of the jury noticed the verdict, or knew anything about it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3170-3178; Dec. Dig. § 1174.*]

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW (§ 20*)—"WILLFULLY."

The word "willfully" is synonymous with "intentionally," "designedly," "without lawful excuse"—that is, not "accidentally."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 21, 24, 25; Dec. Dig. § 20.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7468-7481.]

Appeal from District Court, Le Flore County; Malcolm E. Rosser, Judge.

Davis Miller was convicted of manslaughter, and appeals. Affirmed.

C. E. Dudley, of Antlers, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and C. J. Davenport, of Oklahoma City, for the State.

DOYLE, J. The plaintiff in error was indicted in the United States Court in the Indian Territory for the Central District, at Antlers, for the murder of Sam Wright on August 18, 1906.

The case was pending in said court at the time of the admission of Oklahoma as a

state, and was transferred by operation of law to the district court of Pushmataha county. His trial was there had, which resulted in a conviction of manslaughter, and the judgment was appealed to this court and reversed and remanded. *Miller v. State*, 3 Okl. Cr. 575, 107 Pac. 948.

When the case was again called for trial, a motion for a change of venue was made, and the same was granted and the case transferred to the district court of Le Flore county. The trial resulted in a verdict and conviction of manslaughter. April 14, 1911, in accordance with the verdict, the defendant was sentenced to be imprisoned in the state penitentiary for a term of $3\frac{1}{2}$ years, and to pay a fine of \$300. An appeal was perfected by filing in this court, October 7, 1911, a petition in error with case-made.

[1] Three alleged errors are relied upon as grounds for a reversal of the judgment of conviction. The first two are that the court erred in refusing to give two requested instructions, which read as follows:

"Gentleman of the jury, if you find from the evidence that the defendant, Davis Miller, unlawfully and willfully, but without malice, struck the blow or blows which caused the death of the deceased, or, though he did not strike the fatal blow or blows himself, was present aiding and abetting the person or persons who did strike the fatal blow or blows, it will be your duty to convict of manslaughter, unless you should believe from the evidence that at the time the blow or blows were struck which resulted in the death of the deceased the defendant was in a state of intoxication, and was too drunk to form a criminal intent."

"Gentlemen of the jury, I have instructed you; every person who unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures, another, of which striking, stabbing, wounding, shooting or other injury such other person dies, is guilty of manslaughter, and in this connection I charge you that the word 'willfully' means, not merely voluntarily, but with bad intent."

Upon this phase of the case the court instructed the jury as follows:

"(4) Every person who unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures, another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, is guilty of the crime of manslaughter."

"(5) The term 'willfully' means intentionally, designedly, or without lawful excuse. To make a person guilty of manslaughter, he must have willfully done the act which results in death, but it is not necessary that he should have intended to kill. If he willfully did the act which caused the death, a defendant would be guilty of manslaughter, whether he intended to kill or not."

"(6) Now, in this case, if you find from the

evidence, beyond a reasonable doubt, that the defendant, Davis Miller, in what is now Pushmataha county and state of Oklahoma, at any time within three years next before the finding of the indictment in this case, unlawfully and willfully struck, wounded, or otherwise injured Sam Wright, from the effects of which striking, wounding, or injuring Sam Wright died, it will be your duty to convict the defendant of manslaughter."

It will be noted that the court followed the federal statutes in defining manslaughter, and the only complaint is that the court should have added these words: "Unless you should believe from the evidence that at the time the blow or blows were struck which resulted in the death of the deceased the defendant was in a state of intoxication, and was too drunk to form a criminal intent."

At most, a state of intoxication rendering the defendant incapable of forming a criminal intent would only reduce murder to manslaughter.

In Wharton on Homicide (3d Ed.) p. 809, it is said: "Homicide committed when the accused was so intoxicated that no intent to commit the crime of murder could have existed, however, not being murder in the first degree, is either manslaughter or murder in the second degree. Intoxication cannot operate as an entire exemption from criminal responsibility, and it is not conclusive against the existence of criminal intent. At the utmost it only extenuates the crime from murder to manslaughter, and it does not do this as a matter of law."

In *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112, the Supreme Court of the United States, in speaking of the action of the trial court in refusing requested instructions, said: "This instruction was refused, because it had been covered by the instructions given. In those instructions the jury were distinctly told that if the defendant, at the time of the killing, although not insane, was in such a condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or to do the act that he did do, the grade of his crime would be reduced to manslaughter."

In *United States v. Meagher* (C. C.) 37 Fed. 875, loc. cit. 881, Judge Maxey discusses the question as follows: "There is another point to which your attention is directed, and that is intoxication. There is evidence before you tending to show that at the time of the killing defendant was laboring somewhat under the influence of liquor. You are instructed that intoxication is no excuse for crime, but it may be considered to discover the specific intent which actuates a party in the commission of the offense, and thus it may sometimes reduce the offense of murder to manslaughter; and the rule is thus stated: 'Where the question of a specific intent is essential to the commission of a crime, * * * the fact that an offender was drunk when he did the act which, being coupled

with that intention; would constitute the crime should be taken into account by the jury in deciding whether he had that intention.' But this excuse is to be received with great caution, and the question is left for the jury to determine whether the defendant's mental condition was such that he was capable of a specific intent to take life."

In 12 Cyc. 170 the responsibility of a person who has voluntarily become drunk is thus stated: "It is a well-settled, general rule that voluntary drunkenness at the time a crime is committed is no defense. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible." See, also, *Carney v. United States*, 7 Ind. T. 248, 104 S. W. 606.

The rule is settled that evidence of intoxication is admissible only as bearing upon malice or lack of malice; and since the defendant was convicted of manslaughter, wherein malice is not essential, there is no error. The court, in instructing the jury on manslaughter, followed the definition, as it appears in section 5341, United States Comp. Statutes 1909, and also instructed the jury that "the term 'willfully' means intentionally, designedly, or without lawful excuse."

[4] In the opinion in this case, first here on appeal, this court quoted from *O'Barr v. United States*, 3 Okl. Cr. 819, 105 Pac. 988, 139 Am. St. Rep. 959, as to the meaning of the word "willfully," as follows: "It is a synonymous term with 'intentionally,' 'designedly,' 'without lawful excuse'—that is, not accidentally."

[2] We think the instructions given by the court fairly cover the case.

[3] Second. Next, it is argued that the court erred in giving to the jury the original indictment, upon which was indorsed the verdict of the jury when the case was first tried. The recital in the case-made as to this is as follows: "The indictment was given to the jury by the court with the instructions, and no one's attention was called to the fact that the verdict of a former jury was on the indictment. When the jury returned their verdict, it was discovered that the jury had the verdict of the former trial. The defendant then protested, and objected to the jury having had said indictment and verdict; said objection having been made as soon as the defendant discovered that the jury had been in possession of said verdict."

There is no attempt to show that the jury were influenced by this inadvertence. In fact, the affidavits of five of the jurors in the case are as follows: "I was a member of the jury that tried Davis Miller in the case of the United States of America v. Davis Miller, and that I did not see the verdict of his former trial on the indictment, and did not know that he had ever been convicted of the offense charged in the indictment. The verdict on the indictment was not mentioned in the jury room during the deliberation of the

jury, and, so far as I know, no member of the jury saw the verdict on the indictment, or knew anything about it."

Counsel cite only one case (*Green v. State*, 38 Ark. 304), and that does not hold such action of the court is error. The third paragraph of the syllabus is as follows: "It is better practice not to give to the jury in a criminal case, upon retirement, an indictment on which is indorsed a verdict of guilty at a former trial."

In *Lancaster v. State*, 36 Tex. Cr. R. 16, 21, 35 S. W. 165, loc. cit. 167, the Court of Criminal Appeals of Texas said: "It is also urged that the case should be reversed, because the jury were permitted to take out, on the back of the indictment, a verdict of a former jury in the case, which, it was claimed, was legible; and in this connection a motion was made to have the original indictment sent to this court. We find an indictment with the record, but there is no certificate of the clerk to the same. An inspection of this indictment, however, does not indicate that such verdict, as claimed, is legible and can be read by the naked eye. Moreover, there is in the record the certificate of the judge to the same effect, and the affidavits of three of the jurors. Said affidavits go further, and show that, in their presence, the matter of a former verdict indorsed on the indictment was not discussed or mentioned by any of the jurors in their presence. We do not think there is anything in the appellant's contention."

The defendant did not produce any juror for the purpose of proving that the jury either saw, considered, or were influenced by the verdict returned in the first trial. The five jurors produced by the state swear that they did not see the verdict, did not know defendant had ever been convicted, and the verdict was not mentioned during the jury's deliberation. These facts bring the case clearly within the rule announced in the Texas cases.

In *State v. Tucker*, 75 Conn. 201, 52 Atl. 741, the court held: "On a criminal prosecution in the court of common pleas, failure to remove the record of the judgment of conviction in the town court from the file given to the jury, or direct them not to regard it, was not prejudicial to the defendant, where no objection was made until after verdict."

In *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875, it is said: "Where three were jointly indicted for a felony, and one had been tried and convicted, and the verdict of 'guilty' was written on the indictment, and on the trial of another one of the three the said indictment was taken by the jury to their room, while they were considering their verdict, and the prisoner moved the court to send for the indictment and take it from the jury, and the court denied the motion, held no error."

In *Small v. State*, 105 Ga. 669, 675, 31 S.

E. 571, loc. cit. 574, the Supreme Court of Georgia said: "The question of practice to which the sixth headnote relates has been several times considered by this court. If a party desires a verdict rendered at a former trial concealed from inspection by the jury, he should present a request to this effect."

No prejudice is shown, and none will be presumed. The action of the court in giving the jury the original information with the former verdict thereon was through inadvertence.

This disposes of all questions presented. No error appears, and it seems to us the defendant had a fair and legal trial. It follows that the judgment should be affirmed.

The judgment of the district court of Le Flore county is therefore affirmed. Mandate forthwith.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 1)

WATSON v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 4, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 121, 1150*)—APPEAL—GRANT OF CHANGE OF VENUE.

An application for a change of venue is addressed to the sound discretion of the court, and, unless an abuse of this discretion is shown, the judgment will not be reversed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 3044; Dec. Dig. §§ 121, 1150.*]

2. CRIMINAL LAW (§ 134*)—CHANGE OF VENUE—COUNTER AFFIDAVITS.

On an application for a change of venue, on the ground "that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein," the court may permit the introduction of counter affidavits for the purpose of contesting the grounds of the application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.*]

3. CRIMINAL LAW (§ 1166½*)—CHALLENGE TO PANEL—HARMLESS ERROR.

A challenge to the panel on the ground that only two jury commissioners participated in selecting the jury list, and that the names from the municipal townships were not selected in proportion to the voting strength of such townships, is insufficient, unless it is shown that the irregularities were such that the defendant has suffered material prejudice, as prescribed by section 6795, Procedure Criminal (Comp. Laws 1909).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.*]

4. JURY (§ 72*)—INSUFFICIENCY OF REGULAR PANEL—OPEN VENIRE.

At any time during the term of court after the regular panel has been drawn and summoned, when for the trial of any cause the regular panel of jurors shall appear to be in-

sufficient, as a matter of discretion with the court, the jury may be completed from talesmen, or the court may direct that an open venire be issued to the sheriff or his deputy for such number of jurors as may be deemed necessary.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 333-347; Dec. Dig. § 72.*]

5. CRIMINAL LAW (§§ 1150, 1152*)—APPEAL—HARMLESS ERROR.

Where a petition in error assigns error on every proceeding had upon the trial, but the brief does not point out specifically the grounds of objection, nor the portion of the record applicable thereto, and counsel fail to support the assignments with citation of authority, and it appears from an examination of the record that the constitutional right of the defendant to a "trial by an impartial jury of the county" was fully accorded, this court will not disturb the discretion exercised by the trial court in denying a change of venue and overruling a challenge to the panel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3044, 3053-3057; Dec. Dig. §§ 1150, 1152.*]

Appeal from District Court, McIntosh County; R. C. Allen, Judge.

Robert Watson was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Jack G. Harley and James B. Miller, both of McAlester, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and R. E. Gish, of Oklahoma City, for the State.

DOYLE, J. The plaintiff in error, Robert Watson, hereinafter referred to as the defendant, was convicted of first-degree manslaughter in the district court of McIntosh county under an indictment charging him with the murder of one Robert Gentry on or about November 14, 1910, in said county, and upon such conviction was sentenced in accordance with the verdict of the jury to serve a term of 20 years' imprisonment in the state penitentiary.

The judgment and sentence was rendered March 29, 1911. To reverse the judgment, an appeal was perfected by filing in this court August 29, 1911, a petition in error with case-made. Upon the trial the defendant admitted the killing of Gentry, but sets up as a justification therefor that it was done in necessary self-defense.

The circumstances under which the homicide was committed are, briefly, as follows: Robert Gentry, the deceased, and Duff McIntosh left Checotah on Sunday, November 14th, and went to Onapa, and from there to the house of Willie Collins, and there participated in a game of poker with three or four other parties. After supper the game was renewed, the participants sitting on the floor, and playing on Gentry's laprobe, which was spread on the floor. About midnight Watson quit playing, and the game continued between the deceased and Alvin Arnold. Collins, McIntosh, and the defendant looking on, the deceased and the defendant began "raw-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hiding" one another about the game until bad feeling developed, and the deceased took a pistol from his coat pocket, and told the defendant to let him alone, or he would shoot him "in the fat part of the hip." It was conceded, however, that this particular language was not used. The defendant then said, "Just shoot me then," but the deceased continued the game with Arnold, and seemed to show no disposition to execute his threat. The defendant stood around for a short while, and then walked out, saying, "You won't say that later," or words to that effect. The deceased made no hostile demonstration as the defendant left. In about twenty minutes the defendant returned. The deceased, sitting on the floor near the open door, was still playing cards with Arnold. Without warning there was a shot from the outside. At the same time the deceased raised slightly, the light went out, and it is a disputed fact as to whether or not he fired his automatic pistol. Immediately there came from the outside the report of a shotgun, and three pistol shots in rapid succession. The defendant, Watson, then entered the room, holding a shotgun in both hands. When the first shot was fired from the outside, the deceased dropped his pistol, fell over on his elbow, and said, "O! I am killed." In the early morning several persons, including the marshal of Onapa, having heard that some person had been killed at Collins' house, went there and found the body of the deceased inside of the door in a sitting position against the wall. There was a shotgun wound in the pit of the stomach, and three bullet holes in the body. They found no weapon or money on his body.

Duff McIntosh testified that, when he heard the defendant coming back, he went out, and walked about 75 yards, and stood there; that, when the shooting commenced, the light went out, and he walked to his brother's house.

Alvin Arnold testified that the deceased fired two shots, and there were four shots fired from the outside, and then the defendant stepped into the room, holding a shotgun with both hands; that, when the shot was fired from the outside, the deceased fell over on his elbow, and said, "O! I am killed;" that Willie Collins lit a lantern, and in a few minutes they all left the place, Willie Collins riding double with the defendant on his horse.

The defendant, as a witness on his own behalf, testified that he lived on his allotment near Bond's Switch, and had known Robert Gentry "pretty nigh all his life"; that he, with other parties, was drinking whisky and playing stud poker at Willie Collins' house; that, when he quit the game, that left Alvin Arnold and Gentry playing; that he said something or other just in a joking way, and Gentry jerked out his gun, and said, "If you do not get out of here, I will shoot you;"

that one word brought on another, and he told Gentry that he would not say any more if he was mad; that he stayed in there a little bit, and went out, and was out in the yard about 15 minutes, when he heard Willie Collins coming through the cotton stalks, saying, "I will kill the son of a bitch;" that he asked him, "Who are you going to kill?" and he said, "Alvin Arnold," and he said, "No; you are not," and run up and grabbed him and wrenched the gun out of his hand; that just then he heard a shot, and it grazed him; that he looked, and saw Robert Gentry shooting him from the door; that he then fired two shots at Gentry with his shotgun, and then Willie Collins with a pistol shot three shots at Gentry; that he told Collins not to shoot any more, and Willie Collins stepped inside, and picked up Robert Gentry's automatic pistol, and brought it out and gave it to him, and he then went to his home, Collins going with him.

Willie Collins, in rebuttal, testified that he heard a "whoop," and stepped out, and saw the defendant coming in the gate with a shotgun, and he walked directly towards the door, and threw the gun down and went to shooting; that he said to him, "Robert, don't do that," and the defendant shoved him back, and said, "I will do the same for you;" that he fired two shots with the shotgun, and then three shots with a 45-caliber pistol, and then made witness go into the house and light the lantern, and the defendant followed him in; that as they went in Alvin Arnold came out; that the defendant said he was wounded, and made witness go with him; that they went down to Bartons at Bond's Switch, and left the horse there, and then went back to Collins' house; that the defendant made him go in and light the lamp, and then he came in and picked up Gentry's automatic pistol, and shot one shot out of the door with it; that they then went and got in Gentry's buggy, and drove to the defendant's home.

[1, 2] The transcript of the testimony covers about 400 pages, but the foregoing statement is sufficient to understand the assignments of error, which are in effect:

First. "That court erred in refusing to order a change of venue." The application was supported by the affidavits of the defendant and three other persons, to the effect "that the minds of the inhabitants of McIntosh county are so prejudiced against the defendant that he cannot receive a fair and impartial trial in said county." Later the defendant filed a large number of supporting affidavits setting forth the following statement of facts: "That the relatives of Robert Gentry, deceased, are very prominent and influential in said county, and they are active in this prosecution against the defendant, and that the defendant was tried and convicted of cutting Grant Johnson, who was for many years a deputy United States mar-

shal, and that he is also a man of large personal influence in the county, and that the defendant took an active part in the county seat contest between Checotah and Enfaula, in the interest of Checotah." The state filed an equal number of counter affidavits from citizens of various parts of the county, abundantly showing there was no such state of feeling generally prevailing throughout the county as would prevent the defendant from having a fair and impartial trial therein. The statute provides that in such cases the court may in its discretion grant or refuse the change of venue. *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988; *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356. We are of opinion that there was no error in refusing a change of venue.

[3] Second. "The court erred in overruling the defendant's challenge to the panel of the petit jurors." It appears from the record that, when the jury list was selected, only two jury commissioners participated, the Republican member of the board having failed to qualify, and that the jury list as selected disclosed that one-half of the 200 names are persons who live in Checotah township, and that names from two municipal townships were wholly omitted from the jury list. There is no claim that these irregularities were corruptly conceived, or that the jury commissioners who acted were in any way prejudiced against this defendant. We think that, before the defendant can avail himself of any irregularities on a challenge to the panel, he must show intentional omission on the part of the jury commissioners from which he has suffered material prejudice. The provisions of our Procedure Criminal (sections 6795 and 6801) enumerates the grounds upon which a challenge to the panel must be founded. The fact that the jury commissioners failed to strictly follow the provisions of the jury law is not in itself a sufficient ground to sustain a challenge to the panel. It must be shown that such irregularity was prejudicial to the substantial rights of the defendant. We are of opinion that the challenge to the panel was properly overruled. However, we will say that it is the duty of district courts to compel, not only compliance with the spirit of these statutes, but, as far as practicable, the jury commissioners should be compelled to comply with the letter thereof.

Third. "The court erred in refusing the defendant's request for a full panel of 24 jurors duly drawn from the jury box as selected by the jury commissioners."

[4] Fourth. "The court erred in ordering the sheriff to summon additional jurors upon an open venire from the body of the county." We are of opinion that these objections are not well taken. The trial court sets forth the facts upon which he based his rulings in the record as follows: "The Court: The request is denied for the reason that the

shortage in the panel is due to the fact that this case was continued over from the 17th; that a number of jurors on the regular panel who announced that they would be disqualified to sit in this case, and after good reasons were excused from the panel, and for the further reason that this demand comes too late, having been made after the state announced ready for trial, twelve men called in to the jury box, and sworn to answer questions, and the examination having commenced; that there is also, at this time, 20 qualified jurors in attendance who were summoned in open venire by order of this court in addition to the eighteen that are now here on the regular panel, which gives a panel of thirty-eight qualified men." Section 6788, Procedure Criminal, provides: "If a sufficient number cannot be obtained from the box to form a jury, the court may as often as is necessary, order the sheriff, marshal or such other person as he may designate to summon from the body of the county or from such portion of the county as the court may order, as many persons qualified to serve as jurors as he deems sufficient to form a jury or may select from the bystanders with the consent of the defendant, a sufficient number of persons qualified as jurors to constitute the required number. The jurors so summoned may be called from the list returned by the officer and so many of them not excused or discharged as may be necessary to complete the jury, must be impaneled and sworn. The court may upon its own motion, at any time before the jury is sworn to try the cause, excuse from the jury or panel any person whom the court deems, for any reason, unfit to serve as a juror in said cause, and shall not be required to state any reason therefor." And the last proviso of section 3986 of the jury act is: "Provided, further, that at any time during the term of court, after the petit jury has been drawn and summoned in the manner herein provided for, when, for the trial of any cause, civil or criminal, the regular panel of jurors shall appear to be insufficient, the jury may be completed from talesmen or the court may direct that an open venire be issued to the sheriff or his deputy, for such number of jurors as may be deemed necessary to be selected from the body of the county." It appears that the constitutional right of the defendant to a "trial by an impartial jury of the county" was fully accorded.

[5] The voluminous brief of the learned counsel for the defendant is without the citation of a single authority. This they explain by stating that "most of the propositions herein raised are elementary and statutory, and we think it only necessary to point out these errors to the court in order to secure a reversal of this case." While we are reasonably certain that counsel could have found no authority to support their contentions, yet, as we have heretofore said, this

practice of alleging unfounded assignments of error and arguing the same without the citation of authority to support the contentions made should not be indulged in. It presumably costs counsel effort and time and needlessly occupies the time of the court, and avails nothing.

It is also contended that the testimony shows that the defendant shot Robert Gentry in necessary self-defense, and that, under the proof, the jury was not warranted in returning a verdict of guilty of any crime. We have patiently read the transcript of the testimony, and we think the jury under their oaths could not, as reasonable men, have returned a more favorable verdict for the defendant, and there is nothing in the record to indicate that the verdict was the result of passion, prejudice, or partiality. It is our opinion that the evidence not only fully justified the jury in finding the defendant guilty of first degree manslaughter, but a verdict for murder would not have been unwarranted.

The case appears to have been carefully and ably tried on the part of the court as well as counsel.

Finding no prejudicial error, the judgment is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 81)

PROCTOR v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 22, 1913.)

(*Syllabus by the Court.*)

1. GAMING (§ 88*)—INDICTMENT—SUFFICIENCY.

An indictment which charges a person with conducting the prohibited game of roulette for value, but which fails to charge that the persons who played at the game were playing for money, or a representative value, does not charge a public offense under our statute.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 241-243; Dec. Dig. § 88.*]

2. INDICTMENT AND INFORMATION (§ 47*)—FOLLOWING DECISIONS OF APPELLATE COURT.

It is the duty of prosecuting attorneys to follow the decisions of the appellate courts in the preparation of informations, and there is little justification for a failure to do so when the appellate court has spoken in plain, unequivocal language on any specific proposition.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 148, 149, 157; Dec. Dig. § 47.*]

3. INDICTMENT AND INFORMATION (§ 151*)—DEMURRER—DUTY OF COURT.

When questions of law are properly raised by demurrer, which are fatal to an information under the established law, it is the sworn duty of the trial courts to sustain such demurrer, and direct the prosecuting officer to file a proper information, or dismiss the prosecution.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 498; Dec. Dig. § 151.*]

Appeal from Oklahoma County Court; John W. Hayson, Judge.

Cecil Proctor was convicted of gaming, and appeals. Reversed.

Kistler, McAdams & Haskell, of Oklahoma City, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Cecil Proctor, was convicted at the March, 1912, term of the county court of Oklahoma county, on a charge of conducting a roulette game, and his punishment fixed at a fine of \$500 and imprisonment in the county jail for a period of 60 days.

[1] The Attorney General has filed the following confession of error in this case: "The Attorney General would respectfully call this honorable court's attention to the charging part of the information filed in this case, which is in words and figures as follows, to wit: 'That the above-named Cecil Proctor did, in Oklahoma county, and in the state of Oklahoma, on the 20th day of January, in the year A. D. 1912, commit the crime of operating a roulette game in manner and form as follows: They did unlawfully operate a game of roulette, as owners or employes to the state unknown, for money and other representatives of value.' To this information plaintiff in error filed a demurrer upon the ground that said information did not state facts sufficient to constitute an offense under and by virtue of the laws of the state of Oklahoma. This demurrer was overruled by the court, and the ruling excepted to, and the error in so doing was set up in the motion for new trial and in the petition in error. Under the holding of this court in the case of Brown v. State, 5 Okl. Cr. 41, 113 Pac. 219, the overruling of this demurrer was reversible error, for the information must allege that the same so conducted was played for money, or some representative of value. The same ruling was made in an identical case to wit, Morgan et al. v. State, 7 Okl. Cr. 45, 121 Pac. 1068. For the above reasons, the Attorney General believes that under the holdings of this court sufficient error appears of record to authorize a reversal of this judgment, and confesses error accordingly."

[2] It is not necessary for this court to enter into a discussion of the merits of this appeal. The confession of error correctly states the law. The opinion in the Brown Case, 5 Okl. Cr. 41, 113 Pac. 219, was filed more than a year prior to the institution of this prosecution, and should have been followed by the county attorney in preparing the information, and by the court when a demurrer was filed to such information raising the question of its sufficiency. The rule declared in the Brown Case, supra, has been the law in this jurisdiction for many years. As far back as February, 1907, the territorial court declared the doctrine that is followed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the Brown Case, and many cases from other courts declare the same rule.

[§] This appeal should not have been permitted to come to this court. The trial court should have sustained the demurrer, and directed the county attorney to file a proper information, or dismiss the prosecution. It was his sworn duty to do so. The law is plain and unequivocal. The question here raised has been passed upon and adjudicated both by this court and its predecessor. The failure of the prosecuting officer and the trial court to follow the plain, unequivocal expressions of the appellate courts on this question necessitates a reversal. We cannot but sustain the confession of error and order a new trial. If this case is to be prosecuted again, a proper information should be filed, and the case tried upon its merits.

The judgment is reversed, and the cause remanded.

DOYLE and FURMAN, JJ., concur.

(9 Okl. Cr. 62)

BAKER v. STATE

(Criminal Court of Appeals of Oklahoma.
March 19, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 641*)—TRIAL—RIGHT TO COUNSEL—ASSIGNMENT—WAIVER.

(a) It is a fundamental right of a person accused of crime to be represented by counsel, and, in order that the accused may have the full benefit of this right, it is provided that, when he appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and he must be asked if he desires the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him. Bill of Rights, § 20; Crim. Proc. § 6731 (Snyder's Comp. Laws 1909).

(b) This right may be waived by the defendant, but it cannot be denied by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1505; Dec. Dig. § 641.*]

2. CRIMINAL LAW (§ 641*)—TRIAL—ASSIGNMENT OF COUNSEL—"COUNSEL."

The term "counsel," as used in section 6731, Proc. Crim. (Snyder's Comp. Laws 1909), providing that the court must assign counsel to defend indigent defendants, means one who has been admitted as an attorney and counselor at law in this state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1505; Dec. Dig. § 641.*]

For other definitions, see Words and Phrases, vol. 2, p. 1644.]

3. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—ATTORNEYS.

Under the law (section 250, Snyder's Comp. Laws 1909) no person resident of the state shall be permitted to practice as an attorney in any action or proceeding in which he is not a party concerned unless he has been previously admitted to the bar by order of the Supreme Court, and the courts will take judicial notice of the fact that a person appearing and acting as an

attorney and counselor at law is or is not duly authorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 295½, 700-717; Dec. Dig. § 304.*]

4. CRIMINAL LAW (§ 641*)—TRIAL—ASSIGNMENT OF COUNSEL TO DEFEND—PERSONS NOT ADMITTED TO THE BAR.

In a prosecution for a felony, it having been made to appear that the defendant was destitute of means to employ counsel, the court appointed a person to defend him who was not authorized to appear as an attorney at law in the courts of this state. Held, that this was, in effect, the denial of a fundamental right, and constitutes reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1505; Dec. Dig. § 641.*]

Appeal from District Court, Wagoner County; R. C. Allen, Judge.

Stanley Baker was convicted of larceny of live stock, and he appeals. Reversed.

Earnest L. Kistler, of Muskogee, Norman R. Haskell, of Oklahoma City, and C. J. Nelson, of Wagoner, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, hereinafter referred to as the defendant, was tried in the district court of Wagoner county on an information charging him with the crime of larceny of live stock, and was convicted and sentenced to imprisonment in the penitentiary for a term of 10 years. The judgment and sentence was entered April 17, 1911, and on the same day the defendant was delivered to the warden of the state penitentiary at McAlester. To reverse the judgment an appeal was taken by petition in error with a certified transcript of the record.

It is assigned as error that the defendant was deprived of his constitutional right to be represented by counsel. It appears from the record that the court prior to entering upon the trial, it having been made to appear that the defendant was destitute of means to employ counsel, appointed one P. E. Reed to defend him. No brief was filed. Norman R. Haskell, Esq., appeared and argued the case orally. The proposition of the defendant's counsel upon which he bases his demand for a reversal of this judgment is as follows: That the trial court and this court will take judicial notice of the fact that P. E. Reed was not authorized to appear as an attorney in the courts of this state. Therefore the defendant was denied the benefit of counsel. And the attention of the court is directed to the fact that the journal record shows that said P. E. Reed was not admitted to practice as an attorney in this state until June 18, 1912. From an examination of the record the conclusion of the court is that the judgment in this case cannot be permitted to stand.

[1] It is the right of a person put upon trial for a criminal offense to be represent-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed by counsel. This right may be waived by the defendant, but it cannot be denied by the courts. The right of the accused to the assistance of counsel in making his defense has long been regarded in this country as essential to the due administration of justice in criminal cases. Says Mr. Cooley: "With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." Cooley, Const. Lim. 334. The Constitution of the United States expressly provides that: "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense." Sixth amendment. And the right is secured in the Constitution of nearly every state. Our state Constitution provides that: "In all criminal prosecutions the accused shall have the right to be heard by himself and counsel." Bill of Rights, § 20. In order that the accused may have the full benefit of this fundamental right, it is provided by statute that when he appears for arraignment, upon a charge for felony without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and he must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him. Procedure Criminal, § 6731 (Snyder's Comp. Laws 1909). And it is further provided that the court shall in all such cases allow and direct to be paid by the county in which said trial is had a reasonable and just compensation to the attorney or attorneys so assigned for such services as they may render. Procedure Criminal, § 7128. Under these provisions of the Constitution and laws, the defendant was entitled to be assigned counsel, duly authorized to appear as an attorney before the courts of this state.

[3] Under the laws of this state, no person shall be permitted to practice as an attorney or counselor at law in any action or proceeding in which he is not a party concerned, unless he has been previously admitted to the bar by order of the Supreme Court (section 250, Snyder's Sts.). And the courts of the state will take judicial notice of the fact that a person appearing and acting as an attorney at law is or is not duly authorized to appear as such before the courts of this state. *Nolan v. St. L. & S. F. R. R. Co.*, 19 Okl. 51, 91 Pac. 1128. Under these provisions of the Constitution and laws, it is clearly competent for the accused to appear in person without counsel if he so desires, or to waive his right to have the assistance of the counsel assigned to conduct his defense by the court. Nevertheless, we think that, when he has applied to the court as a poor person to assign counsel to defend him, he should not be held to have waived this right, even though he failed to object to the counsel so assigned.

[2] The term "counsel," as used in section

6731, providing that the court must assign counsel for indigent defendants, means a person who has been admitted as an attorney and counselor at law in this state, and it was the duty of the trial court to assign counsel duly authorized under the law to act as such. We think the right and privilege of indigent defendants to have the assistance of counsel should be strictly guarded by the courts. And in this regard our courts have uniformly conformed to the requirement of the statute. Even pleas of guilty have been rarely accepted until counsel have been assigned to investigate the merits and have recommended their acceptance by the court. So deeply ingrafted in our criminal jurisprudence has this great right become that none are so low or so poor but that they may rely upon it.

[4] Evidently in this case the court through mistake or inadvertence believed the person assigned was qualified to act as counsel. It does not appear that he was so assigned at the solicitation of the defendant, or that he had any voice in the selection of counsel. As a general rule all presumptions here are in favor of the lower court, but when from the record it appears that there has been a departure from the fundamental rules of criminal procedure, this court will reverse the judgment of conviction, unless it affirmatively appears from the record that the error complained of was not prejudicial. While the information is sufficient to charge grand larceny, it is defective in charging the statutory offense of larceny of live stock, in that it does not aver that the property was taken with the felonious intent to appropriate the same to the taker's own use. However, in the lower court no objection was made to its sufficiency. For the reason stated, the judgment of the district court of Wagoner county is reversed, a new trial awarded, and the case remanded to be further proceeded in according to the foregoing opinion and the rules and principles of law.

The warden of the penitentiary will surrender the defendant to the sheriff of Wagoner county who will hold him in custody until he shall be discharged, or his custody changed by due course of law.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

(9 Okl. Cr. 76)

Ex parte ELEY.

(Criminal Court of Appeals of Oklahoma.
March 22, 1913.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 53*)—PETITION—DEMURRER.

A petition for the writ of habeas corpus, setting up facts which show that the petitioner was imprisoned under a valid judgment of the court on the date the commitment was issued, and that no appeal was taken from such judg-

ment, and that after incarceration in the prison petitioner was by the county judge, county attorney, and sheriff discharged from such imprisonment on their own initiative, and without authority of law, and that petitioner was thereafter, after the expiration of more than the time for which the petitioner could have been imprisoned under the original judgment, recommitted under the same judgment, states ground for relief, and is not demurrable.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 50, 50½; Dec. Dig. § 53.*]

2. CRIMINAL LAW (§ 1216*)—PARDON (§ 4*)—PUNISHMENT—SENTENCE—WRONGFUL DISCHARGE—EFFECT—"TRUSTY."

The petitioner was convicted of a misdemeanor in the county court of Jackson county. Judgment was pronounced by the court sentencing him to 30 days' imprisonment and to pay a fine of \$50, and upon the failure to pay such fine in cash that he should be imprisoned 25 days in lieu thereof. Commitment was issued, and he was incarcerated in the county jail. The county judge, county attorney, and sheriff released him within a short time, and, after the expiration of more than the time for which he could have been imprisoned under the judgment, the county court ordered him recommitted on the same judgment to serve the original sentence. *Held*, that the action of the officers in discharging the petitioner was without authority of law. *Held*, further, that the petitioner was in the control and custody of the sheriff, and was in effect a "trustee" under the facts disclosed, and, as a matter of law, his period of imprisonment expired 55 days from the date of his incarceration; and that any further imprisonment would be unwarranted and unlawful.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.* Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.*]

3. PARDON (§ 4*)—AUTHORITY TO PARDON.

County judges, county attorneys, and sheriffs in this state have no power to parole or pardon persons convicted of crime in the courts of this state. That power is vested solely in the Governor.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.*]

4. PARDON (§ 4*)—POWER TO RELEASE PRISONER.

When a person is tried for crime in a county court, convicted, and judgment pronounced, such court has no authority to release him from imprisonment under a commitment issued upon the judgment, unless the judgment be vacated or set aside on lawful grounds, or upon habeas corpus, when the judgment under which the imprisonment is had was void, except in certain cases on appeal.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.*]

5. ESCAPE (§ 3*)—INCARCERATED PERSON—UNLAWFUL DISCHARGE.

When a person is imprisoned on a judgment of a court of competent jurisdiction, and later such court, acting with the county attorney and sheriff, usurps the power to release, and does release, him from imprisonment, such person is not guilty of escape, technical or otherwise.

[Ed. Note.—For other cases, see Escape, Cent. Dig. §§ 2, 4; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2460-2463.]

Petition for writ of habeas corpus by Charles Eley. Granted, and petitioner discharged.

W. T. McConnell, of Altus, for petitioner. Charles West, Atty. Gen., and M. L. Hankins, Co. Atty., of Altus, contra.

ARMSTRONG, P. J. This is a petition for the writ of habeas corpus, filed by Charles Eley, seeking his discharge from the custody of John D. Bailey, sheriff of Jackson county.

The undisputed facts are: That the petitioner was incarcerated on the 15th day of April, 1912, upon a commitment issued out of the county court of Jackson county on the 11th day of said month, which commitment was based upon a judgment imposing upon the petitioner a sentence of 30 days' imprisonment and a fine of \$50. The petitioner was incarcerated by the jailer of Jackson county just before noon on the 15th day of April, 1912, having been delivered to him by A. W. Collins, a deputy sheriff. A copy of the commitment issued by said court was also delivered to the jailer at the same time. In the afternoon of the same day the petitioner was taken by the jailer to the courthouse yard and, along with the other prisoners, put on the public works. Later in the afternoon the same deputy sheriff went to the jailer and told him that the court wanted the petitioner brought before it, and asked the jailer to get the commitment which had been delivered to him, which was done. The deputy sheriff then took the petitioner and the commitment into the courthouse, and later told the jailer that the court had released the petitioner. No written release, however, was ever filed with the jailer. On the 12th day of August thereafter the county court issued another commitment on the same judgment, which was executed by the same deputy sheriff on the 15th day of said month by a delivery of a copy of the commitment and the petitioner into the custody of the jailer again. It appears that the county attorney, the county judge, and the sheriff, for some reason unknown and unexplained to this court, were responsible for the foregoing disposition of the petitioner. On the 17th day of August the petition in this case was filed and the petitioner released on bail pending a determination of his petition.

[1, 2] Counsel for the respondent have filed a demurrer to the petition, based upon the decision of this court in *Ex parte Eldridge*, 3 Okl. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967, contending that under the doctrine in that case the petition does not state grounds for relief. With this contention we cannot agree. The facts upon which the petition in the *Eldridge* Case was based were entirely different from those in the case at bar. In the *Eldridge* Case the petitioner had prayed an appeal from a judgment of the county court, bail had been allowed and given, but the appeal was not perfected, and after the time had lapsed within which the appeal could properly have been taken the county court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Noble county, wherein Eldridge was convicted, issued a warrant for his arrest and imprisonment under the original judgment. In the petition in the Eldridge Case and the argument before this court counsel contended that the county court of Noble county was without jurisdiction to issue the order of commitment, for the reason that the time for perfecting said appeal expired June 4, 1909, and the defendant was within the jurisdiction of the court at all times, and that by operation of law his sentence began from the expiration of the time allowed to file a petition in error and case-made in this court, or, at the farthest, the maximum time within which his appeal could have been perfected under the statute. The petitioner in the Eldridge Case had never been confined in prison. No commitment had ever been issued for him. The judgment against him had been superseded by an appeal bond, and the appeal had never been perfected, and on this state of facts this court held, and correctly so, that an expiration of the time under such circumstances, without imprisonment, was in no sense an execution of the sentence.

[3, 4] In the case under consideration, however, no appeal was taken. The county court pronounced judgment, and upon the judgment issued a commitment. Upon the commitment the petitioner was confined within the cells of the county jail of Jackson county, and thereafter was released by the county judge, sheriff, and county attorney. The judgment was not vacated on lawful grounds or otherwise, nor the petitioner released by the writ of habeas corpus, on the ground that the judgment against him was void. Just what prompted such action upon the part of the officers mentioned is not explained, and no effort has been made looking to that end. When a judgment is pronounced and no appeal taken, and a commitment issued and the prisoner delivered to the custody of the county jailer, there are only three ways for him to be released lawfully until the judgment is satisfied: First, by habeas corpus, on the ground that the judgment is void; second, by order of the court, when the judgment is vacated or set aside upon lawful grounds; third, by parole or pardon from the Governor. Any other discharge or release is without authority of law, and officers guilty of such conduct lay themselves liable to the penalties prescribed by the statute.

As said by this court in *Ex parte McClure*, 6 Okl. Cr. 241, 118 Pac. 591: "The county court was without power or authority to grant a parole. Under the Constitution that is the prerogative of the supreme executive power vested in the Governor; and the only effect of the order discharging petitioner on probation, upon good behavior, was to modify the judgment imposing the fine, and directing imprisonment until such fine is satisfied, by making the fine, in effect, nothing more

than a civil judgment, to be satisfied by execution as on a judgment in a civil action. To that extent only could the court modify the judgment rendered."

The county attorney and the sheriff are without color of power of any kind to release a prisoner, and what is said by the court in *Ex parte McClure*, supra, applies with greater force to sheriffs and county attorneys; for they cannot in the least vacate, modify, or change a judgment of the court, and the court itself can only modify, vacate, or set aside a judgment upon lawful grounds.

[5] We are asked by counsel for the respondent to hold that the act of the petitioner in departing from the custody of the jailer, under the circumstances heretofore set out, amounted to a technical escape. This we cannot do. The petitioner in this case did no more than any other intelligent human being would have done under like circumstances—that is, to go home, when the court who had sentenced him, the county attorney who had prosecuted him, and the sheriff who had incarcerated him told him he could do so—and a rule could not be established, technical or otherwise, holding him to be an escape and liable to reincarceration, without placing in the hands of county courts, sheriffs, and prosecuting attorneys the power to defeat every judgment of a court of record entered in this state, and permit them to harass and impose upon the unfortunate members of our citizenship, who happen to be convicted and sentenced for a crime, during an endless period, by placing them in jail to-day and releasing them to-morrow, with or without cause, as their caprice might suggest. The petitioner in this case was in the custody of the sheriff and subject to his call at all times until the expiration of the prison sentence, and was in legal effect a "trustee." We do not suggest that the action of the officers was prompted by corrupt motives, but it makes no difference what prompts the act; the rule of law is the same. There is no statute authorizing such conduct, and there should be none. The demurrer to the petition is overruled.

The judgment of the court, which was 30 days' imprisonment and a fine of \$50, or 25 days additional in case the fine was not paid, was fully satisfied 55 days from the date of the incarceration of the petitioner; and any imprisonment under said judgment after the expiration of that time is and would be unlawful and without warrant.

More than 55 days having expired from the date of the incarceration of this petitioner to the date of his reincarceration, the judgment of the court was satisfied in law, if not in fact; and he is entitled to the writ of habeas corpus releasing him from further imprisonment.

Let the writ issue and the petitioner be discharged.

DOYLE and FURMAN, JJ., concur.

© Okl. Cr. 63)

BOWLEGS v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 881*)—VERDICT—DEGREE OF OFFENSE.

The provision of Procedure Criminal (section 6874) that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty," must be construed in connection with other provisions; i. e., section 6873, authorizing a general verdict of "guilty" or "not guilty," and declaring that such verdict "imports a conviction or acquittal of the offense charged," and section 6878, providing that the court may direct informal verdicts to be reconsidered, and "rendered in some form from which it can be clearly understood what is the intent of the jury," also section 2028 of the Penal Code, providing that the jury shall "assess and declare the punishment in their verdict."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

2. HOMICIDE (§ 313*)—VERDICT—DEFINITENESS.

On the trial of an indictment for murder, the court instructed the jury, in effect, that they might find the defendant guilty of murder, and, if they should so find, they must designate in their verdict whether he shall be punished by death or imprisonment for life, but, if the jury had a reasonable doubt as to the defendant's guilt of murder, they should acquit him of that charge, and determine whether he was guilty of "manslaughter in the first degree," and, if they should so find, his punishment must be by imprisonment for not less than four years, and that, if every essential element of this offense was not established beyond a reasonable doubt, it was the duty of the jury to acquit him, and so say by their verdict. The issue of "manslaughter in the second degree" was not submitted to the jury. The verdict was: "We, the jury, * * * do upon our oaths find the defendant guilty of manslaughter as charged in the indictment, and assess his punishment at confinement in the state prison for a period of ten years." Held, that the verdict is sufficiently definite and certain as to the offense, of which the defendant was convicted, and is in fact a verdict of guilty of manslaughter in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 671-675; Dec. Dig. § 313.*]

3. CRIMINAL LAW (§ 942*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — IMPEACHING TESTIMONY.

A verdict should not be set aside because of affidavits being filed in support of motion for new trial, showing that the affiants had heard a witness for the state make statements directly contrary to such witness' testimony in the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.*]

4. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

Technical errors or defects which do not affect the substantial rights of the defendant must under section 6957 (Comp. Laws 1909) be disregarded on appeal. Prejudice is not presumed from error being made to appear in the absence of reasonably clear indications that the defendant was thereby prejudiced upon the merits,

or that it tended to his prejudice in respect to a substantial right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

Appeal from District Court, Seminole County; Tom D. McKeown, Judge.

Noble Bowlegs was convicted of manslaughter in the first degree, and he appeals. Affirmed.

J. Coady Johnson, of Wewoka, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., Jos. L. Hull, Special Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error, hereinafter referred to as the defendant, was in the district court of Seminole county convicted of manslaughter in the first degree under an indictment charging him with the murder of one Caesar Stepney on or about November 26, 1908, in said county, and in accordance with the verdict of the jury was on February 2, 1911, sentenced to serve a term of 10 years in the penitentiary. From the judgment of conviction, the defendant has appealed.

Briefly stated, the record discloses the following facts: That on the night of the death of Caesar Stepney, the defendant, Noble Bowlegs, together with Tom Jefferson and a number of negroes, were at the home of Geo. Stepney. The defendant and Tom Jefferson were engaged in what is commonly known as a crap game. Caesar Stepney was not playing, but, with Pinkie King, was standing by, presumably watching the game. A difficulty arose between Jefferson and the defendant, and they both pulled pistols, and commenced to shoot. Caesar Stepney was killed. Jefferson was wounded.

It was the theory of the state that the defendant in making the murderous assault upon Jefferson shot and killed Caesar Stepney. The defendant claimed that he did not fire the shot which killed Stepney, and that, if he did fire said shot, he was justified in doing so because said shot was fired in his necessary self-defense at Tom Jefferson.

The alleged error upon which the defendant most confidently relies for a reversal of the judgment against him is that the verdict is insufficient to sustain the judgment. The verdict is as follows: "We, the jury, drawn, impaneled, and sworn in the above-entitled cause, do upon our oaths find the defendant, Noble Bowlegs, guilty of manslaughter as charged in the indictment herein and assess his punishment at confinement in the state prison for a period of ten years."

[2] Counsel contends that the verdict is insufficient, because it fails to observe the requirements of section 6874, Procedure Criminal (Comp. Laws 1909), which provides: "Whenever a crime is distinguished into degrees, the jury, if they convict the defend-

ant, must find the degree of the crime of which he is guilty." The court instructed the jury that they might upon the indictment find the defendant guilty of murder, or of manslaughter in the first degree, and that, if they found the defendant guilty of murder, they must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor; and, if they should find him guilty of manslaughter in the first degree, his punishment must be by imprisonment in the state prison for not less than four years. The essential elements of each of these offenses were clearly stated, and the doctrine of self-defense clearly defined, and that, if every essential element of each offense was not established beyond a reasonable doubt, it was the duty of the jury to acquit him, and so say by their verdict. Manslaughter in the second degree was not included in the issues submitted to the jury by the instructions of the court. The verdict was received, read, and recorded without objection on the part of the defendant.

[1] This provision of Procedure Criminal must be interpreted in connection with other provisions which have a bearing on the question as will be seen by reference to the same. Section 6873 provides that: "A general verdict upon a plea of not guilty, is either 'guilty,' or 'not guilty,' which imparts a conviction or acquittal of the offense charged in the indictment." Section 6878: "If the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it, and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury." Section 6957: "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Section 2028 of the Penal Code provides: "In all cases of a verdict of conviction for any offense against any of the laws of the state of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict and the court shall render a judgment according to such verdict, except as hereinafter provided." The object and intention of section 6874 evidently was to guard and protect the rights of the defendant, so that the court in inflicting the punishment might be advised of the exact nature of the crime of which he was convicted. The object is fully accomplished where the jury under section 2028 assess and declare the punishment in their verdict.

There is a wide divergence of judicial opinion upon the question which this contention presents. The courts of several states have held without qualification that the degree of the crime must be specifically stated in so many words, and that it cannot be ascertained from the evidence, the instructions, or the punishment assessed. On the other hand,

the courts of several states hold that, where the jury is required by statute to find the degree of the crime of which the defendant is guilty, a verdict which does not expressly state the degree is sufficiently definite and certain as to the degree of which the defendant was convicted, if the assessment of punishment clearly indicates such degree. The cases which sustain this doctrine which we have examined are as follows: *Hays v. Commonwealth (Ky.)* 14 S. W. 833. In this case the indictment was for murder, and the verdict was: "We, the jury, find the defendant guilty, and fix his punishment at five years in the penitentiary." The Court of Appeals of Kentucky in the opinion said: "The 257th section of the Criminal Code provides that a general verdict upon a plea of not guilty shall be guilty or not guilty; 'and, if guilty, fixing the offense and the degree of the offense, and the punishment in cases in which the jury is required to fix the degree of punishment.' Certainty is highly important to a proper administration of the criminal law; but it should not go so far as to sacrifice substance to form. Under our law, one indicted for murder may be convicted of manslaughter. The jury were told, if they found the accused guilty of murder, they must fix his punishment at death or confinement in the penitentiary for life, but, if guilty of manslaughter, at not less than two, nor more than twenty, years' confinement in the penitentiary. It is therefore absolutely certain from the verdict that the jury intended to and did find the accused guilty of manslaughter. While properly the verdict should have said so, yet it substantially does, by the punishment awarded. Judgment affirmed." And the same court in *Hunn v. Commonwealth*, 143 Ky. 143, 136 S. W. 144, held: "Failure of a verdict to name the offense of which the jury found defendant guilty does not invalidate it: if from its language as a whole no doubt can arise as to the offense of which he was convicted."

In *State v. Hayes*, 23 S. D. 596, 122 N. W. 652, the Supreme Court of South Dakota in a homicide case held: "That a verdict finding accused guilty 'as charged in the information' and fixing 'his punishment at death' was not objectionable for uncertainty."

In *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449, the Supreme Court of Washington said: "The fourth contention is that a verdict of guilty as charged is not a sufficient finding of the degree, where the statute requires the degree to be found by the jury. In addition to the fact discussed above, viz., that under the testimony no other degree of guilty could have been found by the jury, there is no difficulty in interpreting this verdict. It was as follows: 'We, the jury in the case of the State of Washington, Plaintiff, v. Geo. Pepoon, Defendant, find the defendant guilty of the crime as charged in the informa-

tion.' So that it was just as certainly a verdict of murder in the first degree as though it had been so stated in so many words, and the court would have no difficulty whatever in pronouncing the proper judgment. Any verdict which clearly indicates the conclusion reached by the jury is sufficient. *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037."

We shall not attempt to review the many authorities contrary to this view which are cited by counsel in his elaborate brief. However, we think it will be found by reference to the cases cited that many of them rest on the reason that the statute is mandatory, or the jury are not required to assess the punishment. While the verdict in the case at bar is technically informal, it is sufficiently definite and certain as to the offense and the degree of which defendant was convicted, and it is, in fact, a verdict of guilty of manslaughter in the first degree. We think the defect is not sufficient to affect the substantial rights of the defendant. He was present, his counsel was there, and this verdict was received and read in his hearing, and no objection was made. It is our opinion that the error is not one which will justify a reversal of the judgment. It is claimed that the court erred in several of its instructions, and some half dozen are briefly criticized. We have carefully examined the instructions, and we think the instructions criticized are correct, and the instructions as a whole present the law of the case clearly and correctly.

[3] Finally, it is insisted that the court erred in refusing to grant a new trial, based upon the insufficiency of the evidence to support the verdict and upon the ground of newly discovered evidence, as appears from the affidavits of Isaac Williams, J. P. Davis, Jones Williams, and Minnie Bowlegs, to the effect that Pinkie King said to Vernie Bowlegs in the presence of affiants a few days before the trial, that when the trouble between the defendant and Jefferson started she ran into the side room and covered up her head until the shooting was over, and that no one could tell who fired the fatal shot. And it is argued that the testimony of Pinkie King was the only testimony tending to show that the defendant fired the shot that killed Stepney, and that her testimony was false and untrue. Pinkie King testified on the trial that she and Cesar Stepney ran into an adjoining room when the shooting began; that Cesar Stepney was shot and fell dead across the bed; that she looked back after hearing the shot, and saw Noble Bowlegs standing in the door to this room with a gun in his hand, pointing towards the bed where Stepney had fallen, shot through the head. There is other testimony that the defendant fired the fatal shot. George Stepney testified that he was sitting by Tom Jefferson when the

shooting occurred; that Jefferson, after the defendant's first shot, fell into a corner, and fired one shot which went into the ceiling, and the defendant fired three or four more shots. The testimony showing the position of the parties, the size of the defendant's pistol and the size of the wound all tends to show that the defendant fired the fatal shot. It is also in evidence that he became a fugitive from justice, and was finally apprehended at Omaha, Neb., where he was living under an assumed name. The showing was entirely insufficient to authorize any disturbance of the verdict, and the trial court properly overruled the motion for new trial.

Having examined every question presented by counsel, we are of the opinion that the defendant has no just cause of complaint; that he received a fair and impartial trial; and that the verdict of the jury is upon the testimony a just one. The judgment of the district court of Seminole county is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(22 Colo. App. 456)

COLORADO CITY et al. v. WORLEY et al.

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. COURTS (§ 487*)—COLORADO COURT OF APPEALS—REMANDING TO SUPREME COURT—STATUTE—"BEFORE HEARING."

Sess. Laws 1911, p. 269, creating the Court of Appeals, provided by section 6 for writ of error to the Supreme Court from the final action of the Court of Appeals in certain cases, and that, if before a hearing of any case either party shall advise the Court of Appeals that it is one of the cases reviewable by writ of error, and the court shall so find, it shall at once remand the case to the Supreme Court. On October 14th the case was set for hearing, and oral argument on November 11th, together with another case involving the same issues, and, while the other case was submitted, the instant case was reset for argument November 21st, at which time it was called and defendants' motion to remand to the Supreme Court was first made. *Held* that, since defendants failed to move in apt time, and since the Court of Appeals had no opportunity to find whether the grounds alleged in the motion came within one of the classes of cases specified in the law, it could not be said that it was so advised "before hearing," and the motion would be denied.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 703, 1307-1315; Dec. Dig. § 487.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 735-737.]

2. PLEADING (§ 418*)—WAIVER OF DEFECTS—PLEADING OVER—TRIAL ON THE MERITS.

A demurrer to a complaint on the ground that plaintiff had no legal capacity to sue—a ground specified in *Mills' Ann. Code*, § 50—is waived by answer over, if it has been overruled, and going to trial upon the merits.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION ELECTION—RIGHT TO CONTEST ELECTION.

A citizen may maintain an action in equity to enjoin action under an alleged fraudulent local option election, and for such relief as the case may require.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 43, 44; Dec. Dig. § 36.*]

4. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS—RULINGS.

Where the trial court, in an action for an injunction and for such relief as equity might require, found that seven persons voting at a local option election were all illegal voters, and excluded such voters, and defendants challenged the ruling of the court only as to three of such votes, it will be presumed, on appeal, that the court's ruling as to the remaining four was correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

Error to District Court, El Paso County; J. W. Sheafor, Judge.

Action by John F. Worley, for himself and others similarly situated, against the City of Colorado City and P. J. Hamble, as Mayor, and others. Judgment for plaintiffs, and defendants bring error and move to remand to the Supreme Court. Motion denied, and judgment affirmed.

F. F. Schreiber and Samuel H. Kinsley, both of Colorado Springs, for plaintiffs in error. Joseph P. Jackson, of Colorado City, and Wayne O. Williams, of Denver, for defendants in error.

HURLBUT, J. [1] Motion to remand, by plaintiffs in error, was filed November 20, 1912, and is based upon section 6, c. 107, of the legislative act creating the Court of Appeals, p. 269, Session Laws 1911.

The case of *Patterson v. People* (No. 3,677) 130 Pac. 618, decided at this term of this court, involved substantially the same questions for consideration as are involved in the instant case. Both cases were set for hearing November 11, 1912. On that date, on motion of plaintiffs in error, the instant case was reset for oral argument November 21st, while case No. 3,677 proceeded to argument and submission. It was tacitly understood between the court and counsel that both cases would be heard at the same time, as they involved the same issues; but as above shown, to suit the convenience of counsel for plaintiffs in error, the instant case was reset for November 21st. On that day, being the day of hearing, the court being in session and the case having been called, the motion of plaintiffs in error to remand was first brought to the court's attention. Oral argument on the merits was had and the case submitted. Counsel for defendants in error contend that the motion to remand was not made in apt time, and that the court should deny the same and proceed to determine the cause on its merits, leaving plaintiffs in error to their remedy

by writ of error from the Supreme Court if aggrieved. Section 6, above referred to, after providing that final action by this court in certain classes of cases may be reviewed by the Supreme Court on writ of error, reads: "Or if before a hearing in any case either party thereto shall advise the Court of Appeals that it belongs to one of the classes of cases in this section above specified, and the court shall, upon investigation, so find, it shall at once and without further proceedings remand the same to the Supreme Court for determination." We are of the opinion that this language clearly implies that one seeking to have a cause remanded under this section must use reasonable diligence in invoking the benefit of the same. Upon full consideration of the record of the proceedings herein, we think plaintiffs in error have failed to move in apt time to have the cause remanded. October 14th the court set this case for hearing, and oral argument on November 11th; 28 days intervening between the time the order was made and the hearing. Again, on November 11th, at the request of plaintiffs in error, the case was reset for hearing, and oral argument for November 21st; 10 days intervening between the court's order and the hearing. Thus 38 days intervened between the time the case was first set for hearing and the time oral argument was had thereon; but no effort was made by plaintiffs in error, during that time, to apply to the court to have the case remanded. Counsel for plaintiffs in error were aware that on November 11th the court listened to full oral argument upon case No. 3,677, which involved the same issues as those of the instant case. Still no suggestion was made at that time that they intended to ask to have the instant case remanded to the Supreme Court. When the motion to remand was first called to the attention of the court during its session on November 21st, there was no opportunity for the court to then make an investigation as to whether or not the grounds alleged in the motion came within one of the classes of cases mentioned in the section. We do not think, under the situation here shown, it can be said that the Court of Appeals was advised, before hearing, that this case came within one of the classes of cases specified in said section. At the very time the matter was presented to the court it was in session, the case had been called and was before the court for oral argument upon the merits. For reasons given, the motion is denied.

This action was begun April 18, 1911. Except as to some matters hereinafter mentioned, the facts and law herein are so nearly identical in their nature with those of case No. 3,677, *supra*, that, upon authority of the latter, the judgment herein will be affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[2] The complaint in the case at bar shows that this proceeding was instituted in the court below by John F. Worley, for himself and all others similarly situated. One of the objections vigorously urged by plaintiffs in error as fatal to the maintenance of this action is that plaintiffs had no legal capacity to sue. It will be noticed that a demurrer to the complaint, containing this ground, was interposed by plaintiffs in error. The demurrer was overruled, and plaintiffs answered over and went to trial on the merits. This precludes them from raising this question now on appeal. *Elliott v. Field*, 21 Colo. 378, 41 Pac. 504. From that opinion we extract the following: "Under our practice, a demurrer to the complaint, except for the grounds that the same does not state a cause of action, and that the court has no jurisdiction of the person of the defendant or the subject of the action, is waived if, after the demurrer is overruled, the defendant answers and goes to trial upon the merits." "That plaintiff had no legal capacity to sue" is the second ground for which a demurrer may be filed under section 50, *Mills' Annotated Code*.

[3] This case falls within the rule announced in the foregoing excerpt; but, even if it did not, there is abundance of authority which sustains the right of plaintiffs in error to maintain this action. *Martin et al. v. Simpkins et al.*, 20 Colo. 438, 38 Pac. 1092; *Wheeler v. Northern Colo. Ir. Co.*, 9 Colo. 248, 11 Pac. 103; *Rizer et al. v. People et al.*, 18 Colo. App. 40, 69 Pac. 315; *Phillips et al. v. Corbin et al.*, 8 Colo. App. 346, 46 Pac. 224; *Lanier et al. v. Padgett et al.*, 18 Fla. 842; *Gibson v. Supervisors*, 80 Cal. 359, 22 Pac. 225.

As to the ground stated in the demurrer that the complaint does not state facts sufficient to constitute a cause of action, the complaint alleges fraud on the part of the judges and clerks of the election in opening the ballot boxes, holding back the returns, and manipulating the ballots, thereby changing the result of the election, and that illegal votes were cast and counted, sufficient in number to change, and did change, the result. These allegations, coupled with other averments appearing therein, clearly stated a cause of action. The demurrer was properly overruled.

[4] The trial court, in its findings and decree, held that of three persons, naming them, who voted in favor of the town becoming anti-saloon territory, neither thereof was a qualified elector when he voted; and that of seven voters, naming them, who voted at said election against the town becoming anti-saloon territory, each and all thereof were illegal voters, not being qualified electors at the time they cast their ballots. All such votes were excluded by the court from the count. As to the seven ex-

cluded, plaintiffs in error challenge the ruling of the court only as to three thereof. The court's ruling as to the remaining four will be presumed to be without error. As to the court's ruling in excluding certain votes from the count and refusing to exclude others, the remarks of this court in *Patterson v. People*, supra, on similar rulings in that case, will apply.

Judgment affirmed.

CUNNINGHAM, P. J., not participating.

(54 Colo. 320)

WILLISON, Bldg. Inspector, v. COOKE.

(Supreme Court of Colorado. March 3, 1913.)

1. MUNICIPAL CORPORATIONS (§ 600*)—POLICE POWER—BUILDING REGULATIONS.

While a municipality may require the owner of a lot to so use it that the public health and safety will be best conserved, the owner may erect such buildings covering such portions thereof as he chooses, and put his property as thus improved to any legitimate use he pleases, if, in doing so, he does not imperil or threaten harm to others; and hence restrictions upon the use of property can only be imposed if necessary for the health, comfort, or general welfare of the public.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1332; Dec. Dig. § 600.*]

2. MUNICIPAL CORPORATIONS (§ 625*)—POLICE POWER—SCOPE OF POWER.

Building regulations enacted by the council of a municipality by virtue of its incidental powers, there being no express authority therefor, are invalid if unreasonable, arbitrary, or oppressive.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.*]

3. MUNICIPAL CORPORATIONS (§ 589*)—POLICE POWER—SCOPE OF POWER.

Police regulations must tend to accomplish a legitimate public purpose and have a substantial relation to the public objects which government may legally accomplish.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1308, 1319; Dec. Dig. § 589.*]

4. MUNICIPAL CORPORATIONS (§ 63*)—GOVERNMENTAL POWERS—JUDICIAL SUPERVISION.

While it is for the legislative department of a municipality to determine the occasion for the exercise of its police power, the courts may determine the reasonableness of that exercise, when it assumes that power by virtue of its incidental or general grant of authority.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.*]

5. CONSTITUTIONAL LAW (§§ 87, 211, 278*)—EMINENT DOMAIN (§ 2*)—MUNICIPAL CORPORATIONS (§ 801*)—POLICE POWER—BUILDING REGULATIONS.

Section 17 of the charter of the city and county of Denver, providing that the council shall have power to enact and provide for the enforcement of ordinances necessary to protect life, health, and property, to declare, prevent, and summarily abate and remove nuisances, to preserve and enforce the good government, general welfare, order, and security of the city and county and its inhabitants, does not authorize

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the council to prohibit the erection of store buildings on a residence street which is neither a park nor a parkway, without the consent in writing of a majority of the property owners in the same block on both sides of the street, and without agreeing to erect such building on a line the average distance back from the front line of the lots as the buildings on the same side of the street in the same block, since such regulations have no relation whatever to the health, safety, or general welfare of the public, and do not tend to accomplish anything for the benefit of the public, but merely limit the use of property not infringing upon the rights of others, and simply being undesirable from an aesthetic point of view, and hence are unreasonable, arbitrary, and oppressive, especially as such regulations violate Bill of Rights, § 3, providing that all persons have certain natural, essential, and inalienable rights, among which are those of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness; section 15 providing that private property shall not be taken or damaged for public or private use without just compensation; and section 25 providing that no person shall be deprived of life, liberty, or property without due process of law; and Const. U. S. Amend. 14 providing that no person shall be deprived of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171, 678, 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. §§ 87, 211, 278.* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.* Municipal Corporations, Cent. Dig. § 1333; Dec. Dig. § 601.*]

In Banc. Error to District Court, City and County of Denver; H. C. Riddle, Judge. Action in mandamus by Demmie P. Cooke against Robert Willison, as Building Inspector of the City and County of Denver. Judgment for petitioner, and respondent brings error. Affirmed.

Defendant in error, as petitioner, brought an action in mandamus against the plaintiff in error, as respondent, in his official capacity as building inspector of the city and county of Denver, the purpose of which was to compel him to issue a permit for the construction of a building on the southeast corner of Colfax avenue and Williams street. In his petition, petitioner alleged that he was the owner of the lots in question; that respondent was the duly appointed, qualified, and acting building inspector of the city and county of Denver; that he applied to respondent for a permit for the erection and construction of a one-story brick store building upon his lots, to cost the sum of \$10,000, and then and there submitted and filed with him plans and specifications of the proposed building, showing and describing all parts of the construction thereof, and tendered him \$10, the prescribed fee for the issuance of the permit requested; that the plans and specifications submitted to and filed with the inspector indicated and showed that the work to be done in the construction of the building was in all respects in accordance

with the provisions of the ordinances of the city and county of Denver; that the inspector so found, but, without lawful excuse or reason therefor other than the provisions of certain ordinances referred to by number and title, refused to issue the permit applied for. Petitioner prayed that a peremptory writ of mandamus be issued, directed to the building inspector, ordering and commanding him, upon payment or tender of the proper fee therefor, to at once issue a permit for the erection of the proposed building on the lots mentioned.

To this pleading the respondent answered, admitting that petitioner was the owner of the lots in question; alleged that they fronted on the east side of Williams street, at the corner of Colfax avenue; admitted that, in so far as the application and the plans and specifications of the proposed building were involved, they indicated that the construction of the building and the materials to be used therein were in all respects in accordance with the provisions of the ordinances of the city and county of Denver, and that he found the plans and specifications submitted to him by the petitioner to be in full compliance with such ordinances, in so far as the character of the building or the construction thereof, and the materials to be used therein, were concerned; but alleged that the building as indicated by the plans and specifications, as well as the application for the permit to erect the same, and in so far as the erection of the building relates to the location and construction thereof upon the premises described, did not comply with the provisions of the ordinances of the city and county of Denver. The answer then sets out the ordinances referred to, which are as follows:

"In the following described section or portion of the city and county of Denver [then follows a description by reference to streets which includes the lots in question], it shall be unlawful to build or erect or make addition to a terrace (for more than two (2) families), apartment house, or flat (for more than four (4) families), store building or factory of any kind, rooming house of more than thirty (30) rooms, hotels or any buildings similar to those before mentioned, unless the party desiring a building permit for any such building has first secured and filed with the building inspector the signatures of a majority of the owners of the property in the same block, on the same side of the street, and of the owners of the property in the block on the opposite side of the street or avenue, facing same, approving of the erection of such a building, such approval to be accompanied by a certificate from some reliable abstract company that the parties signing the same are the owners of the property for which they signed. Before issuing any permit for any building, as before mentioned, the owner must specifically agree

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in writing to build said building on a line of the average distance back from the front line of lots as the buildings on the same side of the street in the same block; whenever such buildings are proposed to be erected on corner lots, they shall be set back from the front face of the lots to conform to the other buildings on the same side of the street in the same block, but may be built up to the lot line toward the street or avenue on the long side of the lot, provided that for the purpose of this section, the frontage of all lots within the city and county of Denver shall be and remain as laid out and platted at the time of the passage of this ordinance." Section 248, Municipal Code, as amended.

"If the matters mentioned in the application for a permit, or the plans and specifications filed with the same, indicate to the building inspector that the work to be done is not in all respects in accordance with the provisions of the city ordinances, he shall refuse to issue a permit therefor until the same has been made so to comply, when he shall issue the permit." Section 228, *Ibid.*

"Whenever, in any block or on any street or avenue in the residence sections of the city and county of Denver, and fifty (50) per cent. of the lots in such block facing on said street or avenue have been improved, and the building line of the improvements made permanent, it shall be required that all buildings thereafter erected on adjoining lots within such block and facing on the same street or avenue must have the front building line established not nearer to the front lot line than the average distance back from the front line of the buildings already built. * * *" Section 250, *Ibid.*

The answer then alleged that the petitioner did not secure and file with the inspector the signatures of a majority of the owners of the property in the block on the same side of the street in which the lots upon which it was proposed to erect the building are located, and the owners of property on the opposite side of the street facing the same, approving of the erection of such buildings; nor did petitioner specifically agree, in writing, to erect the building on a line the average distance back from the front lot line of lots that buildings on the same side of the street in the block in which his lots are situate are constructed; nor did he agree that the building proposed to be erected should be set back from the front line of his lots to conform to the other buildings on the same side of the street in the same block, but in fact insisted that the ordinances imposing these conditions as a condition precedent to the issuance of a permit were invalid and of no effect. The answer further alleges that the permit was refused because of the failure of petitioner to comply with the provisions of the ordinances above quoted, in the particulars noted, for the reason that to issue the permit requested in such circumstances would be in violation of such

ordinances and contrary to the duty and obligation of respondent, as building inspector of the city and county of Denver. The answer does not raise any issue upon the question that the proposed building will obstruct the street, or sidewalk, or upon the question of fire protection or insurance.

To this answer a demurrer was filed by petitioner, challenging its sufficiency to constitute a defense to the petition. This demurrer was sustained; and, the respondent electing to stand upon his answer, the court ordered that a peremptory writ of mandamus issue, as prayed for by petitioner. The respondent has brought the case here for review on error.

Henry A. Lindsley and George Q. Richmond, both of Denver (John T. Bottom and A. Newton Patton, both of Denver, of counsel), for plaintiff in error. James H. Brown, of Denver, for defendant in error.

GABBERT, J. (after stating the facts as above). From the foregoing synopsis of the answer, in connection with admissions therein of allegations in the petition, and the ordinances set out *hæc verba*, it appears that petitioner is the owner of lots upon which he desires to erect a store building in a district which the ordinances of the municipality inhibit, unless he first secures and files with the building inspector the signatures of a majority of the owners of property in the same block, on the same side of the street, and of the owners in the block on the opposite side of the street facing the same, approving of the erection of such building, and that, when such approval is secured, a permit will be withheld unless he agrees to build on a line the average distance back from the front line of lots that buildings on the same side of the street in the block in which his lots are situate are constructed; that the building which he proposes to erect complies in all respects, according to the plans and specifications, with the ordinances, in so far as the character of the building and the materials to be used therein are concerned; and that the sole defense interposed by respondent, and his only reason for refusing a permit, is based upon the failure or refusal of petitioner to comply with the provisions of the ordinances, as above noted. In brief, the ordinances inhibit petitioner from constructing a store building upon his lots until he complies with the provisions of such ordinances, upon which respondent bases his right to refuse the permit requested, and even then petitioner must agree not to construct his proposed building nearer the front line of his lots on Williams street than the average distance back other buildings on that street are constructed, in the same block, before the permit will be granted. The important question, then, to determine is the validity of these ordinances, in so far as they provide conditions with which petitioner did

not comply, and for which reason the respondent, according to his answer, refused the permit requested. On behalf of respondent, it is contended that these provisions are a valid exercise of the police power of the city; while on behalf of petitioner it is asserted that they are not, on the ground that they are so unreasonable as to be invalid, and, if enforced, deprive him of his property without compensation.

[1] It is fundamental law that a municipality under our system of government may, by ordinance, require the owner of a lot to so use it that the public health and safety will be best conserved, and to this end its police power may be exercised; but it is also fundamental that such owner has the right to erect such buildings covering such portions thereof as he chooses, and put his property, as thus improved, to any legitimate use which suits his pleasure, provided that in so doing he does not imperil or threaten harm to others. *Curran Bill Posting Co. v. City of Denver*, 47 Colo. 221, 225, 107 Pac. 261, 27 L. R. A. (N. S.) 544; *State v. Whitlock*, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765; *Bryan v. City of Chester*, 212 Pa. 259, 61 Atl. 894, 108 Am. St. Rep. 870; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494; *Bill Posting Co. v. Atlantic City*, 71 N. J. Law, 72, 58 Atl. 342. So that legislative restrictions upon the use of property can only be imposed upon the assumption that they are necessary for the health, comfort, or general welfare of the public; and any law abridging rights to a use of property which does not infringe the rights of others, or which limits the use of property beyond what is necessary to provide for the welfare and general security of the public, cannot be included in the police power of a municipal government. In *re Morgan*, 26 Colo. 415, 423, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; *Curran Co. v. Denver*, supra, 47 Colo. 225, 107 Pac. 261, 27 L. R. A. (N. S.) 544.

Williams street is an ordinary public thoroughfare. It is not a park or parkway, and the authority of the municipality to make the provisions in question, so far as advised from briefs of counsel, is found in section 17 of the charter, which provides: " * * * The council shall have power to enact and provide for the enforcement of all ordinances necessary to protect life, health and property; to declare, prevent and summarily abate and remove nuisances; to preserve and enforce the good government, general welfare, order and security of the city and county and the inhabitants thereof. * * * "

[2] It will be observed that there is no express authority conferred upon the council to pass ordinances embracing the conditions and restrictions imposed as to lots fronting on an ordinary street upon which respondent relies; and hence it is only by virtue of the incidental powers with which the mu-

nicipality is vested to pass police regulations that it assumes to act in passing the ordinance in question; consequently they are invalid, if it appears that they are unreasonable, arbitrary, or oppressive. *Phillips v. City of Denver*, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; *Curran B. P. Co. v. City of Denver*, supra, 47 Colo. 229, 107 Pac. 261, 27 L. R. A. (N. S.) 544; *City & County of Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042, 25 L. R. A. (N. S.) 247.

[3, 4] Police regulations, in order to be valid, must tend to accomplish a legitimate public purpose; that is, such regulations must have a substantial relation to the public objects which government may legally accomplish; and, while it is for the legislative department of a municipality to determine the occasion for the exercise of its police power, it is clearly within the jurisdiction of the courts to determine the reasonableness of that exercise, when, as in the case at bar, it assumes that power by virtue of its incidental or a general grant of authority. *O., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 598, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; In *re Morgan*, supra, 26 Colo. 424, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; *Curran B. P. Co. v. City of Denver*, supra, 47 Colo. 226, 107 Pac. 261, 27 L. R. A. (N. S.) 544.

[5] The building which petitioner proposes to erect complies in all respects with the ordinances relating to the materials which shall be used in its construction. The lots upon which it is proposed to erect it front upon an ordinary street or public highway. A store building is in no sense a menace to the health, comfort, safety, or general welfare of the public; and this is true whether it stands upon the rear portion of the lots upon which it is erected, or is constructed to the line of the street; but, even if it could be said that its construction imperiled or threatened harm to others, such objections would in no sense be removed by the consent to its construction by the majority of the owners of property in the same block on the same side of the street, and of the owners in the block on the opposite side of the street facing it; neither is it any more or less objectionable, on the score mentioned, whether it be limited to the rear portion of the lots or covers them from alley to street line. It is thus apparent that the sole purpose of the regulations involved is to prevent the construction of a store building in the locality where petitioner's lots are located, unless property owners, as indicated, consent, and then, if such consent is secured, to limit its construction to that portion of the lots not nearer to the front line of Williams street than the average distance back other buildings on that street in the same block are constructed. These regulations do not, in the slightest degree, have any relation whatever to the health, safety, or general welfare of the public; nor do they tend, in any sense, to accomplish anything

for the benefit of the public in this respect, but merely attempt to limit the petitioner in a use of his property, which does not infringe upon the rights of others. This deprives him of the fundamental right to erect a store building upon his lots covering such portions thereof as he chooses, although, by so doing, he does not imperil or threaten injury to others of which they can lawfully complain. A store building in a residence section of the city is not desirable, from an aesthetic point of view; but restrictions for this purpose alone cannot be upheld, as it is only those having for their object the safety and welfare of the public which justifies restricting a use of property by the owner. *Curran Co. v. City of Denver*, supra, 47 Colo. 226, 107 Pac. 261, 27 L. R. A. (N. S.) 544; *State v. Whitlock*, supra, 149 N. C. 543, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765; *Varney et al. v. Williams*, 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88; *City of Passaic v. Patterson Bill Posting, A. & S. P. Co.*, 72 N. J. Law, 285, 62 Atl. 267, 111 Am. St. Rep. 676; *Commonwealth v. Boston Adv. Co.*, supra.

We must therefore hold that the restrictions under consideration are invalid, because they have no relation to any object which the municipality, in the exercise of its police power, may legally accomplish; and are unreasonable, arbitrary, and oppressive. Aside from this, the ordinances, in the particulars involved, violate sections 3, 15, and 25 of our Bill of Rights, which provide:

"Sec. 3. That all persons have certain natural essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

"Sec. 15. That private property shall not be taken or damaged for public or private use without just compensation. * * *"

"Sec. 25. That no person shall be deprived of life, liberty or property without due process of law."

This latter section is similar to the fourteenth amendment to the federal Constitution, which declares: " * * * Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

One of the essential elements of property is the right to its unrestricted use and enjoyment; and, as we have seen, that use cannot be interfered with beyond what is necessary to provide for the welfare and general security of the public. Enforcing the provisions of the ordinances in question does not deprive the petitioner of title to his lots. He would not be ousted of possession. He would still have the power to dispose of them; but, although there would be no actual or physi-

cal invasion of his possession, he would be deprived of the right to put them to a legitimate use, which does not injure the public, and this without compensation or any provision therefor. This would clearly deprive him of his property without compensation, and without due process of law, which our federal and state Constitutions not only inhibit, but which would be repugnant to justice, independent of constitutional provisions on the subject. *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 228; *Bill Posting Co. v. Atlantic City*, supra; *Commonwealth v. Boston Adv. Co.*, supra; *City & County of Denver v. Rogers*, supra. For these reasons, the provisions of the ordinances involved are also invalid.

On behalf of the respondent, it is urged that mandamus is not the proper proceeding on the part of the petitioner. It appears from the opinion of the trial judge that this question was not urged or passed upon in the court below; and for this reason we do not deem it necessary to discuss that question on review.

The judgment of the district court is affirmed.

Judgment affirmed.

(54 Colo. 337)

BAILEY v. PEOPLE.

(Supreme Court of Colorado. March 3, 1913.)

1. HOMICIDE (§ 197*)—SELF-DEFENSE—DEFENSE OF HABITATION—BELIEF OF DEFENDANT—"JUSTIFIABLE HOMICIDE."

Under Rev. St. 1908, § 1632, which defines justifiable homicide as the killing of a human being in necessary self-defense, or in the defense of habitation or person against one who manifestly intends, by violence, to commit a known felony upon the person, or against any person manifestly intending, in a violent manner, to enter the habitation of another to assault or do personal violence to any person dwelling or being therein, the defendant's belief, or what, under the circumstances, he might have reasonable cause to believe, to be the intention of deceased is to be considered, as well as the intention of deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 422; Dec. Dig. § 197.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3910-3913.]

2. HOMICIDE (§ 278*)—QUESTION FOR JURY—DEFENSE OF HABITATION—INTENTION OF DECEASED.

On the evidence, in a prosecution for murder, held, that the question whether deceased manifestly intended to enter defendant's habitation in a violent manner and for the purpose of assaulting or doing personal violence to any person dwelling or being therein was for the jury.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 278.*]

3. HOMICIDE (§ 197*)—DEFENSE OF HABITATION.

A husband, without warrant or authority and over the protest of the occupants, has no such right to enter the house of another for the purpose of talking with and procuring his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wife, against her will, to leave, or any such right to use such reasonable force and persuasion as may be necessary to cause the wife to leave the house of her mother and brother and return with him, so as to deprive the brother from exercising necessary force to prevent injury to the habitation or those within it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 422; Dec. Dig. § 197.*]

4. HUSBAND AND WIFE (§ 3*)—RIGHTS OF HUSBAND—CONTROL OF WIFE.

A husband has no right to control the acts and will of his wife by physical force, or to have the custody of the wife against her will.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 5-8; Dec. Dig. § 8.*]

5. JURY (§ 34*)—RIGHT TO TRIAL BY JURY—MANSLAUGHTER.

Since the Constitution and laws of the state provide a jury trial for a person charged with murder, it is for the jury alone to determine the weight of the evidence and the credibility of the witnesses, so that, where there is testimony tending to reduce the homicide to manslaughter, the taking of that issue from the jury is an infringement of defendant's right to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 233-235; Dec. Dig. § 34.*]

6. HOMICIDE (§ 197*)—ADMISSIBILITY OF EVIDENCE—PREVIOUS QUARRELS AND ILL FEELING—HUSBAND AND WIFE.

In a trial for a murder committed as deceased was attempting at night to enter the house of his wife's mother and brother, the defendant, to which the wife had fled after a quarrel with deceased, and in which the defense was defense of habitation and those therein, evidence as to the wife's brutal and abusive treatment by deceased, known to defendant, and threats of deceased to kill both her and defendant, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 422; Dec. Dig. § 197.*]

7. HOMICIDE (§ 197*)—ADMISSIBILITY OF EVIDENCE—SELF-DEFENSE—APPREHENSION OF DANGER.

In such trial, evidence as to the defendant's state of mind, and as to his apprehension of the designs of the deceased, was likewise admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 422; Dec. Dig. § 197.*]

8. HOMICIDE (§ 197*)—ADMISSIBILITY OF EVIDENCE—CHARACTER AND HABITS OF DECEASED.

In a trial for a murder committed while deceased was attempting at night to enter the house of his wife's mother and brother, the defendant, to which the wife had fled after a quarrel with deceased, and in which the defense was the defense of habitation and those therein, the exclusion of defendant's evidence showing the reputation of the deceased as quarrelsome and dangerous was error, especially where the court afterwards allowed the state to put in evidence tending to show that his reputation in that respect was good.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 422; Dec. Dig. § 197.*]

9. CRIMINAL LAW (§ 700*)—DUTIES OF PROSECUTING ATTORNEY—CONDUCT OF CRIMINAL CASES.

The prosecuting attorney is required, not merely to execute justice, but to preserve intact all the sanctions of public law and liberty; and, no matter how guilty a defendant may be in his opinion, he is bound to see that no conviction is had except in strict conformity to

law, particularly where the defendant is defended as a poor person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1658; Dec. Dig. § 700.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Joseph E. Bailey was convicted of murder in the first degree, and he brings error. Reversed and remanded.

T. J. O'Donnell, J. W. Graham, Canton O'Donnell, and Willis Stidger, all of Denver, for plaintiff in error.

SCOTT, J. Joseph E. Bailey, defendant in error, was convicted, in the district court of the city and county of Denver, on the charge of the murder of Eugene H. Smith. The verdict was that of murder in the first degree. The wife of Smith was a sister of the defendant, Bailey. The homicide occurred on the 18th day of July, 1910. It appears that because of a quarrel between Smith and his wife, and of the violent beating and abuse of her by Smith on the 15th day of July, the wife with her two children left home and took refuge with her mother at the house where the defendant and his wife resided. This seems to have been but one of many similar occurrences. At about 10 o'clock on the evening of the 18th, Smith called over the telephone demanding that he be permitted to talk with his wife, which was refused by the mother, who answered the telephone, whereupon Smith replied with vile and abusive language, which caused the mother to hang up the receiver. About 15 minutes after this, Mrs. Smith's little boy, by a former marriage, who was in the yard for the purpose of sleeping there, and who had heard his grandmother talk over the telephone, came running into the house and shouted to his mother that he (meaning Smith) was coming. It seems that all of the occupants of the house had at the time retired, or were in the act of retiring. Upon hearing the boy's cry, Mrs. Smith ran into the bedroom occupied by the defendant and his wife and called to him.

Mrs. Smith's testimony upon this point is, in substance, as follows: "I looked out of the window, looked northward. I was undressed to go to bed. He was under the arc lights. He was almost running. He was just plunging, just coming in a jump like that [indicating]. It frightened me so. I could see from his appearance that he was in a very angry, bad mood, and I ran to my brother's bedroom door and called to him that there he came. I said to my brother, 'Get up out of bed, yes, there he comes,' and I said, 'For God's sake, don't let him come in here. If you do, he will kill the whole family. He will kill Mother and me.'"

The defendant thereupon arose from his bed, secured a revolver, and called out to Smith through the window, demanding that he should not come into the yard. He then

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—53

went from his bedroom into a room from which a door opened upon a porch, and upon which Smith was entering. The defendant called to Smith, it appears, four times, and demanded that he should not come in. In reply to either the first or second request, Smith said, "I will come in and get the whole God damned push of you." Smith finally opened the screen door as if coming in, when the defendant said, "I tell you, for God's sake, don't try to enter this side porch or the house. If you do, I will shoot you." About this time the defendant fired the shot that resulted in the death of Smith. The defendant was crippled in his right hand from an injury recently sustained, and was compelled to use the revolver with his left hand. Smith was a very large and powerful man, much larger than the defendant.

It appears that earlier in the day R. L. McDonald, a brother-in-law, at the request of Mrs. Smith, went to Smith to see if an adjustment of their trouble could not be had, and at which time Smith said, "Well, if she will come back and live with me and do just as I say, I will live with her; and if she won't, God damn her, I will kill her."

A witness named Tyler, who was at the time living at the house of the Smiths, also testified that: "On the morning of the shooting, Smith showed me a gun and said, 'It was a God damn good thing you got me drunk last night, or I would have gone down and cleaned out the whole God damn push. Smith came home on the morning of the 18th of July [the day of the shooting] about 2 o'clock. He had been drinking. He came into my room and raised a fuss with me, struck me, and used [the witness repeats vile language of deceased toward him]. I had a 38 revolver under my pillow. I drew the gun on him and stood back on the opposite side of the bed until I could get down the stairway; and, when I got down the stairway, I got out and stayed out the rest of the night. Mrs. Smith wasn't there, just I and Smith."

There are many assignments of error; but, inasmuch as the case must be reversed by reason of certain prejudicial instructions given, it will not be necessary to consider other assignments.

[1] The court, over the objection of the defendant, gave instructions Nos. 10 and 21, which are so clearly erroneous and prejudicial to the rights of the defendant, and are so closely connected in their subject-matter, as to make it convenient to consider them together. These in full are as follows:

"No. 10. That if you believe from the evidence that the deceased, Eugene H. Smith, attempted to enter the house of Joseph E. Bailey or his mother, wherein he resided, and that at the time he attempted to enter the same he feloniously intended to assault or kill any of the inmates thereof, then you are instructed that the doctrine that every man's house is his own castle would apply, and the defendant Joseph E. Bailey is not

required under the law to retreat from the position or stand which he had taken; but upon the other hand, if you believe that the said Smith attempted to enter the said house for the purpose of conversing with and inducing his wife to leave the said house, or for the purpose of using physical force in endeavoring to do so, and had no intention of injuring, or attempting to injure, any of the inmates of the said house further than to exercise a reasonable supervision and control over his wife and her conduct, then you are instructed that there is no self-defense in this case, and no justifiable killing, and the said Joseph Bailey's killing of the deceased was unlawful, unless you believe from the evidence that the circumstances attending the entry into the house was of such a character as would lead a reasonable man, under like circumstances, to believe that he or the inmates of the said house were about to receive great bodily injury."

"No. 21. The court instructs the jury that the deceased, Eugene H. Smith, as the husband of the sister of the defendant, Joseph E. Bailey, had a right to exercise such reasonable control over her as was necessary to conduce to the proper establishment and maintenance of his household as the head of a family, and as such husband had a right to enter, in a lawful manner, the house or houses of any person whomsoever for the purpose of talking with and procuring his said wife to leave the said house, if he so desired, and had a right to use such reasonable force and persuasion as was necessary to induce her to leave the house of her mother and come back to her home with him; and no person, not even her brother, Joseph E. Bailey, had a right to interfere with him in the exercise of such reasonable force or persuasion; and if you believe from the evidence, beyond a reasonable doubt, that the deceased, Eugene H. Smith, left his home on the evening of July 18th, and, after telephoning to the house of Mrs. Bailey, went there for the purpose of seeing his wife and talking with her and endeavoring to persuade and induce her to leave the house of the said Mrs. Bailey, her mother, or to talk over their family affairs and difficulties, and that he had no intention to inflict bodily harm or injury upon the persons in said house, then you are instructed that there is no self-defense in this case, and no justification for the killing of said Eugene H. Smith by the said Joseph E. Bailey."

These instructions not only announce such palpable misstatement of the law as to prejudice the rights of the defendant, but go to the extent of proclaiming a doctrine concerning the relation of husband and wife as to appear nothing less than monstrous at this period of our civilization.

The jury are here told that, in order that the doctrine of self-defense may apply, they must believe from the evidence that Smith attempted to enter the house of defendant, and

also that at that time he feloniously intended to assault or kill any of the inmates. This is not the law. It is not the state of the mind of the deceased alone which the jury are to consider, but of the defendant as well. That is to say, what the defendant believed, or what, under all the circumstances, he might have reasonable cause to believe to be the intention of the deceased.

These instructions are the equivalent of a denial of the very right of self-defense, as defined and provided by our statute. Section 1632, Revised Statutes 1908, provides: "Justifiable homicide is the killing of a human being in necessary self-defense or in the defense of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like, upon either person or property, or against any person or persons who manifestly intend and endeavor in a violent, riotous or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person, dwelling or being therein."

[2] The evidence clearly justified the submission to the jury of the question as to whether or not the deceased was a person who manifestly intended and endeavored, in a violent, riotous, or tumultuous manner, to enter the habitation of the defendant for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

[3] Instruction No. 21, without qualification, declares, in substance, that a husband without warrant of authority, and over the protest of the occupant, has a right to enter the house or houses of any person whomsoever for the purpose of talking with and procuring his wife, and against her will, to leave such house, if he so desires. This is not now and never was the law in this country. It is a repudiation of every reasonable conception of the law of domicile and the right of habitation. Neither a husband nor any other person has such right. It strikes at the very foundation and sanctity of home life. It gives license to every drunken vagabond or other evil person to invade the privacy of every man's home. It would destroy the moral, constitutional, statutory, and common-law right of defense of habitation. It is true the instruction declares the entrance must be in a lawful manner. But there can be no such thing as lawful entrance under such circumstances.

But the part of the paragraph of the instruction following is even more shocking. Here the jury are told that a husband may, over the protest of the occupant of the house, and over the protest of the wife of the husband so entering, not only enter any man's house, but has a right also to use such reasonable force and persuasion as may be necessary to cause the wife to leave the house of her mother and come back to his home with him, and that no person, not even her brother, has

a right to interfere with him in the exercise of such reasonable force or persuasion. The use of the word "force" in connection with the word "persuasion" can refer to physical force only; and the extent of this force is thus limited only by the necessity of the case in order to so secure the possession, control, and abduction of the person of the wife, and all this as against her will, her fear, and even the apparent danger of her life. In other words, if this be the law, whatever may be the circumstances, the defendant was absolutely without right to defend his home and his near relatives from the threatened assaults and brutality of an infuriated and drunken husband, at whose will the home is to be made the place of riot and the occupants to suffer mental distress, probable assault, and, as indicated by the testimony in this case, possible murder. Such is not, and can never be, the law in a civilized country.

[4] This assertion of the right of a husband to control the acts and will of his wife by physical force cannot be tolerated. The prejudicial effect on the defendant's rights by these instructions is too palpable to require comment.

Counsel for defendant, in their very excellent brief, have cited many cases bearing upon this question. Among these is that of the English case of *Queen v. Jackson*, Div. 1, 1891. This was a case where a husband undertook to restrain the liberty of his wife by forcibly keeping her in his own home after she had declined to further live with him. The decision of the court in that case may be epitomized in the statement of Mr. Helmer Collins, Q. C., as follows: "The contention of the husband would result in the reintroduction into society of private war, for the male relations of a wife would naturally, if at hand, be likely to resist her capture by the husband. The contention for the husband involves wholly untenable propositions. First, it involves that the husband may take possession of the wife's person by force, though no process of law could give him such possession of her. There never was any process of law for seizing and handing over the wife to the husband. * * * A husband has no such right at common law to the custody of his wife. It is inconceivable that the husband should be entitled to do by force for himself that which the law cannot enforce in his favor."

In *Fulgham v. State*, 46 Ala. 143, the rule is stated as follows: "But in person the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the state, and is entitled in person and in property, to the fullest protection of the laws. Her sex does not degrade her below the rank of the highest in the commonwealth."

In *State v. Oliver*, 70 N. C. 61, it is said: "We may assume that the old doctrine that

a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances."

Again, in *Buckingham v. Buckingham*, 81 Mich. 89, 45 N. W. 504, the same doctrine is declared: "There would seem to be no legal principle which would prevent her from voluntarily deserting her husband and abandoning her homestead. She is in no sense the slave of her husband, and is so far the master of her own will that she has liberty to remain with her husband, or go from him, as she pleases; and he has no legal remedy to compel her to return."

In *State v. Conally*, 3 Or. 69, the principle is stated as follows: "If Mrs. Hill, the wife of the deceased, having reasonable ground to apprehend personal violence at the hands of her husband, sought a temporary refuge in the defendant's house, and the deceased, being forbidden, sought to enter, then either the defendant or his wife had a right to use all necessary force to prevent him from entering."

And in *Commonwealth v. McAfee*, 108 Mass. 459, 11 Am. Rep. 383, we find a very clear and comprehensive statement of the rule: "It may be stated, however, that under modern legislation, as well as judicial opinions, that fiction of legal unity by which the separate existence of the wife in a legal sense is denied is exploded. Her person is as sacred as that of the husband, and the protection afforded by law to the one should not be denied to the other. In fact, courts of equity have always recognized the separate existence of the wife in reference to her sole and separate estate; and to say that a court of law will recognize in the husband the power to compel his wife to obey his wishes, by force if necessary, is a relic of barbarism that has no place in an enlightened civilization."

Many additional authorities are cited to the same effect.

[5] Instruction No. 25 was as follows: "No. 25. You are instructed that there is no manslaughter in this case."

And again, instruction No. 26 contains the following: "You are instructed that under the instructions in this case, and the evidence, you are at liberty to find the following verdicts: Murder in the first degree, murder in the second degree, or not guilty."

Under the testimony, this was clearly material error. This subject was exhaustively discussed by Mr. Justice Gabbert in the recent case of *Henwood v. People*, 129 Pac. 1010, decided at this term of court, and it is only necessary to cite this authority without a repetition of the argument. Considering the testimony in this case in comparison with the circumstances there, we cannot escape

the conclusion of error in the giving of these instructions. This becomes more apparent when we consider the testimony offered by the defendant and refused by the court.

[6, 7] In line with the court's theory, as outlined in the instructions, testimony competent and vital to defendant's defense of self-defense was refused and stricken out. This line of testimony is sufficiently indicated by the statement of defendant's counsel as to what he desired to prove as follows: "I want to show, prior to the night of the killing and since the marriage of the deceased to Mrs. Smith, the sister of the defendant, that there have been repeated and continued acts of brutality on the part of the deceased; that these acts were made known, and the results of them, to the defendant; that the deceased had made threats to take the life of both the sister of the defendant and the defendant himself; that on the day of July 15, 1910, there was a fight—a row occurred in the house of Smith—at that time he jumped upon the abdomen of his wife and caused hemorrhages, which afterwards necessitated an operation; that Mrs. Smith left his house and fled to the house of the defendant for protection, as she had done oftentimes before; and I want to show that, also to show the state of mind that the defendant was in, and the apprehension he might have as to the designs of the deceased." And again: "I want to ask questions of this witness, and other witnesses, which show the probability of whether or not Mr. Smith was the aggressor; and I want to ask this witness everything that Mrs. Smith would have been allowed to testify to were she the defendant, and what he knew of prior to the time of the shooting."

The court, in the instructions and in the rejection of testimony offered, has overlooked the right of the brother to use such force as may be necessary for the protection of the person and life of his sister, as well as a consideration of the sudden passion that may be aroused in such a case. *Campbell v. Commonwealth*, 88 Ky. 402, 11 S. W. 290, 21 Am. St. Rep. 348.

The defendant complains and assigns as error the conduct of the deputy district attorney and the court. It is not necessary to go into detail in this matter, nor to especially consider it in that light; but some of the acts of both, in this regard, were unusual, uncalled for, and manifestly unfair.

[8] The refusal of the court to permit the defendant to show the general reputation of the deceased in the neighborhood in which he lived, as to being quarrelsome and dangerous, was worse than error. Considering the well-known state of the law in this regard, this was inexcusable. But still more grievous was that, after the court had rejected such testimony, it permitted the deputy district attorney to introduce testimony in rebuttal tending to show the reputation of the

deceased in this respect to be good. Citation of authorities as to these matters is not required.

[8] Very much of the conduct of the deputy district attorney upon the trial was unfair at least, if not reprehensible. For instance, he asked, and was permitted to ask, questions of witnesses which by insinuation and innuendo, tended to reflect upon the moral character of the home of the defendant and his mother, when there was not a scintilla of testimony to justify these questions. This court in *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 334, has approved Mr. Wharton's statement of the duty of a prosecuting attorney in the trial of criminal cases: "It is scarcely necessary to add that a prosecuting attorney is a sworn officer of the government, required not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, he is bound to see that no conviction shall take place, except in strict conformity to law. It is the duty, indeed, of all counsel to repudiate chicanery and appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of that they are independent officers of state." Particularly should this be his course of conduct in a case like this, where the defendant is in poverty and defended as a poor person. It is such conduct upon the part of officials, intrusted with power to enforce the law, as appears in this case, that breeds discontent, subjects courts to criticism, and provokes contempt of the law.

The judgment is reversed, and the case remanded.

MÜSSER, J., concurs. GARRIGUES, J., concurs in the reversal of the case upon the ground that the instructions were erroneous.

(54 Colo. 230)

PEOPLE v. ZOBEL

(Supreme Court of Colorado. March 3, 1913.)

1. CRIMINAL LAW (§ 1024*)—APPEAL—RIGHT OF STATE.

A writ of error will not lie at the instance of the state in a criminal case, unless clearly authorized by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024.*]

2. CRIMINAL LAW (§ 1024*)—APPEAL—RIGHT TO REVIEW—RIGHT OF STATE.

Where the court of its own motion dismissed a larceny prosecution, on the ground, based upon facts within the judge's knowledge, but outside the record, that accused was only an accessory and could not be tried after the dis-

charge of his principals, its action was, in legal effect, based upon a plea in bar interposed by itself, so that the state could have the judgment of dismissal reviewed, under Rev. St. 1908, § 1997, permitting writs of error on behalf of the people to review criminal judgments upon questions of law arising upon pleas in bar.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024.*]

3. CRIMINAL LAW (§ 302*)—TRIAL—DISCONTINUANCE OF PROCEEDINGS—AUTHORITY OF JUDGE.

That the district attorney had dismissed a prosecution against the principals in larceny did not authorize the court, over his objection, to discharge an accessory without setting the case for trial, even if an accessory cannot be tried after the principal's discharge; the district attorney alone having authority to order the proceedings dismissed in advance of trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 688-697; Dec. Dig. § 302.*]

Musser, C. J., and Scott and Bailey, JJ., dissenting.

En Banc. Error to District Court, Lake County; Charles Cavender, Judge.

August Zobel was charged with larceny of ores, and judgment was rendered dismissing the prosecution, and the People bring error. Reversed and remanded.

The district attorney of the Fifth judicial district filed an information against the defendant in error, charging him with the larceny of ores. Two others were also charged with the larceny of these ores, whether in the same or other informations is not altogether clear; but that is not material. Subsequently, in the same district court in which these criminal proceedings were instituted, and before the same presiding judge, a civil action against these parties for the recovery of the value of the ore so charged to be stolen was tried, and a judgment rendered against them. Thereafter the criminal proceedings against defendants other than Zobel were dismissed by the district attorney upon their promise to give evidence against Zobel. Later the district attorney made a motion to fix a time for the trial of Zobel, when the presiding judge said to the district attorney that he had already heard the evidence in the civil action, and therefrom it appeared that the defendants against whom the charge had been dismissed were the principals in the crime and Zobel only an accessory, and, as the principals had been discharged by the district attorney, Zobel, as accessory, could not thereafter be tried. The judge thereupon, over the objection and against the protest of the district attorney, and notwithstanding the latter's statement that he had other evidence of Zobel's guilt than that produced at the trial of the civil action, dismissed the criminal charge against Zobel, discharged him, and released his bondsmen. To review this action, the district attorney has brought the case to this court for review on error, under and by virtue of the provisions of section 1997, R. S. 1908, which, so far as material

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to any question involved, is as follows: " * * * Writs of error shall lie on behalf of the state or the people to review decisions of the trial court in any criminal case upon questions of law arising upon the trial, motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment, or where a statute is declared unconstitutional: * * * Provided, that nothing in this act shall be construed so as to place a defendant in jeopardy a second time for the same offense."

On behalf of the people the district attorney contends that the dismissal of the action and the discharge of the defendant were erroneous, because that step could not be taken without his consent and over his objection; while on the part of the defendant the contention is that the question presented does not come within the purview of the section of the statute above quoted, for the reason that the dismissal was not ordered upon "questions of law arising-upon the trial."

John T. Barnett, Atty. Gen., James M. Brinson, Deputy Atty. Gen., and James T. Hogan, Dist. Atty., of Leadville, for the People. Joseph W. Clarke, of Leadville, and T. E. McIntyre, of Denver, for defendant in error.

GABBERT, J (after stating the facts as above). [1] It is well settled in this state, and generally in this country, that a writ of error in a criminal case will not lie at the instance of the state, unless clearly authorized by statute (*People v. Raymond*, 18 Colo. 242, 32 Pac. 429, 19 L. R. A. 649; *U. S. v. Sanges*, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445); and the first question we shall determine is whether or not the section of the statute above quoted, covers the case made by the facts.

[2] It appears from the record that the dismissal of the cause was based upon facts knowledge of which the judge obtained outside of the record in this case, which were that because the proceedings against the other defendants charged with the larceny of the ores had been dismissed, and it appeared to the court from the facts established at the trial of the civil action that they were the principals and the defendant only an accessory, that the latter could not be tried after the discharge of his principals. In legal effect, therefore, the action of the court was based upon a plea in bar, which of its own motion it orally interposed. Such being the case, it is not necessary to define the meaning of the phrase "questions of law arising at the trial," for the reason that a decision of the court was made on a plea in bar, and that is one which the statute specifically authorizes to be reviewed in a proceeding like the present one.

[3] In this state an accessory is guilty the

same as a principal, and may be indicted and punished as a principal. Section 1620, R. S. 1908. The mere fact that the district attorney had dismissed the proceedings against the principals did not justify the court, over his objection, to discharge the accessory. This is true, even if an accessory cannot be tried after the discharge of the principal; that is, the court should not, for this reason, refuse to set a case against an accessory for trial, and of its own motion dismiss it before it had regularly been brought on for trial before a jury. It would doubtless be within the jurisdiction of the trial court, after the trial was commenced, if it appeared the evidence was insufficient, or that the law, as applied to the facts developed at the trial, would not permit a conviction, to discharge the defendant; but, in advance of the trial, as in this case, it was not competent for the court of its own motion, and against the protest and objection of the district attorney, to dismiss the cause and discharge the defendant. At that stage of the proceedings the district attorney was the only one who could order the proceedings discontinued. *People v. District Court*, 23 Colo. 466; 48 Pac. 500; *Gray v. District Court*, 42 Colo. 298, 94 Pac. 287.

For the reason that, in our opinion, the court erred in dismissing the action, the judgment is reversed, and the cause remanded for further proceedings according to law. Reversed and remanded.

MUSSER, C. J., and SCOTT and BAILEY, JJ., dissent.

(54 Colo. 358)

CORYELL et al. v. FAWCETT.

(Supreme Court of Colorado. March 3, 1913.)

1. APPEAL AND ERROR (§ 781*)—TERMINATION OF CONTROVERSY—SETTLEMENT.

Where parties to a writ of error have settled their differences, and no real controversy or live question concerning the matters in litigation remains, the writ will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. APPEAL AND ERROR (§ 19*)—PROSECUTION OF PROCEEDINGS—BAD FAITH.

Where the parties to a writ of error did not intend that any of the errors assigned should be reviewed, but the proceedings were instituted in order to afford a basis for defeating the claim of the attorneys for the defendant in error for their fees, the confession of errors being filed with the transcript without regard to the merits of the alleged errors, the writ was not filed in good faith, and was insufficient to confer jurisdiction on the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

3. APPEAL AND ERROR (§ 781*)—PROCEEDINGS IN ERROR—COMMENCEMENT—BAD FAITH—DISMISSAL.

Where plaintiff, in a stockholder's suit, succeeded in recovering a judgment, not only for herself, but for the benefit of the corporation, and her attorneys were also awarded \$2,-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

500 fees, after which a settlement between the parties in fraud of the attorneys was arranged and proceedings in error instituted to carry out the fraud, without intent that any of the errors assigned should be reviewed, but that errors should be confessed and the judgment reversed, the writ would be dismissed, leaving the parties in the position in which they placed themselves before invoking the jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

White, J., dissenting.

En Banc. Error to District Court, Garfield County; Charles McCall, Judge.

Action by Pauline M. Fawcett against Perry C. Coryell and others. Judgment for plaintiff, and defendants bring error. Dismissed.

E. L. Clover, of Denver, for plaintiffs in error. H. J. O'Bryan, of Denver, for defendant in error.

PER CURIAM. Through her attorneys, D. M. Campbell and S. J. De Lan, the defendant in error, Miss Pauline M. Fawcett, claiming to be a stockholder in the Garfield County Coal & Fuel Company, prosecuted an action in the district court of Garfield county against Perry C. Coryell and his wife, Minnie B. Coryell, and the coal company. The Coryells were the officers and a majority of the board of directors of the company and the holders of all the capital stock, unless Miss Fawcett owned 5,000 shares which she claimed. In the complaint it was alleged that she owned these shares. Her ownership thereof was admitted by the defendants in their answer and throughout the trial. The certificate therefor was not produced, and the company had no stock ledger or other book to show who were the owners of the stock. The result of the action in the district court was a decree that Mrs. Coryell convey to the coal company certain lands which she had taken in her own name, and which the court found belonged to the company; that she pay to the company \$20,474 in money; that Perry C. Coryell pay to the company the sum of \$1,000; and that the company pay to D. M. Campbell and S. J. De Lan, as attorney's fees for them as the plaintiff's attorneys, the sum of \$2,500.

A receiver was appointed to take charge of the business and property of the coal company, who was empowered to do all things that he might lawfully do for the best interests of the company and those interested, and to sue for and collect all money and property due the company and make distribution thereof according to the respective rights of the stockholders, and in such manner as might be approved by the court.

After judgment the Coryells applied for a new trial. In support of this application Mr. Coryell, in an affidavit, set forth a chain of facts and circumstances which he began vaguely to remember after the trial, and whereby he attempted to show that Miss

Fawcett did not in fact own any stock in the company, but that the stock she had owned, and which was treated as hers at the trial, had been turned over to Mrs. Coryell several years before for a certain consideration, since which time the Coryells had been the owners of all the stock of the company, and the corporation had practically gone out of business. Miss Fawcett denied this in a counter affidavit. The motion for a new trial was overruled in August, 1911. On March 14, 1912, a transcript of the record was filed in this court and the cause docketed on error, with the coal company and the two Coryells as plaintiffs in error and Miss Fawcett as defendant in error. On the same day and simultaneous with the filing of the transcript, there was filed on behalf of Miss Fawcett, the defendant in error, what purports to be a confession of errors, wherein, after confessing that the court below committed prejudicial error in many particulars, Miss Fawcett empowered an attorney other than Campbell and De Lan to appear for her, file the confession of errors, consent that the judgment be reversed and annulled, and that a final judgment be entered in this court dismissing the complaint.

When the filing of this confession of errors was brought to its attention, this court, of its own motion, appointed a commissioner to take testimony with reference to the preparation and filing thereof. The parties, together with Campbell and De Lan, appeared before this commissioner. Testimony was taken, and the same, together with the certificate of the commissioner relative thereto, was filed in this court. It appears from the testimony of Miss Fawcett, Mr. Coryell, and others, taken before the commissioner, that after the motion for a new trial was denied Miss Fawcett became convinced that she was not the owner of any stock in the company, and that the stock which she had claimed had been by her turned over to Mrs. Coryell for a consideration several years before she began the action. When she became convinced of this, she disclaimed any interest in the company or in the litigation or judgment, and desired, as she expressed it, "to quit." Thereupon the Coryells and Miss Fawcett had various meetings, conversations, and negotiations, the result of which was that the certificate of stock theretofore claimed by Miss Fawcett was found and turned over to the Coryells, and Mr. Coryell had his attorney prepare the confession of errors, which, if we understand her testimony aright, was outlined by Miss Fawcett. The confession was prepared and sent to Mr. Coryell, who in turn sent it to Miss Fawcett. The latter signed and acknowledged it before a notary public and transmitted it to an attorney, authorizing and directing him to file it, and to consent to the reversal of the judgment and the dismissal of the complaint, as above

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

stated. Mr. Coryell, at the request of Miss Fawcett, had seen this attorney, and the latter consented to act for her upon her assurance that her other attorneys had been discharged. Campbell and De Lan were not notified or consulted with reference to the confession of errors, and knew nothing concerning it until they were notified by order of this court. All that was said to them with reference to settling the matters was in September, 1911, when Miss Fawcett sent to Campbell an alleged proposition of compromise or settlement from Coryell, which was returned by Campbell to Miss Fawcett with a notation thereon that there was nothing to compromise; that her rights were fully protected by the judgment, and there was nothing to do but to execute it. When asked by Campbell if she remembered sending a proposition of compromise, Miss Fawcett said: "I do. You turned it down as a yellow dog. You told me to go no further. I got your letter. I know what you said. I gave you a fair, square chance. You would not take it. I was going into bankruptcy, and I wasn't going, and I quit. Now there you have got it." After that Campbell and De Lan seemed to have been studiously ignored.

It was also made to appear to this court that shortly before the transcript and confession of errors were filed the receiver, at the direction of the district court, was proceeding to sell some of the property of the company to pay the costs of the trial and the attorney's fees allowed to Campbell and De Lan. While the Coryells and Miss Fawcett were careful in their testimony to avoid saying that their matters had been settled prior to the filing of the transcript and confession of errors, it is very plain from the testimony and the confession of errors that they had reached an understanding and agreement to wipe out the judgment of the district court and to dismiss the action, leaving the Coryells the owners of and in possession of all the capital stock of the company and its officers and directors. Before the cause was docketed in this court, Miss Fawcett had disclaimed all interest in the company and the judgment, and declared that she never had any cause of action against the defendant. She no longer claimed to be a stockholder. The stock that she had claimed had been turned over to the Coryells, and they were, without dispute, the owners of and in possession of all the capital stock, and were the officers and directors. There remained no longer any real or live controversy between the parties to the action. So far as the rights of the Coryells, the company, and Miss Fawcett are concerned, their controversy was settled, and the matters over which the litigation had been waged adjusted. To effectually wipe out the litigation and the judgment, it is plain that the parties further agreed that the case should be lodged in this court in the form of a writ of error, together

with a confession of errors, so that a reversal of the judgment and a dismissal of the complaint should be at once secured. It was not necessary to bring the case here to effectuate the settlement. In so far as the rights of the parties are concerned, that could have been accomplished in the district court. Mrs. Coryell was the owner of all the capital stock, except possibly two shares held by Perry C. Coryell and Perry C. Coryell, Jr., who with Mrs. Coryell were directors, and the company had no debts. The only reason for the attempted proceeding in this court that the parties could have had was the anticipation that a reversal of the judgment and a dismissal of the complaint would defeat the rights of Campbell and De Lan to the attorney's fees allowed them. Having settled their own matters, the parties have attempted surreptitiously and without notice to use this court to defeat the attorneys. From the foregoing, the following conclusions necessarily follow:

[1] (1) The matters in controversy and the subject of the litigation between the Coryells, Miss Fawcett, and the company have been adjusted and settled between them, and the errors, if any, occurring in the lower court, have become moot; for, whether the judgment be reversed or affirmed, the same result will follow from their agreement. When parties have settled their differences, there remains no real controversy or live question concerning the matters that the litigation was about. If parties dispose of the subject-matter of litigation, there remains no matter to litigate. Under such circumstances, a writ of error will be dismissed. *People v Hall*, 45 Colo. 303, 100 Pac. 1129; 2 Cyc. 533; 3 Cyc. 188.

[2] (2) The parties did not intend that any of the errors assigned should be reviewed in this court. The confession of errors was made before the case was lodged here, and then filed at the same time that the transcript was filed and the case docketed, and the confession was made without regard to the merits of the alleged errors. As no review was ever intended, the writ of error was not sued out in good faith. The purpose of a writ of error is to obtain a bona fide review of a judgment of a lower court; and when such a writ is sued out, not for the purpose nor with the intention of having a bona fide review, but for some other and ulterior purpose, foreign to the purpose of appellate jurisdiction, it cannot be said to have been sued out in good faith, nor that the appellate jurisdiction has attached. Such a proceeding is a pretense and a sham, and cannot give parties any standing.

[3] (3) The evidence before us, circumstantial and otherwise, indicates that the parties endeavored to defeat Campbell and De Lan of their attorney's fees. For the accomplishment of that purpose, the parties hit upon the plan of pretending to institute proceed-

ings in error in this court, and, by confessing error as to matters concerning themselves and over which there was no longer any controversy, secure a reversal of the judgment and a dismissal of the complaint. It was not intended to have a real review of the question of the allowance of attorney's fees. The proceeding was resorted to for ridding the company and the Coryells of the attorney's fees allowed, and leaving the attorneys to look for payment for their services to their client, who confessed that she was going into bankruptcy. It is certain that Campbell and De Lan were led to believe, and confirmed in the belief by all the parties, plaintiff and defendants, that Miss Fawcett was a stockholder in the company and, as such, prosecuted the action, which through the work of the attorneys, resulted in a very substantial judgment in favor of the corporation. Certain it is that these attorneys were and are entitled to just compensation from some one. In the final disposition of the controversy, fair dealing required that they be considered, consulted, and given an opportunity to protect their rights, whatever they may be. The manner in which it was sought to do away with the rights of these attorneys was a fraud upon them, and the use of the forms of review, for the purpose of completing that fraud, was an imposition upon this court. This court has the right, and it is its duty, to protect itself from imposition and from being used as an instrument for the accomplishment of a designed wrong by parties who invoke its jurisdiction in bad faith. To retain this pretended proceeding in error in this court would be to condone wrong and to say that parties have the right to impose upon courts and use them for illegitimate purposes.

The least that should be done under all the circumstances as recited is to leave the parties in the situation in which they had placed themselves before they pretended to invoke the jurisdiction of this court. That can be accomplished by striking the confession of errors and dismissing the writ of error; and the same is accordingly done.

Writ of error dismissed.

WHITE, J., dissents.

WHITE, J. I cannot agree to a dismissal of this suit, at this time, upon the record as it now is. To do so affirms the judgment in every particular and, as I believe, deprives at least two of the plaintiffs in error of a constitutional right.

Pauline M. Fawcett prosecuted a stockholders' suit against the Garfield County Coal & Fuel Company and Perry C. Coryell and Minnie B. Coryell, a majority of the members of its board of directors. Upon final hearing a decree was entered, requiring Minnie B. Coryell to convey to the coal company certain lands of the value of \$50,-

000, which she claimed as her own; that she likewise pay to the company \$20,474 in money; that Perry C. Coryell pay to the said company the sum of \$1,000. It was further adjudged, in the decree that the company pay to D. M. Campbell and S. J. De Lan, who had represented the plaintiff in the prosecution of the suit, the sum of \$2,500 as attorney's fees therein, and a receiver was appointed to take charge of the property and carry on the business of the company.

March 14, 1912, the company, Minnie B. Coryell, and Perry C. Coryell, as plaintiffs in error, presented a transcript of the record and docketed the cause in this court on error, being represented therein by the same attorney that represented them in the trial court. On the same day Pauline M. Fawcett, the defendant in error, through an attorney of this court, H. J. O'Bryan, filed a confession of errors and consent that the judgment be reversed and annulled, and that a judgment be entered in this court dismissing the complaint. Plaintiffs in error thereupon applied for a supersedeas, and, at the time of the hearing thereof, the confession of errors was brought to the attention of the court. Upon an inspection of the record, it appearing that the decree ordered the payment by the coal company to Messrs. Campbell and De Lan of a certain sum as attorney's fees, it was thought wise, before taking action in the premises, to advise them of the confession of errors filed, which was done. Thereupon Messrs. Campbell and De Lan, by telegram, and subsequently by letters, entitled in the cause and addressed to the clerk of this court, protested against the acceptance of the confession of errors and the disposition of the cause thereon, claiming to be the attorneys authorized to act for the defendant in error. Within two or three days thereafter defendant in error, in her own proper person, presented for filing in this court a paper, entitled in the cause, wherein she denied the authority of Campbell and De Lan, or either of them, to represent her in the suit in this court, declaring that they had no right or authority to appear for her in said cause in any way, and that H. J. O'Bryan was her attorney therein. Thereupon this court, of its own motion, appointed a commissioner to take testimony with reference to the preparation and filing of the confession of errors, but in no wise designated the witnesses to be examined or the scope of the inquiry. The witnesses examined were E. L. Clover, attorney for plaintiffs in error, Pauline M. Fawcett, defendant in error, Henry J. O'Bryan, the attorney representing her in this court, Perry C. Coryell, one of the plaintiffs in error, D. M. Campbell and S. J. De Lan, the attorneys who had represented defendant in error in the court below, and J. D. Fillmore, a clerk in the office of S. J. De Lan.

Plaintiff in error Minnie B. Coryell neither testified, nor does the record disclose that

she was present, at the hearing before the commissioner. Moreover, contrary to the statement in the opinion, it does not appear that the Coryells and Miss Fawcett had various meetings, conversations, and negotiations, and had reached a conclusion whereby the rights of the Coryells, the company, and Miss Fawcett were settled and the matters in litigation adjusted. The only meetings, conversations, and negotiations that were had, if any, were between Perry C. Coryell and Miss Fawcett, and there is no evidence that Minnie B. Coryell was in any wise apprised thereof. Besides, the testimony is positive that nothing whatever was paid or promised Miss Fawcett as a consideration for the filing of the confession of errors. Her testimony is specific that she was prompted thereto solely by reason of the production and inspection of a forgotten letter written years before, wherein she had sold and placed in trust for delivery the shares of stock in the company which she had, prior to the determination of the suit, believed she owned, and which trust had been carried out according to its terms. The testimony of Perry C. Coryell is to the same effect, and there is none of a direct nature to the contrary. If this court, upon evidence taken for the purpose of ascertaining the relation of attorneys to a confession of errors filed, disregards the positive testimony of two of the interested parties to a suit, and from inferences only finds that the cause was settled as between the two, it surely cannot properly extend that finding to another party to the suit, who was neither a witness heard therein, nor apprised that the inquiry would extend to the question of whether or not a settlement of the litigation had been made. Therefore the court cannot, it seems to me, consistently with the rules of procedure, and the principles of justice, foreclose the constitutional right of Minnie B. Coryell, at least, to have the enormous judgment entered against her reviewed by writ of error in this court. It is said that the only reason for lodging the case here was the belief of the parties that a reversal of the judgment and the dismissal of the complaint would defeat the rights of Campbell and De Lan to the attorney's fees allowed them. If it be true that some of the parties so intended, the record certainly does not disclose, even by inference, that Mrs. Coryell shared in such intent or had knowledge thereof.

It is asserted, presumably to show that no harm will follow an affirmance of the judgment by dismissal of the writ of error, that Mrs. Coryell is the owner of all the capital stock of the corporation, except two shares held by Perry C. Coryell and Perry C. Coryell, Jr., and that the Coryells constitute the board of directors, and the company has no debts. If the statement as to the ownership of the stock, control of the corporation, and its freedom from indebtedness be true, it in

no sense changes the situation, nor removes the probability of grave injustice being done the Coryell judgment debtors. The record shows conclusively that 45,000 shares of the capital stock, being all thereof except 5,000 shares claimed at the time of the suit by Miss Fawcett, are in the possession of a bank as collateral security upon an indebtedness to the bank of some person or corporation not disclosed. Suppose the payment of such indebtedness is defaulted? Thereupon the bank resorts to the collateral security and sells the shares of stock. It would necessarily follow that the new holder of the stock could force payment into the treasury of the corporation of the judgments against the Coryells, affirmed by the dismissal of this writ of error.

Moreover, I am not convinced that the record is conclusive that the corporation is not indebted at the present time. It shows that several years ago all indebtedness was paid, but not the negative of subsequent indebtedness. Whatever the condition of the corporation was then, does this court know its condition now? Besides, the record shows that the concern is now in the hands of a receiver authorized to carry on its business, to incur indebtedness, to collect money and property due the company, and to make distribution thereof. But let us suppose, at this time, there are no debts of the corporation, that the Coryells own all the stock, that the receiver is discharged, and the Coryells, as a board of directors, cause the corporation to satisfy of record the judgments involved in this suit. Thereupon the stock passes into the hands of others, or the corporation becomes financially involved. Is it at all certain that the new holders of the stock or the creditors of the corporation would be precluded from forcing the payment of the judgments in question, or a surrender to the corporation of the property claimed herein by Mrs. Coryell? If the property which she holds and claims as her own actually belongs to the corporation, as adjudged by the decree herein affirmed, would it not seem that whosoever acquired ownership of any portion of the capital stock of the company could force a reconveyance of such property to the corporation from one who had been released from such obligation, without consideration, by an act of the corporation which was, at the time of the release, under the full control of the person released?

But were we to assume that all the parties to the litigation participated in the acts and things which, in the opinion of the court, constitute a settlement of the litigation, it would not, in my judgment, warrant a dismissal of the writ of error. Substantial judgments actually exist against two of the plaintiffs in error. There is no claim that these judgments have in any wise been satisfied or discharged. The only claim is that Miss Fawcett was satisfied in some way. Neither should the writ be dismissed, though it be

true that one of the purposes thereof, in conjunction with the confession of errors, was to deprive Campbell and De Lan of that which was their just due. Their fees were earned in the trial court, not in this. The proceedings here constitute a new suit, and the employment of attorneys in the court below does not constitute them attorneys in the proceedings here. It is quite true that attorneys should be paid for their services, and Campbell and De Lan are entitled to theirs, and may receive them in a proper proceeding either in the court below, or, perhaps, by intervention in the proceeding here. If the allegations of the complaint and the admissions of the answer disclose a certain state of facts, and these attorneys have rendered services justly chargeable, under such facts, to the corporation itself, it would necessarily follow that the corporation would be estopped, as between itself and the attorneys, from denying the existence of such facts. A reversal of the judgment would send the matter into the district court, possessed of full jurisdiction in the premises, where all parties could be heard and the matter properly adjusted.

But it is said that the writ of error is not prosecuted in good faith; that its purpose, together with the confession of errors, was to secure a reversal of the judgment and a dismissal of the complaint; and that it was unnecessary to bring the case here, as that could have been accomplished in the district court, or at least a settlement therein made. If it is meant by this that the district court could have rendered the relief a judgment of reversal would afford, a sufficient answer thereto is that the term of the district court, at which the decree was entered had expired prior to the time that Miss Fawcett concluded that she was in the wrong. The district court was therefore powerless to set aside, change, or modify its decree in any particular. Again, how could a settlement have been made in the district court? The Coryells constituted the board of directors of the corporation. The judgments are against them and in favor of the corporation. Under these circumstances it is probable that neither the Coryells nor the corporation itself could safely discharge or satisfy the judgments without payment thereof. Nor is it certain that Miss Fawcett possessed that power. She was, in legal effect, a trustee for the corporation, suing for herself and those similarly situated. However, were we to assume that the entire matter could have been adjusted in the district court, because it was not, is this court to dismiss the writ of error, thereby affirm the judgment, and thus impose upon the Coryells a payment aggregating over \$71,000 in money and property which they claim they do not owe? Would it not be wiser and more consonant with sound judicial procedure to reverse the case and let

the entire matter be inquired into where all parties may be heard, a full inquiry had, every one's rights protected, and substantial justice done?

(54 Colo. 385)

NATIONAL SURETY CO. v. PEOPLE ex rel. TOWN OF MARBLE.

(Supreme Court of Colorado. March 8, 1913.)

1. APPEAL AND ERROR (§ 1245*)—APPEAL FROM POLICE COURT—BOND—UNDERTAKING—DISMISSAL OF APPEAL—"ACTIONS."

C. having been convicted in police court in 11 different cases for violations of a town ordinance, and fines having been assessed in each case, she appealed to the county court, giving one bond to stay proceedings, which in apt terms covered each and all of the cases. Thereafter the appeals were dismissed, and a *procedendo* entered, and, C. having failed to pay the fines, an action was brought on the bond, which alleged that after the cases were taken to the county court each of "said actions" was dismissed. *Held*, that the word "actions" was not used in its ordinary sense of suits or causes, but was used to refer to the actions of C., to wit, the taking of the appeals; and hence the complaint was not fatally defective as showing that the actions, instead of the appeals, had been dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4798-4806; Dec. Dig. § 1245.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140; vol. 8, p. 7563.]

2. APPEAL AND ERROR (§ 1245*)—ACTION ON BOND.

A bond on appeal from judgments assessing fines for violations of a city ordinance provided that if defendant should prosecute the appeals with effect and pay any judgment, or judgments, that might be rendered by the court on dismissal or trial of the appeals, or would surrender herself in satisfaction of any such judgment or judgments, and if she would appear before the county court on the first day of the next term and be and remain at and abide the order of the county court and not depart without leave, the bond should be void, otherwise in full force and effect. *Held*, that a complaint on the bond, alleging that the appeals had been dismissed, and that the judgments were due and unpaid, sufficiently negatived the idea that C. had surrendered herself in satisfaction of the judgments, or that they had been satisfied in any manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4798-4806; Dec. Dig. § 1245.*]

3. APPEAL AND ERROR (§ 1246*)—APPEAL BOND—EXECUTION.

Where an appeal bond was filed by C. with the magistrate, who had imposed certain fines on her, to secure an appeal and a stay of proceedings, and such appeal and stay were secured, it sufficiently appeared that C. signed the bond; her name appearing thereon when delivered by the surety company's agent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4807, 4808; Dec. Dig. § 1246.*]

4. PRINCIPAL AND SURETY (§ 57*)—APPEAL BOND—EXECUTION—ALTERATION—AUTHORITY.

An application for an appeal bond having been made to the local agent of a surety company having authority to take such application and deliver bonds, a bond was procured, executed in the company's name by its attorney in fact,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and sent to the local agent, and through him delivered to the magistrate. The latter, not approving the form, returned it to the local agent, who changed the bond to meet the requirements and gave it to the principal's attorney, who delivered it to the magistrate, he having no knowledge that it had been changed by the local agent. *Held*, that the magistrate was entitled to presume that the agent was acting within the scope of his authority and delivered a bond executed by the company, and that the surety company was therefore estopped to deny that it had executed the bond in the form required.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 101; Dec. Dig. § 57.*]

5. APPEAL AND ERROR (§ 895*) — APPEAL BOND—FORM—LIABILITY.

Where a bond executed by a surety company was delivered to a magistrate to stay execution of a judgment pending appeal, and it was given that effect, and recited that if the appeals were dismissed, the principal would pay the judgments or surrender herself in satisfaction thereof, when the bond would be void, otherwise it should remain in full force and effect, it was enforceable as against the surety, though it was not in the statutory form or in any recognized form.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2058, 2064–2070, 2085, 2086, 8127; Dec. Dig. § 895.*]

Error to District Court, Gunnison County; Sprigg Shackleford, Judge.

Action by the People, on relation of and for the use of the Town of Marble, against the National Surety Company. Judgment for plaintiff, and defendant brings error. *Affirmed*.

George Q. Richmond, of Denver, and J. M. McDougal, of Gunnison, for plaintiff in error. Dexter T. Sapp and James B. Nash, both of Gunnison, for defendant in error.

MUSSER, C. J. The action below was on an appeal bond given by one Mrs. Curley, with the plaintiff in error as surety. Mrs. Curley had been convicted in a police court in 11 different cases for violations of an ordinance of the town of Marble. A fine was assessed in each case. The fines aggregated \$3,200, for which amount the bond was given. While there was but one bond, the recitals therein showed the charge and conviction and the amount of the fine in each of the 11 cases, and that an appeal was taken in each, and the bond, by apt words, was made to apply in each of the appeals; that is, while there was but one instrument, yet it was intended to be in effect the same as 11 bonds for the amount of the fine in each case, to be used in each case for the purpose of appealing it. Upon the filing of the bond proceedings were stayed in the police court, and the cases were transmitted to the county court, as is done in such appeals. Thereafter, as we think sufficiently appears from the record, the appeals were dismissed in the county court, and a procedendo issued to the police court. Mrs. Curley failed to pay the fines, and an action was brought to recover on the bond,

which, after a trial to the court, resulted in a judgment against the surety.

It was urged by demurrer, and otherwise in the court below, and is urged here, that the complaint did not state facts sufficient to constitute a cause of action. This objection seems to be based in this court on two grounds:

[1] 1. The complaint alleged that after the cases were taken to the county court such action was had in that court that each of the "said actions" was dismissed. The contention is that it appears in the complaint that the actions, or suits, or causes were dismissed, and that therefore no cause of action was stated. This would be true if the word "actions" was used in the complaint in the sense of suits, or causes, or in the sense it is used in our Code when referring to a civil action, for if these were dismissed, the judgments would have been wiped out. It is clear that the word "action" was not used in that sense in the complaint, for immediately thereafter it speaks of each of "said causes" as having been remitted to the police court, and alleges that Curley failed and refused to pay the judgments, and that each of the judgments was still due and unpaid at the time of the filing of the complaint, all of which was admitted by the answer. If the causes, the suits, the civil actions (for they were civil actions—*Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1; *Weiss v. People*, 39 Colo. 374, 89 Pac. 778) were dismissed, and it was intended to so allege in the complaint, then the allegations concerning the remission of the causes, and that the judgments were still due and unpaid, would be altogether wrong, and at variance with the preceding allegations. It is fairly clear that the pleader, when speaking of the suits or civil actions, used the word "causes," and by the use of the words "said actions," was referring to the actions of Mrs. Curley, which have been mentioned, and those actions were taking the appeals in each of said cases. So that when the complaint said that "said actions" were dismissed, it meant that "said appeals" were dismissed. At the trial, the complaint seems to have been so treated; for while the attorney who tried the case was quite specific in mentioning defects in the complaint, the alleged defect as now specified was not mentioned. At most the complaint might be said to be ambiguous in that particular. If it was, the defect has been waived, for it was not raised by demurrer on the ground of uncertainty or ambiguity, nor by motion to make more certain.

[2] 2. The bond was conditioned that if Mrs. Curley should prosecute the appeals with effect and pay off any judgment or judgments that might be rendered by the court upon dismissal or trial of the appeals, or would surrender herself in satisfaction of any such judgment or judgments, and if she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would appear before the county court on the first day of the next term, and be and remain at and abide the order of the county court, and not depart the court without leave, etc., then the bond to be void, otherwise in full force and effect. The contention in this court seems to be that the complaint should have negatived all the conditions, whereas all it said was that Mrs. Curley failed and refused to pay the judgments, or any part thereof, and that the said judgments, and each of them, were still due and unpaid. No such contention was made in the lower court. It was there contended that the complaint only negatived the payment of the judgments; whereas, as was said, it should also negative the condition that Mrs. Curley would surrender herself in satisfaction of the judgments. Now it is plain that the conditions in the bond that are joined by the word "and" must all be performed, and the violation of any one of them would be a breach. The conditions relative to the prosecution of the appeals with effect, and the payment of the judgments, and the appearance before the county court, were all of this kind. Each one of them had to be performed. The only condition preceded by the word "or" is the condition relative to the surrender of Mrs. Curley in satisfaction of the judgment. There is no doubt that in the lower court the company took the position that the conditions joined by the word "and" were all to be performed, and that the only other condition besides the one of payment that had to be negatived was the condition concerning the surrender of Mrs. Curley. If it was necessary to negative the latter condition, that has been done in a manner sufficient to withstand a general demurrer. The allegation that the judgments were due and unpaid negatived the idea that Mrs. Curley had surrendered herself in satisfaction thereof, for if the judgments were satisfied by Mrs. Curley's surrender they were not due and unpaid. The answer admitted that the judgments were due and unpaid, thus further negativing the idea that they had been satisfied in any manner.

[3, 4] It is also contended that no proof was offered that Mrs. Curley signed the bond. The proof showed that Mrs. Curley's name was signed to the bond, and the bond was delivered by the company's agent with the signature on it. The bond was filed by Mrs. Curley with the magistrate for the purpose of securing the appeal and a consequent stay of the proceedings, and such appeal and stay were secured. Such evidence is sufficient proof that Mrs. Curley signed the bond. The real defense below, and the contention here, is that the company never executed the bond sued on. The company had a local agent at Glenwood Springs. Upon application of Mrs. Curley, or her attorney, to this local agent, a bond for \$3,200 was executed in the name of the company by one Toncray, its

attorney in fact. This bond was sent to the local agent, and through him was lodged with the magistrate. The latter did not approve the bond because it was not in form to answer the requirements of the situation. It was returned to the local agent, and the magistrate indicated what the situation was and the nature of the bond required. The agent changed the bond to meet the circumstances. It is not necessary to particularly state what changes were made by the local agent. It is enough to say that they were such as to materially change the nature and character of the bond from what it had been. The bond as changed by the local agent was given by him to Mrs. Curley's attorney to be delivered to the magistrate. The local agent wrote a letter to the magistrate informing him that he had corrected the bond, and that it would be delivered to the magistrate by Mrs. Curley's attorney. The magistrate received the bond. He did not know in what manner the correction had been made. It cannot be said from this record that the magistrate knew that the local agent had corrected the bond by changing it himself, or by sending it to another agent to be changed. He approved the bond, knowing that it came to him from the local agent, apparently duly executed by the company, and proceeded with the appeals as the law required. That the local agent had the authority to deliver bonds executed by the company is undisputed. The company was in the bonding business, and all of its business was conducted by agents. The local agent was there for the purpose of obtaining such business, and when a satisfactory opportunity presented itself to furnish a bond, it was his business to see that it was furnished. The presumption is that one known to be an agent is acting within the scope of his authority. *Austrian & Co. v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350. The local agent was known to the magistrate to be such agent. The local agent had the apparent, as well as the real, authority to deliver such a bond executed by the company. The magistrate had the right to presume that the agent was acting within the scope of his authority and did deliver a bond executed by the company, and the company cannot be permitted to say that the agent did not do that which it had authorized him to do, when that which he did was to all appearances that which he was authorized to do.

[5] It is also contended by the company that the bond is not in statutory form, and that such a bond was never before filed in a court. This may all be true, but it is not necessary to dwell long upon this contention. As a matter of fact, through the instrumentality of this bond, as was intended, proceedings were stayed in the magistrate's court in all of the cases, and they were transmitted to the county court. It was entered into voluntarily. It was an obligation founded

on a valuable consideration, and which consideration was delivered. By its terms, for this consideration, the bond recited that if the appeals were dismissed and Mrs. Curley did not pay the judgments or surrender herself in satisfaction thereof, it would remain in full force and effect. It was not against public policy. The company had the right to enter into such an obligation, whether in statutory form or some other form, and, having done so, and having received the consideration therefor, the bond is enforceable according to its terms and provisions. *Abbott v. Williams*, 15 Colo. 514, 25 Pac. 450; *Dry Goods Co. v. Livingston*, 16 Colo. App. 257, 65 Pac. 413.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

(64 Colo. 314)

BURCHMORE v. ANTLERS HOTEL CO.
(Supreme Court of Colorado. March 3, 1913.)

1. INNKEEPERS (§ 10*)—PERSONAL INJURIES TO GUEST—EVIDENCE.

In an action by a hotel guest for injuries from a fall due to a defective chair, testimony as to the condition of other chairs in the dining room prior to the accident, and as to other accidents occurring in the dining room prior thereto, was properly excluded, where it appeared that the chairs were not all of the same make or design, or of similar defective condition.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 14-16; Dec. Dig. § 10.*]

2. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF CONTROVERTED FACT.

In an action by a hotel guest for injuries from a fall due to a defective chair, an instruction that defendant was liable if, "had it used reasonable care," it would have known of the defect, was properly refused, especially where the law in such respect was well stated in other instructions; the expression quoted being an assumption that the defendant did not use reasonable care.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

3. APPEAL AND ERROR (§ 273*)—OBJECTION BELOW—SUFFICIENCY—INSTRUCTIONS.

Where an instruction contains but one proposition of law, a general exception directed to the whole of the instruction is sufficient to preserve for review an error in a particular portion of it; and hence, in an action by a hotel guest for injuries from a fall due to a defective chair, a general exception was sufficient to preserve for review an error in respect to the words quoted in an instruction that the burden was on plaintiff to establish, by a preponderance of the evidence, that defendant invited plaintiff to sit in a chair which was unsafe and out of repair, and "known" by "defendant to be unsafe and out of repair prior to the happening of the accident complained of," and that the injuries were the natural and probable consequence of defendant's negligent act—such instruction stating but a single proposition of law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.*]

4. INNKEEPERS (§ 10*)—INJURY TO GUEST—LIABILITY—KNOWLEDGE OF DEFECTS.

A hotel keeper is liable for injuries to a guest from a fall due to defects in a chair provided for the guest, where the defects, by the exercise of reasonable care, should have been known to the hotel keeper, and not merely where they are actually known to him.

[Ed. Note.—For other cases see *Innkeepers*, Cent. Dig. §§ 14-16; Dec. Dig. § 10.*]

5. TRIAL (§ 251*)—INSTRUCTION—KNOWLEDGE OF DEFECTS—COMPLAINT.

In an action against a hotel company for injuries to a guest from a fall due to a defective chair, it was error, in an instruction relative to defendant's knowledge, to fail to state that defendant was chargeable with knowledge of the defect if, by the exercise of reasonable care, he could have known of the same, though the complaint alleged actual knowledge only.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Error to District Court, El Paso County; W. S. Morris, Judge.

Action by Adelaide E. Burchmore against the Antlers Hotel Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Joseph N. Baxter, of Denver, Vanatta & Dolph, of Colorado Springs (Robert E. Harding, of Colorado Springs, of counsel), for plaintiff in error. Wm. E. Hutton, of Denver (Bruce B. McCay, of Denver, of counsel), for defendant in error.

SCOTT, J. This is an action upon the part of the plaintiff in error, plaintiff below, to recover damage for injuries alleged to have been received while a guest of the Antlers Hotel, at Colorado Springs, conducted and operated by the defendant corporation. The plaintiff was a resident of the city of Boston, Mass., and was one of a party of about 175 making a tour across the country. The party, including the plaintiff, stopped at the city of Colorado Springs, and became guests of the said hotel.

Presumably because of so large a party to be cared for at one time, the hotel management provided one of its dining rooms partially with certain camp chairs. The plaintiff, on the evening of the second day at the hotel, entered the dining room in company with two friends, husband and wife, and they were being seated at the same table. The plaintiff, while being seated, and while assisted by a waiter, sat down on the chair provided for her, and it immediately collapsed, precipitating the plaintiff to the floor, causing the injuries alleged to have been sustained. The particular chair in question is described as a folding camp chair, with perforated wood back and seat. The other chairs were as hereinafter stated, and at least a part of them were camp chairs, and presumably of the same description.

The allegation in the complaint as to negligence is that the defendant, "neglectful of its duty, carelessly, negligently, knowingly, recklessly, wantonly, and maliciously invited

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff to the use of a chair which was unsafe, and known to be so by the defendant company." The answer is a general denial, and also charges contributory negligence. As to what was the character or nature of the defect in the chair used is not clear; in fact, this appears to be purely speculative. The cause was tried to a jury, and a verdict returned for the defendant.

The assignments of error are: (a) The refusal of the court to admit certain testimony; (b) the refusal to submit to the jury an instruction tendered by the plaintiff; and (c) the giving of other instructions by the court, over the objections of defendant.

[1] The testimony refused was as to the condition of other chairs in the dining room prior to the accident, and as to other accidents occurring in the dining room prior thereto. No testimony was offered as to the particular defect in the chair used by the plaintiff, and the same seems to have disappeared, and could not be produced at the trial.

Plaintiff cites many cases wherein testimony is admitted as to the prior condition of the particular object or thing causing the accident, and also of other and prior accidents occasioned thereby; but in no case cited does it appear that such testimony was admitted as to the condition of similar objects or things in the same vicinity, or as to previous accidents occasioned by similar objects or things, not related to the object which was the direct cause of the accident.

The testimony discloses that the chairs in the dining room were not all of the same make or design, or of similar defective condition, but, on the contrary, that some were solid framed, some cane bottomed, and others of the type of the chair in question. Hence it cannot be justly reasoned that a defect in one should give notice to the defendant of a dangerous condition in the particular chair in question. It is true that in cases where the specific defect is of such a character that the general condition, as in case of a sidewalk, would naturally draw attention to the precise defect complained of, that such general condition is sometimes admitted. *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311.

But the condition of one particular chair in a large dining room could not be expected to give notice of the condition of any other one chair, though, if such defective condition was known to be general with the chairs used, it might be permissible as tending to show a prudent duty upon the part of the landlord to examine all of them. The rule in this respect, as stated by Wigmore on Evidence, is "that the prior injury or defect should be one which, if known, would naturally warn the person charged of the existence of the defect in question. It should be so closely associated with the one in question that the discovery of the one would

naturally lead to the discovery of the latter, or would warn of its existence."

It is said in *R. G. S. Ry. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986: "In an action for negligence the general rule is that evidence of other independent and disconnected acts of negligence, which could not have contributed to the plaintiff's injuries, is not admissible to establish the negligence charged."

The testimony complained of was properly excluded.

[2] That part of the instruction complained of as having been refused by the court is as follows: "And if you find that the defendant, *had it used reasonable care*, would have known of the defect in the chair provided for plaintiff, if you find the same was defective, it would be liable in this action, although it had not actual notice of the defect."

The law in this respect is reasonably well stated in other instructions, and the expression, "had it used reasonable care," would appear to be an assumption upon the part of the court that the defendant did not use reasonable care. We see no error in the refusal of this language as an instruction.

[3] The objection as to instructions given and numbered 3, 4, 7, and 10 is of more serious concern. It is contended by the appellee that we may not consider these several instructions on appeal, for the reason that sufficient and proper objections and exceptions were not made at the time. The defendant in error cites *Hasse v. Herring*, 36 Colo. 383, 85 Pac. 629, in support of this contention and wherein it is held: "When one instruction contains two or more independent and distinct propositions of law, one of which is right and another, or the others, wrong, a general exception directed to the whole instruction will not entitle the party to be heard as to that portion of the instruction which he deems to be wrong." This must be regarded as the rule of this court, not only at the time of the decision in that case, but before and subsequent. But it cannot be the rule where the instruction contains but one proposition of law, for a specific objection to a single legal proposition is all that can be reasonably asked; and the objection is sufficiently specific if it calls the attention of the trial court to that particular proposition. In the present case the objection was made to each instruction separately, and not as one general objection to all instructions. An examination of the instructions complained of makes it clear that neither one of them contains more than one proposition of law; and that each of them is subject to the identical criticism.

[4] Instruction No. 7 is as follows: "(7) The court instructs the jury that the burden of proof is on the plaintiff to establish, by a preponderance of the evidence, that the defendant invited the plaintiff to sit in a chair which was unsafe and out of repair, and known by the defendant to be unsafe and out

of repair prior to the happening of the accident complained of; and that the injuries occurring to the plaintiff were the natural and probable consequences of such negligent act on the part of the defendant."

This purports to set forth certain prerequisite determinations of fact, in order to lawfully establish, by proof, the question of negligence under the law, as applicable to the case. It is not possible to conceive of more than the one legal proposition in this statement. In *French v. Guyot*, 30 Colo. 227, 70 Pac. 684, cited by counsel, it was said: "It has been held by this court that a general exception to an instruction which contains more than one proposition of law is not an exception which entitles the party to have the alleged error reviewed in this court." In that case there was but the one general objection to all instructions, including those admittedly good, so that the court was not even advised as to the specific instruction or instructions, relied on as being erroneous.

National Fuel Co. v. Green, 50 Colo. 307, 115 Pac. 709, also relied on by counsel, does not sustain their contention in this case; for there the instruction to which objection was made contained three distinct propositions of law, each relating to a different item of damage involved in the case, viz., damages to be allowed during plaintiff's minority, damages subsequent thereto, and damages on account of expenses incurred, in each of which a different rule of law obtained as to measure of damage.

It was not intended to be the rule of this court that an objection should embrace an argument, but rather that the attention of the court should be called to each particular legal proposition objected to. Holding, therefore, as we do, that the instruction now being considered contained but one legal proposition, the objection thereto, as stated, was sufficient. It is not seriously contended by counsel for defendant that the instruction

correctly states the law, if the pleadings are sufficiently broad to cover a proper statement of the law in that respect. The objection to the instruction is that it holds the defendant liable only in case of actual knowledge; for it declares, "and known by the defendant to be unsafe and out of repair," thus overlooking the legal proposition as to the duty imposed on the defendant in such cases in the matter of the exercise of reasonable care. For the law holds the defendant to the exercise of reasonable care to the same extent as in case of actual knowledge. Particularly is this the rule in case of hotel keepers, livery stable keepers, and common carriers, as it relates to the patrons of these.

[5] But it is said that the complaint in this case alleges knowledge and omits the alternative usually pleaded in such cases, "or, by the exercise of ordinary care, could have known," etc.; and therefore the latter duty is not within the pleadings, and such an instruction is, for that reason, improper. While the form of the complaint is not to be commended in this respect, yet the charge as to knowledge must, of necessity, embrace and include the full requirement of the law in that respect.

But the instruction not only does not embrace more than one proposition of law, but the four instructions complained of embrace but one and the same proposition of law, and the same erroneous statement is included in each, thus unnecessarily and without reason repeating the error, so that in this case it became flagrant. By these instructions the plaintiff was denied a substantial right, for it is difficult in any case to prove actual notice; and to sustain the instructions complained of would be to overrule an unbroken line of precedent in this court.

Judgment reversed, and the case remanded.

MUSSER, C. J., and CARRIGUES, J., concurring.

(21 Wyo. 184)

EVANS v. CHEYENNE CEMENT, STONE & BRICK CO.

(Supreme Court of Wyoming. March 24, 1913.)

1. WORK AND LABOR (§ 22*)—ASSUMPSIT—PETITION.

Where a petition in assumpsit, after alleging plaintiff's corporate capacity, alleged that between certain dates plaintiff, at defendant's request, furnished materials and labor and constructed a cement sidewalk around defendant's property situated, etc., and that the labor and materials so furnished and the sidewalk so constructed were of the reasonable value of \$163.20, which sum was due and unpaid, was sufficient.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 41; Dec. Dig. § 22.*]

2. WORK AND LABOR (§ 11*)—QUANTUM MERUIT—EXPRESS CONTRACT.

Where plaintiff sued for work, labor, and materials in the construction of a sidewalk, the fact that it appeared that there was an express contract between the parties for the construction of the walk did not bar plaintiff's right to recover the contract price; it being regarded as the reasonable value of the work, labor, and materials.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 26; Dec. Dig. § 11.*]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

A judgment would not be reversed as not sustained by the evidence, where it was conflicting and there was sufficient evidence of each material fact to support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error to District Court, Laramie County; Charles E. Carpenter, Judge.

Action by the Cheyenne Cement, Stone & Brick Company against David P. Evans. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 122 Pac. 588.

Ray E. Lee and Charles F. Mallin, both of Cheyenne, for plaintiff in error. Marion A. Kline, of Cheyenne, for defendant in error.

BEARD, J. This case was brought by the defendant in error as plaintiff against the plaintiff in error as defendant in justice court to recover the amount claimed to be due from said defendant to the plaintiff for the construction of a cement sidewalk. The case was tried to a jury in justice court resulting in a verdict and judgment in favor of plaintiff and against the defendant for \$163.28 and costs. The defendant, Evans, appealed the case to the district court of Laramie county, where the case was tried de novo to the court, without a jury, and judgment was again rendered for the plaintiff and against defendant for the sum of \$163.28 and costs, and defendant brings error.

The plaintiff, in its petition filed in the justice court, after alleging the corporate capacity of plaintiff, alleged, in substance, that between the 14th and 28th days of Septem-

ber, 1908, plaintiff, at the request of defendant, furnished materials and labor and constructed a cement sidewalk around defendant's property situated at the southeast corner of House and Twenty-Third streets in the city of Cheyenne; that the labor and materials so furnished and the sidewalk so constructed were of the reasonable value of \$163.28; that said sum was due and unpaid. The defendant filed an answer denying each and every allegation of the petition; and for a second defense alleged, in substance: That the plaintiff made and entered into the following contract or agreement with defendant, to wit: "Cheyenne, Wyoming Sept. 14, 1908. Mr D. P. Evans, Cheyenne, Wyo.—Dear Sir: We propose to construct a cement sidewalk one hundred eight (108) feet long and five (5) feet wide along the west side of your residence more fully described as No. 301 E. 23 Street. Will furnish all labors and material, and put in same according to the city specifications, and guarantee a first class job in every respect for the sum of \$70.20. Cheyenne Cement, Stone & Brick Co., by D. E. Clark, Treasurer." That defendant accepted the terms of said agreement and plaintiff proceeded to lay said walk, but did not do so in accordance with the terms of said agreement in that it did not lay said walk on the grade established by the city engineer, and failed to make the walk of the required thickness, and did not properly mix the materials used in its construction. That under an oral agreement between the parties plaintiff constructed a walk on another side of said premises on the same terms, and alleges the same defects as stated above. Plaintiff replied orally, denying the new matter set up in the answer.

On the trial in the district court the court found generally for the plaintiff, and also found that plaintiff had substantially complied with the conditions of its contract with defendant; that the walk is of the thickness required by the city specifications; that the materials used were of the proper kind and were properly mixed; that, while part of said sidewalk is not on the established sidewalk grade of the city, the city engineer and the defendant both saw it while it was being constructed and made no objections to its being constructed on the grade on which it was being constructed; that neither the city nor its engineer has condemned the walk or ordered its removal although it has been laid for nearly two years; that defendant expressed himself satisfied with the walk and willing and ready to pay therefor upon the approval of the city engineer; that after the construction of the 108 feet of the walk the parties entered into a new contract for the construction of the remainder of the walk (on the other side of the lot); that the contract did not require that the walk be approved or accepted by the city engineer; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—54

defendant accepted said walk and has enjoyed the use and benefit of the same; that it is of substantial benefit and value to the premises; that it is of the reasonable value of \$163.28.

[1] Beside the contention of counsel for plaintiff in error that the findings of the court are not sustained by the evidence, it is contended that the court erred in several particulars which we will notice briefly. It is urged that the petition does not state a cause of action. But we think the objection is not well taken. The petition is substantially in the form approved in Whittaker's Code Forms, p. 26; Bradbury's Rules of Pleading, p. 865, Form No. 172; and 3 Sutherland's Code Pleading, Practice & Forms, § 5185, Form No. 1464.

[2] It is also contended that, as the petition claims on a quantum meruit, the plaintiff must recover on his quantum meruit or not at all. That question was passed upon in *Hecht v. Stanton*, 6 Wyo. 84, on page 91, 42 Pac. 749, 43 Pac. 508, where in the opinion on petition for a rehearing, the court said: "As we understand the argument on behalf of plaintiff in error, the position is taken that defendant in error must recover upon his quantum meruit or not at all, although the evidence may show that he is entitled to recover under the contract set up by plaintiff in error in his defense. We cannot agree to this proposition. Neither do the authorities cited sustain it. The contract might change the amount of recovery, but could not preclude an inquiry as to whether anything was due to defendant in error or not." In that case the cause of action stated in the petition was that the plaintiff had at the instance and request of defendant made, excavated, and constructed an irrigating ditch, and in so doing had necessarily removed 29,432 cubic yards of stone, gravel, and earth, which was reasonably worth ten cents per cubic yard, or a total sum of \$2,943.20, and admitted payment of \$1,659. Defendant answered denying performance of the work as alleged, and as a separate defense averred that plaintiff had commenced the construction of the ditch, that the work so commenced was not done upon any promise of defendant to pay the reasonable value of the work, but that it was done under an express contract in writing. The terms of the contract were set out, and the failure of plaintiff to construct the ditch according to the terms of the contract was alleged. In the present case the plaintiff alleged that it constructed the walk at the request of defendant, and that the labor and materials were reasonably worth so much—the price mentioned in the contract pleaded by defendant—and that defendant had failed to pay therefor. Defendant denied generally those allegations and averred that the work was done under a special contract and that the work failed to comply with the contract

in three particulars, viz.: (1) The materials were not properly mixed; (2) the walk was not of the required thickness; and (3) that it was not on the established grade. The two cases are alike in principle, and the same rule applies to each. "It is settled law that where the contract has been fully performed by the plaintiff, and nothing remains to be done but the payment of the money by the defendant, it is not necessary to set out or declare upon the special contract, but the liability of the defendant may be enforced under a count for the reasonable value of the services." *E. D. Metcalf Co. v. Gilbert*, 19 Wyo. 331, 340, 116 Pac. 1017, 1020: "Where the complaint is upon a quantum meruit, proof of a special contract for a given price does not necessarily defeat the plaintiff's recovery, but the price fixed by the contract becomes the quantum meruit in the case." 22 Ency. P. & P. 1378. In the case at bar the walk had been completed, and the defendant was not misled by the form of the pleading, and he had the opportunity to make, and did make, his defense under the contract pleaded by him. He failed, in the judgment of the court, to sustain his defense, but was not prejudiced by the form of plaintiff's pleading.

[3] On a number of questions of fact in the case the evidence was conflicting; but there was sufficient evidence on each of them to support the findings; and under the well-settled rule, when such is the case, the judgment will not be reversed on the ground that it is not sustained by the evidence. We find no prejudicial error in the record, and the judgment of the district court is affirmed. Affirmed.

SCOTT, C. J., and POTTER, J., concur.

(21 Wyo. 196)

THOMSON v. STATE.

(Supreme Court of Wyoming. March 24, 1913.)

LARCENY (§ 83*)—VERDICT—STATEMENT OF AMOUNT.

Comp. St. 1910, § 5832, makes one who steals any horse, etc., of value, guilty of a felony. Section 6252 provides that, when an indictment charges an offense against another's property by larceny, etc., the jury on conviction shall declare in their verdict the value of the property stolen. *Held*, that a verdict in a prosecution for horse theft, which merely found accused guilty as "charged in the information," was fatally defective for not stating the value of the horse, though the information did not allege any particular value.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 208; Dec. Dig. § 83.*]

Error to District Court, Weston County; Carroll H. Parmelee, Judge.

Daniel Thomson was convicted of horse theft, and brings error. Reversed and remanded for new trial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A. H. Beach, of Newcastle, and Camplin & O'Marr, of Sheridan, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

BEARD, J. The plaintiff in error, Daniel Thomson, was informed against, tried, and convicted in the district court of Weston county, of the crime of stealing a horse, and was sentenced to a term in the penitentiary. He brings the case here on error, seeking a reversal of that judgment.

The information was filed under the provisions of section 5832, Comp. Stat. 1910, which provides: "Whoever steals any horse, mule, sheep or neat cattle, of value, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary not less than one year nor more than ten years." The information charged the defendant below, Thomson, with stealing one horse (describing it) of value the property of James Ryan. On the trial the jury returned the following verdict: "We, the jury, being lawfully impaneled and duly sworn in the above-entitled cause, do find the defendant guilty as charged in the information." The sufficiency of the verdict to support the judgment is the important question in the case. The statute provides: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained." Section 6252, Comp. Stat. 1910. The Attorney General argues that this section of the statute does not apply to the case at bar for the reason that horse stealing is declared to be a felony regardless of the value of the animal stolen, and for the further reason that at the time section 6252, supra, was adopted, horse stealing was included in the statute defining larceny generally, and to be a felony the value must be \$25 or more, and if below that amount it would be a misdemeanor only; and that in that state of the law it was necessary for the jury to ascertain and return in their verdict the value of the property stolen in order to determine the grade or degree of the crime, and that it is necessary for the jury to do so only in those cases in which the value determines the degree of crime. He has cited a number of authorities to the effect that, where the statute makes the stealing of a particular article or kind of property a felony without regard to its value, it is not necessary, in the absence of a statute requiring it, to allege or prove any particular value, or for the jury to find and return the value in their verdict, and that a general verdict of guilty as charged in the indictment or information would support the judgment.

In none of the states from which decisions have been cited by the Attorney General, and

numerous others which we have examined and which so hold, do we find a statute like ours. So far as we have been able to discover, Ohio and Nebraska are the only states having such a statute, and in each of them the language is identical with that of the section above quoted. In *Armstrong v. State*, 21 Ohio St. 357, this section of the statute and the precise question involved in the present case was decided. It was there held that the statute was peremptory and applied to horse stealing, which was a felony whatever the value of the animal stolen. The court said: "Horse stealing is larceny, and the language employed in the 167th section of the Code (our section 6252, supra) is clearly broad enough to embrace that offense. It expressly includes in its provisions the offense of obtaining property by false pretenses, and the grade of punishment affixed to this offense by the statute, like that of horse stealing, does not depend upon the value of the property obtained. Since then the section applies expressly to one of these offenses, we cannot well hold that it has no application to the other, for there is no reason for applying it in one case that is not equally strong in the other. The determination of the grade of punishment is not, then, the only reason for this provision of the Code. Although the value of the property stolen in one case, or falsely obtained in the other, may not affect the grade or kind of penalty imposed for these offenses, it may influence the degree of punishment to be inflicted. The statute gives a wide discretion to be adjudged, on conviction. In this view, it may have been regarded as material to the substantial rights of the defendant that the actual value of the property stolen, or falsely obtained, should be ascertained and returned in the verdict, and that it should not be left, as on a general verdict of guilty, according to respectable authority it might be (Bish. Crim. Proc. § 719), to be implied to be the amount stated in the indictment. But whatever reasons may have induced the enactment of the section, its terms are such, we are constrained to hold, that the offense for which the defendant was tried was embraced in its provisions. To hold the reverse would virtually be a judicial repeal of the section. The verdict was not, therefore, in accordance with the express requisition of the statute, and should have been set aside on the motion of the defendant made for that purpose. It follows that the judgment must be reversed, and the cause remanded for a new trial."

The Code of Criminal Procedure containing what is now section 6252, Comp. Stat. 1910, was adopted by the First Territorial Legislature of Wyoming and was approved December 10, 1869 (section 156, c. 74, tit. 13, Laws 1869). The Crimes Act passed by the same Legislature and approved on the same

day did not make the stealing of a horse of less value than \$25 a felony, but did make the obtaining of property, of whatever value, by false pretenses, a felony. Section 139, c. 3, tit. 10, Laws 1869. So that what is said, in the above quotation, by the Supreme Court of Ohio, applies with equal force to our statute and need not be repeated.

In *Holmes v. State*, 58 Neb. 297, 78 N. W. 641, a case of larceny from the person, the court, after quoting at length from *Armstrong v. State*, supra, said: "We are entirely satisfied with the reasoning employed in the opinion from which we have just quoted, and think it states the correct rule. In *McCoy v. State*, 22 Neb. 418 [35 N. W. 202], the prisoner was tried on the charge, and declared guilty by general verdict, of the crime of larceny as ballee, and no value of the property was stated in the verdict. In an opinion of this court it was said, after quoting section 488 of the Criminal Code (same as our section 6252): 'This provision of the Code, although clearly applicable to the case at bar, was wholly ignored. Its provisions are mandatory and cannot be evaded. The verdict therefore conferred no authority upon the trial court to enter a judgment or sentence by which plaintiff in error was convicted of felony.'" The judgment was reversed and the cause remanded. See, also, *Fisher v. State*, 52 Neb. 531, 72 N. W. 954; *McCormick v. State*, 42 Neb. 866, 61 N. W. 99. In the case at bar the information clearly charges an offense against the property of another by larceny, and in our opinion comes within the provisions of section 6252, supra, and that they are mandatory; and for that reason the judgment of the district court will have to be reversed. Were it not for the express command of the statute, we would not feel inclined to do so; but, whatever may have been the reasons which induced the Legislature to make the provision, it has done so, and we agree with the Ohio court that "to hold the reverse would virtually be a judicial repeal of the section."

The giving of certain instructions to the jury and the refusal to give others requested by defendant are assigned as error. We have considered the instructions given and think they fairly presented the law of the case to the jury on the evidence, with the exception that the jury should have been instructed that if they found the defendant guilty they should ascertain and declare in their verdict the value of the property stolen. Other errors assigned are not likely to occur on another trial of the case and need not be considered.

For the reasons stated, the judgment of the district court is reversed, and the case remanded for a new trial.

Reversed.

SCOTT, C. J., and POTTER, J., concur.

(89 Kan. 96)

BROWNING v. BROWNING.

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. MARRIAGE (§ 58*)—LICENSE—MINORS—ANNULMENT—GROUNDS.

A statute, forbidding under criminal penalties the performance of a marriage ceremony without the issuance of a license, and the issuance of a license for the marriage of a minor without the consent of the parent or guardian, does not authorize the annulment of a marriage entered into by a minor without such consent.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 115-123; Dec. Dig. § 58.*]

2. MARRIAGE (§ 58*)—MINORS—ANNULMENT.

Such a statute does not bring a minor within the operation of a provision authorizing the annulment of a marriage, either party to which is incapable, from want of age, of contracting it.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 115-123; Dec. Dig. § 58.*]

3. DIVORCE (§ 18*)—GROUNDS—"FRAUD."

Ordinarily the concealment by a woman of her prior unchastity is not a ground either for the annulment of her marriage or the granting of a divorce; but where a woman of 30 induces a boy of 19 to marry her, without the knowledge or consent of either parent or guardian, representing to him that she had been divorced from a former husband, when in fact he had procured a divorce from her on the ground of adultery, her conduct constitutes fraud for which a divorce may be granted.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 35-38; Dec. Dig. § 18.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2942-2954; vol. 8, p. 7666.]

4. PLEADING (§ 34*)—CONSTRUCTION—PARTICULAR ALLEGATIONS.

An allegation that a wife had not been divorced from a former husband, as against a demurrer, will be construed as intended to mean that such husband was still living, although no direct statement is made to that effect.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

5. MARRIAGE (§ 58*)—ANNULMENT—GROUNDS.

The fact that at the time of her marriage a wife had a former husband, living and undivorced, is a ground for a decree of nullification.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 115-123; Dec. Dig. § 58.*]

(Additional Syllabus by Editorial Staff.)

6. MARRIAGE (§ 5*)—MINORS—AGE OF CONSENT.

There being no statute in Kansas fixing the age at which persons are capable of entering into the marriage relation, the common law, fixing the ages at 14 and 12 respectively, governs.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 24; Dec. Dig. § 5.*]

Appeal from District Court, Woodson County.

Suit by R. M. Browning, a minor, by Anna Laura Browning, as his guardian and next friend, against Beatrice L. Browning. Judgment for defendant, and complainant appeals. Reversed and remanded, with directions.

S. C. Holmes, of Yates Center, for appellant. G. R. Stephenson, of Yates Center, for appellee.

MASON, J. R. M. Browning brought an action to annul the marriage which had taken place about a year before between himself and Beatrice L. Browning, on the ground that it was entered into during his minority without the knowledge or consent of his parent or guardian, in violation of the statute. A demurrer to his petition was sustained, whereupon it was amended by the addition of other grounds. The trial court held the amended petition to be insufficient, and the plaintiff appeals.

[1] The statute provides that "the marriage relation shall only be entered into, maintained or abrogated as provided by law." Gen. Stat. 1909, § 4855. It is made a misdemeanor for any one empowered by law to join others in marriage to do so without a license therefor having been issued by a probate judge. Section 4858. The issuance of a license for the marriage of a minor is forbidden, except with the consent of the father, mother, or guardian. Section 4859. The statute does not declare that the marriage of a minor entered into without the consent of the parent or guardian is void, and, in the absence of a provision to that effect, such legislation is construed as intended to prevent such marriages as far as possible, but not to avoid them if they are once entered into. The general acceptance of this rule is shown by the following expressions, and by the cases cited in their support: "In nearly all of the states of the Union the marriage laws require the consent of parents or guardians before the marriage license is issued to minors, and impose penalties upon the officers issuing a license or conducting a marriage ceremony without such consent. Such statutes are merely directory and do not render void a marriage without such consent." 19 A. & E. Encycl. of L. 1191. "Unless the statute expressly declares a marriage contracted without the necessary consent to be a nullity, it is to be construed as only directory in this respect, so that the marriage will be valid, although the disobedience to the statute may entail penalties on the licensing or officiating authorities." 26 Cyc. 835. "It is a well-settled general rule that the effect of statutes prohibiting clergymen or magistrates from marrying minors without the consent of their parents or guardians, or forbidding the issuance of marriage licenses without such consent, and prescribing a penalty in case of violation thereof, is not to render such marriages void when solemnized without the required consent, the statutes being regarded as directory only, in the absence of any provision declaring such marriages absolutely void." Note, 17 Ann. Cas. 94. "Statutes regulating the marriage of minors generally provide; in

addition to the period of disability created by fixing the age of consent for the parties themselves, a period during which the consent of parents is required before the marriage can take place. Statutory provision is sometimes made allowing parents or one of the parties to avoid such a marriage by means of judicial interposition; but, where the statute is merely prohibitory, it has been generally held that a marriage contracted without the required parental consent is not void because of the fact that such consent was not obtained; in other words, the consent of parents is not necessary to the validity of the contract." Note, 22 L. R. A. (N. S.) 1206.

[2, 6] The act already referred to, in the case of a groom under 17 years of age, or of a bride under 15, requires the consent of the probate judge, as well as the parent or guardian; but we have no statute fixing the age at which persons are capable of entering into the marriage relation. The common law therefore governs; the ages being 14 and 12, respectively. That it was not the legislative purpose to nullify marriages entered into by minors in violation of the sections of the statutes referred to appears from the different language used with respect to marriages between persons within the forbidden degrees of relationship, which are declared to be absolutely void. Gen. Stat. 1909, § 4856. The statute relating to the annulment of marriages reads: "When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party." Gen. Stat. 1909, § 6272 (Code Civ. Proc. § 677). It is obvious that when this statute was enacted the phrase "incapable from want of age" referred to the age of consent to marriage as fixed by the common law, since there was then no statute whatever relating to the age of the groom or bride. In forbidding the issuance of a license for the marriage of a minor without the consent of the parent or guardian, the Legislature is to be regarded, for the reasons already indicated as intending to prevent minors from the improvident exercise of the power to enter the marriage relation, rather than to deprive them of the capacity to do so. The ruling of the trial court in sustaining the demurrer to the original petition is therefore approved.

[3] The amended petition contained additional allegations which may be thus condensed: At the time of the marriage the plaintiff was 19 years of age; the defendant 30. She had been married at least twice before. She was not of good moral character; the plaintiff being ignorant of this. He had been acquainted with her but a short time and knew nothing of her character excepting what he had learned from her. She told

him she had left her second husband and obtained a divorce from him, when in fact, as the plaintiff afterwards learned, her second husband had obtained a divorce from her on the ground of adultery. She had been arrested at different times for conduct unbecoming a lady. During her married life with the plaintiff she received letters and had correspondence with other men and received money from them. The defendant induced plaintiff to marry her, taking advantage of his youth. She only entered into the marriage for the purpose of getting the plaintiff to support her until she could find some other companion who would suit her better.

The plaintiff contends that the facts so pleaded are sufficient to justify the annulment of the marriage on the ground of fraud. The fact that the statute enumerates certain grounds for annulling a marriage does not imply that no others exist. *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774. Fraud has been held to be a ground of annulment, even where, as in this state, it is made a cause of divorce. *Foss v. Foss*, 12 Allen (94 Mass.) 26. But the grounds upon which, because of fraudulent representations, a marriage may be annulled or a divorce granted, are very different from those justifying the setting aside of an ordinary contract. The most serious charge contained in the amended petition is the concealment of the fact by the defendant that her former husband had obtained a divorce because of her adultery. It must be regarded as the settled law, being determined by the great weight of authority, that the concealment by a woman of her previous unchastity is not sufficient to justify either an annulment of the marriage or the granting of a divorce. This sufficiently appears from the following texts, and the notes thereto: "Fraud which vitiates the marriage contract is cause for its annulment. But the fraud or falsehood must be one which goes to the very fundamentals or essentials of the marital relation; deceit, concealment, or misrepresentation concerning the party's health, character, wealth, social position, previous history or habits, is not sufficient for this purpose, except perhaps in New York, where the rule has been broadly laid down that every misrepresentation of a material fact, made with intent to induce the other party to enter into the marriage contract, and without which it would not have been made, authorizes its annulment." 26 Cyc. 905. "The concealment by the wife of the fact that she had committed fornication before marriage is not fraud constituting ground for divorce." 14 Cyc. 595. "The degree of fraud sufficient to vitiate an ordinary contract will not afford sufficient ground for the annulment of a marriage. It is not sufficient that the party relied upon the false representations and was deceived, or that important and essential facts were concealed with intent to deceive. The marriage relation is a status controlled

and regulated by considerations of public policy which are paramount to the rights of the parties. * * * It is contrary to public policy to annul a marriage for concealment by a woman of her unchastity prior to marriage. Antenuptial incontinence is not a ground for annulment or for divorce." 19 A. & E. Encycl. of L. 1184, 1185. "Not even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage; for, although this seems to strike into the essence of the contract, yet public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue." Schouler's Domestic Relations (5th Ed.) § 23. "Concealment by a woman of her prior marriage, or even her misrepresentation in that regard, is not a ground of nullity or divorce in the absence of statute, and so of her unchastity prior to marriage; for were it otherwise a woman who had once fallen would in most cases have forever closed to her the only avenue to respectability and virtue." Law of Domestic Relations, Spencer, sec. 70.

It is said, however, that "some courts are disposed to relax the severity of the rule, especially when the fraud or deceit has been accomplished by some measure of coercion or imposition, in the case of very young girls duped or decoyed into an unsuitable marriage, and in the case of aged persons of feeble intelligence who have been tricked or deluded." 26 Cyc. 906. The circumstances pleaded in this case bring it within the same class as those referred to. The marriage with a boy of 19 years, brought about by an experienced woman of 30, without the knowledge or consent of his parent or guardian, may be such an imposition as to justify the interposition of a court. Moreover, the defendant here is charged not merely with unchastity, but with adultery—the violation of her marriage vow—which had been established by the finding of a court and become a matter of public record. The plaintiff asks the nullification of the marriage, but also prays for such relief as may be found just. He alleges residence for 10 years in the county where the action is brought. The amended petition may therefore be treated as one for divorce on the ground of fraud. We think in that aspect it stated a cause of action, and, as the relief so afforded is ample, there is no occasion for any other remedy.

[4, 5] The amended petition contains the further allegation "that the said defendant and her first husband were not divorced, but that said first husband abandoned said defendant, and said defendant has never obtained any divorce from him." This seems intended as an averment that the defendant was incompetent to contract the marriage with the plaintiff, and by a liberal construction we think it should be so interpreted, although there is no specific statement that her husband is still alive. Such incapacity

would be a ground either of annulment or divorce.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(89 Kan. 72)

UNION PAC. R. CO. v. BOARD OF COM'RS
OF LEAVENWORTH COUNTY
et al. (two cases).

(Nos. 17,991, 17,992.)

(Supreme Court of Kansas. March 8, 1913.)

(Syllabus by the Court.)

1. DRAINS (§ 91*)—DRAINAGE DISTRICT—ORGANIZATION—DE FACTO CORPORATION.

Although the petition preliminary to the incorporation of a drainage district under chapter 215 of the Laws of 1905 incorrectly described the territory intended to be included in the district, the board of county commissioners undertook to incorporate all the territory and the inhabitants thereon as a drainage district and to make a body politic and corporate, and the petitioners, the owners of the land, the public officers, and the district itself has since proceeded on the theory that all of the territory intended to be described in the petition constituted a drainage district, and it has since assumed to be a corporation, and its officers have exercised corporate functions to the extent of building a levee, erecting a floodgate, and issuing bonds to pay for the same, and subsequently levied a tax in payment of the bonds. *Held*, that the district will be deemed to be a corporation de facto, and the tax so levied cannot be enjoined because of the irregularity in the organization.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 53, 82, 102, 103; Dec. Dig. § 91.*]

2. DRAINS (§ 74*)—DRAINAGE DISTRICT—IMPROVEMENT—TAXATION—INJUNCTION.

Where a taxpayer encourages the making of an improvement of a drainage district by affirmative action and, in a way, induces the officers of the district to construct a floodgate and levee upon his property at public expense by which he receives a benefit, he is not in a position to ask a court of equity to enjoin the collection of a tax levied to pay for the improvement because of defects in the incorporation of the drainage district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 53, 82; Dec. Dig. § 74.*]

3. CONSTITUTIONAL LAW (§§ 63, 64*)—LEGISLATIVE POWER—DELEGATION.

The drainage act (Laws 1905, c. 215) does not conflict with the Constitution by delegating, or attempting to delegate, legislative power to the petitioners who ask for the organization of a drainage district, nor because of the taxing powers conferred upon drainage districts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92, 108-114; Dec. Dig. §§ 63, 64.*]

(Additional Syllabus by Editorial Staff.)

4. DRAINS (§ 76*)—IMPROVEMENT—GENERAL TAX—NOTICE TO TAXPAYER—OPPORTUNITY TO BE HEARD.

Laws 1905, c. 215, § 7, subs. 11, 12, relating to the organization of drainage districts, provides two methods for making improvements, one by special assessment on real property benefited and the other by levy of a general tax on all taxable property within the district. *Held*, that a tax for drainage improvements on all the taxable property of the dis-

trict was not invalid because notice of levy and opportunity to be heard was not given to taxpayers; such notice only being required in the case of special assessments by section 22.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

Appeal from District Court, Leavenworth County.

Suits by the Union Pacific Railroad Company against the Board of County Commissioners of Leavenworth County and others to enjoin the collection of certain taxes levied on the property of the Lenape Drainage District for the making of improvements. From decrees in favor of defendants, complainant appeals. *Affirmed*.

R. W. Blair, C. A. Magaw, and B. W. Scandrett, all of Topeka, for appellant. Lee Bond and J. B. Kelsey, both of Leavenworth, M. N. McNaughton, of Tonganoxie, and C. W. Trickett and L. W. Keplinger, both of Kansas City, Kan., for appellees.

JOHNSTON, C. J. These actions were brought by the Union Pacific Railroad Company to enjoin public officers from collecting taxes levied upon its property by the Lenape drainage district for the purpose of building a levee, floodgate, and the making of other improvements to protect the territory within the district from injury by overflow of the river. The proceedings toward the incorporation of the district were taken under the provisions of chapter 215 of the Laws of 1905. The incorporation was initiated by a petition in which, through a clerical error, the territory intended to be included in the district was incorrectly described. The territory as described in the petition was "Commencing at the northwest corner of the N. W. $\frac{1}{4}$ of section 21, township 12, range 22; running thence south to the northerly bank of the Kansas river at ordinary high-water mark; thence down along said bank of said river at ordinary high-water mark to a point due south of the northeast corner of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 14-12-22; thence west 80 rods; thence south 80 rods; thence west to the point of beginning." The boundaries of the territory intended to be included in the district, and which was incorporated in it, were: "Commencing at the northwest corner of the N. W. $\frac{1}{4}$ of section 21, township 12, range 22; running thence south to the northerly bank of the Kansas river at ordinary high-water mark; thence down along said bank at ordinary high-water mark to a point due south of the N. E. corner of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 14-12-22; thence north 80 rods; thence west 80 rods; thence south 80 rods; thence west to the point of beginning." The difference in the description, as will be observed, is that after the figures, "14-12-22," there was omitted the locative call, "thence north 80 rods." The error is manifest on the face of the petition, as the last call, "thence west to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

point of beginning," does not lead to the starting point.

[1] It is contended that because of the faulty description a part of the territory on which the tax was levied was not within the district, and it is insisted that there was no authority in the officers to levy a tax on property outside the boundaries as defined in the petition. The actions were tried upon an agreed statement of facts under which it is made clear that the defective description in the petition was a mere clerical error. The error in the petition, however, was not carried into the other proceedings of incorporation which it is stipulated were "strictly in conformity with the statute." All the territory upon which the tax was levied was intended to be incorporated into the district, and all the parties, including the petitioners, landowners, and officers, as well as the appellant itself, proceeded on the theory that the territory intended to be included in the district was really incorporated into it. It appears that persons who owned lands and had residences in the district but outside of the territory described in the petition signed the petition for the incorporation of the district. The levee and floodgate were built on the right of way of the Union Pacific Railroad Company and in the district as it was intended to be incorporated, but they were not within the territory as described in the petition. The company, it appears, was not present or represented at any meeting of the board of directors of the drainage district; but it knew of the erection of the levee and floodgate on the right of way, and it even "prescribed the conditions and elevation, the manner in which the levee should cross its right of way and tracks, and the location of the floodgate." In their proceedings the directors of the drainage district described the improvement as one that benefited the entire district, and they provided that bonds should be issued to build the improvements, and that these bonds were to be paid by a tax levied upon all the taxable property within the district. The improvements were made according to plans and specifications prescribed, and these extended on and over the right of way and tracks of the railroad company and in a territory not described in the petition, but they were in the district which the officers undertook to incorporate. The tax was levied upon all the property within the territory intended to be described in the petition, and all the tax so levied has been paid by the owners of the property within this territory, except that levied against the Union Pacific Railroad Company.

While there was an error in the initiatory steps taken towards the incorporation of the district, the agreed facts of the parties show that the territory intended to be organized into a drainage district was in fact organized and treated as a body politic and corporate. The incorporation consists of the territory and the inhabitants residing therein, and the

whole territory, as well as the inhabitants, have assumed to be a corporation and to exercise corporate functions. It was irregularly organized, of course; but the inhabitants of the entire district and the officers have proceeded on the theory that all the territory intended to be included was in the incorporated district, and the drainage board has exercised control over the territory which they sought to incorporate. There having been a bona fide attempt to create a municipality including all the territory, and it having assumed to be a corporation and to exercise corporate functions, it is a corporation de facto notwithstanding the defective petition and the irregularity in the preliminary steps. Having an existence in fact under color of law, the regularity of the organization and its right of existence can only be challenged by the state in a direct proceeding for that purpose and is not open to collateral attack by a private person. This principle was applied where the statute under which the municipality was created was unconstitutional. *In re Short*, Petitioner, 47 Kan. 250, 27 Pac. 1005. In a case where the initial steps to organize a corporation were attacked as well as the sufficiency of the petition upon which the order of incorporation fixing the boundaries of a city was based, it was held that the municipality, having proceeded on the theory that the incorporation was effective and having assumed to be a corporation and to exercise corporate functions, it was a de facto municipality, and the regularity of its incorporation or its corporate existence was not open to attack by a private individual. *Levitt v. Wilson*, 72 Kan. 160, 83 Pac. 397. See, also, *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239.

[2] The error of description in the petition is manifestly one of form rather than substance, one that might have been corrected at any time, and it is therefore a matter of doubt whether upon a direct attack by the state the incorporation would be held to be invalid as to any of the territory. Besides, there is good reason for the contention that appellant is estopped to ask an injunction because of its attitude and actions when the organization was effected and the improvements made. It made no objection when the publication notice was given of the organization of the district, but it was not content with a mere passive dissent. Instead of silent opposition or an unresisting attitude, the appellant took affirmative action and encouraged the making of the improvement and the assumption of the obligations by the district to pay for them. As we have seen, the appellant selected the location for the floodgate on its right of way, prescribed the height of the levee and the manner in which it should be built across its right of way and tracks. Having encouraged and, in a way, induced the officers of the district to make the outlay on its property and which necessarily benefited it, the ap-

pellant is not in a position to ask a court of equity to enjoin the collection of the taxes against its property to pay for the improvement. *Stewart v. Com'rs of Wyandotte County*, 45 Kan. 708, 26 Pac. 683, 23 Am. St. Rep. 746.

[4] One of the grounds upon which injunction is asked is that no notice was given appellant or opportunity to be heard when the board determined that the improvements would benefit its property. That would have been a very serious objection if a special assessment had been made to pay for the improvements. Two methods are provided for making improvements under the drainage act, one by special assessment upon the real estate that may be benefited by the improvement and in proportion to the benefit, and the other by the levy of a general tax on taxable property of every kind in the district. Laws 1905, c. 215, § 7, subds. 11, 12. In this instance the latter method was adopted, and the election, the issuance of the bonds, and the levy of the tax and every other step in the proceedings were taken under the sections of the act which provide that the expense of such improvement shall be met by a general tax. Laws 1905, c. 215, §§ 24-26. Notice as well as a hearing is required in the case of special assessments (Laws 1905, c. 215, § 22); but no such requirement is made where a general tax is to be levied and a special notice or hearing of that kind is not essential to a valid levy of a general tax in a taxing district legally created. It is not necessary in a drainage district, any more than it would have been in the case of a school district, a township, or a county.

[3] It is next contended that the act is unconstitutional in that it delegates legislative power to those who petition for the incorporation of the drainage district. The validity of the act was attacked and sustained in *State v. Monahan*, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661, and *Roby v. Drainage District*, 77 Kan. 754, 95 Pac. 399. These cases, in effect, hold that the Legislature has the power to build levees to prevent the overflow of natural water courses and to protect land from damage resulting from overflow within particular districts, that this power may be exercised through public corporations organized for that purpose, that drainage districts provided for are creations of the Legislature itself, and that such corporations are taxing districts, and that the officers thereof, under legislative authority, can levy a general tax or special assessments to pay for such improvements. Legislative power is not delegated to the petitioners, as was attempted in *Com'rs of Wyandotte County v. Abbott*, 52 Kan. 148, 34 Pac. 416, or as in *Hutchinson v. Leimbach*, 68 Kan. 37, 74 Pac. 508, 63 L. R. A. 630, 104 Am. St. Rep. 384; but the power is exercised by the Legislature itself by the passage of the drainage act, which is to be-

come operative in any part of the state when certain conditions are found to exist and certain agencies or instrumentalities for which it provides are organized. The operation of the law does not depend on the will of the petitioners, but it is the will of the Legislature which is to be put in force when the board of county commissioners find that the prescribed conditions exist within the district which the petitioners ask to have incorporated. If the conditions are found to exist, a corporation is organized and an election held to choose the officers of the district, who proceed to make the improvements as the Legislature has provided. The law becomes effective on these contingencies somewhat as it did in the metropolitan police act under which a board was appointed by the executive council of the state in which was vested the control of the police force of the city, its organization, government, and discipline. It was argued that the legislative power was unlawfully delegated to the executive council, but it was said that: "The act in question, however, does not, in our opinion, confer any legislative power on the executive council. It came from the Legislature, formal and finished. The executive council is not authorized and cannot add to or take from the act a single provision or word. The expediency of the law, the classes of cities which may be brought within its provisions, the contingency upon which its operation depends, have all been determined and expressed by the Legislature. The action of the executive council, taken upon the petition of the householders, is the contingency upon which the operation of the law depends. When this contingency arises, the law, positive and detailed in its provisions, takes effect." *State ex rel. v. Hunter*, 38 Kan. 578, 583, 17 Pac. 177, 180.

A contention is also made that the power to levy a general tax; being legislative in its nature, cannot be delegated to the officers of the drainage district. The tax in question was levied, as we have seen, in pursuance of a positive statute, the drainage act, and in conformity with its requirements. The general rule with reference to the delegation of the taxing power is subject to this exception: A public corporation, created to discharge a governmental function, may be intrusted with the power of general taxation in aid thereof. *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207, and cases cited; 37 Cyc. 725, note 37. A drainage district that is created to take measures for the protection of life and property is within this exception, being analogous in this respect to municipal corporations such as cities and villages. See, also, *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534, and cases cited.

Appellee urges other reasons why injunction is not available to appellant and why the judgment of the trial court should not be disturbed; but a consideration of these is unnecessary to the disposition of the cases.

Upon the grounds stated, the judgment of the district court in each of the cases will be affirmed. All the Justices concurring.

(21 Cal. App. 55)

COUNTY OF SAN LUIS OBISPO v. SMITH et al. (Civ. 801.)

(District Court of Appeal, Second District, California. Jan. 28, 1913.)

STATUTES (§ 101*)—SPECIAL LEGISLATION—SURETY BONDS.

Act March 25, 1903 (St. 1903, p. 476), to provide for payment by the state, counties, or municipalities of the premium on official bonds when given by surety companies, is not unconstitutional as special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 113; Dec. Dig. § 101.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the County of San Luis Obispo against Frank H. Smith and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Albert Nelson, of San Luis Obispo, for appellant. Paul M. Gregg, C. P. Kaetzel, and A. E. Campbell, all of San Luis Obispo, for respondents.

PER CURIAM. No briefs have been filed herein. It appears, however, by a stipulation filed in this court on July 28, 1910, that the point involved, to wit, the constitutionality of an act of the Legislature of the state of California entitled "An act to provide for the payment by the state, or counties, or cities, or cities and counties, of the premium or charge on official bonds when given by surety companies," approved March 25, 1903 (St. 1903, p. 476), is identical with the question presented in *L. A. No. 2,726*, entitled *County of San Luis Obispo v. P. H. Murphy*, 162 Cal. 586, 123 Pac. 808, wherein by an opinion of the Supreme Court filed April 11, 1912, the said act was declared constitutional and valid.

Upon the authority of that case and pursuant to the stipulation of the parties, the judgment herein appealed from is affirmed.

(21 Cal. App. 54)

PEOPLE v. SITZ. (Cr. 267.)

(District Court of Appeal, Second District, California. Jan. 28, 1913.)

CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL—ESCAPE OF DEFENDANT.

Defendant pending his appeal from a conviction having escaped from custody, and being at large, appeal will be dismissed, unless he surrenders.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

Appeal from Superior Court, Kern County; Paul W. Bennet, Judge.

Bernard C. Sitz was convicted, and appeals. Dismissed conditionally.

Joseph H. Tam, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted of the crime of obtaining money under false pretenses; the judgment of the court being that he be imprisoned in the state prison for the term of five years. He appealed from the judgment and an order of court denying his motion for a new trial; and upon the issuance of a writ of probable cause he was remanded to the custody of the sheriff pending the hearing of his appeal. Thereafter, and during the pendency of his appeal, as shown by the affidavit of the sheriff, he escaped from custody, and thence to the hearing of his appeal has remained at large. Upon the authority of *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32, and *People v. Elkins*, 122 Cal. 654, 55 Pac. 599, the Attorney General has moved to dismiss the appeal. That defendant escaped from the lawful custody of the sheriff, and is now at large, conclusively appears from the affidavit filed in support of the motion.

The case is identical with those above cited, and upon the authority thereof it is ordered that, unless defendant shall within 30 days from the date of the filing hereof surrender to the custody of the sheriff of Kern county, his appeal herein shall without further order stand dismissed.

(20 Cal. App. 782)

ALBION LUMBER CO. v. LOWELL. (Civ. 990.)

(District Court of Appeal, Third District, California. Dec. 31, 1912. Rehearing Denied by Supreme Court March 1, 1913.)

1. SALES (§ 181*)—DELAY IN PERFORMANCE BY PURCHASER—EVIDENCE.

In an action by a purchaser for breach of a contract to furnish ties, evidence held to warrant a finding that a delay of about three months in sending for the ties was beyond plaintiff's control and not unreasonable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

2. FRAUDS, STATUTE OF (§ 118*)—SIGNATURES BY PARTY CHARGED—SEPARATE MEMORANDUMS.

A letter written and signed by defendant, asking whether plaintiff had "made any further arrangement in regard to shipping the ties" he had sold him, where there was no other transaction between them, was a sufficient reference to a full memorandum agreement of the sale written and signed by the plaintiff and delivered to defendant; and hence there was a sufficient memorandum, signed by the defendant, to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

3. SALES (§ 384*)—BREACH—"PROXIMATE DAMAGES"—REMOVEDNESS.

Where there was a contract of sale of ties, and the seller, by reason of the purchaser's breach, had to make several trips and pay for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an extension of an option on the timber land, expenses for such trips and the payment for the extension could not be recovered as damages, not being "proximate damages" contemplated by Civ. Code, § 3300, stating the measure of damages for a breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

For other definitions, see Words and Phrases, vol. 6, p. 5769.]

4. FRAUDS, STATUTE OF (§ 113*)—STATUTE OF FRAUDS—MEMORANDUM—TIME OF DELIVERY.

A memorandum of a sale which does not specify the time of delivery satisfies the statute of frauds; a reasonable time being implied.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 239-241; Dec. Dig. § 113.*]

5. FRAUDS, STATUTE OF (§ 118*)—MEMORANDUMS—PAROL EVIDENCE.

Parol evidence was admissible to show that there was but one transaction between plaintiff and defendant, for the purpose of showing that a letter written by defendant referred to a certain memorandum.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

6. SALES (§ 416*)—BREACH OF CONTRACT—OPEN MARKET—MARKET PRICE—EVIDENCE.

In an action by a purchaser of ties for damages for a breach of a contract to sell ties, evidence that the plaintiff had to go into the open market to purchase ties, and as to the market price at the time, was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

7. SALES (§ 181*)—BREACH OF CONTRACT—EVIDENCE.

In an action for damages for breach of a contract of sale of ties, where conditions beyond plaintiff's control caused a delay in removing the ties, evidence showing that defendant sold the ties to protect himself upon an option he had on the timber land was immaterial; and the sustaining of objections to its admission was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

8. EVIDENCE (§ 448*)—FRAUDS, STATUTE OF (§ 118*)—MEMORANDUMS—LETTERS—PAROL EVIDENCE.

Parol evidence is admissible, under the statute of frauds, to show that ties referred to in a letter written by defendant were those concerned in a sale of which there was a memorandum, but which defendant had not signed; parol evidence which does tend to vary the contract or introduce any new condition being admissible to show the meaning of a writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.* Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

9. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EVIDENCE—MEANINGLESS ANSWERS.

A meaningless answer of a witness was not prejudicial, although the question was improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Albion Lumber Company against A. J. Lowell. Judgment for plaintiff, and defendant appeals. Affirmed.

Rehearing denied in Supreme Court, 130 Pac. 864.

Robt. Duncan and J. O. Ruddock, both of Ukiah, for appellant. Mannon & Mannon, of Ukiah, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover for the breach of an alleged contract entered into between plaintiff and defendant November 5, 1908, for the sale and purchase of redwood ties. It is alleged that about March 1, 1909, plaintiff notified defendant of its readiness to receive the ties, but defendant repudiated and refused to carry out said contract. Defendant denies that he entered into any contract with the plaintiff as alleged, or at all. As further answer, That the agreement sued upon is for goods and chattels of value exceeding \$200, and is in violation of the statute of frauds, not having been in writing subscribed by defendant. As a third answer, defendant alleges: That defendant "entered into certain negotiations with one Donald McDonald in reference to said redwood ties, * * * and said McDonald thereupon wrote, in his own handwriting," the following instrument: "Nov. 5, 08. Bot. of A. J. Lowell for the Albion Lumber Co. 35 M to 40 M 6 x 8 x 8 split redwood ties at 34 c. each f. o. b. vessel Westport subject to our inspection when loaded on vessel. Payments to be made in cash to George D. Gray 110 Mkt. St., San Francisco, as fast as these ties are moved. Donald McDonald." That this is the alleged agreement sued upon. That no part of said ties was received or accepted by said McDonald or said plaintiff, nor has any part of the purchase price been paid therefor. That as part of said agreement on the part of the buyer, and as part of the consideration, it was agreed that the buyer "should begin moving and accepting said ties within 10 days or two weeks from said November 5, 1908, at the latest," and so continue until all were accepted and moved by the buyer, and were to be paid for as fast as accepted and moved. That said time of acceptance was "expressly made part of said consideration of purchase, and was a material part of said consideration," and "was expressly made the essence of the contract of purchase." That, through the fault of plaintiff, "said ties were not taken nor accepted nor paid for within said time, nor within a reasonable time thereafter." That thereupon defendant promptly notified plaintiff "that the said defendant refused to sell or deliver the said ties or any part thereof. That any contract, verbal or otherwise, claimed or alleged by said McDonald or plaintiff to have been entered into with reference thereto by the defendant was rescinded by said defendant." For a fourth separate answer, among other things, it is alleged that, "at the time of the agreement on the part of the buyer, said defendant informed said McDonald that it was necessary that said ties should be ac-

cepted and defendant have the money for said ties in the immediate future, in order that said defendant might pay one George D. Gray for certain timber lands," for the purchase of which defendant had a contract from Gray, "and said McDonald then and there agreed that said ties would be taken and paid for in the immediate future," payments to be made to Gray, to which he consented; that plaintiff did not offer to take said ties or pay for them until about March 1, 1909, and said delay was unreasonable, "and defendant thereupon refused to deliver said ties;" that, prior to said offer to take said ties said Gray had notified defendant that "he would no longer deal with plaintiff, and would cancel said option or contract of sale to this defendant, unless said defendant should make some other arrangement for the sale of said ties and payment to said George D. Gray," and that, "by reason thereof and said unreasonable delay on the part of plaintiff and said McDonald, * * * defendant refused to sell or deliver said ties," and so notified plaintiff. Defendant pleaded a set-off or counterclaim, alleging that, by reason of plaintiff's failure to accept and pay for the ties, he "was compelled to and did make two trips from his place of business at Westport to the city of San Francisco," and expended for his necessary expenses on said trips \$100 and "lost 24 days from his other business," and was thereby damaged in the sum of \$240; and that by reason of plaintiff's said failure, "defendant was compelled to and did pay to said George D. Gray the sum of \$500 for an extension of the said option * * * until this defendant could secure the necessary money to pay the said George D. Gray therefor." A general demurrer to this defense was sustained. "and motion to strike out matter from said counterclaim granted." Plaintiff's answer to defendant's separate defenses is a denial of the averments.

The court made the following findings: That plaintiff and defendant entered into a contract, on November 5, 1908, by which "defendant agreed to sell to the plaintiff and the plaintiff agreed to buy from defendant 35,000 split redwood ties" upon the terms stated in the agreement set out in defendant's answer, and on said date McDonald, "who was the general manager and duly authorized agent of the plaintiff corporation, having authority so to do, wrote, signed, and delivered to defendant an instrument in writing" (the same as set out in the answer); that "thereafter the defendant duly ratified, acknowledged, and accepted the terms of said contract by several instruments in writing subscribed by him in his own name;" that "the said written instrument contains all the terms of the contract between the plaintiff and defendant." It is further found, that after said memorandum was signed by McDonald and delivered to and accepted by de-

fendant, "further conversation was had between the defendant and the agent of plaintiff as to when plaintiff would receive said ties, but plaintiff did not agree that it would begin moving said ties within ten days or two weeks from said Nov. 5, 1908, or at any specified date; that no time of acceptance was made part of the consideration of said contract, nor was the time of acceptance and payment particularly or expressly, or at all, made the essence of the contract of purchase and sale;" that about March 1, 1909, plaintiff notified defendant of its readiness to receive said ties, but defendant thereupon notified plaintiff that "he would not carry out said contract, and would not deliver said railroad ties, or any part thereof, and then repudiated said contract; that plaintiff was then ready to receive and pay for all said ties in accordance with the terms of the contract hereinbefore set out; that plaintiff offered, within a reasonable time, to accept and pay for said railroad ties, and the consideration for said contract moving to defendant herein did not fail in any respect whatever, and that said contract was never rescinded; that plaintiff never offered to take or pay for said ties until about the 1st day of March, 1909, but that said delay was not unreasonable." It was further found that the price of ties "advanced in value to 40 cents each on board vessel at Westport" after said contract was entered into, and were of that value on March 1, 1909, and for 30 days prior thereto; that, relying on said instrument, plaintiff contracted to sell the ties therein mentioned to a third party, "and by reason of defendant's refusal to deliver said ties plaintiff was compelled to purchase, and did purchase, 35,000 ties of the same quality in the open market, and was compelled to pay therefor at the rate of 40 cents each," and was thereby damaged in the sum of \$2,100. Judgment for that amount was entered in favor of plaintiff. The appeal is from this judgment, and from the order denying defendant's motion for a new trial.

The pleadings and findings of fact present a fairly clear exposition of the various contentions of the parties.

Aside from some alleged errors of law assigned by defendant in the course of the trial, the principal, if not the only point presented by defendant is: That there was no contract or memorandum in writing signed by defendant; and therefore the agreement was invalid.

There was evidence that on November 5, 1908, Lowell met McDonald, whose agency and authority to act for plaintiff in the matter is admitted, for the purpose of selling the ties in question then on the landing at Westport, Mendocino county; that the meeting resulted in McDonald's agreeing to purchase and Lowell agreeing to sell on the terms set forth in the written memorandum signed by McDonald on behalf of plaintiff, as set forth

in defendant's answer; that McDonald gave the original to Lowell, retaining a copy. Present at this meeting was W. P. McFaul, who had a day or two before informed McDonald that Lowell had some ties, and who arranged with McDonald to meet Lowell. McFaul's interest in the sale arose out of the fact that he had an option to purchase certain timber land from George D. Gray, mentioned in said memorandum. Lowell had advanced money to McFaul in carrying on his tie-cutting and lumber operations. The Gray option had expired, and McFaul desired Lowell to take up the matter with Gray for a renewal of the option. Lowell testified: "It was understood between me and Mr. McFaul to sell these ties and apply it on the option and take it over myself. I had advanced some money to McFaul, and had money tied up in this land." McFaul testified: "I am interested in this transaction. My interest is this: Our option [his firm was McFaul & Hess] had expired on the land. Mr. Gray had notified us that we would have to vacate; so our interest was to have Mr. Lowell take up this option, extend the option to us, and give us a chance to get our equity out of the property, which he had agreed to do if he could make arrangements to pay off Mr. Gray. At that time our company was indebted to Mr. Lowell something in the neighborhood of \$7,000." McDonald testified, in speaking of what occurred, that he "did not know at that time whether Mr. McFaul was interested in the ties, or what the situation was. There was nothing said as to what Mr. McFaul's interest in the transaction was. He appeared anxious to have the ties sold; that was all." McDonald testified further that after the terms of the sale had been agreed upon, and the memorandum was signed and given to Lowell, they had a further conversation as to how soon McDonald could send for the ties. He testified: "My recollection is, after we had agreed on the terms of purchase and all that concerned that in their inspection and one thing and another, Mr. Lowell asked me, 'How soon can you have a vessel up there to move them?' 'Well,' I said, 'the Pasadena [the vessel which, it was understood, was to bring out the ties] has got a cargo or two at Albion [a nearby port], and she has got two cargoes from Newport [another neighboring port], and, of course, the weather conditions get bad, and I can't state definitely; but I will do it as soon as I can possibly get a boat up there. Just as soon as I could get the Pasadena up there—that is, my reports I got from her—I could get them moved. As it is, I had other business ahead of that I had to attend to. There was very little conversation between Lowell and myself on the subject. I assured him I would do it as soon as I could, which was my intention to do all the time. No definite time was mentioned by either of us. I could not give a definite time at that time of

year, or any other time of year. I could only do it as I got to it. Q. Was anything said at that time about moving them within ten days or two weeks? A. I would not agree to handle any as soon as that. Q. Was anything said about that? A. I know nothing was said to me about it; if there had been, I would simply have said, 'I can't do it in ten days or two weeks.' The only statement on my part was that I would do it as soon as I possibly could. We expected to shortly begin work with them, move them away." He testified that this was the only transaction for cross-ties he or his company had with Lowell. Later in the day the same parties met with Mr. Gray. Lowell's object in bringing about the meeting was to satisfy Mr. Gray, in order that the McFaul option might be extended. Plaintiff had no interest in this matter, as Lowell had the ties and had the right to sell them, and had already sold them. Gray testified that Lowell made the appointment for the meeting and brought him there; that the object was to satisfy him that he would "receive the cash due for the sale of the ties immediately on delivery of the ties that were receipted by the inspection certificate; and, furthermore, that a vessel would proceed immediately to bring those ties into the market, as I had insisted upon cash from Mr. Lowell." Gray also testified that McDonald said "he could not send a vessel immediately, of course, as the vessel was at the time on the Mendocino coast;" that she had some trips to make; that "as to the moving of the ties he assured me the vessel would go for them within ten days or two weeks." He further testified: "I don't remember that the transaction between Lowell and McDonald was discussed at that time. I saw no paper pass between them." There was much testimony tending to show that the condition of the weather was such, after the Pasadena was at liberty to go for these ties, as to make landing at Westport uncertain and at times dangerous, if not impracticable, during the months of December, January, and February; there was also evidence that in one of her trips she became disabled, and was sent to dry dock for repairs, which consumed about two weeks; that plaintiff had made unsuccessful efforts to reach Westport landing; and that McDonald, acting for plaintiff, had resold the ties, and was anxious to get them out and make delivery. Upon these various phases of the transaction, including the delay on plaintiff's part and its cause, there is a conflict in the evidence; but we think there was sufficient to justify the trial court in making its findings upon them.

[1, 2] Time was not made of the essence of the contract by its terms, and McDonald testified that he made no promise to move the ties at any specified time. Hence plaintiff was allowed a reasonable time to perform. The court found, on sufficient evidence, that the delay resulted from causes beyond plain-

tiff's control, and was not unreasonable. *Salinas Lumber Co. v. Magne-Silica Co.*, 159 Cal. 182, 112 Pac. 1089. Nevertheless, it is urgently contended that defendant is not liable, because, as is claimed, he never, in writing, agreed to the sale. And this brings us to an examination of what further followed the signing of the memorandum by McDonald.

There is a conflict in the evidence as to what he did with the memorandum after signing it. He testified that he gave it to Lowell, retaining a copy. Lowell testified that McDonald handed it to McFaul, who afterwards (he did not remember when) gave it to him. This was the memorandum produced at the trial by defendant. It is, perhaps, not important which received it; for McFaul was there in Lowell's interest, and in a sense acting for him, or at least jointly with him, in bringing about the sale, though not a party to the sale. However, the court accepted McDonald's version, and so must we. The parties separated with the understanding that the memorandum expressed the terms of the sale. On the 20th day of November, 1908, 15 days after the memorandum was in Lowell's hands, he wrote McDonald a letter, in which, among other things, he said: "Have you made any further arrangement in regard to shipping the ties I sold you? My object is that I had ordered some freight from San Francisco and referred shippers to the Bishop Lumber Co. for a vessel to Westport; their answer being that they had no vessel for Westport. This being the case I thought perhaps you had instructed them as to when you would take the ties out." It may be observed that this was after the limit of time for delivery had been reached, according to Lowell's testimony, and yet he makes no mention of it, nor complains of the delay. Upon the point under consideration we are satisfied that Lowell, in his letter of November 20th, referred to the memorandum signed by McDonald, and could have referred to none other, for the reason that this was the only sale of ties made by Lowell to plaintiff or to McDonald. He so testified on his cross-examination. On November 30, 1908, McDonald replied: " * * * I am in receipt of yours of the 20th. In regard to your ties, I have a couple of cargoes to move from Newport, after which I will have the Pasadena move those that I bought from you at Westport, but as those ties are all going to San Pedro, the Pasadena will not call at San Francisco. She will come up from San Pedro direct to Westport. How much freight will you have? If the amount is sufficient to warrant it I could have the boat call into San Francisco. It costs \$125.00 per day to run one of these boats, and you will understand that the loss of time is quite a serious thing." Lowell made no reply to this letter. It was now the end of November, and no complaint had been made of any delay on plaintiff's part.

About the 1st of February McDonald met Gray, and explained to him the causes of the delay in not moving the ties. He testified: "He [Gray] said, 'Of course, those things you cannot help, the only things we have to guard against in transporting lumber and ties on the Mendocino coast,' or words to that effect; he realized those things. After this conversation, I think about the middle of February, I ordered the captain to Albion [near Westport] for orders, with a view of sending him to Westport, if there was a chance to get the boat in there. He came to Albion. It was very rough. I told him to go up the coast now; we had to move those ties. * * * He laid out three or four days and came back to San Francisco without a cargo. It was then I called up Mr. Lowell [by telephone] and told him I expected to get the Pasadena up there. My recollection is I talked to him twice, once about the middle of February; and when I advised him I would be up there for a cargo he told me then he didn't think the deal would go through; that he had heard something from Mr. Gray, and would have to see Mr. Gray first before he could say whether he would deliver me the ties or not. * * * My recollection I called a few days after that, about February 25th; he was at home. He said he had been to San Francisco and had seen Mr. Gray; the whole thing was off; could not have the ties under any conditions. I have no recollection of Mr. Lowell calling me by telephone or writing any letter, or making any other demand to take those ties than what is shown by the letters introduced in evidence." In one of these telephone conversations between McDonald and Lowell, the former offered to advance the latter 75 per cent. on the ties at the landing; but Lowell said that would not hold him, as Gray wanted all his money. It appears from Lowell's testimony that he went to San Francisco in February. He did not see or communicate with McDonald, but did see Gray, who told him he would have nothing more to do with McDonald; whereupon Lowell sold the ties to the Santa Fé Railroad Company for what would have yielded him 40 cents per tie, if he had not been obliged to pay Gray a commission on the sale. On March 3, 1909, McDonald wrote Lowell, notifying him that plaintiff would expect him to make delivery of the ties which he had sold to the Albion Lumber Company on November 5, 1908. Lowell answered March 8, 1909: "Replying to your letter under date of March 3, 1909, relating to the 35,000 to 40,000 split redwood ties your Mr. McDonald agreed to purchase from me on November 5th '08." He then proceeds to state that "this sale was made to cover a certain option which I held from Mr. Gray on timber lands," and to restate what he claimed was the agreement about delivery, and that he had been damaged by the company's failure

to keep its agreement, concluding that he would hold it responsible to him for the damage.

Some point is made by counsel for defendant, in connection with these two letters, that McDonald introduced a new condition to his readiness to pay for the ties, to wit, "less a proper amount for chuteage and inspection," as to which there was no meeting of minds. We attach no particular importance to either of these letters. They were written after Lowell had repudiated the contract originally entered into. Both were claiming damages, and both dealing with a situation which arose after the contract had been repudiated by defendant and his liability, whatever it became, was fixed. The question to be decided is: Did Lowell's letter of November 20, 1908, under the circumstances, amount, in legal contemplation, to a memorandum in writing sufficient to charge him? We entertain no doubt that it had such effect, and that plaintiff had the right to so regard it.

Defendant contends that, under the statute of frauds Lowell could not be charged, except upon a memorandum signed by him containing "every material part of the contract of sale"; and "it must show the names of the parties, the subject-matter of the sale, and the terms and conditions of sale, and must be certain as to all these"—citing *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Brown on Statute of Frauds* (5th Ed.) § 384, and other authorities. It is further claimed that, "if it is sought to establish a memorandum or contract by different papers, the papers must be attached together, or one must clearly refer to another, and they cannot be connected by parol testimony"—citing *Tiedeman on Sales*, § 75.

Turning to the memorandum signed by McDonald, it will be found to lack nothing to charge plaintiff. The mere delivery of the memorandum to Lowell would not bind Lowell; but it is not the law that, before he would be bound, he must himself write and sign a memorandum equally specific. Any communication in writing by Lowell to plaintiff, sufficiently definite to show his acceptance of or acquiescence in the memorandum of purchase signed by plaintiff, or showing that he treated it as an existing obligation of plaintiff and binding on himself, would satisfy the statute. There is nothing in the statute of frauds requiring the signed memorandum of a contract to be contained in a single paper. Two or more papers properly connected may constitute a sufficient memorandum. 20 Cyc. 278; *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. The evidence very clearly shows that the contract was treated as valid and binding by both parties until the later part of February, 1909, four months after its execution, and it was then disavowed by defendant, not because it was never entered into, but because of plain-

tiff's alleged failure to promptly move the ties.

It remains to notice certain alleged errors of law.

[3] The rule stated by the Code is that for a breach of contract the measure of damages is "the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. To be proximate the damages must be such as, "next immediately follow and are produced by the act complained of," or, if not proximate, "such as, in the ordinary course of things, would be likely to result therefrom." *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40. The damages claimed (by defendant) could not well have been contemplated by the parties when they entered into the contract. They were not proximate, as proximate damages are above defined; and we do not think they were such as would be likely to result in the ordinary course of things. They were too remote. See *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534.

[4] We think the McDonald memorandum of November 5, 1908, was properly admitted in evidence. The objection that it specified no time of delivery is not tenable, for a reasonable time would be implied. Civ. Code, § 1657.

[5] It was not error to show witness McDonald that plaintiff made no other contract for ties with Lowell. The purpose of the evidence doubtless was to show that Lowell's letter of November 20th had reference to the memorandum of November 5th by showing that the parties had no other transaction. We think it would have been in aid of fraud, rather than for its discouragement, to allow defendant to claim that he referred to some other transaction by having the evidence excluded.

The letters dated, respectively, November 20th and 30th were admissible. McDonald's letter of March 3 and defendant's of March 8, 1909, perhaps added nothing material to the case; but they were not prejudicial to defendant.

[6] The plaintiff's testimony that, upon defendant's refusal to deliver the ties, it was compelled to go into the open market to supply them, and the testimony of witnesses to the market price of ties at the times mentioned, was admissible.

[7] We do not think it was material, and hence not error, to sustain objections to questions put, on cross-examination, to McDonald, for the purpose of showing that Lowell was selling the ties to protect himself upon the Gray option. Lowell's relations with Gray did not concern plaintiff, and defendant's motive in selling the ties was not material. Conversations at the time of

making the contract would not be admissible to vary its terms.

Some questions put and answers given, and some rulings occurring in proving market value, may be open to objection; but in the main the questions were proper, and no prejudicial error is discoverable. The motion for nonsuit was rightly denied.

[8] In his cross-examination Lowell was asked what ties he referred to in his letter of November 5th, and, over objection, answered, "I referred to the ties he agreed, to buy from me." The objection is that parol evidence is inadmissible to prove the terms of a contract, under the statute of frauds. The question did not tend to vary the contract or introduce any new condition. In fact, we think the letter was sufficiently definite on its face. If there was doubt as to his meaning the enforcement of the rule against parol evidence would aid rather than discourage fraud. *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496.

[9] It is contended that the evidence is insufficient to justify the finding that defendant "fully ratified, acknowledged, and accepted the terms of said contract [the memorandum] by several instruments in writing subscribed by said defendant." The finding is supported if there was one such instrument, and we think defendant's letter of November 5th was sufficient. We very much doubt the right of plaintiff to have made proof of custom or usage in the matter of shipping ties and lumber from along the Mendocino coast as excusing delays in delivery in the manner it was attempted to be done. One witness, in his answer, simply gives his own experience as a shipper on one occasion, which did not tend to establish usage. The only other witness answered: "Well, the custom is a man undertakes to transfer lumber on the Mendocino coast is for his ability to do so, weather conditions, accidents, and other things particularly controlling; that is the custom among all freighters on the coast." The answer is meaningless, and could not have been prejudicial.

We have thus endeavored to notice the questions presented by defendant's brief, and, discovering no prejudicial error in the transcript, the judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(20 Cal. App. 782)

ALBION LUMBER CO. v. LOWELL.
(S. F. 5906.)

(Supreme Court of California. March 1, 1913.
Dissenting Opinion, March 4, 1913.)

1. SALES (§ 181*)—BREACH OF CONTRACT—EVIDENCE—ADMISSIBILITY.

In an action for damages for breach of a contract for the sale of ties, where conditions beyond plaintiff's control caused a delay in his removing the ties, evidence showing that defendant sold the ties at a sacrifice for cash to

get money to save a valuable option he had on the timber land was material, and should have been admitted.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

2. APPEAL AND ERROR (§ 1048*)—CURED ERROR—EVIDENCE.

Where the court erroneously sustains objections to questions asked on cross-examination, the error is cured by the witness testifying fully on such points on recross-examination.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4153-4160; Dec. Dig. § 1048.*]

Beatty, C. J., dissenting in part.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Albion Lumber Company against A. J. Lowell. There was a judgment of the District Court of Appeals (130 Pac. 858) affirming a judgment for plaintiff, and defendant applies for a rehearing. Rehearing denied.

Robt. Duncan and J. C. Ruddock, both of Ukiah, for appellant. Mannon & Mannon, of Ukiah, for respondent.

PER CURIAM. [1, 2] In denying a hearing in this court after decision by the District Court of Appeal of the Third District, we deem it proper to say that the following paragraph, viz:

"We do not think it was material, and hence not error, to sustain objections to questions put, on cross-examination, to McDonald, for the purpose of showing that Lowell was selling the ties to protect himself upon the Gray option. Lowell's relations with Gray did not concern plaintiff, and defendant's motive in selling the ties was not material. Conversations at the time of making the contract would not be admissible to vary its terms,"

—does not contain a correct answer to the claims of error referred to therein. This matter is not urged in the petition for a hearing in this court. We think the lower court erred in its rulings in this matter; but it appears from the record that on recross-examination McDonald testified fully upon the matters which were sought to be elicited by the questions, on cross-examination, referred to.

BEATTY, C. J. (dissenting). I cannot concur in the view of the court that the testimony of McDonald on recross-examination cured the error of the trial judge in sustaining the objection to the questions previously asked, for the purpose of showing that in the course of the negotiation for the sale of the ties he was informed by Lowell that the sale was being made at a sacrifice, for the sole purpose of raising funds essential to the securing of a valuable option. This ruling was sustained by the appellate court, on the ground that "Lowell's relations with Gray did not concern plaintiff, and that defendant's motive in selling the ties was not ma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terial." It is here conceded that McDonald's knowledge that Lowell was selling the ties at 34 cents cash on delivery, in order to secure funds to meet a pressing obligation to Gray, was competent and material evidence on the question of reasonable time for removing the ties—the controlling question in the case. If so, McDonald's admission, subsequently made, that he did know that Lowell was making the sale in order to pay Gray a debt of some sort, only denying knowledge that it was to *secure an option*, can hardly be supposed to have caused the trial judge, by whom the findings were made, to change his opinion that such testimony could not be considered as having any relevancy to the question of reasonable time.

I think the long delay in sending for the ties, while the defendant was kept waiting for his money, was altogether unreasonable.

(9 Okl. Cr. 716)

BRADFORD v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 5, 1913.)

Appeal from District Court, Okmulgee County.

Larua Bradford was convicted of crime, and appeals. Dismissed.

Geo. C. Beidleman, of Okmulgee, for plaintiff in error. Chas. West, Atty. Gen., for the State.

PER CURIAM. This cause coming on to be heard upon motion of the plaintiff in error, requesting that his appeal be dismissed, upon due consideration by the court it is considered that the motion should be sustained, and the appeal dismissed.

It is so ordered.

(33 Okl. 509)

ST. LOUIS & S. F. R. CO. v. SPARKS et al.

(Supreme Court of Oklahoma. May 9, 1911.
Rehearing Denied Sept. 11, 1912.)

Error from Grady County Court; N. M. Williams, Judge.

Action by J. F. Sparks, Tom Peery, and John Sacra, doing business under the firm name of Sparks, Peery & Sacra, against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt, of Oklahoma City, and W. C. Mitchell, for plaintiff in error. F. E. Riddle, of Chickasha, for defendants in error.

KANE, J. There is a stipulation in the above-entitled cause to the effect that it may abide the result of St. L. & S. F. R. Co. v. Ladd (Sup.) 124 Pac. 461. In pursuance of said stipulation, the judgment of the court

below is reversed, and the cause remanded, with directions to grant a new trial.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

POUCHAN v. GODEAU (Civ. 1,148.)

(District Court of Appeal, First District,
California. Feb. 27, 1913.)

Action by Germain Pouchan against Julius S. Godeau. From a decision in favor of plaintiff, defendant appeals. Order submitting cause for decision set aside, and copies of opinions forwarded to the Supreme Court.

LENNON, P. J. The Justices of this court having given their respective opinions in this cause, and being unable to agree in a judgment therein, the order heretofore made submitting said cause for decision is set aside. It is ordered that the said opinions be filed with the clerk, and that copies thereof be forwarded by him to the Supreme Court.

(165 Cal. 24)

McKENDRICK et al. v. WESTERN ZINC MINING CO. et al.

In re BARTHELET.
(Sac. 1,904.)

(Supreme Court of California. Feb. 27, 1913.
Rehearing Denied March 24, 1913.)

1. JUDGMENT (§ 382*)—VACATION—PERSONS ENTITLED TO MOVE.

In an action to impose a lien on real property, the executrix of a person purchasing the property pendente lite may appear and move to vacate the judgment against her testator's grantor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 684, 722, 723; Dec. Dig. § 382.*]

2. CORPORATIONS (§ 507*)—PROCESS—SERVICE—"PERSON."

Under Code Civ. Proc. § 411, providing that summons must be served on a domestic corporation by delivering a copy to the president or other head of the corporation, secretary, cashier, or managing agent, and section 412, providing that where the person on whom service is to be made resides out of the state, has departed therefrom, cannot be found within the state after due diligence, conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the state, the court or judge may order service to be made by publication, service may be made by publication on a domestic corporation, all of whose agents and officers upon whom service can be made have departed from the state; a corporation being a "person" and being regarded in such a case as having itself departed from the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

3. PROCESS (§ 96*)—SUBSTITUTED SERVICE—AFFIDAVITS—SUFFICIENCY.

Under Code Civ. Proc. § 412, authorizing service by publication on a defendant who resides out of the state, has departed from the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state, cannot after due diligence be found therein, or conceals himself to avoid service, an affidavit for service by publication, showing that the defendant has departed from the state, need not show that due diligence has been used to find such defendant except for the purpose of showing that his actual residence is unknown, since such service is authorized when either one of the separate and distinct conditions mentioned in that section exists.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

4. CORPORATIONS (§ 507*)—SUBSTITUTED SERVICE—AFFIDAVITS—SUFFICIENCY.

An affidavit for service by publication on a domestic corporation, which alleged that there was no president, secretary, etc., within the state, but that they had departed therefrom, was sufficient without stating the evidence showing such departure; the statement that they had departed being one of fact.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.*]

5. CORPORATIONS (§ 52*)—DOMICILE.

A domestic corporation is deemed to have a legal residence in this state, although it may do no business, and although its officers, agents, and stockholders reside outside the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 140-150; Dec. Dig. § 52.*]

6. PROCESS (§ 8*)—STATUTORY PROVISIONS.

The authority conferred on courts by Code Civ. Proc. § 187, to adopt any suitable process or mode of proceeding most conformable to the spirit of that Code when jurisdiction is conferred and the course of proceeding not specifically pointed out by statute should not be exercised where the existing statute may reasonably be construed to provide for process.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 7; Dec. Dig. § 8.*]

7. PROCESS (§ 85*)—STATUTORY PROVISIONS.

Statutory provisions, prescribing the process and mode of service upon persons who cannot be personally reached, should receive a most liberal construction to prevent inability to reach persons subject to the court's jurisdiction.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 99; Dec. Dig. § 85.*]

Department 2. Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by William McKendrick and another against the Western Zinc Mining Company and others. From an order denying a motion by L. R. Barthelet, executrix, of W. Henry Jones, deceased, to vacate a judgment against, and open the default of, the defendant Tehama Mining Company, the executrix appeals. Affirmed on rehearing.

P. H. Coffman, of Red Bluff, for appellant. Bush & Hall, of Redding, for respondent.

SHAW, J. At the time of the hearing of this cause in bank a motion of the respondents to amend the record on appeal by inserting therein a copy of the verification of the complaint, showing that it was duly verified, was granted; but the clerk failed to enter the order in the minutes. The verification must now be deemed a part of the record. This makes it necessary to deter-

mine questions which were not considered by the court in department in its decision upon which a rehearing was granted.

[1] The appeal is from an order of the trial court denying the motion to vacate the judgment against and open the default of the Tehama Mining Company upon the ground that it had never been served with summons in the action. The moving party is L. R. Barthelet, who by affidavit shows that the Tehama Mining Company sold and transferred the Donkey Mine, the real estate in controversy, upon which it is sought to impose a lien, to W. Henry Jones after the commencement of the action; that W. Henry Jones died; and that, after proceedings duly had and an order duly made, the affiant Barthelet was appointed executrix of the last will of said Jones and ever since has been such executrix. These allegations of interest are not controverted or disputed, and they sufficiently connect Mrs. Barthelet with the action to authorize her to appear and prosecute the motion. Code Civ. Proc. § 385.

The Tehama Mining Company is a domestic corporation, and constructive service of the summons by publication was made under an affidavit to the effect that there is no president or other head of the corporation, no secretary, no cashier, and no managing agent of the corporation within the state of California; that these officers had departed from the state and cannot after due diligence be found within the state of California.

[2] The first question presented by the appeal is the claim that the law does not authorize the publication of summons in the case of a domestic corporation; that section 412 of the Code of Civil Procedure applies exclusively to foreign corporations, so far as it applies to corporations at all; that section 411, Code of Civil Procedure, contains the sole provision for the service of process upon a domestic corporation; and that there is an omission in the law regarding the service upon a domestic corporation when the enumerated officers upon whom alone such service can be made cannot be found within the state or have departed therefrom.

We think this question is settled by the decision in *Douglass v. Pacific M. S. Co.*, 4 Cal. 304. In that case the defendant was a foreign corporation. Service was made upon it by publication as prescribed by section 39 of the Practice Act of 1851, which was the statute then in force. *Stats. 1851, p. 55, G. & S. Comp. 524.* Section 30 then provided that service by publication could be made "when the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons, and the fact appears by affidavit," etc. Section 29 of the Practice Act, so far as here applicable, then provided as follows:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"The summons shall be served by delivering a copy thereof attached to a certified copy of the complaint, as follows: (1) If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier or managing agent thereof." Section 412 is in effect a re-enactment of said section 30 with the addition of the words "or is a foreign corporation having no managing or business agent, cashier or secretary within the state," as an additional class upon which service by publication can be made. Section 29 was re-enacted in section 411 aforesaid with the addition of the words "formed under the laws of this state" inserted after the word "corporation" in the first clause. No such qualifying phrase occurs in section 29, and it therefore applied both to domestic and foreign corporations at the time of the decision in the *Douglass Case*. It will be observed that section 30 of the Practice Act did not specifically authorize constructive service upon corporations, and it could be held to do so only upon the theory that corporations were included in the word "persons," as there used. The court in that case held that corporations were so included and that the service was good, saying: "The court erred in restricting the operation of the thirtieth section of the 'act defining the manner of commencing civil actions' to natural persons. The word 'persons,' in its legal significance, is a generic term, and was intended to include artificial as well as natural persons."

This case is conclusive as to the meaning of the word "persons" in section 412, unless the insertion therein of the additional clause, above mentioned, authorizing such service upon foreign corporations, shows an intention to limit its meaning to natural persons and foreign corporations, and to exclude domestic corporations from its operation. The clause with the above addition first became law upon the adoption of the Codes in 1872. In view of the *Douglass* decision, the addition of this clause would appear to serve no purpose except possibly that of simplifying the proceeding for publication in such cases. A corporation is often a necessary or proper party to a civil action in which constructive service is proper. If it was a foreign corporation doing business in the state, then, under the act of 1870 (Stats. 1869-70, p. 881), it would be required to have a designated agent in the state authorized to receive service of process and personal service could be made upon him. If no such agent had been designated, then, under the original section 411 of the Code, service could be made upon any managing or business agent, cashier, or secretary of such corporation within the state. If there were none, then, under the decision in the *Douglass Case*, it would be a nonresident person upon whom the service by publication could be made as

upon natural persons. But there would still remain many cases for which the Code would contain no provision if the meaning of the word "person" is limited as above suggested. The agent of a foreign corporation might conceal himself in the state to avoid service, or it might be that after due diligence he could not be found within the state, although the plaintiff would not be able to say that he was out of the state. So also in the case of a domestic corporation, which in legal contemplation is a resident of the state, its officers and agents might depart from the state, or conceal themselves therein to avoid service, or be so concealed or obscure that they could not be found. If the word "persons" does not include corporations, there could be, in these cases, no service of process upon such corporations, although they might be necessary parties without whom the action could not proceed. Under these circumstances, we think it is clear that the maxim, "expressio unius," etc., should not be applied, and that the word "person" in section 412 should be given its generic meaning, as in the *Douglass Case*, at least with respect to all corporations concerning which the Code makes no express provision for service by publication. The service, therefore, is not invalidated by the fact that the defendant is a domestic corporation.

[3] There is a suggestion in the appellant's brief that the service is void because the affidavit for the order of publication does not state facts showing that due diligence was used to find the officers and agents of the Tehama Mining Company upon whom service could lawfully be made. If the only cause for publication shown by the affidavit was that such officers could not be found within the state, after due diligence, this question would be necessarily involved. But, as will be seen, the affidavit states another sufficient cause. Therefore it is unnecessary to consider the question of diligence.

[4] Section 412 authorizes service by publication where either one of five separate and distinct conditions exist, the second of which is stated to be where the person has "departed from the state." An affidavit showing the existence of this condition is sufficient, although no other condition is alleged. *Ligare v. Cal., etc., Co.*, 76 Cal. 614, 18 Pac. 777; *Parsons v. Wels*, 144 Cal. 415, 77 Pac. 1007; *Spencer v. Houghton*, 68 Cal. 87, 8 Pac. 679. The affidavit in question states that "said defendant corporations are formed under the laws of the state of California; but there is no president or other head of either of said corporations, no secretary, no cashier, and no managing agent of either of said corporations within the state of California, but have departed from the state of California." We take this to be, in effect, a statement that the officers and agents mentioned have departed from the

state. It is fairly susceptible of that construction, and we must presume that the court below so interpreted it when it was considering its effect and the condition necessary to authorize the publication. The statement is one of fact, and it is sufficient without giving the evidence upon which it is founded. The addition of a statement of facts tending to show the diligent efforts made to find these parties does not vitiate the proceedings. These averments were immaterial except for the purpose of showing that the actual residence of these persons were unknown. *Ligare v. Cal., etc., Co.*, supra. They sufficiently showed that such residence was not known, although they were perhaps insufficient as a showing of diligence under the third cause for publication.

[5] It is true, as stated, that a domestic corporation is deemed to have a legal residence in this state, although it may do no business at all and all its officers, agents, and stockholders may reside out of the state. Being a legal resident for many purposes, it seems anomalous to say that it may depart from the state; but we think under the provisions of the Code, properly construed, it may be so held.

[6, 7] Our courts have jurisdiction of civil actions, and this includes power to bring before them, or in some reasonable way to give proper notice to, the parties whose rights and interests are to be determined. A wronged person must have a remedy which he can enforce. Doubtless if there were no enabling statutes prescribing a process to be used, the courts, being vested by the Constitution with jurisdiction of civil actions, could frame suitable writs and direct a reasonable mode of service. Section 187, Code of Civil Procedure, expressly declares that this may be done where necessary. The power, of course, should not be resorted to in any case where the existing statute may reasonably be construed to provide for process. For these reasons the provisions prescribing the process and mode of service upon persons who cannot be personally reached should receive a most liberal construction to avoid the conclusion that there is no statutory provision made for any process at all upon any given class of persons who are otherwise subject to the jurisdiction of the court. A natural person retains his legal residence although bodily absent. In the case of a domestic corporation, all of whose agents and officers upon whom service can be made, its actual body, in point of fact, for this purpose, have departed from the state, we think it is not too great a stretch of construction to hold that the corporation itself, although still a legal resident of the state and constructively present therein, has departed from the state, within the purview of section 412 of the Code of Civil Procedure. The affidavit was therefore sufficient to support the

order made by the court for publication of summons and the service was valid.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.

(164 Cal. 705)

In re GLASS' ESTATE.

MILLER et al. v. GLASS et al. (L. A. 3,202.)
(Supreme Court of California. Feb. 25, 1913.)

WILLS (§ 10*)—CONSTRUCTION—"ESTATE."

A devise or bequest to the estate of a person is void and cannot be strained to mean that the property was meant to descend to such person or to his heirs if he predeceased the testator; an estate not being a person or entity which can take under a will under Civ. Code, §§ 1276, 1313, relating to wills, and the word "estate," when used in reference to a living man, may refer either to his whole property or to only a part of it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 18-25; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653, 7654.]

Department 2. Appeal from Superior Court, Riverside County; M. T. Dooling, Judge.

In the matter of the estate of Nellie Glass, deceased. From an adverse construction of the will, Howard L. Glass and others appeal, and Charles F. Miller and others respond. Decree affirmed.

Lafayette Gill, of Riverside, and H. K. Stahl, of Ontario, for appellants. George R. Freeman, of Corona, and C. Schuebel, of Oregon City, Or., for respondents.

HENSHAW, J. The testatrix, Nellie Glass, died in 1907, leaving the following will, which was duly admitted to probate: "Oct. 10, 1901. At my death if my dear husband Mack Glass is living I want him to have all my property. Then at his death I want my brother Dr. J. K. Miller to have \$500.00 five hundred dollars. Also my two sisters Sarah Mawhinney and Dell Nesbit to have \$500.00 five hundred dollars each. Then what is left I want to go to Thos. Glass my husband's father. If my dear husband Mack Glass is not living then I want my brother Dr. J. K. Miller to have \$500.00 five hundred dollars. Also my two sisters Sarah Mawhinney and Dell Nesbit to have \$500.00 five hundred dollars each. The balance to go to father Glass estate. The old family dishes to be divided between my two sisters Sarah Mawhinney and Dell Nesbit. The dear old clock to go to my brother Dr. J. K. Miller. My old watch I give to Rosa Nesbit and father Miller's watch to Berneil Miller my nephew. Nellie Glass. Corona, Cal., Oct. 10, 1901."

The construction of the will coming before the court under a petition for distribution, an appeal is taken from the decree by certain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

disaffected heirs of Thomas Glass. The controversy is over the sentence, "The balance to go to father Glass' estate." The only facts pertinent to the consideration, besides those appearing upon the face of the will, are that, at the date of the execution of the will, Thomas Glass was living, but died before the death of the testatrix. It is intimated, but not found, that the word "estate" was written by testatrix in the will after the death of Thomas Glass. It would seem to be not improbable that such is the case; but nevertheless, the formalities attending the execution of a codicil were not observed, and the legal result is that the will must be construed as a single instrument executed at the date it bears. In re Pearsons, 99 Cal. 34, 33 Pac. 751. The language of the testatrix thus being referred to the date of her will and not to the date of her death, by the plain terms of the will Nellie Glass attempted to leave the residue of her estate, not to Thomas Glass, but to Thomas Glass' estate. Thomas Glass' estate is not a person or entity which can take under the will. Civ. Code, §§ 1276, 1313. When used with reference to a living man, "estate" may either mean all of his property and property interests, as, colloquially, "upon his death he will leave a large estate," or it may refer specifically to a particular property in land, as his "estate in Sonoma county." But, however used as to a living man no property can pass to it by descent, devise, or bequest. The case of appellants is not bettered if the word "estate" were eliminated from the will, though, of course, this would not be permissible, for the result would be a devise or bequest to one who predeceased the testatrix; and, no intent appearing to substitute another in his place, the disposition would fail. Civ. Code, § 1343. The construction contended for by appellants, namely, that the will is to be read as though it declared that the balance should go to Thomas Glass, if alive, and, if not, then to his estate, by "his estate" meaning his legal heirs, or his devisees or legatees, as the case may be, is too strained to be permissible.

The decree appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(165 Cal. 12)

SEARS v. WILLARD et al. (L. A. 2,990.)

(Supreme Court of California. Feb. 26, 1913.)

1. TAXATION (§ 793*)—RIGHT OF ACTION—TITLE.

An action to quiet title can only be maintained by a plaintiff who has a complete title, and not by one who has a mere inchoate right of redemption from a tax sale, especially where

the defendant is admittedly in possession under claim of title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1578-1581; Dec. Dig. § 793.*]

2. QUIETING TITLE (§ 10*)—RIGHT OF ACTION—TITLE.

A plaintiff in a suit to quiet title cannot recover unless he shows title in himself, even though the defendant is also without title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Ed. A. Sears against Elizabeth H. Willard and another. From an order granting a motion for a new trial, defendants appeal. Reversed.

Haines & Haines, of San Diego, for appellants. C. H. Rippey and Charles S. Conner, both of San Diego, for respondent.

MELVIN, J. Plaintiff sued to quiet title to two lots in Morse's addition in the city of San Diego. Defendants answered denying plaintiff's title, setting up their own title by conveyance as well as by open and exclusive possession of the property and payment of the taxes thereon, and pleading the bar of the statute of limitations. The court found that plaintiff was not the owner of nor entitled to the possession of the land in question; that for more than five years after their entry thereon under a certain tax title pursuant to certificates of sale of said premises, for nonpayment of city taxes for the year 1900, defendants had held exclusive possession of, and had paid all taxes upon, said property; and that plaintiff had not repaid nor offered to repay any of the amounts so expended. The conclusions of law drawn from said findings were: First, that it was not necessary to determine the question presented to the court by the plea of the statute of limitations; and, second, that plaintiff was not entitled to take anything by the action, but that the defendants should have their title to the two lots quieted. A motion for a new trial was made, and this appeal is from the order granting said motion.

Appellants contend that the title is not in the plaintiff; that this fact appears without conflict from evidence introduced by him; and that therefore plaintiff's case absolutely fails because he may only recover, if at all, upon the strength of his own title (referring to Schroder v. Aden Gold Mining Co., 144 Cal. 630, 78 Pac. 20, and the cases therein cited).

[1] Plaintiff claims title deraigned from one Morse, and the validity of Morse's title is conceded; but by plaintiff's own proof it appears that before the commencement of this action the property was sold to the state for taxes and deeded to the state. Plaintiff concedes that the evidence offered by him does show the title to have been transferred

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the state, but insists that the title of the state is always coupled with the right of redemption by the former owner, which may be exercised at any time before the sale of the property by the state. This right of redemption, he affirms, gives him standing to prosecute this action, and in his brief it is asserted that the testimony shows a redemption by plaintiff of the property from the state just before the commencement of this suit. We have vainly searched the record for any evidence of such redemption. The bill of exceptions before us shows without contradiction that plaintiff introduced in evidence certificates of sale made in 1901 by the tax collector of the county of San Diego for the property involved in this action for taxes levied for the fiscal year 1900 and 1901, and also two certain deeds of the same lots from the said tax collector to the state of California. Upon this showing we cannot see how the mere "inchoate right of redemption," as it is called in respondent's brief, gives him a right to maintain this action. An action to quiet title must have a more substantial basis than an "inchoate right," especially when, as in this instance, it is prosecuted against persons admittedly in possession of the real property under claim of title. It is true that one whose real property has been sold to the state for nonpayment of taxes is not disturbed in his possession before sale of the land by the state; but the claim to have title quieted must be based upon a complete, not an inchoate, title.

[2] A plaintiff in an action like this must fail unless he shows title in himself, and he is not in a position to complain if some one else, even when that person is also without title, asserts an interest in the property. *Williams v. City of San Pedro et al.*, 153 Cal. 49, 94 Pac. 234. One seeking to establish his equitable title under an agreement of purchase must show compliance with the said agreement by the tender of the amount therein specified as the price to be paid. *Pennie v. Hildreth*, 81 Cal. 133, 22 Pac. 398. And it may be said with equal force that one who seeks to establish a legal title in himself may not prevail by showing that the title is not in him, even if he have an unexercised privilege of redemption. We conclude therefore that the motion was improperly granted so far as the finding that plaintiff was not the owner of the premises described in the complaint, and the conclusion of law and the judgment based thereon, are concerned. It is unnecessary to consider the motion with reference to the second finding and that part of the judgment based upon it, because it is no concern of the respondent whether error appears therein or not. Having no title himself, he is not in a position to complain. *Williams v. San Pedro*, supra.

The order granting a new trial is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

(184 Cal. 705)

STORY v. GREEN. (L. A. 3,013.)

(Supreme Court of California. Feb. 25, 1913.)

1. APPEAL AND ERROR (§ 605*)—RECORD—TRANSCRIPT—ARRANGEMENT.

Consideration of the transcript will not be refused because of failure to chronologically arrange therein the pleadings, proceedings, and statement, as required by Supreme Court rule 8 (119 Pac. xi), this causing no court no inconvenience; the contested points being few and simple.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2660-2663; Dec. Dig. § 605.*]

2. APPEAL AND ERROR (§ 607*)—TRANSCRIPT—APPROVAL—TIME.

A judge may postpone the presentation of the transcript to the trial judge for his approval beyond the time prescribed by Code Civ. Proc. § 953a, to a day when such judge, who is not a resident of, nor within, the county, will be present, and take up the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665-2672; Dec. Dig. § 607.*]

3. DAMAGES (§ 181*)—PERSONAL INJURY—EVIDENCE—WEALTH OF DEFENDANT.

The cause of action for personal injury being simple negligence, plaintiff may not show the wealth of defendant.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 474, 490; Dec. Dig. § 181.*]

4. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—INSTRUCTIONS—CURING ERROR IN ADMISSION OF EVIDENCE.

Error in admitting in an action for injury from simple negligence evidence of defendant's wealth is not cured by a general instruction, enumerating the proper elements of damage; an instruction that in determining the amount of damages to be awarded defendant's pecuniary condition, as disclosed by the evidence, may be considered, being also given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

5. TRIAL (§ 412*)—WAIVER OF ERROR—ADMISSION OF EVIDENCE—CROSS-EXAMINATION.

Error in allowing plaintiff, in a personal injury case, calling defendant as a witness, to examine him as to his wealth, is not waived by defendant's examination in his own behalf, amounting to nothing more than additional cross-examination to explain some of the matters brought out in his examination by plaintiff, and being directed not to the amount of his property, but to the character of his interest thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.*]

6. APPEAL AND ERROR (§ 864*)—REVIEW—APPEAL FROM JUDGMENT.

Error in admission of evidence is not waived by failure to perfect the appeal from the order denying a motion for new trial; but is properly reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.*]

7. TRIAL (§ 133*)—REMARKS OF COUNSEL—STATEMENT OF COURT.

In an action for running an automobile into plaintiff's motorcycle, in which violation of a municipal ordinance was charged, defendant, being cross-examined as to his being a lawyer,

having said, "You do not hold that, because he is a lawyer, he is held to be more accountable than anybody else," and on plaintiff's counsel replying that he claimed it was a natural presumption that a lawyer is presumed to know more of the law than an ordinary layman, having further said, "He is not on trial for his knowledge of the law," such statements must have apprised the jury of the true rule that defendant's occupation was not a material inquiry.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 318; Dec. Dig. § 133.*]

Department 2. Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by C. V. Story against Howard Green. Judgment for plaintiff, and defendant appeals. Reversed.

L. E. Clawson and M. M. Meyers, both of Los Angeles (Howard Green and E. B. Drake, both of Los Angeles, of counsel), for appellant. Swaffield & Munholland, of Los Angeles, for respondent.

MELVIN, J. Action for damages for personal injuries received by plaintiff, who, while riding a motorcycle, was struck by an automobile driven by defendant. From a judgment against him for the sum of \$3,000, defendant appeals.

[1, 2] Respondent moves the dismissal of the appeal upon the ground that the reporter's transcript does not conform to Rules 7 and 8 (119 Pac. xi) of this court, and that the clerk's transcript was not approved within the time prescribed by law. Although respondent's motion to dismiss the appeal has been heretofore heard and denied, it is proper to say here that his objection is founded principally upon rule 7 as it was before amendment. The transcript was upon paper within the maximum size allowed by that rule. It is objected that the pleadings, proceedings, and statement are not chronologically arranged in the transcript as required by rule 8. As the contested points on this appeal are few and simple, this fact causes us no inconvenience, and we do not feel that the ends of justice would be subserved by our refusal to consider the transcript. The appeal was taken under the "alternative method" as provided in section 953a et seq., Code of Civil Procedure. Respondent denies the right of a judge to postpone the presentation of a bill of exceptions beyond the time prescribed by section 953a, Code of Civil Procedure, but we think the contention is without merit. It was shown at the hearing below by the affidavit of a deputy county clerk (which document by direction of the judge was made a part of the transcript) that Hon. K. S. Mahon, who had presided at the trial and who is not a resident of Los Angeles county, was not within said county when the notice required by law was given to the attorneys, informing them that the transcript was ready for pres-

entation to the judge who had tried the case. The affiant communicated with Judge Mahon, who appointed a day upon which he would be in Los Angeles and would take up the matter. The hearing was regularly continued by orders of the presiding judge of the superior court of Los Angeles county until the day thus indicated. This was the lawful and proper method of procedure.

[3, 4] The plaintiff called the defendant as a witness, and over objection examined him with reference to his wealth. This was a case where only actual damages resulting from negligence were alleged. There was neither averment nor testimony tending to establish fraud, oppression, or malice, and appellant insists that in such a case as this plaintiff may recover, if at all, only such an amount as will fairly and reasonably compensate him for the injuries received and the detriment caused to him as a result of the defendant's negligence. It has long been established that the plaintiff may not in such a case introduce proof of his poverty, because the damages are not in any manner dependent upon his financial condition. *Shea v. Potrero & Bay View R. R. Co.*, 44 Cal. 429; *Malone v. Hawley*, 46 Cal. 414; *Mahoney v. San Francisco & San Mateo Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Johnston v. Beadle*, 6 Cal. App. 253, 91 Pac. 1011. The rule, it seems to us, is equally applicable to the defendant. A man's responsibility for his negligence does not depend, in the slightest degree, upon his wealth, and the introduction of evidence upon that subject could only have the effect of prejudicing the rights of the defendant. In *Fox v. Oakland Consolidated St. Ry. Co.*, 118 Cal. 66, 50 Pac. 28, 62 Am. St. Rep. 216, this court, quoting from *Mayhew v. Burns*, 103 Ind. 340, 2 N. E. 793, said: "We can discover no principle upon which it can be determined whether negligence can be attributed to one in a given case by an inquiry into the state of his fortune." It is true that, in the case under review, the matter in issue was not the wealth or property of the defendant, but the court was considering the subject of the plaintiff's alleged contributing negligence. But the principle announced is thoroughly applicable to this case. The very rule for which appellant contends was announced in the instructive case of *Barbour County v. Horn*, 48 Ala. 578, an action against a county by one who had been injured by a fall from a defective bridge. After enumerating the elements of damage which may be considered in a case in which no malice, fraud, oppression, nor gross negligence are pleaded, the court said: "But the wealth of the defendant or poverty of the plaintiff has nothing to do with their ascertainment. It was therefore improper to admit evidence of the wealth of the defendant in the court below to go to the jury, or to refuse to instruct the jury, when properly requested, that the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendant's wealth could not be taken into consideration in making up their verdict." In 2 Greenleaf on Evidence (16th Ed.) § 269, the rule is phrased as follows: "Nor are damages to be assessed merely according to the defendant's ability to pay; for whether the payment of the amount due to the plaintiff, as compensation for the injury, will or will not be convenient to the defendant, does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive." The same rule is announced in *Roach v. Caldbeck*, 64 Vt. 596, 24 Atl. 989. But respondent says that the instructions cured any possible error in the admission of evidence regarding the defendant's wealth, calling our attention to a general instruction by which the proper elements of damage in a case like this were enumerated. This general instruction could not have served to cure the error because the court instructed the jury as follows: "You are instructed that in determining the amount of damage, if any, to be awarded to the plaintiff, you have a right to take into consideration the pecuniary condition of the defendant as disclosed by a preponderance of the evidence in this case." That this instruction was erroneous, and that in its tendency it was injurious to defendant, can scarcely be doubted.

[5] When defendant opened his case, he took the stand and gave testimony in his own behalf regarding his property, and this, according to respondent, was a waiver of the errors discussed above. In support of his position he cites a number of cases, including two Californian authorities—*People v. Anderson*, 28 Cal. 132, and *McLeod v. Barnum*, 131 Cal. 606, 63 Pac. 924—neither of which is in point. One was a case in which a defendant waived the error committed by the court in placing his wife on the stand without his consent as a witness against him by calling her in his own behalf. In the other case, after one witness had testified without objection to the contents of a letter, another gave testimony upon the same subject without preliminary proof of the loss of the written instrument. The court held that the evidence was immaterial, but, if it has been, the admission of the testimony without any objection was a waiver of the error. In this case the examination of the defendant in his own behalf amounted to nothing more than additional cross-examination for the purpose of explaining some of the matters brought out in his examination in chief while he was testifying as plaintiff's witness. The testimony quoted in respondent's brief, which was given by defendant in his own behalf, was directed, not to the amount of his property, but to the character of his interest therein. This was practically but a continuation of his cross-examination.

[6] There is no merit in the contention that the errors discussed above were waived by the failure of appellant to perfect his appeal from the order denying his motion for a new trial. They are properly reviewable in an appeal from the judgment.

[7] During the cross-examination of the defendant he was asked by a juror if he were a practicing lawyer, and, having stated his occupation to be that of an attorney at law, he was asked further questions about his practice. The court, interrupting the cross-examination, said: "You do not hold that because he is a lawyer he is held to be more accountable than anybody else." To this remark counsel replied: "Yes; I claim it is a natural presumption that a lawyer is presumed to know more of the law than an ordinary layman." Inasmuch as one of the counts of the complaint charged that at the time of the accident the defendant was violating a municipal ordinance, this remark might have been prejudicial to him, because naturally a lawyer is no more charged with knowledge of the ordinances of a great city like Los Angeles applicable to automobiles than is any other person who acts as a driver of such a vehicle. But the remark of the court immediately following counsel's statement was probably sufficient to overcome any injury which might have resulted from an erroneous and uncontradicted declaration of the law. The court said: "He is not on trial for his knowledge of the law." The two statements of the court quoted above must have apprised the jurors of the true rule that the occupation of the defendant was not a material subject of inquiry. As the case must be reversed for other reasons, it is not necessary to discuss this matter further. As counsel for respondent admits that his statement (which we have quoted) was "one which would have been much better unsaid," there will doubtless be no repetition of it at another trial.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

(164 Cal. 756)

In re GLEASON'S ESTATE.

CORBIN v. GLEASON. (L. A. 3,285.)

(Supreme Court of California. Feb. 24, 1913.
Rehearing Denied March 24, 1913.)

1. WILLS (§ 165*)—EXECUTION—UNDUE INFLUENCE—EVIDENCE—SUBSEQUENT STATEMENTS OF TESTATOR.

Statements of testator a few minutes after executing his will are inadmissible, unless part of the *res gestæ*, to show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

2. EVIDENCE (§ 121*)—"RES GESTÆ."

Res gestæ are those circumstances which are the undesigned incidents of a particular litigated act—that is, stand in immediate causal relation to the act—and so include declara-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions which are the immediate accompaniments of the act; immediateness being tested by closeness of causal relation (citing 7 Words & Phrases, 6130).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 8, p. 7787.]

3. WILLS (§ 165*)—EVIDENCE—RES GESTÆ—DECLARATIONS.

Statements of testator, though made only a few minutes after executing his will, that he "had to do it right," and, if he had not, it would be extremely uncomfortable at home, being the mere expression of his opinion regarding a past occurrence, are not part of the *res gestæ*.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

4. WILLS (§ 166*)—EXECUTION—"UNDUE INFLUENCE"—EVIDENCE.

Evidence on a contest of a will held insufficient to show undue influence—that is, a pressure which overpowered the mind—and bore down the volition of testator at the very time the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

In the matter of the Estate of Henry B. Gleason, deceased. Lida E. Corbin contested the will, which was in favor of Eva Mildred Gleason, and from an adverse judgment and an order denying her motion for new trial, contestant appeals. Affirmed.

J. H. Peters, G. P. Adams, and Newman Jones, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

MELVIN, J. The will of Henry B. Gleason, deceased, was admitted to probate July 13, 1911. By it he left \$10 to his sister, Lida E. Corbin, appellant herein, and the rest of his property, amounting in value to about \$40,000, to his wife, Eva Mildred Gleason. Early in July, 1911, the sister of the deceased, Gleason, filed a contest to said will, praying revocation of the probate thereof on the grounds, among others, that "the said deceased was induced to execute the said will by reason of the undue influence of the said Eva Mildred Gleason, exercised and exerted by her over and upon him, and that the said will was extorted from him by the said Eva Mildred Gleason by threats of personal violence, and was executed by him under fear of the same, and that at the time of the making of the said will, and for a long time prior thereto, he was not of sound mind and memory, and was not competent to make a will." The questions of fact involved were tried before a jury, and, a determination in favor of the validity of the instrument having been made, judgment was entered accordingly adverse to the prayer of the sister's pe-

tition. From said judgment and from an order denying her motion for a new trial the contestant appeals. The will was drawn by W. S. Lang, a notary public, who had known Mr. Gleason for some years. Testator went alone to the office of Mr. Lang; told the notary that he wanted to make a will; stated his wishes in relation thereto; and the will was prepared by the notary. Mr. Gleason requested that, in addition to the signatures of the two witnesses, he desired Mr. Lang to acknowledge the instrument as a notary. This was accordingly done, and that the will was executed with proper formality is not questioned. Of the manner and apparent testamentary competency of Mr. Gleason at the time of the execution of the will, the notary testified: "At the time he signed the will his condition was apparently normal, or otherwise I would not have taken his acknowledgment. I saw nothing at that time to indicate to my mind at all that he was not perfectly normal and sane. He told me how to make the will and who to will the property to. Q. Who did he tell you to will the property to? A. I remember the wife and sister. He gave his sister \$10, if I remember right. After the will was written I think he read it. I am quite sure he did. Q. Was there anything to indicate that he was acting under any undue influence that you noticed at that time? A. No; not that I noticed. Q. You would never have taken his acknowledgment as a notary public if there had been, would you? A. Unquestionably I would not."

Further describing the conduct of the testator, the notary was permitted to testify, over objection, that Mr. Gleason returned to his office within 10 or 15 minutes after the execution of the will; that testator seemed to be in a state of nervous collapse; that he "fell into a rocking chair"; and that a conversation ensued between him and the notary. This may be best described in the language of the record. Witness Lang, being questioned by Mr. Adams, testified as follows: "He sat down in a chair and made the remark: 'Oh, hell.' I did not pay any attention to it at that time and continued to read, and again he remarked: 'Oh, hell, that paper,' and so I looked up, and he was looking at me, and I said, 'What paper do you mean?' 'That will.' So I thought I would ask him questions— Q. (By Mr. Adams): You mean he said 'that will'? That was his answer, 'That will.' I said: 'I suppose you knew, Mr. Gleason, it was not necessary to acknowledge that at all. That was rather an unusual proceeding.' 'I know,' he said, 'but I had to do it. I had to do it right or hell would pop at home; I could not stay there.' And that is about all that was said on that particular point. He frequently says, 'Oh, hell,' or 'Damn it.' Q. Repeat any further conversation you had with him at that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time. A. I asked him—I said: 'Why, Mr. Gleason, who did you marry?' He said, 'I will be damned if I know.' He said, 'I got drunk, and they said I was married; that is all I know about it.' That was about all that was said at that time." Another witness named Clemens corroborated Mr. Lang in his account of the testator's nervous condition. In the charge to the jury the court gave the following instruction: "You are instructed that while there was testimony admitted in this case from the witnesses, William S. Lang and Nicholas Clemens, that shortly after the making of the will in controversy, but after it was signed, witnessed, and delivered, that the decedent appeared to be nervous and in more or less of a physical collapse, and which evidence contained a purported conversation or statement at that time and place by decedent, yet you are now cautioned that such testimony was admitted alone upon the theory, and was competent only for the purpose, of being considered by you upon the question of the soundness or unsoundness of the mind of the testator, the said Henry B. Gleason, and was not competent to prove, nor was it admitted for the purpose of, nor can you consider the same, in any wise as establishing undue influence on the part of Eva Mildred Gleason, and was not competent for that purpose, and you should not consider it for that purpose."

[1] The limitation in the above instruction of the scope of the testimony of the two witnesses is the appellant's sole assignment of error, and her entire reliance for a reversal of the judgment rests upon the contention that the conduct and utterance of the testator were a part of the *res gestæ*. Undoubtedly the rule regarding the matters which are admissible as parts of the *res gestæ* has been somewhat liberally construed by courts in later years. It is also, true that declarations, when admissible as parts of the *res gestæ* need not necessarily be absolutely contemporaneous with the main event. Appellant contends that the test is not the time of the declarations with reference to the main event, but the opportunity for reflection and intention which may have been given to the testator, or as Prof. Wigmore expresses it: "The utterance must have been before there has been time to contrive and misrepresent; i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings." Wigmore on Ev. par. 1750. Conceding this to be the general rule, we cannot say that the lapse of from 10 to 15 minutes was not, under the circumstances here given, sufficient to exclude the evidence as part of the *res gestæ* and as applicable to the issue of undue influence. In the first place such declarations are not looked upon with favor by the courts. Many statements of the rule

might be cited, but a typical and oft quoted one is that of Colt, J., in *Shaller v. Bumstead*, 99 Mass. 119: "That the instrument which contains the testamentary disposition of a competent person, executed freely and with all requisite legal formalities, must stand as the only evidence of such disposal, is generally conceded. Such a will is not to be controlled in its plain meaning by evidence of verbal statements inconsistent with it, nor impaired in its validity and effect by afterthoughts or changes in the wishes or purposes of the maker, however distinctly asserted. It is to be revoked only by some formal written instrument, some intentional act of destruction or cancellation, or such change of circumstances as amounts in law to a revocation. Any invasion of this rule opens the way to fraud and perjury; promotes controversy; destroys to a greater or less degree that security which should be afforded to the exercise of the power to control the succession to one's property after death."

The rule with reference to declarations in cases like this in this and many other jurisdictions has long been that so well expressed in *Kirkpatrick v. Jenkins*, 96 Tenn. 89, 33 S. W. 820: "We think the great weight of authority and of reason is to the effect that subsequent declarations of an alleged testator may be considered by a jury upon an issue of mental capacity, but that they cannot be considered upon an issue of undue influence, unless there be independent proof indicating the presence of undue influence, and then only to show a condition of mind susceptible to such influence, and the effect thereof upon the testamentary act." This court has formulated the rule even more forcibly. In *re Calkins*, 112 Cal. 301, 44 Pac. 578, contains this language in the opinion: "In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves. Whenever the condition of the mind is a fact which it is desirable to prove, it may be established by such evidence as is competent for that purpose. The mental condition of an individual is made manifest to others by his statements, declarations, conversations, as well as by his conduct, and, when the state of a testator's mind at the

time of executing the will is the fact to be shown, his contemporaneous declarations or statements furnish the most satisfactory evidence of that fact. His statement of the effect that an act or suggestion of another produced upon him at some previous time is, however, only hearsay, while the statement of his feeling or disposition at the time of making the statement is but the expression in words of his condition at that time, and, so far as it produces a picture thereof, is admissible." See, also, *Estate of Ricks*, 160 Cal. 485, 117 Pac. 539; *Estate of Kilborn*, 162 Cal. 11, 120 Pac. 762; *Estate of Gregory*, 133 Cal. 131, 65 Pac. 315. Unless, therefore, we are compelled to regard the utterances and demeanor of the testator as parts of the *res gestæ*, evidence relating to them should be declared inadmissible according to a rule most firmly established in this state.

[2, 3] Definitions of *res gestæ* are as numerous as prescriptions for the cure of rheumatism and generally about as useful. One accurate definition is quoted with approval in 7 *Words & Phrases*, 6130, as follows: "The *res gestæ* is defined by Wharton in his work on Evidence, 258, 267, 'as those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*; remembering that immediateness is tested by closeness, not of time, but by causal relation, as just explained.'" Tested by this rule, we cannot say that the conduct and conversation of the testator here reviewed must be considered a part of the *res gestæ*. The mere fact that but a trifling period of time elapsed between the testamentary act and the circumstances related by witnesses Lang and Clemens does not make the evidence admissible for all purposes. It appears from the record that Henry B. Gleason was subject to sick spells, relief from which was obtained only by the use of morphine hypodermically injected. It may well have been that his agitation and his remarks on the occasion of his second visit to the notary's office were caused by illness, or morphine, or a combination of the two. His agitation may have resulted from any one of a dozen causes, and his remarks, when analyzed, do not amount even to a statement that his wife had coerced him in the matter

of the disposition of his property by will. He described no act or command or threat of his wife; but said he "had to do it right" and expressed the conclusion that matters would have been extremely uncomfortable at home if the instrument had not been properly executed. His statements were not even declarations of past occurrences. That which he said was merely the expression of his opinion regarding a past occurrence, and was no more a part of the *res gestæ* because it was uttered a few minutes after the execution of his will than it would have been if spoken a month later. *Lissak v. Crocker Estate Co.*, 119 Cal. 444, 51 Pac. 688; *Durkee v. Central Pacific R. R. Co.*, 69 Cal. 534, 11 Pac. 130, 58 Am. Rep. 562; *Luman v. Golden A. C. M. Co.*, 140 Cal. 709, 74 Pac. 307; *Boone v. Oakland Transit Co.*, 139 Cal. 492, 73 Pac. 243; *Waldeck & Co. v. Pacific Coast S. S. Co.*, 2 Cal. App. 169, 83 Pac. 153.

[4] But, even if the court had erred in refusing to rule that the conduct and statements of the testator subsequent to the preparation and execution of the will constituted parts of the *res gestæ*, we would not look upon the error as material, because the evidence in the case fell far short of establishing contestant's allegation that the will was the result of undue influence exerted upon the testator by Eva Mildred Gleason in such manner as improperly to influence him in the making of his will. The contestant's only material evidence at the trial beyond that which we have discussed was the following, which we quote from the transcript: "Other evidence was given on behalf of the plaintiff to the effect that the decedent at the time of his marriage to the defendant was 60 years of age; that she at the time was 22 years of age; that the decedent's first wife, to whom he was devotedly attached, died less than a year prior to his marriage to the defendant, after a happy married life of more than 30 years with him; that the defendant first married November 23, 1903; her husband was killed April 19, 1904; that she married again September 1, 1904; was divorced from the second husband December 5, 1906; married the decedent June 5, 1907, having known him but six months; that he had numerous sick spells and his only relief at such times was by use of morphine hypodermically injected; that the will in controversy was taken by the defendant a few hours after its execution to Mr. Pennington, one of the witnesses to the said instrument, and she showed it to him and asked him if he had signed it as a witness, and thereafter on the same day she placed it in a safe deposit box at the bank; that the defendant married again a few months after the death of the decedent Gleason, and this latest marriage was thereafter annulled at her instance; that the decedent, Gleason, died June 22, 1910, seven weeks after the execution of the alleged will,

and that the estate left by him was and is appraised at about \$40,000, all of which, with the exception of ten dollars bequeathed to his sister, the said Lida E. Corbin, is by the terms of the will in question devised and bequeathed to the said defendant Eva Mildred Gleason."

The court seems to have been very liberal towards contestant in the admission of testimony. This, of course, was proper, in view of the several issues involved, but we fail to see what relevancy the numerous marriages of Eva Mildred Gleason could possibly have to the questions involved in the contest, and this is most emphatically true with reference to the marital ventures of the lady after she become the Widow Gleason. Surely her influence over her former spouse, whatever it may have been, had then ceased. While Gleason's marriage to a young woman who had been once widowed and once divorced might possibly have indicated that he was reckless, it would not necessarily suggest either lack of testamentary capacity or subjection to the will of his new wife. Her early custody of the will and her prompt inquiry regarding its execution might have been important, if there were other evidence that she had sought by threats or subtler means improperly to influence her husband, but there is no such showing beyond the conduct and statements of the testator which we have discussed above, and which were totally inadequate to establish undue influence. The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." *Estate of Carithers*, 156 Cal. 428, 105 Pac. 130; *Estate of Lavinburg*, 161 Cal. 543, 119 Pac. 915; *Estate of Kilborn*, supra.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(185 Cal. 36)

VESPER v. CRANE CO. et al.

(L. A. 2,908.)

(Supreme Court of California. Feb. 28, 1913.)

1. MALICIOUS PROSECUTION (§ 16*)—ATTACHMENT (§ 356*)—INJUNCTION (§ 257*)—ELEMENTS.

Generally, under the common law, suit for maliciously prosecuting an action against plaintiff does not lie on the fact per se that such action was unsuccessful or abated; it being necessary that it have been prosecuted maliciously and without probable cause, whether the damages be sought for bringing an action alone or procuring issuance of an attachment, injunction, or other ancillary process.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22, 59; Dec. Dig. § 16;* Attachment, Cent. Dig. §§ 1319-1321; Dec. Dig. § 356;* Injunction, Cent. Dig. § 606; Dec. Dig. § 257.*]

2. ATTACHMENT (§ 331*)—MALICIOUS PROSECUTION (§ 13*)—WRONGFUL ATTACHMENT—REMEDIES.

On failure of an attachment, defendant may either sue on the attachment undertaking or for malicious attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1180-1185; Dec. Dig. § 331;* Malicious Prosecution, Cent. Dig. §§ 13-15; Dec. Dig. § 13.*]

3. ATTACHMENT (§ 331*)—WRONGFUL ATTACHMENT—SUIT ON UNDERTAKING—PROOF REQUIRED.

Suit on an attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured, that there was no debt due from the attachment defendant when it was issued and levied; a showing of malice and want of probable cause being unnecessary.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1180-1185; Dec. Dig. § 331.*]

4. MALICIOUS PROSECUTION (§ 16*)—WRONGFUL ATTACHMENT—PROOF REQUIRED.

In an action for wrongful attachment, wherein plaintiff, the attachment defendant, disregards his remedy on the attachment undertaking, he must allege and prove malice and want of probable cause in procuring issuance of the attachment the same as in a common-law action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22, 59; Dec. Dig. § 16.*]

5. ATTACHMENT (§ 374*)—WRONGFUL ATTACHMENT—EVIDENCE—JUDGMENT ROLL.

Even if, in an action for wrongful attachment brought independently of the attachment undertaking, the judgment roll in the attachment action, showing judgment for the attachment defendant, is admissible as prima facie evidence of want of probable cause, it is no evidence of malice in procuring issuance of the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1363-1372; Dec. Dig. § 374.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. E. Vesper against the Crane Company and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Grant Jackson and Lewis Cruickshank, both of Los Angeles, for appellant. S. J. Parsons, of Los Angeles, for respondents.

PER CURIAM. This appeal was originally heard and determined in Department 2, an opinion written by Mr. Justice Lorigan having been filed on September 13, 1912; the court affirming the judgment and order appealed from. A rehearing in bank was ordered. Upon further consideration we adhere to the views expressed in the department opinion, and adopt the same as the opinion of the court in bank.

The following is a copy of the department opinion:

"This appeal is taken from a judgment in favor of defendants and an order denying the motion of plaintiff for a new trial.

"The action was brought to recover damages for the alleged wrongful issuance and levy of a writ of attachment.

"The complaint was in two counts, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

allegations common to both are that in April, 1907, the defendant Crane Company, asserting that plaintiff was indebted to it in the sum of \$463.57 for goods, wares, and merchandise sold by it to him, assigned its claim therefor to the other defendant, Hunt, one of its employes, for the purpose of collecting the amount by suit, and such an action was brought therefor at its request by Hunt on May 10, 1907; that an affidavit and undertaking on attachment was filed and given, and a writ of attachment issued in the suit, under which an automobile belonging to plaintiff was levied on and taken possession of by the sheriff on the same day the action was commenced, and held in the possession of the latter until January 19, 1909, some 20 months; that plaintiff answered in said action, and, after trial, judgment was entered in his favor in September, 1908, for his costs of suit, the court finding that he was never indebted to the Crane Company or Hunt, as assignee, in any sum whatever; that Hunt appealed from said judgment and executed a bond to continue the attachment in force pending the appeal, and also moved for a new trial; that while the appeal and said motion for a new trial were pending, it was on January 19, 1909, stipulated between the parties that both the appeal and motion should be abandoned, the automobile released from attachment and restored to plaintiff, and the costs in the judgment awarded to plaintiff paid by said Hunt, all of which was done.

"It was then further alleged in the first count that plaintiff was never indebted to the defendant Crane Company or to said Hunt, and that said action was commenced and said attachment issued and levied by defendants 'maliciously and without probable or any cause therefor, and for the purpose of harassing and annoying plaintiff and putting him to trouble and expense'; that the reasonable value, use, and occupation of said automobile during its detention for said 20 months by the sheriff under the writ was \$15 a day, amounting in the aggregate, with other alleged damages, to \$9,315, for which judgment was asked.

"As to the second count, the only material difference between its allegations and those of the first count are that the damages claimed as the result of the detention of the automobile are more specifically set forth, the claim being that they aggregated \$9,766.42, and the omission of any allegation that the action was brought and the attachment levied maliciously; it being alleged in that respect 'that the said action was commenced and the said writ of attachment issued and levied without probable or any cause therefor.' It was further alleged in both counts that the said action by Hunt against plaintiff was brought and prosecuted, and the attachment issued and levied, by Hunt at the request and direction of the Crane Company, and as its agent and for its benefit.

"The answer of defendants admitted that defendant Hunt, in the prosecution of the said suit against plaintiff, was acting in behalf of the defendant Crane Company and all the allegations respecting such actions. The levy of the attachment and detention by the sheriff of the automobile of plaintiff thereunder were likewise admitted; but defendants denied that said action was brought maliciously or without probable cause on the part of either of said defendants, or that plaintiff suffered damage by reason of the bringing of said action or the issuance and levy of said attachment. As a further defense, the defendants set forth at length facts and circumstances in connection with the claim of indebtedness asserted by Hunt as assignee of defendant Crane Company in said suit against plaintiff, the bringing of the action thereon, and the levy of the attachment, under all of which it was asserted and claimed that both Hunt and the Crane Company, in bringing said suit, had probable cause for doing so, and believed that plaintiff was legally liable on the account upon which suit was brought, and were so advised by their attorney, to whom they had freely and fairly stated all the facts regarding the matter of which they had then knowledge, and that said action was brought in good faith, with probable cause, and without any malice on the part of either of said defendants against plaintiff.

"On the trial of the action, as to the allegation in the first count of the complaint that the suit complained of was instituted by the defendants maliciously, it was expressly admitted by the attorney for plaintiff that said action was begun and the attachment issued and levied by the defendants without any malice on the part of the defendants against the plaintiff.

"Having so abandoned the allegation of malice, and on the assumption that it was only necessary to prove want of probable cause as alleged in both counts, plaintiff introduced in evidence, in support of such allegation, the judgment roll in the action of Hunt against the plaintiff.

"The admission by plaintiff of the absence of malice and the introduction of this judgment roll on the issue of want of probable cause was all that was presented to the court on these matters. The rest of the evidence was addressed solely to the question of damages.

"The court, in concurrence with the admission of counsel for plaintiff, found that, in bringing the action and levying the attachment, the defendants did so without malice, and further found against the claim of plaintiff that said action and levy were without probable or any cause therefor. In addition the court found that, by reason of the issuance of the attachment and detention of the automobile for the period claimed, the damages to plaintiff did not exceed \$711. The court concluded, as matter of law, that

as the action against plaintiff was brought and the attachment levied without malice, and it not being shown that the same was brought with malice and without probable cause, the defendants were entitled to a judgment in their favor dismissing the complaint of plaintiff, which was accordingly done. The theory upon which the superior court rendered judgment for the defendants was that no action could be maintained directly against an attaching creditor unless upon allegation and proof that the issuance and levy of the writ was procured maliciously and without probable cause; that otherwise the sole remedy of the attachment defendant was against the sureties upon the undertaking on the attachment given to procure the issuance of the writ.

"As we understand the contention made by appellant here, it is that the present action was not brought to recover punitive damages for malicious attachment, but simply to recover actual damages caused by the issuance and levy of the writ; that, when the action is of that character alone, it is not necessary to aver malice or even want of probable cause, but only to aver, as appellant did, that the respondents never had any cause of action against appellant when they brought the suit against him, and that proof thereof entitled them to a recovery of actual damages for which the suit was alone brought; or that, in any event, an averment of want of probable cause and proof thereof was all that was essential to warrant a recovery for actual damages.

[1] "The general rule is well settled in this state, following the common-law doctrine, that no action for damages can be prosecuted against a plaintiff in an action from the fact per se that the action was unsuccessful or abated. The action must have been prosecuted maliciously and without probable cause, or the plaintiff cannot be made liable for bringing it. And the rule is the same whether the damages sought proceed from the bringing of an action alone or whether it is accompanied with an attachment, injunction, or other ancillary process. In either event, the plaintiff in such an action must allege and prove malice and want of probable cause in bringing the original action or in procuring the issuance of the ancillary proceeding therein, or he is not entitled to recover.

[2] "When an attachment is sued out and levied upon the property of a defendant in the action, and the plaintiff therein has failed to maintain his action, two remedies may be open to the attachment defendant: He may sue upon the undertaking on attachment or maintain an action for malicious attachment.

[3] "The remedy on the attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured—that there was no debt due from the attachment defendant when it was issued and levied. It

is not there necessary to aver malice and want of probable cause for the issuance of the attachment, but simply that the attachment was wrongfully procured and levied.

[4] "When, however, the attachment defendant undertakes to proceed against the attachment plaintiff alone and independent of any right of action upon the bond, he must allege and show malice and want of probable cause on the part of the attachment plaintiff, as required by the principles of the common law in actions for malicious prosecution. The averment of malice and want of probable cause go to the very gist of the action by the attachment defendant; and no recovery can be had unless these essential elements of liability are alleged and established by the evidence. The action to recover damages from the attachment plaintiff for the mere wrongful issuance and levy of an attachment is analogous to the ordinary action for malicious prosecution of a criminal proceeding, or of a civil action where no attachment or other ancillary proceeding has been had, and is governed by the same rules as to pleading and proof as far as applicable. *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Robinson v. Kellum*, 6 Cal. 399; *Grant v. Moore*, 29 Cal. 644; *King v. Montgomery*, 50 Cal. 115; *Gonzales v. Cobliner*, 68 Cal. 151, 8 Pac. 697; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777.

"While two of the cases above quoted (*Robinson v. Kellum* and *Asevado v. Orr*) involved actions on injunction bonds, the same principle as to the maintenance thereof is applicable whether the ancillary process or proceeding accompanying the suit consists of an injunction, or attachment, or other writ, which it is asserted has been improperly procured in the action. In the last case immediately cited, quoting from the first, it is said, at page 297 of 100 Cal., at page 778 of 34 Pac.: "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice"—and reversed the judgment because the complaint failed to aver those facts."

"The cases of *King v. Montgomery* and *Gonzales v. Cobliner*, supra, were actions for damages by the attachment defendant against the attachment plaintiff, in which this court declares it to be the settled law that no action lies against the plaintiff in behalf of one whose property has been attached and the suit or attachment terminated in his favor, unless such suit or attachment was prosecuted or sued out and levied malicious-

ly and without probable cause. In the last case just referred to, this court cites several cases from other jurisdictions in support of this rule, among others *Stewart v. Sonneborn*, 98 U. S. 192, 25 L. Ed. 116, where it is said (and extending the quotation somewhat further): "The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fall in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the circuit court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding."

"It will be observed in this quotation from the Supreme Court of the United States that the distinction which the appellant seeks to make between actions for actual damages and those for exemplary damages, as affecting the necessity of allegations of malice and want of probable cause in procuring an attachment or other process, is expressly repudiated; that such allegations are essential to the maintenance of any such action, whatever the character of the damages sought, whether compensatory or punitive.

"We content ourselves with reference to our own cases and the authorities referred to therein sustaining the rule that allegation and proof of both malice and want of probable cause are essential to a suit against an attachment plaintiff, without additional citation from other jurisdictions, which abundantly sustain this rule.

[6] "Considerable discussion is directed on both sides to the effect of the judgment roll in the suit of Hunt against the plaintiff, in which suit the attachment was issued, and

which was introduced in evidence by plaintiff in this action in support of his allegation of want of probable cause. Appellant contends that it sufficiently established such issue; respondent denies that it had that effect. But we perceive no reason for considering this point. If it be assumed, without so deciding, that it was at least prima facie evidence of want of probable cause, this cannot benefit plaintiff, because to maintain the action both malice and want of probable cause must be shown on his part. As pointed out, proof of want of probable cause and malice must be made to warrant recovery; it cannot be had on proof of want of probable cause alone. While malice may be inferred from want of probable cause, there can be no room for such inference where, as here, it was expressly admitted on the trial that neither of the respondents was actuated by malice in bringing the action or procuring the issuance and levy of the attachment.

"Nor is it necessary to discuss the point made as to the proper rule for the assessment of damages in cases of this character. This could only be important if, as contended by appellant, proof alone of want of probable cause in procuring the levy of the attachment was sufficient to sustain an action of this character, which, as pointed out, is not the rule in this state. While the trial court took evidence on the subject of damages and made a finding thereon, still on its further findings, supported by the admissions of appellant on the trial that respondents did not act maliciously in procuring the attachment, the matter of damages became a false quantity in the action. It was not necessary for the court, in view of the other findings, to make any finding on the subject of damages, and properly ignored it in entering the judgment dismissing the action which, under the other findings discussed, it was right to do."

The judgment and order appealed from are affirmed.

BEATTY, C. J., does not participate in the foregoing.

(165 Cal. 19)

TOGNAZZINI et al. v. JORDAN, Secretary of State. (S. F. 6335.)

(Supreme Court of California. Feb. 27, 1918.)

CORPORATIONS (§ 40*)—AMENDMENT OF ARTICLES—DISSOLUTION OF CORPORATION.

Civ. Code, § 362, after prescribing the manner in which a corporation may amend its articles, provides that the section shall not be construed to authorize any corporation to increase or diminish its capital stock, change its name, extend its corporate existence, or change the number of its directors without complying with the special provisions of the Code. Code Civ. Proc. § 1227 et seq., provides a method for terminating the existence of a corporation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

by applying to the court for dissolution. *Held*, that a corporation may shorten its term of existence by filing an amendment in accordance with section 362, although the corporation by reason of such shortened term goes out of existence on filing the amendment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 124; Dec. Dig. § 40.*]

In Bank. Application for writ of mandamus by T. G. Tognazzini and others against Frank C. Jordan as Secretary of State. Writ granted and made peremptory.

Gavin McNab, B. M. Atkins, and Lillenthal, McKinstry & Raymond, all of San Francisco, for petitioners. U. S. Webb, Atty. Gen., for respondent.

MELVIN, J. Petitioners prayed for a writ of mandamus requiring the Secretary of State to file, nunc pro tunc as of the 9th day of August, 1912, a certified copy of a certificate of amendment of the articles of incorporation of the Swiss-American Bank. An alternative writ was issued, and the matter is now before us for final consideration of the points of law involved; there being no controversy with reference to the facts. The Swiss-American Bank was incorporated for the term of 50 years on the 10th day of August, 1909. Subsequently, by a contract made and executed in accordance with the "Bank Act," so called, and approved by the superintendent of banks, the corporation transferred all of its deposits to the Anglo-Californian Trust Company. There are no corporate debts. Prior to August 9, 1912, the Swiss-American Bank, following the procedure prescribed by section 362 of the Civil Code, amended its articles of incorporation by abbreviating its term of corporate existence to three years. A certificate of amendment was filed in the office of the county clerk of the city and county of San Francisco on August 8, 1912, and a certified copy thereof, accompanied by the proper fee, was tendered to the Secretary of State for filing on August 9, 1912—the day before that upon which, if the amendment to the articles of incorporation was valid, the existence of the Swiss-American Bank would terminate. The Secretary of State declined to file the proposed document upon the ground that a corporation may not shorten the term of its corporate existence, at least not in such manner as practically to end its being almost immediately. He insists that a corporation wishing to terminate its existence must apply to a court for dissolution as prescribed by sections 1227 et seq. of the Code of Civil Procedure. The only question before us, therefore, is whether or not section 362 of the Civil Code permits the shortening of the corporate life of the Swiss-American Bank.

Section 362 of the Civil Code, after prescribing the manner in which a corporation may amend its articles of incorporation and providing for the filing with the Secretary of

State a certified copy of its amended articles, contains the following proviso: "Nothing in this section shall be construed to authorize any corporation to increase or diminish its capital stock, change its name, extend its corporate existence, or increase or diminish the number of its directors, without complying with the special provisions of this Code applicable thereto." In his brief the learned Attorney General states that the proviso quoted above was first inserted in section 362 of the Civil Code in 1905, save that part prohibiting the diminishing of capital stock by amendment of the articles of incorporation. He says: "The exceptions running to the change of name, extension of corporate existence, increase or decrease of number of directors, as well as to the increase or decrease of capital stock, were inserted for the first time in the amendment of 1905." He then calls attention to the repeal of section 399 of the Civil Code in 1905 (Stats. 1905, p. 563). That section simply stated that "dissolution of corporations is provided for" in certain specified parts of the Civil Code. In the brief of the Attorney General we are also cited to the language of the note of the code commissioner on said section 399 of the Civil Code to the effect that: "This section, which purports merely to designate the place in the Code of Civil Procedure where the dissolution of corporations is provided for, does not state any rule of law and constitutes but an imperfect index to the provisions referred to." The brief then proceeds as follows: "Prior to the amendment of section 362, in 1905, the Code contained other provisions practically the same as at present, relating to the increase of the capital stock, change of name, extension of corporate existence, and increase or decrease in the number of directors. Yet it has never been contended that, prior to such amendment, section 362 authorized a corporation to accomplish any of these purposes by mere amendment of its articles of incorporation." It occurs to us that the reason for a failure to contend that section 362 of the Civil Code authorized a corporation to accomplish a shortening of its term of existence amounting almost to an immediate dissolution may perhaps be found in the existence of section 399 of the Civil Code and the belief which the profession may have entertained that said section pointed the only way to a practical termination of corporate entity. But whatever may have been the reason, it is certain that ever since its passage in 1885 section 362 has contained a proviso against the *extension* of its corporate existence. This fact seems to have been overlooked, but in the act as originally passed (Stats. 1885, p. 92) we find this language: "Provided, that the time of the existence of such corporation shall not be by such amendment extended beyond the time fixed in the original articles or certificate of

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incorporation." In the amendments to the section in 1893 and 1903 this proviso is substantially repeated (Stats. 1893, p. 181; Stats. 1903, p. 411). The proviso contained in the section as amended in 1905 has been previously quoted above.

Petitioners contend that the power to dissolve by application to a court cannot deprive a corporation of the right to shorten its term of existence even if the practical result of such abbreviation would amount to a speedy termination of the corporate life: First, because there is nothing inconsistent in the two methods of procedure; and, second, because section 362, which (it is asserted) gives the right to curtail the corporate term, was passed subsequently to those sections of the Code of Civil Procedure relative to dissolution of corporations by proceedings in the superior court. These contentions must be upheld. The power to amend articles of incorporation has reference to the changes in those matters essential to the original articles. *California Telephone & Light Co. v. Jordan* (App.) 126 Pac. 598. Section 290 of the Civil Code prescribes the necessary contents of articles of incorporation, among which is the term for which the corporation is to exist, not exceeding 50 years. Section 362 of the Civil Code gives the general right to amend articles of incorporation, limiting the power, however, to certain particulars; one of them being the *extension* of the corporate term. This very limitation indicates an intention to permit an amendment shortening the period of the corporation's life. It is the rule that the exception of a particular thing from the purview of the general expressions of a statute indicates that in the opinion of the lawmaking body the thing excepted would have been included within the general clause if the exception had not been made. *Commonwealth v. Summerville*, 204 Pa. 304, 54 Atl. 27; *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 191, 6 L. Ed. 23; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 438, 6 L. Ed. 678; *Tinkham v. Tapscott*, 17 N. Y. 152; 2 *Lewis' Sutherland*, *Statutory Construction* (2d Ed.) § 351. The limitation upon this rule is that it must not be carried too far—that an exception from the general language of a statute is sometimes made out of an abundance of caution and not to indicate that without the exception its subject-matter would come within the scope of the act. We do not think that section 362 of the Civil Code comes within the limitation upon the general rule.

It is asserted that the other methods of dissolution of corporations would, in general, provide greater protection to minority stockholders from fraud, although it is conceded that in the present proceeding no injury could result from permitting the method selected by petitioners to be used in ending the career of the Swiss-American Bank. The mere fact that other and better methods may

exist cannot prevent us from declaring what seems to us to be the plain meaning of the statute under discussion. If the shortening of the term of corporate existence had been for one year instead of 47 years, there could have been no claim that such action amounted to disincorporation without notice to all persons interested and in possible fraud of their interests. If the statute permits abbreviation of the corporation's legal lease of life, we cannot say, where the law does not, just when the process of diminution becomes dissolution.

Let judgment be entered in accordance with the prayer of petitioners, and let the writ be made peremptory.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.

(165 Cal. 1)

NATIONAL HARDWOOD CO. et al. v.
SHERWOOD et al. (L. A. 2,832.)

(Supreme Court of California. Feb. 25, 1913.)

1. **BILLS AND NOTES (§ 167*)—NEGOTIABILITY —NOTE SECURED BY MORTGAGE.**

Where a note is secured by a mortgage on land, both being executed at the same time and as parts of the same transaction, the note, though negotiable in form, is not negotiable in law, and a purchaser, taking it with knowledge of the existence of the mortgage, takes subject to equities.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 419; Dec. Dig. § 167.*]

2. **BILLS AND NOTES (§ 453*) — RECITALS — VALUE RECEIVED—ESTOPPEL.**

Neither the presumption of consideration arising from the fact that a contract is in writing as provided by Civ. Code, § 1614, Code Civ. Proc. § 1963, subd. 39, nor a recital in a non-negotiable note secured by a mortgage on land that it was given for value received, is sufficient to create an estoppel against the maker and his successors in interest to assert want of consideration as a defense to the note in the hands of an indorsee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1344-1351; Dec. Dig. § 453.*]

3. **BILLS AND NOTES (§ 318*)—ESTOPPEL (§ 22*)—BY DEED—CONSIDERATION—DENIAL—CAVEAT EMPTOR.**

Code Civ. Proc. § 1962, subds. 2, 3, provided that the recital of a fact in a written instrument, except the recital of a consideration, is conclusive between the parties or their successors in interest by a subsequent title, and that when a party by his own declaration, act, or omission has intentionally and deliberately led another to believe a particular thing true, and to act on such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it. F., having accepted a deed of trust for part of the purchase price of a lot sold to S. in order to enable S. to borrow money with which to construct a building, inserted in a trust deed a recital that it was subsequent to the lien of a mortgage for \$3,000 in favor of J., to whom S. executed a note for \$3,000 secured by a mortgage on the property. The consideration of this note was to be advanced as the building progressed, and only \$1,940.67 was paid. J.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—56

sold the note and mortgage to P. for \$3,000, at the time showing to her a statement signed by S. and wife that the note and mortgage to J. had been given for value received, and that there were no offsets against the same, together with the recital in the deed of trust which was subsequently foreclosed and the property bid in by F. Held that, as against P., F. was estopped by the recital in his deed of trust to deny that the consideration of the note and mortgage to J. had not been fully paid; nor was such estoppel obviated by the rule of caveat emptor applicable to a purchaser of a nonnegotiable obligation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 754; Dec. Dig. § 318; *Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.*]

4. ESTOPPEL (§ 22*)—RECITALS IN MORTGAGE.

Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, he is estopped thereby, and may not defeat or impair such other mortgage by denying its priority or validity, at the time he took it, to the amount of it as recited in his own mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.*]

5. ESTOPPEL (§ 72*)—INNOCENT PERSONS—NEGLIGENCE OF ONE.

Where a deed of trust, securing the balance of the purchase price of certain vacant property, recited that it was subject to a mortgage to J. for \$3,000, and contained no statement that the amount of such prior mortgage was to be thereafter advanced, and though only a portion thereof was ever advanced, J. sold the mortgage to a purchaser for \$3,000, who took on the faith of the recital in the deed of trust, the beneficiary under such deed, who purchased the property on foreclosure thereof, was bound by the recital as to the extent of the lien to which the deed was subject under Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the National Hardwood Company and others against Damon Sherwood and others. Judgment for plaintiffs, and defendant A. R. Phelps appeals. Reversed.

Lloyd W. Moultrie, of Los Angeles, for appellant. Borden & Carhart, Job Harriman, H. T. Morrow, G. H. Moore, and Cole & Cole, all of Los Angeles, for respondents.

SHAW, J. The defendant Phelps appeals from the judgment.

The plaintiffs began the action to foreclose certain alleged liens upon the lot in controversy for materials furnished in the erection of a building thereon. No objection is made to the judgment with respect to these liens. The sole controversy is between the appellant, Phelps, and the defendant Emil Firth; and the question presented is whether the principal sum of the mortgage lien held by Mrs. Phelps upon the lot is \$3,000 or only \$1,940.67. The note described in the

mortgage was for \$3,000, but it was given for future advances, and the mortgagors received only \$1,940.67 therefor. The facts are somewhat complicated, and it is necessary to state them at length.

The defendant Firth owned the lot prior to any of the transactions involved in the case. He executed a deed of the lot to the defendant Damon Sherwood; the purchase price being \$1,800. The deed was dated September 8, 1908. Under the same date, Sherwood and wife executed a deed of trust upon the lot to the Title Insurance & Trust Company, as trustee, to secure the payment of the said purchase price in four installments, for which Sherwood executed four notes to Firth. Sherwood desired to build a house on the lot, and for that purpose to borrow money by a first mortgage thereon. He arranged to borrow this money from one L. E. Jones. To accomplish the purpose, it was necessary that the deed of trust in some manner recognize the proposed mortgage as a paramount lien. To accomplish this, the following recital was inserted therein: "This trust deed is given to secure the purchase price of said property, but is second and subsequent to the lien of a mortgage for the sum of \$3,000 in favor of L. N. Jones." On October 8, 1908, Sherwood and wife executed to Jones the mortgage on the lot purporting to secure a note of the same date from Sherwood to Jones for \$3,000, payable three years after date. The mortgage also provided that, in case of foreclosure, the mortgagors would pay the attorneys' fees of the plaintiff in the suit, and that, upon default in payment of the interest or of any installment of the principal, the holder of the note should have the option to declare the whole sum due immediately. The deed of trust, although dated September 8, 1908, was not fully executed by delivery until October 13, 1908, on which day both the mortgage and the deed of trust were placed on record. It was agreed between Sherwood and Jones that the money borrowed on the mortgage should not be immediately paid to Sherwood, but should be paid over from time to time in smaller sums as needed for the proposed building. Firth was cognizant of this agreement. Sherwood thereupon proceeded to erect a building on the lot, and Jones advanced him therefor sums amounting to \$1,940.67, and no more. The building was completed on January 19, 1909. On November 4, 1908, Jones sold, assigned, and indorsed the said note and mortgage to the appellant, A. R. Phelps, for \$3,000, which she then paid to him.

At the time Sherwood and wife made the note and mortgage to Jones, they also signed and delivered to Jones a written statement declaring that said mortgage "has been given for value received, and that there are no offsets to the same." This document, and also the aforesaid recital in the deed of trust,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were shown to Mrs. Phelps by Jones at and prior to her purchase of the note and mortgage from Jones. She took the assignment and paid the \$3,000 to Jones without any notice or knowledge of the agreement between Jones and Sherwood, or of the fact that Sherwood had not received the full amount named in the note; and she relied on said recital of the deed of trust and said statement of the Sherwoods. She made no inquiry, personally, of the Sherwoods, or of Firth, or of the trustee, in regard to the matter.

Default was made in the payment of the purchase price due to Firth, secured by the deed of trust, and thereupon the trustee, in pursuance of the power of sale contained therein, duly sold said lot to enforce payment. Firth was the purchaser at the sale, and on May 22, 1909, the trustee, in pursuance thereof, executed a deed conveying the lot to him.

[1] It appears to be settled by the decisions of this court that where a note is secured by a mortgage on land, both being executed at the same time, or as parts of one transaction, the note, although negotiable in form, is not negotiable in law, where the purchaser takes it with knowledge of the existence of the mortgage. *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Briggs v. Crawford*, 162 Cal. 129, 121 Pac. 381; *Civ. Code*, § 1642. See, also, *Hibernia v. Thornton*, 127 Cal. 577, 60 Pac. 37; *Hays v. Plummer*, 126 Cal. 109, 58 Pac. 447, 77 Am. St. Rep. 153. In *McDonald v. Randall*, 139 Cal. 246, 72 Pac. 997, the court, in deciding that knowledge by the president of a corporation that a note, negotiable in form and secured by mortgage, was without consideration, where the note was payable to him, and was indorsed by him to the corporation, could not be imputed to the corporation under the circumstances shown, said in the course of the opinion, that the note was negotiable, and upon that statement assumed that the corporation would take it free from all existing defenses, unless it took with notice thereof. But the point that the mortgage accompanying the note made it nonnegotiable was not presented upon the argument nor discussed by the court. The case of *Meyer v. Weber*, supra, was not cited or mentioned either in the opinion or in the briefs. In view of these circumstances, the *McDonald* Case cannot be considered as a decision overruling *Meyer v. Weber* on that point. Three reasons for the doctrine were given in *Meyer v. Weber*. The first was that the mortgage there involved provided for the payment of attorneys' fees if suit to foreclose was instituted; a condition which destroyed the negotiability of the note, under the provisions of section 3088 of the Civil Code as it stood prior to the amendment of 1905. It would not have that effect under the section as it now is, and as it was when the note

here involved was executed. The second reason was that the mortgage provided that, upon default in the payment of the interest due before the maturity of the principal, the payee had the optional right to declare the principal due immediately, which also, under section 3088, would make a note nonnegotiable. The third reason was that in this state, under section 726 of the Code of Civil Procedure, a note secured by mortgage can be enforced only by foreclosure of the mortgage, and consequently the personal liability upon such note is contingent and dependent upon there being a deficiency in the proceeds of the mortgaged premises to pay the note upon a foreclosure sale. This also, it was held, introduced into the contract a condition not certain of fulfillment within the meaning of section 3088, and renders the contract as a whole nonnegotiable. The facts upon which the second and third reasons are founded are present in the case at bar; and the reasons are as potent as in the *Meyer* Case. It should be remarked, however, that in the present case, and also in *Meyer v. Weber* and *Briggs v. Crawford*, the note recited that it was secured by mortgage. The result was that no person could receive the note as indorsee without notice of the fact that it was accompanied by the mortgage. There is nothing in any of the decisions which would support the claim, should a case arise, that, in the absence of any such recital in the note, one who should purchase it for value before maturity, in good faith, and without knowledge or notice of the mortgage, could not hold it as a negotiable instrument and free from any defense which the maker might have as against the payee or any previous holder.

The note being nonnegotiable on its face, the result is that Mrs. Phelps, although she paid Jones the full face of the note as the price thereof, is not entitled to the protection which the law gives to an indorsee of a negotiable note, in good faith, for value and before maturity. *Civ. Code*, §§ 3122, 3123, 3124. Firth, as successor in interest of Sherwood, the mortgagor, may therefore avail himself of the defense of partial want of consideration arising out of the fact that Jones did not loan more than \$1,940.67 on the note, unless he is estopped to do so by the conduct of Sherwood, or by some other circumstance not depending upon the law of negotiable instruments.

[2] The note, as signed by Sherwood, recited that it was given for value received. It is not claimed that this representation would constitute an estoppel and prevent Sherwood, or Firth as his successor, from asserting want of consideration as a defense to the note in the hands of the indorsee. It would constitute prima facie evidence of a valuable consideration sufficient to support the promise to pay, although, since the contract is in writing, such consideration would

be presumed without the aid of the recital. Civ. Code, § 1614; Code Civ. Proc. § 1963, subd. 39. But neither the recital nor the statutory presumption is conclusive upon the maker, and the consideration may always be impeached, if the instrument is not negotiable, notwithstanding such presumption and recital.

[3] The court below held that the aforesaid statement given to Jones by the Sherwoods, and exhibited by Jones to Mrs. Phelps to induce her to purchase the note, created an estoppel in her favor against the Sherwoods alone, preventing them from denying that the note was good for the full amount thereof. It did not appear that Firth had any knowledge of the Sherwood statement, or of the exhibition thereof to Mrs. Phelps, or that she was induced to purchase thereby. Hence it was held to work no estoppel against him.

The principal thing relied on by the appellant to create an estoppel against Firth is the recital in the deed of trust that said deed was subject to "the lien of a mortgage in the sum of \$3,000" in favor of Jones. Firth had knowledge of this deed. It does not appear that he signed it, but he was the beneficiary named therein; and the recital was inserted with his consent for the purpose of making the mortgage to Jones paramount to the interest held by the trustee for his benefit. The evidence shows, however, that all the parties to this deed understood that no money was loaned on the mortgage at the time of its execution, and that it was to be advanced subsequently as needed for the proposed building. Hence we must conclude that it was not the actual intention of the immediate parties to the transaction, including Firth, that the mortgage should be a valid lien at any time for a sum larger than had been advanced thereon at such time by Jones.

The Code declares that the recital of a fact in a written instrument, except the recital of a consideration, is conclusive between the parties thereto, or their successors in interest by a subsequent title. Also that when a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it. Code Civ. Proc. § 1962, subs. 2 and 3. Firth unquestionably had an interest in or under the deed, whether he signed it or not. By the conveyance from the trustee he became the successor in interest of Sherwood by a subsequent title. That conveyance placed him in the same position, with respect to this recital, as he would have occupied if Sherwood had conveyed the lot to him after the mortgage to Jones was recorded. So far as the mortgage lien was concerned or af-

1 by the recital, he is bound by it as

fully as if he was a party to the deed in which it was inserted.

The purpose of the recital, so far as Firth, Sherwood, and Jones were concerned, was to assure Jones that the deed of trust would be subject to the mortgage lien for whatever sums he should loan thereon. If he had continued to hold the mortgage, it may be assumed that he could not have enforced it for more than the sum actually loaned by him. But Mrs. Phelps had no knowledge of the agreement that the money was to be loaned subsequently in installments as required. That agreement was not referred to in the mortgage nor placed on record; and it cannot be invoked by Firth against her.

The respondent argues that the rule of caveat emptor applies to one who is about to purchase a nonnegotiable obligation for the payment of money, and that such buyer is bound at his peril to inquire into the defenses of the debtor, and can occupy no better position than does the original creditor. This doctrine is well established; but it does not obviate the estoppel here involved. Under the provisions of section 1962 of the Code of Civil Procedure, above recited, and under the facts we have stated, Firth occupies the position of the mortgagor, and is bound by the recital. He, therefore, comes within the third subdivision of that section—that of a person who has by his own declaration led another to believe a particular thing true, and to act upon that belief. Mrs. Phelps saw the recital and acted upon the belief it inspired; and he cannot be permitted to falsify it for his own benefit and to her detriment in the matter in which she acted. She was bound to inquire into the matter or abide the consequences. She did inquire, and she found this recital which she rightly presumed was made with the knowledge and consent of Firth. She was justified in accepting it as true and in purchasing the note and mortgage in reliance on the information it contained. Under the principle declared in the aforesaid provision of the Code, Firth is estopped to deny the truth of the thing of which it informed her. The authorities are in accordance with the Code upon this proposition.

[4] Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, the rule is that he is estopped thereby and is not allowed to defeat or impair the other mortgage by denying its priority or validity at the time he took it to the amount of it as recited in his own mortgage. *Old National Bank v. Heckman*, 148 Ind. 507, 47 N. E. 953; *Hardin v. Hyde*, 40 Barb. (N. Y.) 435; *Gow v. Lumber Co.*, 109 Mich. 52, 66 N. W. 676; *Bronson v. Railroad Co.*, 69 U. S. (2 Wall.) 310, 17 L. Ed. 725; *Central T. Co. v. Columbus, etc., Co. (C. C.)* 87 Fed. 828. There are also many cases holding that the purchaser, who takes the property by a deed which re-

cites that it is subject to a mortgage thereon, is estopped to assert the invalidity of the mortgage or any defense thereto which existed at the time between the mortgagor and the mortgagee. This is held in cases where it does not appear that the vendor of the land had deducted the mortgage debt, as recited, from the price of the property agreed on between him and the vendee; and it appears to be the rule applicable in any case where the land is taken subject to a mortgage recited in the deed. *Cornell v. Corbin*, 64 Cal. 200, 30 Pac. 629, which concedes, but does not decide, the point; *Freeman v. Auld*, 44 N. Y. 50; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Shufelt v. Shufelt*, 9 Paige (N. Y.) 145, 37 Am. Dec. 381.

Where the recital is of such a nature that it shows an intent to declare that the second mortgage is to be taken subject only to so much of the sum named in the first mortgage as may be justly owing thereon, the second mortgagee is not estopped from showing that the first mortgage is good only for a part of its face value. *Bennett v. Bates*, 94 N. Y. 354. Firth, as the beneficiary of the trustee, clearly stands in the same situation as a second mortgagee, with regard to the recital. The subsequent purchase under the power in the trust deed does not change his position in this respect. If the recital could be reasonably construed to imply by its terms that the lien of the mortgage to Jones was for an amount less than \$3,000, the principle just stated would be applicable. But we find nothing in its language, or in the note and mortgage to which it refers, which suggests the idea that the money was not loaned on the mortgage at the time of its execution, or that it was made to secure future advances, or that the loan was to be made in installments. In the usual course of business of giving a mortgage, the loan of the money and the execution of the mortgage are practically contemporaneous. The presumption, from the facts shown of record, is that the usual course of business was followed, and that the money was all loaned at the time. Code Civ. Proc. § 1963, subs. 13 and 20. Mrs. Phelps was therefore justified in relying upon the recital as a statement that \$3,000 had been loaned upon the security of the mortgage.

It appears that before buying the note she had seen the lot and the house in process of erection thereon. It is argued that this is sufficient to impute to her knowledge of the fact that the mortgage was made to secure money for use in the erection of the building, and of the fact that it would not be loaned until required for payment of the cost thereof. We see no force in this argument. There is not, so far as we are advised, any custom of making loans in that manner sufficiently established to make it the usual course of business, or to require a prudent person to

inquire, in such a case, as to facts concerning such loan, upon becoming aware that a house was being constructed on the lot.

[5] Another consideration leads us to the conclusion that Firth's interest should be deemed subject to the entire mortgage in the hands of Mrs. Phelps. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. Firth knew that the mortgage was taken for future advances, and that it was to be paramount to his claim under the deed of trust. But he consented to the insertion of a recital in that deed which did not disclose the fact that it was taken for money to be thereafter loaned, but which implied that the loan was completed. He thereby put it in the power of Jones to exhibit the recital to a purchaser of the note, and to induce the belief that the note was good for its face value, as well as prior to the deed of trust, and by that means to sell it for its face value before he loaned the whole of the money upon it. By simply causing the insertion in the recital of the words "to be hereafter advanced," Firth could have made it speak the truth, he would thereby have protected himself against any such purchaser, and in all probability the sale of the mortgage to Mrs. Phelps would not have been made. He was negligent in thus allowing Jones to possess the means of deceiving others. The deceit was accomplished by Jones, and it happened through this neglect of Firth. Hence he, rather than Mrs. Phelps, the deceived person, must suffer the injury.

The respondent contends that the facts involved in *Briggs v. Crawford*, supra, were substantially the same as in this case, and that it sustains the proposition that there is no estoppel. The party there entitled to assert the estoppel, if any existed, was Crawford, the defendant. It was necessary for him to plead it in order to obtain any benefit from it. The answer pleaded an estoppel by reason of the original conveyance of the Briggs Real Estate Company to the mortgagor, and by reason of the execution of the mortgage; and it did not plead the deed of trust, or any recital therein, as an estoppel in his favor or at all. The terms of the recital do not fully appear; Crawford did not see it or rely upon it when he purchased the mortgage; and the opinion does not discuss or mention such recital or state of facts upon which it could be based. Hence it does not constitute an authority upon the subject. The court below erred in holding that Firth was not estopped and that Mrs. Phelps could not assert a lien for the full face of the mortgage. No other questions are presented.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(165 Cal. 15)

NELSON v. STEELE et al. (L. A. 2,967.)
(Supreme Court of California. Feb. 26, 1913.)

1. TRIAL (§ 404*)—TRIAL BY COURT—FINDINGS.

A finding of facts by the court, from which a conclusion of the existence of the fact in issue follows, is equivalent to a finding of such fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

2. PATENTS (§ 214*) — LEASE OF RIGHTS — RIGHT TO RESCIND—"ON A PAYING BASIS."

A lease to a corporation of the right to manufacture, sell, and control a patented oiler, providing for payment to the lessor of one-half of "the net proceeds from said * * * oiler and from said corporation," and authorizing cancellation of it at the option of either party if the corporation be not "on a paying basis" within a year, contemplates that there shall be net proceeds paid during the year; and such proceeds not being produced, but net gains being merely shown by treating as cash on hand promissory notes not yet due, received by the corporation for a sale of rights, the lessor may have a cancellation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.*]

3. PATENTS (§ 214*)—LEASE OF RIGHT—CANCELLATION—LOSS OF RIGHT.

A lessor of the right to manufacture, sell, and control a patented article does not lose his right, given by the lease, to have it canceled, if the lessee corporation be not on a paying basis within a year, by not exercising his option till a month after the end of the year; he not having been furnished with information as to the condition of the business.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.*]

4. PATENTS (§ 214*)—LEASE OF RIGHT—CANCELLATION—NOTICE.

A lease of a patent right giving right to have it canceled only if the lessee corporation be not on a paying basis within a year, notice by the lessor that he will not continue, extend, or renew it, as the lessee has not fulfilled its part of the agreement, is sufficient, without stating that it is because it is not on a paying basis.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by R. C. Nelson against H. D. Steele and others. Judgment for plaintiff, new trial denied, and defendants appeal. Affirmed.

W. A. Alderson, of Los Angeles, for appellants. E. E. Hewlett, of San Francisco, and Stuart M. Salisbury, of Los Angeles, for respondent.

MELVIN, J. This is an appeal taken from a judgment in favor of plaintiff and from an order denying the motion of defendants for a new trial.

The action was one whereby plaintiff sought to have canceled a certain contract, by which he had leased to defendants Steele and Baxter, with the understanding that the said agreement should be assigned to a corporation to be formed by them, the right to manufacture, sell, and control a patented

device upon which plaintiff owned the patent rights and known as "the Nelson axle oiler." This agreement provided that Nelson should advance no money; that the defendants should manufacture, sell, and control the patented article; and that they should pay plaintiff 50 per cent. "of the net proceeds from said Nelson axle oiler and from said corporation." The contract contained a provision that a statement should be rendered to Nelson by the manufacturer on the 15th day of each month. In the agreement was this paragraph: "That should this corporation not be on a paying basis within one year from date, this contract may be canceled at the option of any of the parties hereto, or may be extended under a new agreement, and upon a new basis." The date of this instrument was May 14, 1909. On June 22, 1910, plaintiff sent to defendants the following notice, dated May 15, 1910: "Messrs. W. E. Baxter, H. D. Steele. Los Angeles, Calif.—Gentlemen: In accordance with our contract relative to the Nelson axle oiler, which expired May 14, 1910, and now becomes null and void, I wish to advise and serve this notice, that I will not continue, extend or renew any contract with you, as you have not fulfilled your part as per agreement. You must consider all obligations between us at a close. This as per our past agreement. Yours truly, [Signed] R. Nelson."

The court found that the contract was duly executed; that it was duly assigned to the defendant corporation; that monthly statements were rendered to plaintiff at times alleged in the answer, but that said statements showed neither the net earnings nor the financial condition of said corporation; that defendants sold the right to manufacture and control the Nelson axle oiler in the territory known as Northern California for the sum of \$2,500, for which promissory notes were accepted, only \$500 of which had been paid prior to May 15, 1910; "that, in order to show the 'net gain' of \$26.95 contained in defendants' exhibit No. 1, the defendants treated as cash on hand promissory notes amounting to \$2,000, which were not yet due, the said notes being the unpaid portion of the promissory notes for \$2,500 received for the sale of the right to manufacture, sell and control the said Nelson axle oiler in Northern California." The court also found that the notice of rescission, quoted above, was sent to defendants June 22, 1910, and as a conclusion of law announced that plaintiff was entitled to judgment cancelling the contract in question, enjoining defendants and those claiming under them from using the Nelson axle oiler, or in any manner dealing with it, and for costs, but that said judgment should be entered without prejudice to an action by any of the parties for an accounting.

[1, 2] Appellants' first point is that the

matter of the existence or nonexistence of net gain for the year was one squarely in issue, and that the court did not find thereon. There is no merit in this contention. The finding of the court, which we have quoted in *hæc verba*, was equivalent to a finding that the business was not on a paying basis at the end of the first year. This finding was based upon a stipulation that the very facts found with reference to the method of figuring the "net gain," so called, were true. The only important question, therefore, is whether or not these facts show that the concern was on a "paying basis" on May 14, 1910. Respondent insists that the expression means that there must have been "profits," or an excess of receipts over expenditures, in order that the concern might be said to be upon a paying basis, citing as instructive upon this point a number of cases, including *People v. S. F. Savings Union*, 72 Cal. 200, 13 Pac. 498. Appellants insist that the criterion of "profits" is too narrow, but that all "assets," including notes payable in the future, must be set off against all liabilities in determining whether or not a corporation is on a "paying basis."

Appellants cite *Lowther v. Miller-Sibley Oil Co.*, 53 W. Va. 507, 44 S. E. 436, 97 Am. St. Rep. 1027, where the phrase "paying quantities" in an oil lease is construed to mean "paying quantities to the lessee," and a like definition in *Young v. Oil Co.*, 194 Pa. 243, 45 Atl. 121, is approved. But that case does not meet the difficulty here presented. The matter there involved was the question when a right to an extension of the term of a certain oil lease vested; and it was properly determined that ordinarily the term "paying quantities" must refer to the amount that would properly compensate the exploring lessee for his outlay, rather than such sum as might be a reasonable return to the lessor upon his investment. We find no direct authority defining the expression "on a paying basis." None is needed, because the contract itself gives us a key to the meaning of the parties thereto. It provides for a payment of one-half of the "net proceeds from said Nelson axle oiler and from said corporation" to the plaintiff. It was clearly contemplated, therefore, that there should be net proceeds paid during the first year of the life of the contract; and it is equally clear that the option to rescind the agreement rested upon the failure to produce such net proceeds.

[3] Plaintiff was therefore in a position to rescind after May 14, 1910, and we do not think that he lost his right to a cancellation of the agreement because he did not exercise his option on or before that time. His position was not analogous to that of a lessee who may, under the provisions of a lease, terminate it at his option on or before a certain date, because in such a case the ex-

act amount when his right expires is fixed by the terms of the lease; but the plaintiff could have no option until after May 14, 1910, and he could not know until he had received the information, either from the books of the defendant corporation, or from its monthly report, whether the year had been productive of gain or not. As the court found that the statements "did not show the net earnings of the business," plaintiff was sufficiently excused for the brief delay in demanding a cancellation of the contract. We have discussed this matter upon the theory that sale of "territory" is part of the profits of the business. Respondent is of the opinion that such sale is a parting with that which is equivalent to the capital of the corporation. It is not necessary, however, to decide that question, because the same result is obtained, no matter what we call such sales.

[4] The notice of rescission was sufficient. Appellants suggest that it treats the contract as null and void, and does not purport to give them any clew to Nelson's right arising out of the failure of the corporation to be upon a paying basis. But the notice does refer to the plaintiff's refusal to continue, extend, or renew the contract—rights which could only arise under that part of the agreement defining the options which would exist if the enterprise should not be on a paying basis in its first year. This was sufficient to direct the attention of appellants to the exact basis of plaintiff's claim. The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(14 Ariz. 446)

RUSE et al. v. WILLIAMS.

(Supreme Court of Arizona. March 20, 1913.)

1. ASSUMPSIT, ACTION OF, (§ 25*)—"GENERAL ASSUMPSIT"—"INDEBITATUS ASSUMPSIT"—BURDEN OF PROOF.

General or indebitatus assumpsit is an action brought on a promise or contract implied in law that the defendant, in equity and in good conscience, is bound to pay plaintiff the consideration of a benefit conferred; the burden being on plaintiff to show, not only that plaintiff has conferred a benefit on defendant, but that defendant, in equity and in good conscience, is bound to pay therefor.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Cent. Dig. §§ 153-155; Dec. Dig. § 25.*

For other definitions, see *Words and Phrases*, vol. 4, p. 3523.]

2. RELIGIOUS SOCIETIES (§ 18*)—PROPERTY—CONTRIBUTIONS—WITHDRAWAL OF MEMBER—RIGHT TO RECOVER CONTRIBUTIONS—ASSUMPSIT.

Where plaintiff joined a religious sect holding the community theory of ownership of property as one of its doctrines, and in accordance therewith plaintiff contributed all his property to the community on the understanding that he and his family should receive support in the future from the common fund, plaintiff, on subsequently withdrawing from the society, could not recover the value of the property so

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contributed in assumpsit; the facts being insufficient to show that defendants had property of plaintiff which, in equity and in good conscience, they ought not to keep.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.*]

3. RELIGIOUS SOCIETIES (§ 4*) — "ASSOCIATION."

The term "association" is a word of vague meaning used to indicate a collection of persons who have joined together for a certain object; and an aggregation of people joined together for the purpose of effectuating certain ideals of religious life, including the communistic ownership of property, may properly be included within the term.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 8, 5-14; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 584-586.]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by Hiram Williams against C. W. Ruse and others. Judgment for plaintiff, and defendants appeal. Reversed, with instructions to dismiss.

Peter T. Robertson, of Yuma, for appellants. Timmons & Harris, of Yuma, for appellee.

FRANKLIN, C. J. This is an action of assumpsit brought by the plaintiff, in two counts, against the defendants on an alleged joint and several liability for cash, goods, wares, and merchandise furnished and advanced by plaintiff and his assignor, one A. G. Kurvess. In the first paragraph of the complaint the allegation is made that the defendants and each of them are transient persons in a roving band without residence, but at present domiciled in Yuma county.

A judgment on a joint and several liability of the defendants to plaintiff was entered for \$1,600, interest and costs. The appeal is prosecuted from the judgment and from the order overruling the defendants' motion for a new trial. A consideration of appellants' assignment questioning the sufficiency of the evidence to support the judgment is determinative of the case.

[1] General assumpsit or indebitatus assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases. It is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff; and the burden is upon the plaintiff to show that the defendant *ex æquo et bono* is bound to pay. Where the case shows that it is the duty of the defendant to pay, the law implies a promise to fulfill that obligation; but the law never implies a promise to pay, unless some duty creates such an obligation. *Bailey v. Railroad Company*, 22 Wall. 604, 22 L. Ed. 840.

[2, 3] There was no evidence offered by defendants, but a fair inference drawn from

the evidence in behalf of plaintiff discloses that he and his assignor, A. G. Kurvess, together with the defendants and others to the number of about 29 persons, formed themselves into a voluntary association, unincorporated, calling themselves as thus associated a "Spiritual Class." The term "association" is a word of vague meaning used to indicate a collection of persons who have joined together for a certain object, and the Spiritual Class thus formed may properly be included within the meaning of the term as so defined.

The object of the Spiritual Class was to aid in effectuating certain ideals in religious life, especially those relating to the communistic ownership of property. Their aim was to live such a life as Christ lived, and the mode of life described in the Acts of the Apostles was the foundation stone upon which was to be erected the arch of a high ideal in religious belief. Before joining the Spiritual Class, each person passed a "novitiate," as it were, and before being formally considered a member in good standing was subjected to rather a rigid examination as to his fitness. It may be stated in the words of a witness: "We were asked if we were willing to give up all for the Lord, and were referred to the fourth and fifth chapters of Acts to read; and, of course, we said we were willing to give up all and spend our time for the benefit of saving souls and for the benefit of the Lord. * * * We were supposed to live as one family, and when one needed anything, whether they put anything in the treasury or not, they were to have it." The class was formed in Findlay, Ohio, some time about February, 1911, and its membership consisted of persons who had hitherto been acquainted with each other for some time.

When the plaintiff joined, he gave up all his worldly possessions to promote its objects and further his religious belief, the understanding being that the class was to live as one family, and the money he then had and the proceeds of his future labors were to be used for the support of the class, under the Apostolic doctrine that all things were to be held in common, and all were to subsist out of the common treasury; also that no stranger, or any person who was weary and heavy laden, was to be turned away without food and comfort.

That such was a high ideal none can question who believe in the Holy Writings, or who has but the least degree of a common historical faith. The belief of the plaintiff and the devotion of the little class of which he became a member, to further the aspirations of which he dedicated his all, is not without support in the Scriptures. The early Christians, who were converted on the day of Pentecost, it is said, continued steadfastly in the Apostolic doctrine: "And all the multitude of them that believed were of

one heart and of one soul; neither said any of them that aught of the things which he possessed was his own; but they had all things in common. Neither was there any among them that lacked; for as many as were possessors of lands or houses sold them, and brought the prices of the things that were sold, and laid them down at the Apostles' feet; and distribution was made unto every man according as he had need." Acts ii, 44, 45; iv, 32, 34, 35.

The plaintiff, in common with the other members of the class, interpreting the Scriptures to enjoin communal life as a cardinal doctrine of the Christian faith, should not be heard to complain that the substance which each contributed to the family fund has been consumed by the family, and others who were found hungry, as the substance was intended to be consumed. Indeed, that the contributions made by plaintiff and the others were for no temporary expediency, or with any thought of a return, is emphasized by reading in the chapter quoted of the awful fate of Ananias and Sapphira, his wife, for their hypocrisy in concealing a part of the price of their property. This visitation of wrath, we are persuaded, must have deeply impressed the mind of plaintiff; for it is not intimated in the record that he was guilty of the concealment of any part of the price in making his contribution.

The evidence is rather vague as to how many of the class had worldly possessions to sell, and having sold placed the price thereof in the common fund. Quite a number of them did, and others had nothing wherewith to replenish. This, however, was their faith, that the poorest in goods were the richest in spirit. Thus equipped the Spiritual Class chartered a special car, traveling over the country and to California. Upon arriving in California they discarded the car and procured wagons and teams, traveling thereby up and down California and thence to Yuma. On the way they devoted their time to preaching the Gospel and in the interpretation of the Scriptures according to their understanding, and with such powers to speak the Word as they possessed. Such converts were made to their belief as were disposed to look upon individual ambitions and the separate ownership of property as a selfishness to be eradicated for the better opportunity of knowing and serving God. Quite a number were thus attracted and converted and, of course, fed from the common table, which caused some isolated feelings of discontent among some of the older members; for it is not shown that any of the new converts were possessed of goods wherewith to augment the treasury. Street meetings were held, jails were visited, and the hungry never turned away from the common treasury. It is an incontrovertible truth in arithmetic that the result of subtracting, if continued, without adding, is nothing. How-

ever, these high ideals of self-abnegation and the crucifixion of such desires and appetites as tend to divert attention from God were at times tinged with just a little corruption and bitterness of spirit. It began to be noticed that as many as 30 hungry strangers sat in one day at the common table; that some of the members of the class consumed more of the food and of a better quality than was considered their portion; that some were less inclined than others to outstrip their brethren in the severer and less attractive tasks of work so necessary to replenish the commissary. It was noticed there was wanting, at times, that "esprit du corps" with which each should have striven, one with the other, to accomplish the most for the common good, and which spirit of emulation is, perhaps, somewhat necessary for perfect accord among those who practice the doctrine of communal life. In fact, the plaintiff is not entirely without fault; for at times he became petulant over somewhat trifling considerations. Thus at one time he complains because his wife desired a spool of white thread, which was not forthcoming, and upon another occasion his boy required a pair of socks, which by others of the class were thought unnecessary for his welfare; and plaintiff's wife could ill conceal a feeling of disgust because everybody that came along hungry got something to eat, when her boy was refused the socks. But these occurrences were mere ripples on the surface, and little relapses into selfishness which is so hard for mankind to eradicate from his nature all at once. Along with this professed stifling of desire and self-abnegation, it appears the members persuaded themselves that by their faith and mode of life they would each in time be given power to stretch forth the hands and heal, and that signs and wonders would be done by each.

That absolute self-abnegation and an utter limitation upon aspiration and ambition is accompanied with a lurking desire for the possession of miraculous power may appear incongruous to some, but of this each individual must determine for himself. The plaintiff was somewhat impatient because in so short a time he had not become possessed of such power; but it is said in the Scriptures that the faith necessary to move the mountain must be implicit, steadfast, and unwavering, and we may, without harshness, ascribe to plaintiff that his inability to acquire this extraordinary power may have proceeded from a lack on his part of such faith.

The creed this class was organized to promote may appear absurd to some as not adapted to the requirements of modern life; not so, however, to others, as instance the Moravians, Shakers, the Oneida Community, Amana Society, and Zionists. The most striking instance may, perhaps, be the social fabric of China as it was some years ago,

which can be connoted under the term "solidarity." Among the Anglo-Saxon race the idea strongly prevails that each man is an individual by himself, and is to be dealt with as such; that the individual is the social unit. Not so in China. The Chinese Empire was (theoretically) a vast whole, with a head who governed by the decree of heaven. Each gradation from the empire as a whole, down to the individual and collective family, is likewise a unit, of which the parts are mutually interdependent and mutually responsible for each other. It has been said that a Chinese family is like a hill of potatoes—one cannot get at any of them without a process by which all are brought to view. Chinese social life runs in ruts, and in very ancient ruts, and the man in China is but a part of a gigantic social machine—a mere cog in one of many wheels. It is a common thing there for the individual collective family to live in one place for centuries; some times the family will number two or three hundred persons, whose labor and property is controlled by the oldest male ancestor for the common good; and for the conduct and behavior of each member of the family the ancestor is held responsible. There seems to be in the Chinese nature an inherent capacity for combination, united with a powerful tendency to combine, which is, perhaps, as yet strange to the Occidental. This power of cohesion, or, as has been observed, a kind of chemical union, of the Chinese nature probably proceeds from their belief in filial piety and ancestral worship as the golden rule of conduct practiced by them for many centuries. The emperor, being the head of the family, is worshipped as such, and in turn each head of a subordinate family is worshipped by its members.

Epictetus who carried human reason to so great a height, thought it a necessary qualification in a teacher sent from God for the instruction of mankind to be destitute of all external advantages, and a suffering character. He bore testimony to the propriety of that method which divine wisdom hath thought fit to follow in the scheme of the Gospel, whose great Author had "not where to lay his head." A modern writer says: "If we open our eyes, and if we will honestly acknowledge to ourselves what we discover, we shall be compelled to confess that all the life and efforts of the civilized people of our times is founded on a view of the world which is directly opposed to the view of the world which Jesus had." Strauss, *Der Alte und der Neue Glaube*, p. 74.

Some moralists have considered the creation as the temple of God, which he has built with his own hands, and which is filled with his presence. Others have considered infinite space as the receptacle or rather the habitation of the Almighty.

Sir Isaac Newton considered infinite space

as the sensorium of the Godhead, and observed that "brutes and men have their sensoriola or little sensoriums, by which they apprehend the presence, and perceive the actions, of a few objects that lie contiguous to them. Their knowledge and observation turn within a very narrow circle. But as God Almighty cannot but perceive and know everything in which he resides, infinite space gives room to infinite knowledge, and as it were an organ to omniscience."

The sphere in which we move and act and understand is of a wider circumference to one creature than to another, according as we rise one above another in the scale of existence, as by climbing up a hill in the midst of a wide plain a man hath his prospect enlarged. The trouble is with most of us, in Mr. Locke's words, "We see a little, presume a great deal, and so jump to the conclusion."

The law is not the keeper of a man's conscience, and it is not within the province of any department of the government to settle differences in creeds, or to determine what ought or ought not to be a fundamental of religious belief, so long as the professed creed is not subversive of the peace and good order of society. It is the proud boast of our institutions that all opinions are tolerated, and entire freedom of action allowed, unless such interferes in some way with the rights of others. The liberty of conscience is secured by the provisions of our Constitution, circumscribed only by the limitation that such liberty shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. The true benefit of the higher education is not to clothe the man with power to accumulate or display fine parts among his fellow men by employing himself about philosophic syllogisms or sophistical argument, but rather to uproot prejudices and give a broad tolerance for the rights and opinions of others, dropping the readiness to be offended and to hate, but to commiserate and pity rather.

It does not seem that in any of the cases before the courts has a society, whose religious tenets inculcated communistic features, been regarded open to objection as contravening law or any public policy. *Waite v. Merrill*, 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238; *Gass v. Wilhite*, 2 Dana, 170, 26 Am. Dec. 446; *Schwartz v. Duss*, 187 U. S. 10, 23 Sup. Ct. 4, 47 L. Ed. 53; *Goesele v. Bimler*, 14 How. 560, 14 L. Ed. 554; *Burt v. Oneida Community*, 137 N. Y. 346, 33 N. E. 307, 19 L. R. A. 297; *State v. Amana Society*, 132 Iowa, 304, 109 N. W. 894, 8 L. R. A. (N. S.) 909, 11 Ann. Cas. 231.

In *Scriber v. Rapp*, 5 Watts (Pa.) 351, 30 Am. Dec. 327, it was said: "It may be true that the business and pursuits of the present day are incompatible with the customs of the primitive Christians; but that

is a matter for the consideration of those who propose to live in conformity to them. Our laws presume not to meddle with spiritualities; and religious societies are regarded by them but with an eye to their temporal consequences."

In *Ellis v. Newbrough*, 6 N. M. 181, 27 Pac. 490, it was held that a declaration in an action of trespass on the case for damages for deceit, alleging that plaintiff, who was a man of ordinary understanding, was induced to join a religious community, one of the tenets of which was that all property should be held in common, but that the professed principles of the community were not fully put into practice, did not state a proper cause of action.

The plaintiff is not in this court by guardian, and the presumption follows that he is a man of ordinary intelligence, and capable of forming such opinions with reference to the disposition of his property as may, in his judgment, conduce to the betterment of his spiritual as well as temporal welfare.

The cases cited by appellee, where judgments on a count in *indebitatus assumpsit* were upheld on appeal, are not in point; for in those cases a clear duty on the part of the defendant to pay was shown, from which the law implied a promise to fulfill the obligation. No such showing is made in this case.

In parting, the appellee may be admonished that vanities and many vexations attend this business of life. He may apply to himself a great part of St. Paul's catalogue of sufferings: "In journeyings often, in perils of waters, in perils of robbers, * * * in perils among false brethren; in weariness and painfulness, in watchings often, in hunger and in thirst, in fastings often." Solaced with the thought that thereby he lay up to himself treasures in heaven, or, as a great philosopher said, "provided such possessions as fear neither arms, nor men, nor Jove himself," the law of man cannot aid him. "O, that I knew where I might find him!" says Job. "Behold I go forward, but he is not there; and backward, but I cannot perceive him: On the left hand where he does his work, but I cannot behold him; he hideth himself on the right hand that I cannot see him."

Such tribulations have been a source of perplexity to the greatest and most serene and patient minds, and a cause for great dispute among the most learned, who have been never suspected either of superstition or enthusiasm. Every man's experience must inform him in this matter, though it is very probable that this may happen differently in different constitutions.

The soul has a wonderful power of producing her own companions, and is transported into a thousand scenes of her own

raisings. As Dryden so beautifully expresses it:

"She seems alone
To wander in her sleep through ways unknown,
Guideless and dark."

The record in the cause shows that appellee revolted from the Spiritual Class at Yuma some time during February, 1912, perhaps overlooking the admonition in the second epistle of St. John: "Whosoever revolteth and continued not in the doctrine of Christ hath not God, but he that continueth in the doctrine hath both the Father and the Son."

One remaining matter may be adverted to. The necessity for a divine revelation is evident from the universal desire for it. The testimony shows that this Spiritual Class desired revelations, and believed such would be brought by the ghosts of dead men speaking through a tin horn or trumpet. The spirit at times spoke to the class through the trumpet, and this circumstance lately caused appellee to feel that, perhaps, it was of the devil, and some fraud may have been practiced. Such a matter may not be determined by this court. That a revelation may come through a trumpet hath also some countenance in the Holy Writings; for St. John, the Apostle, says: "In the days of the seventh angel, when he shall begin to sound the trumpet, the mystery of God shall be finished, as he hath declared by his servants the prophets." Many, perhaps, will conceive the impossibility of a revelation being so afforded; but such statement must be interpreted by the reader according to his own judgment, and then he must determine for himself whether that be one of the parts inspired by God, or merely emanating from the unaided reason of the writer. We cannot pretend to determine it.

Upon a careful consideration of the whole record, we cannot conclude that the appellee is entitled to recover.

The judgment of the lower court must accordingly be reversed, with instructions to vacate the judgment and dismiss the action. It is so ordered.

CUNNINGHAM and ROSS, JJ., concur.

(14 Ariz. 440)

STATE v. MILLER.

(Supreme Court of Arizona. March 19, 1913.)

CRIMINAL LAW (§ 1024*)—APPEAL—ACQUITTAL—STATE'S RIGHT TO APPEAL.

Penal Code 1901, § 1038, provides that in all criminal actions the territory may appeal on questions of law alone, provided that the Supreme Court shall not reverse a judgment for defendant which operates as a bar to future prosecutions for the offense; and Const. art. 2, § 10, declares that no person shall be twice put in jeopardy for the same offense. *Held*, that section 1038 must be limited to the review of such errors only as may occur in proceedings before legal jeopardy attaches, since in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case of an acquittal questions arising in the proceedings after jeopardy attaches become mere moot questions, concerning which the Supreme Court has no appellate jurisdiction; there being no "action" or "proceeding" within the constitutional provision conferring appellate jurisdiction after judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024.*]

Appeal from Superior Court, Navajo County; Sidney Sapp, Judge.

Jake Miller was indicted for murder and acquitted, and the State appeals. Dismissed.

G. P. Bullard, Atty. Gen., Leslie C. Hardy, Asst. Atty. Gen., J. E. Crosby, Co. Atty., of Holbrook, and George H. Crosby, Jr., of Safford, for the State.

ROSS, J. The respondent was indicted for the crime of murder. He was tried by a jury and acquitted. While testifying in his own behalf, on his cross-examination, the district attorney asked the defendant this question, "Have you ever been convicted of a felony?" An objection to the question was sustained by the trial court, and the defendant was not required to answer. The state has appealed from this ruling of the court.

Paragraph 1038, Penal Code 1901, provides that "in all criminal actions the territory may appeal to the Supreme Court on questions of law alone: * * * Provided, that the Supreme Court shall not reverse a judgment in favor of a defendant which operates as a bar to future prosecutions for the offense."

Territory v. Dowdy, 124 Pac. 894, and Territory v. Gomez, 125 Pac. 702, were cases appealed to this court by the prosecution, after verdicts of acquittal, for the purpose of correcting prejudicial errors alleged to have been committed in the trial court, and that a correct and uniform administration of the criminal law might be established.

The question of our jurisdiction in those cases was not raised or argued by counsel. It was passed sub silentio. But some time after the opinions were handed down in those cases our attention was called by the attorneys in the Dowdy Case to the decision in *United States v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507, 53 L. Ed. 803. The rule announced in that case (to which we shall refer later) has prompted us to fully investigate the law bearing upon the questions involved in this appeal, and we shall record our conclusions unembarrassed by the determinations in the Dowdy and Gomez Cases. In those cases we followed the practice of the territorial Supreme Court (*Territory v. Monroe*, 10 Ariz. 53, 85 Pac. 651) and assumed jurisdiction as a matter of course.

We may say, in the language of the court in *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561: "The question of jurisdiction was not considered, in fact, in that case, nor alluded to in the decision, nor presented to the court by the counsel

for the United States, nor referred to by either party at the argument or in the briefs."

The defendant in this case, on a sufficient indictment, before a competent court and jury, on the issue of his guilt or innocence, was acquitted. That ended the case, so far as he was concerned. The court that tried him was powerless to make any further order, except one of discharge. The trial court had exhausted its jurisdiction, both of the person and the subject-matter. The judgment of acquittal was final. It is made so by our Constitution (article 2, § 10): "No person shall * * * be twice put in jeopardy for the same offense."

Nor will any error of the trial court in the allowance or rejection of evidence affect the result. As was said in *People v. Terrill*, 132 Cal. 497, 64 Pac. 894: "In such case the court has no authority to order a new trial, at the instance of the prosecution, for errors in the ruling during the progress of the trial; and such new trial, if granted, would be vain and useless. * * * The rule is that if, through misdirection of the judge in matter of law, a verdict is improperly rendered, it can never afterwards, on application of the prosecution in any form or proceeding, be set aside. 1 Bish. Cr. Law, § 665; *People v. Webb*, 38 Cal. 467; *People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Roberts*, 114 Cal. 68, 45 Pac. 1016."

Under this rule, which is the law in the federal courts and practically all of the state courts, our decision upon the question as to whether the trial court erred in not requiring the defendant to answer the question propounded can have no effect. Indeed, paragraph 1038 provides that there shall be no reversal of a judgment in favor of defendant which operates as a bar to future prosecutions for the same offense.

Then we are asked to pass upon a question of law that is pertinent to no issue, and in a case that is fully determined and settled. Before this court, it is purely *ex parte*. The defendant has lost all interest in it. He is as indifferent as to the outcome of the appeal as any other citizen, and has no more right to appear here and contest the law point. Indeed, should he appear, it would be only as *amicus curiæ*. This apathy on his part was evidenced in the Dowdy and Gomez Cases and in the present case. The court has had no assistance from defendant's counsel in either case by way of briefs or arguments. While the evident purpose of the statute, as shown by its language, is to establish a correct and uniform administration of the criminal law, it seems to us that it is not calculated to effectuate that purpose, unless the court is afforded the assistance of counsel on both sides of the question. The Constitution gives this court appellate jurisdiction "*in all actions and proceedings*," except civil actions at law, where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the amount involved does not exceed \$200. Without undertaking to define an "action" or "proceeding," suffice it to say that they imply a subject-matter to be litigated, and parties plaintiff and defendant. 1 Cyc. 720 et seq. And while a contest in court to assert rights or prevent wrongs is properly designated an "action" until judgment, not so thereafter, "for the judgment ends the action—*jus prosequendi in judicio*." 1 Cyc. 716. *Bolton v. Lansdown*, 21 Mo. 399. We therefore conclude that we have no "action" or "proceeding" before us on this appeal, but purely an abstract question of law.

In the case of *United States v. Evans*, supra, the Supreme Court had before it precisely the same question on an appeal from the District of Columbia. The statute allowed the United States or the District of Columbia the same right of appeal as was given to the defendant, and provided that a verdict for the defendant should not be set aside. That court, in refusing to take jurisdiction, said: "The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal, and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented."

In *State v. Jones*, 22 Ark. 332, a like view is expressed, wherein it is said: "It must be apparent to every lawyer that if such points of law are to be adjudicated as can be reserved in criminal cases, without regard to their application in the case in which they are made, and especially if to be considered here, as this is presented, without argument, and without the assistance of counsel, such adjudications will be very unsatisfactory as abstract legal expositions, and of but little authority in cases whose decision does involve the honor and dignity of the state and the life and liberty of those who owe allegiance to its laws. Questions of law that are reserved by the state in the trial of a case that puts the life or liberty of a defendant in jeopardy are as much abstract questions as if the circuit court should ask this court how to apply the law, and what the law is, upon any anticipated or supposable state of facts that may come under their review."

Our statute, in so far as the question before us is concerned, seems to be like the California statute (article 2068, § 481, vol. 1, p. 299, *Hittell's Digest*), and in the case

of *People v. Webb*, 38 Cal. 467, 480, the court said: "And, further, the correct interpretation of our statute giving to the prosecutor a right to his bill of exceptions and appeal, when construed with reference to this provision [twice in jeopardy provision] of the Constitution, must be understood to have reference to such errors only as may occur in the proceedings before the legal jeopardy attaches."

Such a construction of our statute does no violence to its language and accords it meaning in line with the spirit and letter of our Constitution and the decided cases of the courts of the land.

Since the decision in the *Webb* Case, the Legislature of California has amended the law of that state, so as to permit the prosecution to appeal from orders setting aside the indictment or information, or sustaining the demurrer thereto, or granting a new trial, or arresting judgment or an order after judgment affecting substantial rights of the people (Cal. Penal Code, § 1238), and eliminated the right of appeal after a verdict of acquittal. It is clear to our minds that this is as far as the Legislature may go in according appeals to the prosecution under our Constitution.

We therefore hold that we have no jurisdiction to entertain this appeal, and it is dismissed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(72 Wash. 490)

CHENEY et ux. v. KING COUNTY et al.
(Supreme Court of Washington. March 20, 1913.)

MUNICIPAL CORPORATIONS (§ 657*)—STREETS—VACATION.

Where there was not, within five years after a tract was platted and dedicated, any use of a street shown thereon except that existing footpaths following the general course of the platted way continued to be occasionally used, the platted way was not open for public travel, and hence was vacated under Rem. & Bal. Code, § 5673, providing that any county road which remains unopened for public use for five years after authority is granted for opening it shall become vacated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1420, 1496; Dec. Dig. § 657.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by W. D. Cheney and wife against King County and others as County Commissioners. From a judgment for plaintiffs, defendants appeal. Affirmed.

John F. Murphy and M. H. Ingersoll, both of Seattle (Aubrey Levy, of Seattle, of counsel), for appellants. Brightman & Tennant, of Seattle, for respondents.

FULLERTON, J. On August 4, 1890, Joseph W. Range and wife, being then the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

owners of certain land situated in the body of King county, state of Washington, and without the limits of any incorporated city or town, platted the same into blocks, lots, streets, and alleys as a town site, filing for record with the county auditor a plat thereof on August 6, 1890. A street 12 feet in width is shown on the recorded plat as lying between blocks 1 and 2. This 12-foot way does not parallel the other streets shown on the plat, but runs diagonal thereto, following approximately the general direction of the shore line of Lake Washington, on which the platted land borders. Some five or six years prior to the commencement of the present action, the respondents acquired by mesne conveyances from the dedicators of the plat a tract described by metes and bounds which included practically all of the north half of block 2, all that part of the north half of block 1 lying above the "high-water line of Lake Washington," and all of the 12-foot way lying between these parts of blocks 1 and 2. Shortly after purchasing the property the respondents began improving the same, and at the time of the present action had highly improved the property, fitting it up as a country home at a cost of many thousands of dollars. In September, 1911, the appellants, who are county officers of King county, Wash., conceived the 12-foot way to be a public highway, and threatened to enter upon the respondents' inclosure and open the way to public travel. This action was thereupon begun to enjoin them from so doing. The respondents had judgment below, and this appeal followed.

The statute relating to the vacation of highways by nonuser (Rem. & Bal. Code, § 5673) provides that if any county road, or part thereof, which remains unopened for public use for a space of five years after the authority for opening the same is granted, shall become vacated, and the right to open it is barred by lapse of time. In *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115, we held that this provision of the statute applied to platted streets in unincorporated towns which are under the supervision and control of boards of county commissioners. The sole question presented by this record is, therefore: Was this way opened for public travel within five years after the dedication of the plat?

The evidence fails to show any formal opening of the way by the road supervisor or any other of the corporate authorities of King county. At the time the land was platted, there were footpaths along the lake shore which followed the general course of the platted way. These paths were undoubtedly used for some time after the making and dedication of the plat, and to some degree at least down to the time the respondent purchased the property in question and erected his inclosures; but the evidence con-

vinces us that there never was any opening of the way to the public or any travel upon it as a public way, or any travel at all, except such as occurred incidentally by the following of the old paths. This was clearly insufficient to constitute an opening of the way such as the statute contemplates, and since more than five years elapsed between the time of the dedication of the way and the time the attempt to open it was made by the present county officers, the right to open it is barred by lapse of time.

The appellants cite cases to the effect that a highway will not be deemed abandoned merely because the travel on some part of it diverts in places from the platted or marked-out way. But we may concede the authority of the principle announced in these cases without denying the conclusion we have reached on the question at issue. These cases have reference to actually opened ways in which the travel, because of some natural obstructions, has deviated from the laid-out way. But in the case at bar, as we say, the way was neither formally opened for travel, nor was it ever traveled, except as incidental to the fact that it was laid out in part over an existing traveled way.

The judgment is affirmed.

MOUNT, MAIN, MORRIS, and ELLIS, JJ., concur.

(73 Wash. 497)

KALER et ux. v. PUGET SOUND BRIDGE & DREDGING CO.

(Supreme Court of Washington. March 20, 1913.)

1. APPEAL AND ERROR (§ 853*)—LAW OF THE CASE.

A ruling of the trial court that a municipal corporation is not liable for damages resulting from filling in lowlands, not appealed from, is the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1524, 3405; Dec. Dig. § 853.*]

2. MUNICIPAL CORPORATIONS (§ 597*)—POLICE POWER—FILLING IN LOW-LYING GROUND.

It is within the police power of the city to fill low-lying ground, when necessary to protect the health, comfort, and convenience of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1325, 1354; Dec. Dig. § 597.*]

3. NEGLIGENCE (§ 11*)—WILLFUL FAULT.

Negligence implies a willful fault.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.*]

4. MUNICIPAL CORPORATIONS (§ 751*)—PUBLIC IMPROVEMENT—INJURY TO ADJUTING PROPERTY—LIABILITY OF CONTRACTOR.

When a city, in filling in low-lying ground, furnishes to the contractor doing the work defective plans, and directs and controls the work by which abutting property is damaged by the overflow of water, the contractor is not an independent contractor, and is not liable when he is not negligent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by C. F. Kaler and wife against the Puget Sound Bridge & Dredging Company. From a judgment for plaintiffs, defendant appeals. Reversed, and suit dismissed.

John W. Roberts and Geo. L. Spirk, both of Seattle, for appellant. Thos. M. Vance and Harry L. Parr, both of Olympia, for respondents.

CHADWICK, J. This is a suit growing out of a municipal improvement in the city of Olympia, and known locally as the Swantown fill. The work was done under an invocation of the police power of the city; the ordinance reciting that it was "necessary and expedient on account of the public health, sanitation, the general welfare and the general improvement of the property located within the boundaries" of the district, which are described in the ordinance. Two lots and a fraction, which were included in the improvement district, are owned by the plaintiffs. When the fill, which was made by a hydraulic dredger with silt and sand from the bottom of the bay, had so far progressed as to come up to plaintiffs' property, they asked and were granted the right to take a part of their property out of the district. They undertook, at their own expense, to build a bulkhead along the line agreed upon. The material used was old bridge flooring, which was placed against some fence posts. As the work progressed, this gave way. A new line was agreed upon and a new bulkhead put in. The salt water and silt ran through and over the barrier and did considerable damage to the property of the plaintiffs. A trial was had and a verdict in the sum of \$500 was returned in plaintiffs' favor. The city was made a party to the suit; but it appearing on the trial that no claim had been presented within the time fixed by law for the presentation of claims, it was dismissed out of the case, and the trial proceeded against the dredging company alone.

It is not denied that the ordinance and contract under which the work was done provided that it should be done strictly in accordance with the plans and specifications furnished by the city and under the direction of the city engineer, and the testimony shows that the changes made were sanctioned by that officer. One other fact material to our discussion is that the property of the plaintiffs was bounded on the north by a street, and on the west and south by property still within the improvement district, and which the dredging company was bound to fill under its contract.

[1] The arguments of counsel, as set forth in the briefs, have taken wide range; but the case, in so far as the liability of the appellant is concerned, can be quickly determined by reference to some of the cases here-

before decided by this court, and to one or two fundamental principles. One of the suggestions made by respondents, and which should be first determined, is that there has been a taking and damaging, within the meaning of the Constitution (article 1, § 16), for which they are entitled to compensation; that, the city being a trespasser, appellant could not escape liability because it had a contract to do that which was unlawful. Whether the damage suffered by respondents is such an injury as would sustain a recovery under the Constitution, and to which the special statute covering the presentation of claims would not apply, is a question that cannot now be raised. Whatever the law may be, the trial court held that the city was not liable; and no appeal having been taken from that order it has become the law of the case (8 Cyc. 791), and respondents must recover from the appellant, if at all, upon other grounds.

[2] This court has held that it is within the police power of the city to fill low-lying ground, when necessary to protect the health, comfort, and convenience of the municipality, and that any consequential damage suffered because thereof is in due process of law. " * * * It would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community." *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369. A proceeding in all respects similar to the one under discussion has been passed by this court as possessing no legal infirmity. *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214. Consequently, the city counsel having determined that it was necessary to fill and improve the property of these respondents, no damages could have been recovered if the city had made the improvement in accordance with the original plan. While the city can improve property within the unsanitary district as determined by the ordinance, it does not follow that it can damage abutting property. "Legislation tending to the preservation of the public health is favored by the courts, and is regarded as a power inherent in a municipal corporation where population is congested. 28 Cyc. 709; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230. But the power must be exercised within a proper limit—in this case the filling of the district—and when the city goes beyond that limit the Legislature should provide, and it has in this case provided, for compensation to those whose property stands in the way. If it did not, it would result in the confiscation of unoffending property." *State ex rel. Stalding v. Aberdeen*, 58 Wash. 562, 100 Pac. 379. See, also, *Donofrio v. Seattle*, 129 Pac. 1094; *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445; *Olson v.*

Seattle, 30 Wash. 687, 71 Pac. 201; State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385. When the city, acting through its engineer, he having authority to exempt property, excluded a part of respondents' property, and drew new lines around it, it made the excluded lots abutting property; and it would become liable for such damages as might result to the abutting property from the manner in which the work was done. Now, admitting, without deciding, that there was such damage for which the city could have been held, the question remains whether the city, which furnished the plan of the work and directed it in all particulars, having been dismissed out of the case, its contractor is liable. The negligence, if any, upon which a right of recovery could have been predicated, was the omission of the city to provide an adequate plan, or to make proper provision for carrying away the water and silt which, in the natural order of things, would seep through and over the bulkheads, and to care for the water that flowed from an artesian well which was on the premises. Because of these omissions water was left standing on the lots, and trees and vegetation were killed. It is not shown that appellant has in any manner violated its contract with the city, or has failed to follow the plans and specifications, or refused to obey the orders and directions of the city engineer.

[3, 4] Negligence implies a willful fault. In keeping with this principle it has been held by this and generally, by other courts that, where the fault lies in the plan furnished by the superior, and the work is done under his direction, the contractor is not liable, in the absence of negligence. If negligent, he is held for his negligence, and not as a trespasser. This case in principle and in many of its facts is not unlike the case of Quinn v. Peterson Co., 69 Wash. 208, 124 Pac. 502, where a recovery was denied. In Potter v. Spokane, 63 Wash. 267, 115 Pac. 176, it appeared that the damage for which a recovery was sought was caused by a defective bulkhead. It was held that, the plan being at fault, the contractor, who had done the work under a contract which "provided that the work should be performed according to certain plans and specifications described in the contract, and should be under the supervision, direction and control of the board of public works of the city, and its representative, the city engineer; and that in case of improper construction and non-compliance with the contract, the board had the right to order a partial or entire reconstruction of the work, or to declare the contract forfeited and relet the same to another contractor, and to adjust the differences that should arise between the city and the contractor by reason of the change"—was not liable.

The liability of the contractor was not

expressly passed on in that case or in Cooper v. Seattle, 16 Wash. 462, 47 Pac. 887, 58 Am. St. Rep. 46, but it would seem to follow from the reasoning of the court that the general rule would have been applied, if it had been necessary to a decision. Peter Casassa brought suit against the city of Seattle and the Lewis & Wiley Company, contractors, for damages from slides suffered because of insufficient slopes to sustain a street grade. The city was held, but the contractor was exonerated; it appearing that the work was done under the direction of the city, and that there was no sufficient evidence of negligence to charge the contracting company. *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 13. The general rule as found by Mr. Dillon is thus stated: "Where a city, acting within its general powers, contracts for the grading of a public street, and in accordance with the conditions of the contract and the law prescribing the same the work is done under the immediate supervision of certain officers, whose official duty it is to superintend the work, and the damages result, not from any negligence or wrongdoing of the contractors, but from the performance of the work in the manner required by the contract, the contractors are the agents of the city, and the city is liable for such damages." 4 Dillon, Mun. Corp. (5th Ed.) 1655n; 28 Cyc. 1280. We conclude that appellant was not an independent contractor, and that the liability for the damages sustained rested upon the city, and not upon appellant.

We shall not discuss the other questions, some of which might, in any event, call for a new trial, as the foregoing is determinative of the case.

Reversed, with instructions to dismiss the suit.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

(72 Wash. 451)

GATES v. SHAFFER.

(Supreme Court of Washington. March 15, 1913.)

LIMITATION OF ACTIONS (§ 72*)—SEDUCTION—ACTION FOR DAMAGES—"AGE OF MAJORITY."

Under Rem. & Bal. Code, § 159, providing that the three-year limitation period for the bringing of an action for seduction shall not commence to run while the person entitled to bring the action is under the "age of 21 years," a female may bring such an action at any time within the three years after she becomes 21 years of age; the words quoted not meaning "age of majority," which, by section 8743, is fixed, in the case of a female, at the end of her eighteenth year.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390-398; Dec. Dig. § 72.*]

Department 2. Appeal from Superior Court, Chehalis County; Ben Sheeks, Judge. Action by Oma Gates against Frank Shaffer. From a judgment dismissing the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

plaint, plaintiff appeals. Reversed and remanded.

Dan Pearsall and A. Emerson Cross, both of Aberdeen, for appellant. Jas. P. H. Calahan, of Hoquiam, for respondent.

FULLERTON, J. The appellant instituted this action against the respondent to recover damages for her own seduction. A demurrer to her complaint was interposed and sustained, and upon her election to stand on the complaint judgment of dismissal was entered against her. From this judgment, she appeals.

The trial court sustained the demurrer to the complaint, on the ground that the action had not been commenced within the time limited by law. It appears from the complaint that the acts of seduction took place in February, 1908; that the appellant reached the age of 21 years on March 30, 1911; and that the action was begun by the filing of a complaint on February 1, 1912. The court ruled that the action, to be within the statute, should have been commenced within three years after March 30, 1908, the time when the appellant, according to the dates given in her complaint, arrived at the age of 18 years.

The chapter of the Code prescribing the period of limitations of action provides that an action for seduction shall be begun within three years after the cause of action accrues. Rem. & Bal. Code, § 159. It also provides that if a person entitled to bring an action mentioned in that chapter shall "be at the time the cause of action accrued, either under the age of twenty-one years, or" under certain other disabilities mentioned, "the time of such disabilities shall not be a part of the time limited for the commencement of the action." Id. § 169. With reference to the persons who may maintain an action for seduction, the Code, after providing that such an action may be maintained by a father, or, in case of his death or desertion of his family, by the mother, for the seduction of a daughter, and by a guardian for the seduction of his ward, further provides: "Sec. 186. An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female."

The Code also provides (section 8743): "Males shall be deemed and taken to be of full age for all purposes at the age of twenty-one years and upwards; females shall be deemed and taken to be of full age at the age of eighteen years and upwards."

It was the opinion of the trial court that the words "twenty-one years," where they

occurred in sections 169 and 186, from which we have quoted, should not be construed literally, but rather as meaning "age of majority"; and since a female in this state reaches the age of majority at the end of her eighteenth year the statute of limitations relating to an action for seduction runs from that period, and not from the end of her twenty-first year, as the statute seems to imply.

But we are not able to give the statute this construction. Did the section of the statute relating to personal disabilities stand alone, there would be reason for the holding of the trial judge, since that particular section is general, and applies to males as well as females, and to a variety of actions other than actions for seduction. But this is not true of the section last cited. That section applies only to females, and only to the action for seduction. It contains the grant of authority to bring such an action. Since, at common law, a woman who had been seduced could not maintain an action in damages against her seducer, except, perhaps, where the relation of guardian and ward existed between the seducer and the seduced, the right to maintain the action in cases like the one before us exists only in virtue of the statute. Being a question of statute solely, the Legislature could annex such limitations to the right as it pleased; and since it has provided that such an action can be maintained only by an unmarried female over the age of 21 years we do not think the courts should prescribe a different limitation.

The judgment appealed from is reversed and the cause remanded, with instructions to overrule the demurrer, and proceed to a hearing of the cause upon the merits.

CROW, C. J., and MAIN, MORRIS, and ELLIS, JJ., concur.

(72 Wash. 503)

HORTON v. OREGON-WASHINGTON R. & NAVIGATION CO.

(Supreme Court of Washington. March 21, 1913.)

1. COMMERCE (§ 27*)—EMPLOYER'S LIABILITY ACT—CONSTRUCTION.

Federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) § 1, which provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person injured while employed by it in such commerce, whose injuries result from the negligence of its officers or employés, or from defects in its cars or equipment due to its negligence, should be construed as including every person who could be so included within the purview of the constitutional power.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

2. COURTS (§ 97*)—DECISIONS OF FEDERAL COURTS AS AUTHORITY IN STATE COURTS.

In determining the extent of the power of Congress and the consequent extent of the ex-

ercise of that power by the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), this court is bound by the decisions of the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

8. COMMERCE (§ 27*)—EMPLOYER'S LIABILITY ACT—EMPLOYÉ ENGAGED IN INTERSTATE COMMERCE.

A pumper at a pumping station for locomotives of a railroad engaged both in intrastate and interstate commerce, who was furnished by the road with a small hand car for going the two or three miles from his home to the station, and who, while going to the station, was struck by an interstate train, was in an employment having a substantial connection with interstate commerce, and in which his death was an injury to such commerce, and hence was within the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) § 1, making a railroad engaged in interstate commerce liable for injury to employés from the negligence of its agents or employés, or from defects in its cars, etc., due to its negligence, so that his representative could maintain an action.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by M. P. Horton, administrator of Wilbur F. Horton, deceased, against the Oregon-Washington Railroad & Navigation Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. H. Plummer and Henry Jackson Darby, both of Spokane, for appellant. Arthur C. Spencer, of Portland, Or., for respondent.

ELLIS, J. Action by the administrator of the estate of Wilbur F. Horton, deceased, for the benefit of the surviving widow and children of decedent, to recover damages for wrongful death under the federal employer's liability act.

The amended complaint alleged, in substance, that the defendant was a corporation engaged in interstate commerce by railroad; that the decedent was employed by the defendant as a pumper at Onyx, Idaho, and operated at that place a pumping plant for the purpose of supplying the locomotives of the defendant with water; that decedent lived two or three miles from the pumping plant, and that it was necessary for him to go to the plant daily; that for this purpose defendant furnished him with a small hand-car, called a "speeder"; that on October 8, 1910, while going from his home to the pumping plant, and while operating the speeder on the track of the defendant, decedent was overtaken by an interstate passenger train; that decedent, upon becoming aware of the approach of the train, stopped the speeder and, for the purpose of avoiding a collision, consequent destruction of defendant's property, and probable loss of life, at-

tempted to remove the speeder from the track; that while so doing he was struck by the train and instantly killed; that defendant failed to exercise reasonable care to avoid the collision after becoming aware of his presence; that "the duties which said Horton performed and was required to perform, both in going to and coming from his home to said water pumping plant, were acts and things incident to and made necessary in the operation of said company's trains, cars, and locomotives in the carrying on of its business of interstate commerce by railroad and as an integral part thereof, and said Wilbur F. Horton was at the time of his death in the performance of said duties and in the employ of said company, and employed by it for the purpose of aiding and assisting it in the operation of its trains, cars, and locomotives, and in the carrying on of its business of interstate commerce by railroad." It was admitted that the decedent was a fellow servant of the persons operating the train. While not so alleged, it seems to be conceded that the defendant was engaged in both interstate and intrastate commerce. The trial court sustained a demurrer to the complaint, upon the ground that the facts stated were not sufficient to invoke the benefit of the employer's liability act, and dismissed the action. The plaintiff appealed.

The first section of the employer's liability act of 1908, 35 U. S. Stats. at L. p. 65, c. 149, provides: "That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[1] The sole question presented for our consideration is this: Was the decedent employed by the defendant in interstate commerce at the time of his death, so as to enable his representative to invoke the benefit of this act? The earlier act of 1906 (Act July 11, 1906, c. 3073; 34 Stat. 232) was, in the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 62 L. Ed. 297, held unconstitutional as exceeding the power of Congress under the commerce clause of the Con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stitution, in that it imposed a liability, as against all common carriers engaged in interstate commerce, in favor of any of their employes, without restriction, and whether their employment did or did not pertain to interstate commerce. In those cases, however, all the justices concurred in recognizing the power of Congress to regulate the relation of master and servant by regulations confined to interstate commerce and services connected therewith. The act of 1908, above quoted, was passed to conform to that decision, and should therefore be construed as including within the term, "any person suffering injury while he is employed by such carrier in such commerce," every person who could be so included within the purview of the constitutional power. "The act meant to include everybody whom Congress could include." *Colasurdo v. Central R. R. of N. J.* (C. C.) 180 Fed. 832. That such was the purpose and intent of the second act seems to be assumed by the Supreme Court of the United States in an opinion holding the act constitutional. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The inquiry is thus narrowed to the concrete question: Had Congress the constitutional power to enact a law regulating the relation between a common carrier engaged in interstate commerce and its servant, who is employed in pumping water used by its engines both for interstate and intrastate commerce? If Congress had this power, then we must assume that it intended to exercise it in passing the present act.

[2] In determining the extent of the power of Congress and the consequent extent of the exercise of that power by this act, we are bound, whatever our personal views, by the decisions of the federal courts. We are not called upon to decide whether, if an injury be inflicted by a person or instrumentality employed by the defendant in intrastate, but not in interstate, commerce, the act could in any event be invoked, since the case is here on demurrer, and the complaint alleged that the train, and by necessary inference its crew, was employed in interstate commerce. It may be remarked in passing, however, as showing the sweepingly broad construction placed upon the act and the true criterion of the congressional power, that in the *Second Employers' Liability Cases*, supra, the Supreme Court expressly decided that the fact that the negligence which caused the injury was that of an employe engaged in intrastate commerce was immaterial; the true criterion being the effect of the injury upon interstate commerce, not the source of the injury. As to the character of service in which the injured servant must be engaged in order to be subject to the congressional power, so as to enable the servant to claim the benefit of the act, the Supreme Court, in the cases mentioned, does not par-

ticularize, but contents itself with the broad holding that "the particulars in which those relations [of carrier, masters, and employes] are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged." In those cases (*Second Employers' Liability Cases*, supra) two of the injured employes were locomotive firemen apparently employed on interstate trains; while the third was a car repairer engaged in replacing a drawbar in one of the defendant's cars then in use in interstate commerce, and was killed by fellow servants pushing other cars against the one on which he was working. In each of these cases it was held that there was such a real or substantial relation to interstate commerce in the employment of the injured person as to come within the regulating power of Congress and within the protection of the act.

In *Darr v. Baltimore & O. R. Co.* (D. C.) 197 Fed. 665, the plaintiff's regular work was the making of what is called "running repairs." An engine and tender used in hauling interstate trains had reached the end of their run, and were placed upon a fire track to await the time for starting upon the return trip. The plaintiff, while replacing a bolt lost from a brake shoe of the tender, was injured through the negligence of a fellow servant. It was held that he was employed by the carrier in interstate commerce and entitled to the benefit of the act.

In the foregoing instances, so far as the opinions show, the employment of the injured servant related solely to instrumentalities used in interstate commerce. There are, however, numerous cases in which it is held that, where the service of the injured servant contributed indiscriminately to both the interstate and the intrastate business of the carrier-master, the injured servant is entitled to the benefit of the act.

In *Zikos v. Oregon R. & N. Co.* (C. C.) 179 Fed. 896, the plaintiff, a section hand, was injured while employed in repairing the main line of the defendant's railroad used both in interstate and intrastate commerce. The argument seems to have been advanced that, because the part of the track he was repairing lay wholly within the state, the plaintiff was not employed in interstate commerce. The late Judge Whitson, holding the employer's liability act applicable, used the following language: "But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate;

but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. * * * But where the employment necessarily and directly contributes to the more extended use, and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter, whenever a carrier is using the track for the double purpose."

In *Colasurdo v. Cen. R. R. of N. J.* (C. C.) 180 Fed. 832, plaintiff, a railroad trackman, was assisting in the repair of a switch in a railroad yard at night, the switch being used indifferently for both kinds of commerce, when he was struck and injured by certain cars. The court, holding that he was within the protection of the act, said: "The track is none the less used for interstate commerce, because it is also used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time." This decision was, on writ of error, affirmed by the Circuit Court of Appeals in *Central R. Co. of New Jersey v. Colasurdo*, 192 Fed. 901, 113 C. C. A. 379; that court saying: "We think the statute was intended to apply to every carrier while engaged in interstate commerce, and to an employé of such carrier while so engaged; and if these conditions concur the fact that the carrier and the employé may also be engaged in intrastate commerce is immaterial."

In *Behrens v. Illinois Cent. R. Co.* (D. C.) 192 Fed. 581, the plaintiff's intestate was fireman of a switching crew, whose duty it

was to switch cars that had to move both in interstate and intrastate commerce indiscriminately. At the time of the accident the train being moved originated within the state, and the freight carried constituted intrastate commerce. It was contended that neither the defendant nor the deceased employé was at the time engaged in interstate commerce, so as to permit a recovery under the employer's liability act. The court said: "In my opinion, the construction sought to be secured by the defendant is entirely too narrow and restricted. Undoubtedly the act of Congress is in derogation of the common law; but certainly the elimination of the doctrine of fellow servant and the modification of the doctrines of contributory negligence and assumed risk makes for the betterment of human rights as opposed to those of property, and I consider that, in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible. In this view of the case I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad; and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employé himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

In *Northern Pacific Ry. Co. v. Maerkl* (C. C. A.) 198 Fed. 1, the plaintiff's intestate, a car repairer employed in the defendant's repair shops connected with an interstate track, was injured while engaged in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce. The Circuit Court of Appeals, in affirming the decision of the District Court that the act applied, after pointing out that the car was one of the instruments of interstate commerce, said: "It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic." See, also, *Johnson v. Great Northern Ry. Co.*, 178 Fed. 643, 102 C. C. A. 89; *Freeman v. Powell* (Tex. Civ. App.) 144 S. W. 1033; *Jones v. Chesapeake & O. Ry. Co.*, 149 Ky. 566, 149 S. W. 951.

[3] But it is urged that, even assuming that the employment of the deceased when actually pumping water was so related to interstate commerce as to meet the require-

ments of the act, still he was not so employed while going to his work. It is argued that the decedent, at the time of his death, was not "actually and actively engaged in interstate commerce." The word, however, used in the act itself, as applied to the servant, is "employed." It is somewhat difficult to see how he could have been *passively* employed, or employed at all without being *actually* employed. The act itself places no such tautological emphasis upon the word "employed." The deceased was going to the pumping station by the means supplied by the master. He was performing a necessary part of his employment in the manner contemplated by the master. The decision of the Circuit Court of Appeals in *Lamphere v. Oregon R. & N. Co.*, 196 Fed. 336, 116 C. C. A. 156, reversing a contrary decision of the District Court (193 Fed. 248), sustains the appellant here in every essential particular. There the decedent, a locomotive fireman, was on his way to the depot to secure a pass, board a passenger train, and go to another town and bring forward, as one of an engine crew, an interstate train. While on his way to the depot and in the yards of the defendant, he was killed by an interstate train. The court said: "He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states, in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the track and take his place on another train engaged in interstate commerce, and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case which is now before the court." Nor can we see any real distinction between the case quoted and the one before us.

The decisions mainly relied upon by the respondent, as generally combating the doctrine sustained in all of the foregoing citations, are *Pedersen v. Delaware, L. & W. R. Co.* (C. C.) 184 Fed. 737, and *Tsmura v. Great Northern R. Co.*, 58 Wash. 316, 108 Pac. 774. The *Pedersen* Case is clearly out of harmony with the principles announced in all of the foregoing decisions. In the *Lamphere* Case, *supra*, after citing the *Zikos* Case, the *Colasurdo* Case, the *Behrens* Case, and others, the court, referring to the *Pedersen* Case, said: "The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the Supreme Court in *Mondou v. New York, N. H. & H. R. Co.*,

223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 441]."

In our own decision in *Tsmura v. Great Northern R. Co.*, we did not have the advantage of the foregoing authorities, which, it will be noted, are all recent. Moreover, as we there said: "It is not shown whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded." In so far, however, as that case may be construed as running counter to the foregoing decisions, we are constrained by the overwhelming weight of those authorities to overrule it.

Tested by the criterion laid down in the *Second Employers' Liability Cases*, *supra*, and exemplified in the foregoing decisions, namely, by the effect of the injury upon interstate commerce, it seems to us too plain for cavil that the deceased, when killed, was employed by the carrier in such commerce, within the meaning of the act. Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master, as well as the local trains, must have ceased altogether. This demonstrates the "real or substantial" connection of his employment with such commerce. There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too finessed and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender, who bestows his labor on instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to these, and not to the pumper supplying the water for motive power in actual transportation, would smack of caprice. The demurrer to the amended complaint should have been overruled.

The judgment is reversed, and the cause is remanded for further proceeding in accordance with this opinion.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

(72 Wash. 493)

LISLE v. QUINLAN et al.

(Supreme Court of Washington. March 20, 1913.)

1. EXCHANGE OF PROPERTY (§ 4*)—CONTRACT—DESCRIPTION.

Evidence in an action for the reformation of a contract for the exchange of real property described as "all ground covered by three buildings located at 806, 808-810 Col. St. in the city of Seattle," held to show that the parties did not intend the description therein to be literally confined to the ground covered by the buildings which had a frontage of 72 feet; but intended it to include "the easterly 78 feet" of the lot on which the buildings were situated.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. APPEAL AND ERROR (§ 226*)—NECESSITY OF OBJECTIONS—COSTS—JOINT DEFENDANTS.

Where a husband was made a joint defendant with his wife in an action to reform the wife's contract for the exchange of real property and answered jointly upon the merits, and did not disclaim interest in the property, he cannot on appeal complain of the award of costs against him as well as against the wife.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 802, 804, 1324; Dec. Dig. § 226.*]

Department 1. Appeal from Superior Court, King County: R. B. Albertson, Judge.

Action by L. N. Lisle against Edith J. Quinlan and husband. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert A. Devers, of Seattle, for appellants. Carkeek, McDonald & Kapp, of Seattle, for respondent.

PARKER, J. [1] The plaintiff seeks reformation and specific performance of a contract for exchange of real property entered into by him with the defendant Edith J. Quinlan, whereby he agreed to convey to her certain lands in Benton county in exchange for certain real and personal property in Seattle, which she agreed to convey to him. The Seattle property so agreed to be conveyed to the plaintiff is described in this contract as follows: "All ground covered by 3 bldgs. located at 806, 808-10 Col. St. in city of Seattle, together with all furniture therein. All interest, taxes, rents, etc., to be pd. to date, excepting \$6000.00 mortg. on R. E. & \$730.30 on Furn. * * * \$6000.00 mortg. on R. estate, \$730.30 on furniture." The reformation sought is to have this description read: "The easterly 78 feet of lot 8 in block 71 of Terry's First addition to the town, now city, of Seattle, King county, Washington"—upon the ground that the parties to the contract did not then know the exact description of the land to be conveyed, and were mutually mistaken in the description made in the contract. Appellant D. M. Quinlan did not sign this contract with his wife. He was made a party defendant with a view to permitting him to set up whatever rights he might have in the property. They answered jointly upon the merits, and he did

not disclaim interest in the property, though the court eventually found it to be her separate property. A trial upon the merits resulted in the court decreeing the reformation and specific performance as claimed by the plaintiff, from which the defendants have appealed.

This controversy has to do principally with the question of the quantity of land respondent is entitled to have conveyed to him under the exchange contracts; appellants contending that the respondent is entitled only to the easterly 72 feet of the lot, while respondent contends that he is entitled to the easterly 78 feet of the lot.

Appellant Edith J. Quinlan at the time of entering into this exchange contract with respondent owned as her separate property all of lot 8 upon which the buildings mentioned in the contract are situated. This lot is upon a corner fronting westerly upon Eighth avenue and southerly 120 feet upon Columbia street. The easterly 78 feet of the lot were then subject to the mortgage for \$6,000 mentioned in the contract, which respondent was to assume. Appellant was free to convey this portion of the lot, and could give good title thereto subject only to this mortgage. The westerly 42 feet of the lot were subject to a certain other lien by virtue of a decree of the superior court. It is apparent that these were held by her as two separate pieces of property. The buildings mentioned in the contract consist of three apartment houses adjoining each other, having the external appearance of a single building. These buildings have a southerly frontage upon Columbia street of 72 feet measured from the easterly end of the lot. To the rear of these buildings on the north there is an open space, some four or six feet wide, between them and the north line of the lot, occupied by a board walk. This ground it is conceded respondent is entitled to under the contract, with the ground upon which the buildings proper are situated. On the west, adjoining the westerly building and attached thereto, is a board walk running the entire length thereof from the front on Columbia street to and connecting with the board walk in the rear. This westerly walk is about three feet wide for a short distance back from Columbia street, where it extends in width to another building of Mrs. Quinlan on the westerly 42 feet of the lot, and where there are steps leading down northerly to the rear of that building; it being on ground considerably lower. There is, however, more convenient access to the rear of that building from Eighth avenue. There are several windows in the outer wall of the westerly building, including one leading into the basement at the level of the walk. The easterly 78 feet of the lot claimed by respondent would possibly encroach slightly upon the steps leading down to the rear of the build-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing on the westerly 42 feet, but would not reach to the eaves of that building, which are about 2 feet wide, by about 8 inches. There is testimony of several witnesses to conversations during the negotiations leading up to the signing of the exchange contract, in which Mrs. Quinlan stated, in substance, that she intended to exchange the same property as that described in and covered by the mortgage; also, that she intended this westerly walk to be included in that property. She denied these conversations, but we are constrained to regard the preponderance of proof as being against her, as it was so regarded by the trial judge who heard and saw the witnesses. We have then these main facts lending support to the conclusion reached by the trial court: (1) The concession that the ground in the rear of the buildings was to be conveyed under the contract, indicating that the parties did not intend that the description in the contract was to be read literally, and confined to the ground covered by the buildings alone; (2) the statements of Mrs. Quinlan in conversation about the time she executed the contract that all of the mortgaged property was included in the contract; (3) the fact that the walk on the west of the buildings had the appearance of being constructed for use in connection therewith and was attached thereto; and (4) the fact that the whole of the easterly 78 feet of the lot was in a sense one piece of property, and so regarded by Mrs. Quinlan. The facts we think support respondent's claim of reformation of the description and specific performance of the contract.

[2] Some contention is made by appellant D. M. Quinlan against the decree in so far as it awards costs against both appellants jointly. In view of the fact that he answered jointly with his wife upon the merits, and did not disclaim interest in the property, we think he cannot now be heard to complain of the award of costs against him as well as his wife.

Other contentions we think are wholly without merit, and do not call for discussion. The judgment is affirmed.

CROW, C. J., and GOSE, CHADWICK, and MOUNT, JJ., concur.

(72 Wash. 487)

PEARSON v. WILLAPA CONST. CO.

(Supreme Court of Washington. March 19, 1913.)

1. NEGLIGENCE (§ 83*)—DEFENDANT'S KNOWLEDGE OF DANGER.

The rule that, though plaintiff places himself in a dangerous position, defendant is bound to use reasonable care to avoid injuring him if he has knowledge of the danger, and is liable if he fails to do so, would not apply where plaintiff, after a cable attached to a dirt scraper had ceased to move, attempted to step over it without defendant's knowledge, when the ca-

ble was suddenly started and injured him; defendant not knowing of the dangerous position. [Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

2. APPEAL AND ERROR (§ 854*)—HARMLESS ERROR.

The grounds of the trial court's action were immaterial where appellant, as a matter of law, was not entitled to recover at all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Pacific County; Sol Smith, Judge.

Action by A. L. Pearson against the Willapa Construction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Chas. E. Miller, of South Bend, for appellant. Welsh & Welsh, of South Bend, for respondent.

MORRIS, J. In November, 1911, the city of Raymond was opening up and grading a new street, known as Henkle street. This street was situate in an outlying district of the city, and in a hilly and wooded section. The work was being done by respondent under contract. In doing the grading, respondent was using two donkey engines and a scraper, taking the dirt from the hilly part of the street and dumping it into the low places. These engines were about 600 feet apart. One hauled the scraper loaded with dirt down the hill, and the other hauled it back; a wire cable being used as a connection. Appellant, on the day of his injury, followed a trail up the hill until he came to the place where the work was being done, and where he desired to cross. He saw one of the donkey engines on his right, and the scraper and cable moving to the left, until the scraper went out of sight around a bluff. He stopped and watched the operations for about five minutes, during which time the cable ceased moving. He saw a man, evidently an employé of respondent, standing about 100 feet to his left, but made no inquiries nor received any information. When the cable stopped, it lay in the loose dirt, with a slight bend or curve converging toward appellant. He then started to cross, and, as he stepped over the cable and had taken a step or two beyond, it started up and, in drawing taut, whipped up against his legs and caused the injuries complained of. This appeal is taken from the granting of a nonsuit.

[1] In presenting his appeal, counsel for appellant contends that his case falls within the rule first established in *Davies v. Mann*, 10 Meeson & Welsby, 546, and since followed by many English and American cases, to the effect that, when a plaintiff by his own negligence has placed himself in a dangerous position where injury is likely to result, the

defendant, with knowledge of the plaintiff's danger, is bound to use reasonable care to avoid injuring plaintiff; and where, by the exercise of such care, defendant could avoid the injury, but fails to do so, the defendant's negligence becomes the proximate cause of the injury and renders him liable. This is but another statement of the rule lately announced by us in *Nicol v. Oregon-Washington R. & N. Co.*, 128 Pac. 628, and *O'Brien v. Washington Water Power Co.*, 129 Pac. 391. But we can see no reason for its application here, for three reasons: (1) Appellant was not in a dangerous situation until he stepped over the cable; (2) there is nothing to show that respondent knew, or should have known, that appellant was about to step over the cable; (3) there is nothing to show that respondent knew, or had received any intimation, that appellant was in a dangerous position with regard to the cable, when the cable was started. Hence the basis upon which that contention rests—one person negligently exposing himself to danger, the other with knowledge of such fact omitting due care for the purpose of avoiding injury—is here lacking. Appellant could plainly see what was going on; the scraper and moving cable were plainly indicative of their use; and, with these facts clearly before him, he chooses his own time to act, with no intimation or knowledge on the part of respondent that he was about to so act.

[2] Appellant says the court below refused to grant the motion upon the ground of contributory negligence, holding that was a matter of defense, but based the ruling upon the ground that there was no evidence that respondent saw the appellant, or that it knew he was about to cross the street at that time and point, and further that it was not the duty of respondent to post notices in the daytime, nor to tell travelers not to cross. We are not so much concerned

with the reasons for the lower court's ruling as we are with its correctness. No liability was established against respondent, and the lower court was right in so holding, whatever its reasons might have been.

Judgment affirmed.

CROW, C. J., and ELLIS and MAIN, JJ., concur.

FULLERTON, J. I dissent. The trail which the appellant followed was one pointed out to him as the proper way by which to reach the place where he intended to go. It was one commonly used by all of the people of the neighborhood. It was not closed by barriers at the point it entered the street which was being graded; nor were there notices of any sort indicating that its use was discontinued. The cable, which caused the appellant's injury, was moving along the surface of the ground in one position when the appellant first observed it, and there was nothing to indicate that it might not safely be crossed, even though moving. He was not warned by the employé of the respondent, whom he saw standing near, that there was danger in crossing it; nor was he told by such person that the way he was pursuing was not still open for travel. As he stepped over the cable, it was moved in an opposite direction from that in which it was being moved when he first observed it; and it was this change in movement that caused the cable to change its position on the ground. There is nothing in the record to show that the appellant was aware that the cable made these changes; and it is too much to say that he ought to have observed them. I think, therefore, that there was a liability established against the respondent, and that the question whether or not the appellant was guilty of contributory negligence was for the jury.

(35 Okl. 646)

MIDDLETON et al. v. ESCOE et al.
(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*) — PROCEEDINGS FOR REVIEW—PARTIES.

The first section of the syllabus in John v. Paullin et al., 24 Okl. 636, 104 Pac. 365, is made the syllabus in this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Eddie Escoe, by Bert E. Nussbaum, his legal guardian, and another, against Drury H. Middleton and another. Judgment for plaintiffs, and defendants bring error. Dismissed.

Kline & Gotwals, of Muskogee, for plaintiffs in error. Harlow A. Leekley and John B. Meserve, both of Muskogee, for defendant in error Eddie Escoe. W. F. Rampendahl, of Muskogee, for defendant in error W. H. Bateman.

TURNER, J. On June 12, 1911, the defendant in error Eddie Escoe, a minor, by his guardian, sued Drury H. Middleton, Frances W. Middleton, and W. H. Bateman in ejectment for his allotment in the district court of Muskogee county and for mesne profits. By amended petition, for a second cause of action, he alleged that defendants claimed some right, title, or interest in the land, the precise nature of which he did not know, and prayed that they be required to exhibit all evidence thereof to the court, that his title to the land be cleared, and they forever barred from setting up any claim thereto. After issue joined there was trial to the court upon an agreed statement of facts; whereupon the court found, in effect, that the Middletons were in possession and relied for title upon certain deeds executed by the plaintiff to them during his minority, and that Bateman was not in possession and asserted a lien only upon the land by virtue of a mortgage executed by plaintiff during his minority for \$690, payment of which the Middletons had assumed as part of purchase price; that \$250 of said \$690 had gone in betterments on the land; and that the rents and profits offset any claim that the Middletons might have thereto. Accordingly, on April 27, 1912, it was ordered, adjudged, and decreed by the court that plaintiff have judgment against the Middletons for possession of the land; that their deeds be canceled; that Bateman "should have and recover of and from the plaintiff Eddie Escoe the sum of \$250 as the value of the improvements which were placed upon the lands involved herein," etc.; "that as a condition precedent to the cancellation of the said mortgage, said Eddie Escoe

should be required to pay to said W. H. Bateman the sum of \$250," etc.; "and for good cause shown, said defendants, Drury H. Middleton and Frances W. Middleton, are hereby granted 90 days from this date within which to serve a case-made upon the plaintiff."

As no extension of time was granted in which to serve a case-made upon Bateman, and the same was not served on him within three days as required by Comp. Laws of Okl. § 6075, and not until July 23, 1912, the motion to dismiss must be sustained; that is, if Bateman is a necessary party to this proceeding which is prosecuted alone by the Middletons. We think he is for the reason that, not appealing, we presume he is satisfied to accept the \$250 which plaintiff is decreed to pay him as a condition precedent to setting aside his mortgage, and hence his interests would be adversely affected should the Middletons' appeal result in a reversal of that decree. The rule is: "All parties to an action whose interests will be affected by a reversal of the judgment appealed from must be made parties to the appellate proceeding." John v. Paullin, 24 Okl. 636, 104 Pac. 365. And this too although Bateman thereafter waived his right to suggest amendments, consented that the case-made be settled without notice, and waived issuance and service of summons in this court. Bank v. Mergenthaler, etc., Co., 31 Okl. 533, 122 Pac. 507.

Dismissed. All the Justices concur.

(35 Okl. 650)

FIRST NAT. BANK OF HENNESSEY v. HARDING.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*)—PARTIES—GARNISHEE.

Where it is sought to reverse an order discharging garnishees from liability, they must be made parties to the proceedings in this court; and a petition in error to which the principal defendants alone are made parties will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action by First National Bank of Hennessey, Oklahoma, against A. M. Harding. From an order discharging a garnishee, plaintiff brings error. On motion to dismiss. Granted.

P. S. Nagle, of Kingfisher, for plaintiff in error. F. L. Boynton, of Kingfisher, for defendant in error.

DUNN, J. This case presents error from the district court of Kingfisher county. Plaintiff in error seeks to have reviewed an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order of the district court which discharged a garnishee. The only parties made plaintiff and defendant in error are the original parties to the action, and counsel for defendant in error have filed motion to dismiss the proceeding for the reason that the garnishee was not made a party. That all parties who will be affected by the judgment of this court must be made parties in this court is fundamental, and the Supreme Court of Kansas, passing on this specific question in the case of *Yerkes v. McGuire et al.*, 54 Kan. 614, 38 Pac. 781, held that: "Where it is sought to reverse an order discharging garnishees from liability, they must be made parties to the proceedings in this court; and a petition in error to which the principal defendants alone are made parties will be dismissed." This case was afterwards followed by this court in the case of *Spaulding Mfg. Co. v. Dill et al.*, 25 Okl. 395, 106 Pac. 817.

The motion to dismiss is sustained.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(35 Okl. 645)

THORNE v. HARRIS.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 356*)—TIME FOR TAKING PROCEEDINGS—DISMISSAL.

The judgment sought to be reversed was rendered April 5, 1912. Proceedings in error to review the same were commenced in this court October 21, 1912, and not within six months after the rendition of said judgment, as required by an act approved February 14, 1911 (Laws 1910-11, c. 18). On motion, the cause is dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

Error from District Court, Caddo County.

Action between R. A. Thorne, administrator, and Alice Harris. From the judgment, the administrator brings error. Dismissed.

Bristow & McFadyen, of Anadarko, for plaintiff in error. C. H. Carswell, of Anadarko, for defendant in error.

PER CURIAM. For the reason that this suit was brought in the lower court February 21, 1912, and the judgment sought to be here reviewed was rendered and entered April 5, 1912, and proceedings in error were not commenced in this court until October 21, 1912, and not within six months after the rendition of said judgment, as required by an act approved February 14, 1911 (Laws 1910-11, c. 18), which went into effect June 10, 1911, the motion to dismiss this cause is sustained. *Holcombe v. Lawyers' Co-Op. Pub. Co.*, 143 Pac. 1046, and cases cited; *Grant v. Creed et al.*, 128 Pac. 511, and cases cited.

It is so ordered.

(35 Okl. 519)

In re SADDLER.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 52*)—GOVERNMENTAL POWERS—ENCROACHMENT ON JUDICIARY.

Section 286, Comp. Laws 1909, in so far as it prohibits a disbarment of an attorney for acts involving moral turpitude, disconnected with his professional or official duty as an attorney, until after conviction therefor, is not violative of the provisions of the Constitution vesting in the various courts of the state the judicial power of the state, and prohibiting the exercise by one of the three great departments of the government of the power properly belonging to the other departments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 50, 52-54, 70, 72-80, 82, 84, 85; Dec. Dig. § 52.*]

In the matter of proceedings to disbar E. I. Saddler. Recommendations of a referee that a demurrer to the petition should be sustained. Confirmed.

HAYES, C. J. After several affidavits had been filed in this court charging respondent of having been guilty of certain alleged unlawful and corrupt conduct, this court appointed a member of the bar commission to investigate said complaints, and make recommendations thereon to the court. The member of the bar commission so appointed, after making investigation, filed in this court his petition for the disbarment of respondent, in which it is alleged that respondent did willfully and corruptly in the month of July, 1909, in the city of Guthrie, county of Logan, in this state, offer to pay to one James Noble the sum of \$10 if said Noble would procure in advance for respondent the questions prepared by the state of Oklahoma, to be submitted to persons applying for certificates to teach school in the state, and that such examination questions were sought by the said Saddler with the intention to, and that he did, sell the same to persons applying at the examinations held by the state for the issuance of certificates to teachers. It is alleged that he offered to procure, and did procure, the services of one John Anderson to sell copies of the questions to persons who were applicants, which would enable incompetent teachers to prepare for said examination and fraudulently secure certificates to teach school; that said Anderson while in the employ of said respondent sold to one L. W. Flowers, an applicant to teach school, a copy of said questions for the sum of \$10; that he sold a set of said examination questions to other applicants to teach whose names are set out in the petition. Some of these sales were effected by respondent in person and others through agents employed by him; and he offered to sell such questions to various persons, in addition to those to whom he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

did sell. In answer to the petition respondent denies all of the charges made therein against him. The court thereupon appointed a referee to hear the evidence, and make and report to this court his findings of fact and conclusions of law. After the referee had heard some testimony in support of the charges, he announced that he was of the opinion that the demurrer of respondent to the petition upon the ground that the facts alleged by the petition did not sufficiently constitute a cause of action against respondent, and that the grounds alleged in said petition constitute none of the statutory grounds upon which a disbarment proceeding may be submitted, should be sustained; and further taking of testimony was suspended, and the referee reported to this court his conclusions of law upon the questions presented by the demurrer for decision of this court before further proceeding with the hearing of evidence.

By section 285, Comp. Laws 1909, any court of record is authorized to revoke or suspend the license of an attorney to practice therein after a copy of the charges against him shall have been delivered to him by the clerk of the court in which the proceeding is begun, and an opportunity is given him to be heard in his defense. The succeeding section prescribes the grounds upon which such suspension or revocation may be had in the following language: "The following are sufficient causes for suspension or revocation: First, when he has been convicted of a felony under the laws of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence. Second, when he is guilty of a willful disobedience or violation of any order of the court requiring him to do or forbear any act connected with or in the line of his profession. Third, for the willful violation of any of the duties of an attorney or counselor: Provided, that whenever any act is done by the attorney for an honest purpose or with the intent to discover the truth in some matter heretofore being litigated and pending in any tribunal at the time the acts were done, or to prevent litigation, then they shall not be grounds for revocation or suspension of the attorney's license. The filing of any pleading or exhibit in court shall not be cause for suspension or revocation of the attorney's license, but may be punished as a contempt and according to the laws governing proceedings in contempt cases. An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act." The same section further provides that if on the trial the evidence shows the acts of which respondent is charged do not fall within one of the provisions contained in the section, or they are barred by the statute of limitations in the act provided, the at-

torney accused shall stand acquitted; and by section 267 it is provided that all actions for suspension or removal shall be brought within one year after the action charged was committed and not thereafter. That it was intended by the statute to prohibit the revocation of the license of an attorney for any other grounds than those specified in the statute cannot be doubted. The language of the statute is susceptible to no other construction. While the acts with which respondent is charged involve moral turpitude, in that by them, if they are true, he attempted and practiced a fraud upon the state by corruptly enabling persons who were not competent to teach school to secure certificates of authority to teach, and thereby defeated the purposes of the statutes of the state requiring that teachers shall possess the qualifications prescribed by the statute before certificates are issued to them. In accomplishing this unlawful purpose, he stood ready and willing to corrupt other persons to procure for him surreptitiously or otherwise copies of the questions in advance that he might barter and sell them to prospective applicants for teachers' certificates, but it is not charged that, if said acts constitute a violation of any statute, he has been indicted and convicted therefor; and the charges made do not, therefore, come within the first provision of section 266, supra. Nor is he charged with being guilty of a willful disobedience or violation of any order of court requiring him to do or forbear any act connected with or in the line of his profession. The acts committed by him, of which complaint is made, are wholly disconnected with any duty or relation of his profession as an attorney.

If the first clause of the statute quoted above stood alone in connection with that portion of the statute which prohibits the revoking of any license except for the causes provided in the statute, it is clear that the effect of the statute would be to authorize a court to disbar an attorney for no other cause than an act or acts involving moral turpitude for which the person charged has been convicted. It would be immaterial whether the immoral conduct pertained to the official or professional life and duties of the attorney, or to his private life. In neither event could a disbarment occur until after a conviction for the offense. But this clause of the statute must, like all statutes, be construed in its relation to all other parts of the statute, so that each and every part will harmonize. It is clear that the second clause authorizes a disbarment for disobedience or violation by an attorney of any order of the court connected with the office of attorney; and the third clause authorizes a disbarment for a violation of any of the duties of attorney or counselor, which duties are, to some extent, specifically defined by section 257, Comp. Laws 1909. A violation of the duties of an attorney or

the disobedience of an order of court relative to some official duty may or may not constitute a criminal offense for which a prosecution lies. As to the grounds of the disbarment provided by the second and third clauses, there is no provision that there shall be a conviction before an order of disbarment may be made, and they must be construed as a limitation upon the first clause. Reading the entire statute together, we think the legislative intent was to provide, not that no attorney shall be disbarred in any event for the commission of an offense against the criminal statute of the state, unless he has been previously convicted, but to provide that no such disbarment shall occur for such an offense until after conviction, where the offense was disconnected with any act of willful disobedience or violation of any order of court requiring him to do or forbear any act connected with the line of his profession, or unrelated to any of his duties as an attorney or counselor and constituting no misconduct in office; and the statute thus construed further prohibits the disbarment of an attorney for any act involving moral turpitude, disconnected with any professional or official duty, if such act is not one for which a prosecution and conviction lies. The offense or offenses with which respondent is charged in this case fall within the class last mentioned above. It is not charged that the acts complained of constitute the violation of any statute for which a prosecution may be had; and, if any statute exists making such acts a criminal offense, it has not been called to our attention, and we have been unable to find it. The acts charged, however, do in our opinion evidence deficiency in character and moral turpitude. "Moral turpitude" has been defined as including any act evidencing baseness, vileness, or depravity in private and social duties which a man owes to his fellow man, or to society in general, contrary to justice, honesty, or good morals. *State v. Mason*, 29 Or. 18, 43 Pac. 651, 54 Am. St. Rep. 772; *Baxter v. Mohr*, 37 Misc. Rep. 833, 76 N. Y. Supp. 982; *In re Disbarment of Coffey*, 123 Cal. 522, 56 Pac. 448; *In re Kirby*, 10 S. D. 322, 414, 73 N. W. 92, 907, 39 L. R. A. 856, 859.

The purposes and effect of the act with which respondent is charged would be to defeat the laws of the state, requiring those to whom certificates to teach are issued to possess qualifications prescribed by the statute, and considered necessary for the protection and welfare of the children of the state. His conduct was such as to enable those who availed themselves of the benefit thereof to practice a fraud upon the state; but it in no way constitutes a violation of any order of court connected with or in line of his profession, nor does it grow out of any professional or official duty or relation existing by reason of his position as an attorney. The offense, therefore, charged

against respondent does not constitute a cause for disbarment under the terms of the statute, and the demurrer to the petition should be sustained, unless the statute is void as being in conflict with the Constitution of the state. This statute was in force in the territory of Oklahoma at the time of the admission of the state, and was by the Enabling Act and the Schedule to the Constitution extended in force in the state, unless in conflict with the Constitution of the state. There is no specific provision in the Constitution conferring upon any court power either to admit or to disbar attorneys. If the Constitution vests in any court or courts the power to determine for what causes an attorney may be disbarred, as well as to determine when an offense has been committed by an attorney that renders him subject to disbarment, it is done by implication, and not by specific provision. In considering the question of the validity of this statute, it must be done with full observance of the rule that must always govern courts in determining the constitutionality of any statute, which requires that the statute shall be sustained, unless its conflict with the Constitution is clear and free from doubt.

Section 1, art. 7, of the Constitution, vests all judicial power of the state in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law. We do not think it can be doubted that the power to determine whether any person has committed acts or has been guilty of conduct which at common law or by provision of statute has been declared to constitute a cause for disbarment is a judicial power that can be exercised only by the courts, and not by the Legislature, under a Constitution, where there is a division of the powers of government vested in different departments, and a limitation imposed by the Constitution that the power vested in one department shall not be exercised by either of the others, but that it is in every instance a judicial power to determine what acts or conduct shall constitute a cause for disbarment is not so free from doubt. There is much vagueness of thought and expression in the cases from the courts upon this question, due, no doubt, in the main, to the fact that the question has been presented directly to the courts in but few cases. There are many decisions, both state and federal, which contain the general statement that the power of disbarring attorneys is an inherent power in the courts, or that it is a power necessarily possessed by all courts having authority to admit attorneys to practice. *In re Peyton*, 12 Kan. 399; *In re Smith*, 73 Kan. 743, 85 Pac. 584; *State ex rel. v. Winton*, 11 Or. 456, 5 Pac. 337, 50 Am. Rep. 486; *Sanborn v. Kimball*, 64 Me. 140; *State v.*

Kirke, 12 Fla. 278, 95 Am. Dec. 314; Davis v. State, 92 Tenn. 634, 23 S. W. 59; Scott v. State, 86 Tex. 321, 24 S. W. 789; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. By a careful consideration of these cases, however, and others of similar import, it is disclosed that they are authority only for the proposition that, in the absence of specific constitutional or statutory provision conferring authority upon the courts to disbar, the courts have power by virtue of the common law to disbar attorneys for certain causes; and they are no authority for determining to what extent the Legislature may limit or regulate this power existing at common law. An illustration of the indefiniteness with which the question has been dealt is to be found in *Re Peyton*, supra, where in the opinion it is said: "We suppose that all courts authorized to admit attorneys may also disbar them upon sufficient cause being shown; that such power is inherent; that it is a necessary incident to the proper administration of justice; that it must be exercised without any special statutory authority and in all proper cases, unless positively prohibited by statute; and that it must be exercised in the manner that will give the party to be disbarred a fair trial and an opportunity to be heard." This language is not accurate, if it is meant that the power to disbar is inherent in the courts in the sense that the power to punish for contempt is inherent in them; for in that event the Legislature could not prohibit the exercise of the power, and a positive prohibition of statute would have no effect upon the question. In many of the states statutory enactments have been made providing grounds upon which attorneys may be disbarred, and the courts have uniformly enforced them without any question as to the power of the Legislature to prescribe grounds for disbarment; for, by the weight of authority, it has been held that the grounds enumerated in such statutes are not exclusive, and that, in addition to the causes prescribed by the statute, the courts may disbar for other grounds existing at common law. *Beene v. State*, 22 Ark. 149; 4 Cyc. 905. But these cases are authority for the proposition only that such statutes should be construed as not intending to limit the power of the courts to disbar for the causes enumerated in the statute, and cannot be taken as authority for the proposition that the Legislature has no power to limit the courts with respect thereto. This latter question has been directly considered in but few cases that we have been able to find, which are as follows: In *re Eaton*, 4 N. D. 514, 62 N. W. 597; In *re Collins*, 147 Cal. 8, 81 Pac. 220; Ex parte Schenck, 65 N. C. 353; In *re Haywood*, 66 N. C. 1; In *re Ebbs*, 150 N. C. 44, 63 S. E.

190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592.

In the *Collins Case*, supra, the statute involved was very similar to the one involved in the instant case, except that it contained no prohibition against the courts' disbarring for other causes than those specified in the statute. The court, after quoting from *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62, the following: "The manner, terms, and conditions of their admission to practice, and of their continuance in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is regulated by statute"—said: "In the plenitude of its power, as announced in this case, the Legislature of the state has plainly defined the causes for which an attorney may be deprived of his right to practice. This it had the right to do, and its specification of such causes is, in our judgment, conclusive on this court. And to the extent that an attorney may be disbarred for causes which affect his moral integrity in dealings with others of a purely personal character, and transacted in his private capacity, the statute has provided that it shall be done by the court only when he has been convicted of a felony, or of a misdemeanor involving moral turpitude." In the North Carolina cases the statutes specifically prohibit the disbarment upon any other grounds than those enumerated in the statute, and the validity of the statute was sustained. The power to disbar is not necessary to the existence of courts; and originally such power was not exercised by them for the reason that parties to a suit were required to appear in person and were not permitted to be heard by attorneys, and, after barristers or counselors at law were permitted in England to appear for parties to an action, they were not appointed by the court, but were called to the bar by the inns of court, and the admission of attorneys has been from time to time in England regulated by statute. *State v. Kirke*, supra. And there appears to be but little division among the authorities that the power to prescribe the qualifications for admission to the bar is a legislative power, and the almost uniform legislation upon the subject in the various states is to prescribe what shall constitute qualifications sufficient to entitle one to be admitted to the bar, and vests the court with jurisdiction to determine when an applicant possesses the prescribed qualifications. Following the establishment of the right of litigants to appear by counsel in court, there came to be recognized a jurisdiction and power in the courts to punish attorneys for misbehaving in the practice of their profession, and to disbar them for official misconduct. The power in the courts to disbar, therefore, is

of common-law origin, while the power to admit is of statutory origin. *Ex parte Bradley*, 7 Wall. 364, 18 L. Ed. 366; *State v. Kirke*, *supra*.

If the power in every case to determine upon what grounds an attorney may be disbarred is a power inherent in the courts in the sense that the power to punish for contempt is inherent, then the grant by the Constitution of judicial functions includes the power to disbar attorneys, and to strike their names from the roll, and the Legislature cannot by statutory enactment prohibit the exercise of this power. The power to punish for contempt is inherent in the courts, because of the necessity of such power in the due administration of justice by them. Does such a necessity for the power to disbar and to determine in all instances what shall constitute causes for disbarment exist? Argument full of sound reason can be adduced to sustain the proposition that the power to disbar an attorney for professional misconduct or neglect of duty, such as obstructs the administration of justice, interrupts the orderly procedure of the courts, bring reproach and contempt upon them or violate his fiduciary relation toward his client, is so necessary to the full and complete administration of justice that such power cannot be taken from the courts by legislative enactment. But does such a necessity exist when applied to the nonprofessional misconduct of an attorney, such as acts that may show deficiency in character and a lack of proper regard for his duties toward mankind generally, but that do not relate to his professional or official duties as an attorney? We are of the opinion that no such necessity is manifest as will authorize us to declare the statute involved void. That the men composing the bar shall be men of high integrity and of unquestionable character in their private lives as well as in their official and professional lives should not be underestimated; but the office of attorney in the courts is of no more importance in the administration of justice than of the judge who presides over it, and it would not be contended that it is essential to the administration of justice by the courts that the courts shall have the power to determine, independent of control by statute, what acts shall constitute a sufficient cause for removal of a judge from office. The statute here involved undertakes to prescribe a rule that no attorney shall be disbarred for acts in his private life, disconnected with his professional duties, although they involve moral turpitude, until he has been convicted therefor. Independent of any statute upon this question, there is a division among the authorities as to whether at common law such acts constituted a cause for disbarment until after conviction. Mr. Justice Bradley, delivering the opinion of the court in *Ex parte Wall*, *supra*, states the general rule to be that previous to conviction

an attorney shall not be struck off the roll for an indictable offense, committed by him when not acting in his character of attorney; but he sustained the disbarment in that case as falling within an exception to the general rule. A careful review and analysis of the authorities by Mr. Justice Field in the dissenting opinion establishes, we think, that the weight of authority, both English and American, supports the doctrine that no disbarment should be made under the rule at common law for offenses that had no connection with the party's professional conduct until after indictment and conviction, and to the same effect is 4 Cyc. 910; *State v. Winton*, *supra*. The statute in providing that no disbarment shall be made for acts involving moral turpitude, disconnected with any professional misconduct, until after conviction, definitely fixes a rule about which under the common law there was much conflict in the authorities; and it is not clear to us that in so doing the statute interferes with any inherent power of the courts and should be declared invalid. The right to pursue one's chosen calling and for which he has spent a large portion of his life in preparation, and which to an extent may have unfitted him for earning a support for himself and those dependent upon him in a different vocation is a valuable right, and his legal status relative thereto should be made as definite and certain as is possible, without infringing upon any necessary power of the court.

We therefore hold that in so far as the statute here involved prohibits a disbarment for acts involving moral turpitude, but disconnected with the professional or official duties of an attorney, until after conviction therefor, is not violative of the provisions of the Constitution, vesting in various courts of the state judicial power and prohibiting the exercise by one of the three departments of government of the power properly belonging to the other departments.

The recommendation of the referee that the demurrer to the petition should be sustained is confirmed. All the Justices concur.

(35 Okl. 535)

SHULL v. STATE et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

COURTS (§ 240½, New, vol. 8 Key-No. Series)
—SUPREME COURT—TAX PROCEEDINGS—APPEAL FROM JUDGMENT AFFIRMING COUNTY TREASURER'S ORDER ASSESSING OMITTED PROPERTY.

Appeal dismissed for want of jurisdiction, on the authority of *State v. Cawthorn's Estate*, 31 Okl. 560, 122 Pac. 522.

Error from Custer County Court; A. H. Latimer, Judge.

Action by the State and Custer County against Mary E. Shull. Judgment for plaintiffs, and defendant brings error. Dismissed.

R. J. Shive, of Butler, for plaintiff in error. Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for defendants in error.

KANE, J. This is an appeal from an order of the county court of Custer county, dismissing an appeal from the final action of the treasurer of that county, finding that certain personal property belonging to the plaintiff in error had been unlawfully omitted from the tax returns for certain years. In *State et al. v. Cawthorn's Estate*, 81 Okl. 560, 122 Pac. 522, it was held that "the Supreme Court is without jurisdiction to review, on appeal thereto, an order or judgment of a county court made in an appeal to such court from a decision and order of a county treasurer, assessing property for taxation, alleged to have been unlawfully omitted from the tax returns for certain years."

On the authority of the foregoing case, the appeal must be dismissed for want of jurisdiction. All the Justices concur, except HAYES, C. J., absent.

(35 Okl. 521)

ST. LOUIS & S. F. R. CO. v. YOUNG.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 367*) — MOTION TO MAKE MORE DEFINITE AND CERTAIN—TIME—EXTENSION OF TIME "TO PLEAD."

A motion to make more definite and certain, which is provided for by section 5659, Comp. Laws 1909, may be made at any time within the period allowed to answer or demur by section 5645, Comp. Laws 1909, and if the defendant obtains an extension of time in which "to plead," he does not thereby waive the right to make such motion within the time so extended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

2. JUDGMENT (§ 108*)—PLEADINGS—UNDISPOSED OF MOTION.

Where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment upon the pleadings against the defendant cannot be taken.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 201; Dec. Dig. § 108.*]

Hayes, C. J., dissenting.

Error from Creek County Court; John O. Davis, Judge.

Action by Wm. A. Young against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. F. W. Jacobs and J. Harvey Smith, both of Sapulpa, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover for work and labor. In due time the defendant filed a special appearance, and moved to quash the summons, which was overruled by the court, whereupon the court granted the defendant "30 days in which to plead." Within the time "to plead" granted by the court the defendant filed a motion to require the plaintiff to make his petition more definite and certain. Thereafter the plaintiff filed a motion for judgment on the pleadings, which motion the court, without considering defendant's motion to make more definite and certain, sustained, and, without hearing any evidence, rendered judgment for the plaintiff, to reverse which this proceeding in error was commenced.

[1] The first, and only, question of any seriousness in the case is: Was the order of the court, "30 days in which to plead," broad enough to authorize the defendant to file a motion to make more definite and certain within the time to plead granted by the court? Our former opinion was based upon the theory that by the leave granted the defendant was restricted to filing an answer, demurrer, or a pleading of the class set out in section 5626, Comp. Laws 1909, which provides: "The only pleadings allowed are: First. The petition by the plaintiff. Second. The answer or demurrer by the defendant. Third. The demurrer or reply by the plaintiff. Fourth. The demurrer by the defendant to the reply of the plaintiff." Upon further reflection we have reached the conclusion that that is too narrow a construction to place upon the words "to plead" as used in the order of the court. It has been the general understanding among the lawyers of this jurisdiction for a great many years that, when leave to plead out of time is granted in the general language of the order herein, it is sufficient to authorize the party securing the leave to file within the extension any of the motions or pleadings provided for by law. That counsel for defendant in error do not form the exception to the general rule above stated is apparent from the following excerpt taken from their brief: "We admit that the defendant below had a right to file that motion and have it acted upon within the 30 days, and, before it was in default, file the pleading it took leave to file." That also is the practice which seems to be approved in 21 Enc. of Pl. & Pr. 701, where it is said: "Where an extension of time for pleading or pleadings after the prescribed period has been allowed, it is advisable that the party benefited thereby should comply strictly with the order as made; because, unless the leave were general, 'to plead, answer, or demur,' the authorities are not in unison upon the question whether the party is entitled to put in any pleading, or motion in the nature of one,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

but that specified in the order." The form approved by the text certainly contemplates that leave "to plead" embraces leave to file all other pleas or motions except those embraced within leave "to answer or demur."

Section 5659, Comp. Laws 1909, provides: "If redundant or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." The foregoing statute clearly provides for a motion to make more definite and certain, but neither the statute nor any rule of court fixes any definite time in which the motion must be made. In *A. T. & S. F. Ry. Co. v. Lambert*, 31 Okl. 300, 121 Pac. 654, it was held that the proper time to file a motion to quash a summons is "within the time to plead."

In *Young v. Lynch*, 66 Wis. 514, 29 N. W. 224, a motion to make more definite and certain was filed within an extension of time "to answer or demur," provided for by stipulation. The court held: "A motion that the complaint be made more definite and certain may be made at any time within the period allowed for answering; and, if the defendant obtains a stipulation extending the time to answer or demur, he does not thereby waive the right to make such motion within the time so extended." In the opinion, Taylor, J., discussing this proposition, says: "In this case the motion was made before the time to answer had expired; but it is urged by the learned counsel for the respondent that the right to make the motion was waived by obtaining a stipulation extending the time to answer or demur; and that, having obtained that stipulation extending the time, and not having reserved in terms the right to make such motion in the meantime, he waived such right. We think this objection to the motion should not prevail. Neither the statute nor the rules of court fix any definite time within which the defendant must make his motion; and as one object of the motion is to enable the defendant to answer understandingly, and as the plaintiff may of his own motion, and without leave of the court, amend his complaint and make it more definite and certain if it be defective in that respect, at any time before the time to answer has expired, the defendant may make his motion to require it to be done within the same time."

[2] There is a dearth of authority on the exact question under consideration, but what there is clearly supports the conclusion we have reached. The Wisconsin case, however, is strongly in point, and, as the statute of Wisconsin upon which the opinion is based

is substantially the same as our own, we consider it very persuasive.

Having reached the conclusion that the defendant under the leave granted was entitled to file a motion to make more definite and certain, the authorities uniformly support the proposition that where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment upon the pleadings against the defendant cannot be taken. *A. T. & S. F. Ry. Co. v. Lambert*, 31 Okl. 300, 121 Pac. 654; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231; *Story v. Ware*, 35 Miss. 399, 72 Am. Dec. 125; *Blythe et al. v. Hinckley et al.* (C. C.) 84 Fed. 228; *Atchison, etc., Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Ridgway v. Horner*, 55 N. J. Law, 84, 25 Atl. 388.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial. All the Justices concur, except HAYES, C. J., who dissents, and WILLIAMS, J., absent and not participating.

(35 Okl. 537)

CONWILL v. ELDRIDGE.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. TRIAL (§§ 5, 408*)—TIME OF TRIAL—RIGHT TO DELAY—WAIVER—CONTINUANCE.

By reason of section 5834, Comp. Laws 1909, where the issues in a case are made up during a term of court, the case is not triable at said term earlier than 10 days after the date the issues are made up; and it is error for the court to compel a party, over his objection upon this ground, to proceed to trial of the case on an earlier date. But where no objection is made that the case is improperly set for trial, and a party moves for a continuance of the cause upon the ground only that a witness who had promised him to be present was absent, he will be held to have waived any objection to the case having been prematurely set for trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 11, 12, 969; Dec. Dig. §§ 5, 408.*]

2. EVIDENCE (§ 474*)—OPINION—NONEXPERTS—SANITY.

Where nonexpert witnesses testify that they have observed the conduct of a person whose sanity is in question, and state the facts which they observed and upon which they base their opinions, they may give their opinions as to the sanity of such person.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

3. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT—INSUFFICIENT EVIDENCE.

Where there is lacking any evidence reasonably tending to support any essential issue that was or must have been found in favor of the prevailing party in order to return a general verdict for him, or to support any special finding of fact in his favor essential to his right to prevail, such verdict or finding will be set aside by this court, and a new trial granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from District Court, Texas County; R. H. Loofbourrow, Judge.

Action by J. D. Conwill against W. H. Eldridge. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Plaintiff in error brought this action in the court below to recover the sum of \$1,117.74 upon two certain promissory notes made and executed to plaintiff in error by defendant in error. Defendant, who is represented by his guardian, admits in his answer the execution and delivery of the notes, but as a defense against any liability thereon he alleges: First. That at the time they were executed he was mentally incompetent, and incapable of entering into a valid contract. Second. That the consideration for which said notes were executed was the purchase price of one jack, and that plaintiff secured the execution and delivery of said notes by false and fraudulent representations that the jack for which they were executed and delivered was sound and in every way and manner suitable for breeding purposes, when in truth and in fact he was entirely and wholly worthless for breeding purposes, and without value, all of which facts were known to the plaintiff at the time of his making said false and fraudulent representations, and were unknown to the defendant; that said representations were made for the purpose of deceiving and defrauding defendant; and that he did rely upon same, and was thereby deceived and defrauded. Defendant alleges that plaintiff was enabled to accomplish his fraud by the senility and weakness of mind of defendant. He alleges that the jack has since died, and he is for that reason unable to offer to return same to plaintiff; that the jack's death occurred without fault of defendant, but, if it be found that he was of value, defendant stands ready, able, and willing to pay into court, for the use of plaintiff, the amount of such value. By way of cross-petition, he further alleges that at the time of the execution of said notes, as a part of the consideration for the jack, defendant delivered to plaintiff two horses, which were of the reasonable value of \$150, for which, on account of the worthlessness of the jack and the false and fraudulent statements of plaintiff, defendant has received no consideration whatever. He thereupon prays that plaintiff take nothing by the action, but that he have judgment on his cross-petition for the sum of \$150. In a reply, plaintiff denied all the affirmative allegations of defendant's answer. The trial, which was to a jury, resulted in a general verdict and special findings of fact in answer to special interrogatories in favor of defendant, upon which the trial court rendered judgment in defendant's favor for the sum of \$150 and costs.

John L. Gleason and R. L. Howsley, all of Guymon, for plaintiff in error. Wiley & Edens, of Guymon, for defendant in error.

HAYES, O. J. (after stating the facts as above). [1] During term time, on the 28th day of October, 1909, the issues in the case were joined. At this time the cause was set down, and thereafter came on for trial on the 2d day of the following November. On the last-mentioned date, plaintiff presented to the court his motion for continuance, upon the ground that one of his material witnesses had promised him that he would attend the trial of the cause and testify whenever plaintiff would notify him to come, but that this witness had, after letter written to him by plaintiff advising him of the date, failed to attend, and was then absent. He sets forth in his motion the facts to which the absent witness would testify, if present. The overruling of this motion for continuance is the basis of the first assignment of error urged. Counsel for plaintiff contend in this court that by reason of section 5834, Comp. Laws 1909, the cause was not triable on the date for which it was set, and he urges in this court solely upon this ground that the court committed error in not granting to plaintiff a continuance. Said statute, where the issues thereto are settled during the term of the court, makes a case triable at the same term of court only after the expiration of 10 days from the date the issues are made up. *City of Ardmore v. Orr*, 129 Pac. 867 (recently decided, but not yet officially reported). And it is error for the court to compel a party, over his objection upon this ground, to proceed to a trial of the case on a date earlier than 10 days after the issues are made up. Such error on the part of the trial court renders the judgment voidable only, and not void. It is not a jurisdictional error, which cannot be waived by the party.

The statute is for the benefit of the parties to the action only. It secures to them in all cases a reasonable time after issues joined in which to secure witnesses and prepare for trial. It does not affect third parties, or the state, suing for the benefit of the parties only; they may consent to a trial upon an earlier date than that fixed by statute. By proceeding to trial without objecting thereto, a party acquiesces therein, and, after the trial has resulted adversely to him, he should not be permitted to object that the judgment was erroneous because the case was not triable. Plaintiff made no objection in the trial court that the case was not properly upon the trial docket, and therefore, under the foregoing statute, was not triable; but he there treated the case as if it was properly upon the docket, and sought a continuance upon the statutory ground of an absent witness. In this court he does not urge that the court committed

error in overruling his motion for continuance upon the grounds upon which he sought the continuance in the trial court; but he here seeks to have the action of the court declared error upon another ground. Nothing is better settled than that one cannot proceed in the trial of questions in the trial court upon one theory, and, having lost, change front and try to prevail on appeal. *Bullen v. Arkansas, etc., Ry. Co.*, 20 Okl. 819, 95 Pac. 476; *Harris v. First, etc., Bank*, 21 Okl. 189, 95 Pac. 781; *Border v. Carra-bine*, 24 Okl. 609, 104 Pac. 906.

Had plaintiff objected to proceeding to trial upon the ground that the case was not triable upon the date for which it was set, or had he made a motion to strike the same from the trial docket for such reason, and saved his exception to the action of the trial court in refusing to sustain his objection or motion, the act of the court would then be reversible error; but since he failed to do this, and treated the cause as properly on the trial docket and triable, and sought a continuance upon other grounds, he will be held to have waived his right under the statute and consented to the trial of the cause, except upon the grounds set forth in his motion, which are not urged in this court.

[2] Several assignments are urged for reversal, complaining of the admission of testimony relative to the sanity or insanity of the defendant at the time he executed the notes. Several witnesses, who did not qualify as experts, after testifying as to their acquaintance with the defendant and to their observation of his acts, and some of them as to transactions with him, were permitted to give their opinions as to the soundness or unsoundness of his mind, or as to his competency to transact his business. The contention of plaintiff that a nonexpert witness may not give his opinion as to the soundness or unsoundness of mind of a person, because it states a conclusion, is opposed by the leading text-writers and weight of authority upon the question. Where non-expert witnesses testify that they have observed any person whose sanity is in question, and state the facts which they observed and upon which they base their opinions, they may give their opinions as to the sanity of such person. *Elliott on Ev.* vol. 1, p. 681; *Wigmore on Ev.* vol. 3, §§ 1917, 1938; *Atkins v. State of Tenn.*, 119 Tenn. 458, 105 S. W. 353, 13 L. R. A. (N. S.) 1031.

[3] One of the grounds urged for a new trial in the court below and here is that the general verdict of the jury and some of the special findings of fact in favor of defendant are not supported by the evidence. The execution and delivery of the notes is admitted by defendant's answer. Plaintiff's ownership thereof at the present time is established by uncontroverted evidence. In order, therefore, for defendant to prevail in this action, it is necessary that he estab-

lish one of three defenses, to wit: That at the time of the execution of the notes he was entirely without understanding; or there has been a failure of consideration; or that the notes were procured by the fraud of plaintiff. There is a special finding of fact that defendant was at the time of the execution of the notes entirely without understanding. Persons entirely without understanding are incapable of making a contract, and any attempt on their part to do so is void; but we fail to find any evidence in the record that supports this finding of the jury. There is considerable testimony tending to show that defendant is weak-minded, and that as he has grown older the weakness of mind has increased; that he is hard of hearing, and is unable to read or write. But, by the same witnesses, it is established that up to the time of this transaction and afterwards he constantly transacted his own business, and, in doing so, has made a number of trades for and purchases of property. One witness, who had made trades with defendant, testified that he seemed flighty like. Another witness, who had rented land from him and had worked with him, testified that he was with him a great deal about the time the transaction involved occurred, and that he did not observe anything unusual in his actions, other than he had observed theretofore; that he had traded horses with defendant, and that the property he exchanged was worth as much as that which he received from defendant. A son of defendant testified that his father, in making certain trades, had been cheated, or permitted the other person to get the advantage in the trade, and that he had been lax in enforcing or collecting obligations due him; but by the testimony of this witness it is shown that defendant made all his trades, and always looked after his own business, which consisted in farming and raising stock.

All of the evidence relative to the condition of defendant's mind is substantially of the character of the evidence above referred to; and while some of it tends to establish that defendant's mind was in such condition that he might have been more easily subjected to fraud, and advantage taken of him, than a person of sound mind and full understanding, none of it tends to establish that he was entirely without understanding. At the time of the execution of the notes, defendant's incapacity had not been judicially determined. In order for one of unsound mind, but not entirely without understanding to rescind contracts made before his incapacity has been judicially determined, he must restore to the other party everything he has received from him, or must offer to return same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. Sections 5041 and 1137, Comp. Laws 1906. The contract of such a person is not void, but voidable. *Maas et al. v. Dunmyer*, 21 Okl. 434,

96 Pac. 591. Since there is no evidence tending to show that defendant was entirely without understanding, in order for him to prevail in this action, it is necessary for him to establish the alleged fraud of plaintiff in securing said notes, or the failure of consideration; and there are special findings by the jury to the effect that the notes were executed in consideration of the purchase price of the jack, and that the fraudulent representations as alleged in defendant's answer were made by the plaintiff, and that said jack was worthless.

Plaintiff testified in his rebuttal testimony that the notes involved were executed to him in payment for a horse of the present value of from \$1,000 to \$1,200, purchased by defendant from plaintiff, and now owned by defendant. A purported full abstract of the evidence is set out in plaintiff's brief, and plaintiff's counsel assert in their brief that there is no evidence whatever to show that the jack was the consideration for which the notes were executed. Counsel for defendant have failed to set out in their brief or to direct us to any evidence in the record that establishes this issue. There is evidence showing that the jack was purchased by defendant from plaintiff and that plaintiff made false and fraudulent representations as to the condition of the jack; but the record is entirely silent as to what defendant was to pay for the jack, or how it was paid. One witness for defendant testified to statements of plaintiff to the effect that other considerations than these notes had been given by defendant to plaintiff for the horse, which plaintiff testified was the consideration of the notes; but this witness did not testify that the notes in controversy were given for the jack, or to any statement of plaintiff to that effect. Whether the purchase price of the jack was the consideration for the notes was squarely put in issue by the pleadings, and the burden was upon defendant to establish such fact before he could prevail in either his defense of failure of consideration or that the notes were procured by fraud.

The finding of the jury favorably to defendant upon his cross-petition is also unsupported by the evidence in essential particulars. The evidence establishes that several transactions have occurred between plaintiff and defendant at different times at or prior to the execution of the notes. Defendant's cross-petition alleges that, as a part of the consideration for the jack, he sold to plaintiff two horses, of the value of

\$150. There is evidence tending to show that at a time subsequent to the purchase of the jack defendant did sell to plaintiff two horses for the sum of \$100, which the witness testified plaintiff stated he would credit upon the note for the jack; but as to whether the notes upon which it was to be credited were either of the notes in controversy the evidence is silent, and there is absence of any evidence as to the value of such horses. Referring to plaintiff's contention that such evidence is lacking, counsel for defendant in their brief state: "It is further contended by plaintiff in error that there was no evidence tending to prove the \$150 counterclaim asked for by defendant. We are frank to confess that the evidence on this proposition was possibly not very definite; but there was evidence of the defendant showing that the defendant delivered to the plaintiff, as a part of the consideration for this jack, two horses or mares, and that there was an agreement at the time of the delivery of these horses or mares that the plaintiff should credit the defendant on the notes sued on in the sum of \$100."

The admission of counsel that there is no evidence showing the value of the horses is correct; but their statement that the record shows that the purchase price of said horses was to be credited upon the notes sued upon is not supported by reference to any evidence in the record to that effect, and after a thorough search of the record we have been unable to find any. Appellate courts should be reluctant to set aside verdicts of juries that have been approved by the trial court; but where there is lacking any evidence reasonably tending to support any essential issue that was or must have been found in favor of the prevailing party in order to return a general verdict for him, or to support any special finding of fact in his favor essential to his right to prevail, such verdict or finding will be set aside by this court and a new trial granted. *Gergens v. McCollum*, 27 Okl. 155, 111 Pac. 208.

Several assignments urged are based upon instructions given over plaintiff's objection; but an examination of them discloses that those which are not wholly without merit would have been cured by the special findings of fact made by the jury, had all such findings been supported by evidence, and we therefore do not deem it necessary to consider these assignments.

For the reasons herein suggested, the judgment of the trial court is reversed, and the cause remanded. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 688)

SMITH v. ALVA STATE BANK.

(Supreme Court of Oklahoma. March 11, 1913.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 362*)—PETITION IN ERROR—AMENDMENT—MOTION FOR NEW TRIAL—RULING.**

An assignment of error to the effect that the court below erred in overruling a motion for a new trial is a new and distinct assignment of error; and a petition in error in the Supreme Court cannot be amended by incorporating such assignment therein after the statutory time for perfecting an appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961; Dec. Dig. § 362.*]

Error from Woods County Court; Wm. Bickel, Judge.

Action between Ike Smith and the Alva State Bank. From a judgment in favor of the latter, the former brings error. Dismissed.

Chase & Stevens, of Alva, for plaintiff in error. E. W. Snoddy, of Alva, for defendant in error.

HAYES, C. J. Judgment was rendered in the court below in this cause on the 22d day of May, 1911. A motion for a new trial was overruled on the 28th day of the following December. Plaintiff in error brought this proceeding in error by filing in this court on the 12th day of June, 1912, his petition in error and case-made and causing summons to be issued.

The order from which he appeals is the order of the trial court overruling his motion for a new trial; but he fails to assign in his petition in error as one of his assignments of error this act of the court. At the time of the overruling of the motion for a new trial, chapter 18, p. 35, Session Laws 1910-11, was in force. By this act, all proceedings in error for reversing, vacating, or modifying final orders are required to be commenced in this court within six months from the rendition of the judgment or order complained of. Without assigning as error the overruling of the motion for a new trial, no questions relating to errors alleged to have occurred in the progress of the trial in the lower court are presented for review by the petition in error. *Meyer v. James*, 29 Okl. 7, 115 Pac. 1016; *McDonald v. Wilson*, 29 Okl. 309, 116 Pac. 920; *Cox v. Lavine*, 29 Okl. 312, 116 Pac. 920.

Plaintiff in error on July 27, 1912, filed his application asking leave to amend his petition in error, assigning as one of the grounds therein the action of the court in overruling his motion for a new trial. This application, however, was not made until after the expiration of the time the statute allows for bringing his proceeding in error; and, under the rule settled by several deci-

sions, amendments after the expiration of such time, which constitute new allegations of error, cannot be made. *Haynes v. Smith*, 29 Okl. 703, 119 Pac. 246.

It follows that the motion to dismiss should be sustained. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 689)

MISSOURI, O. & G. RY. CO. v. McCLELLAN.

(Supreme Court of Oklahoma. March 11, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 362*)—PETITION IN ERROR—AMENDMENT—ASSIGNMENTS—OVERRULING MOTION FOR NEW TRIAL.**

An assignment of error to the effect that the court below erred in overruling a motion for a new trial is a new and distinct assignment of error; and a petition in error in the Supreme Court cannot be amended by incorporating such assignment therein after the statutory time for perfecting an appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961; Dec. Dig. § 362.*]

2. APPEAL AND ERROR (§§ 301, 305, 362*)—ASSIGNMENTS OF ERROR—MOTION TO STRIKE CASE FROM DOCKET.

An order overruling a motion to strike a case from the trial docket will not be reviewed by this court on appeal, where such ruling of the trial court has not been assigned in the motion for a new trial, and exceptions to the ruling on the motion for a new trial saved, and the overruling of the motion assigned in the petition in error in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755, 1759-1764, 1960, 1961; Dec. Dig. §§ 301, 305, 362.*]

3. PLEADING (§ 428*)—PETITION—OBJECTION AT TRIAL.

Where there has been a trial, and no objection has been made to the petition by demurrer or by motion, an objection to the introduction of evidence under the petition for the reason that it does not state a cause of action, or an objection to the sufficiency of the petition in this court, will be held good only when there is a total failure to allege in the petition the relief sought; and the petition will be liberally construed, if necessary, in order to sustain same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.*]

Error from District Court, Hughes County; John Caruthers, Judge.

Action by D. W. McClellan against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones and J. C. Willhoit, both of Muskogee (Alexander New and Arthur Miller, both of Kansas City, Mo., of counsel), for plaintiff in error. Crump & Skinner, of Holdenville, for defendant in error.

HAYES, C. J. Defendant in error, hereinafter called plaintiff, brought this action against plaintiff in error hereinafter called defendant in the court below to recover for injuries he alleges that he sustained by rea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

son of negligence of the defendant while he was employed by defendant as a section foreman. A trial upon the issues formed by the pleadings resulted in a verdict and judgment in favor of plaintiff in the sum of \$7,000, to reverse which this appeal is prosecuted.

Four assignments of error are presented for reversal. The first and second assignments present the contention that the trial court erred in overruling defendant's motion to strike the case from the trial docket; the third assignment complains of the court's overruling a motion of defendant for an order requiring plaintiff to submit to a physical examination; and the fourth assignment complains of the overruling of an objection by defendant to the introduction of any testimony by plaintiff in support of his petition, upon the ground that the petition does not state facts sufficient to constitute a cause of action.

[1] A motion for a new trial, presented by defendant to the trial court, was overruled; but this action of the court was not assigned in the petition in error filed here. After the statutory time for taking an appeal had expired defendant made application to this court for leave to file an amended petition in error, by which he would assign as error the action of the court in overruling the motion for a new trial; but his application cannot be granted, for such an assignment of error is a new and distinct assignment, setting up a new cause for the reversal of the judgment of the lower court and it cannot be made after the statutory time for perfecting the appeal has expired. *Smith v. Alva State Bank*, 130 Pac. 916 (decided at this term); *Maggart v. Wakefield et al.*, 31 Okl. 751, 123 Pac. 1042; *Haynes v. Smith*, 29 Okl. 703, 119 Pac. 246.

[2] No action of the trial court, therefore, can be reviewed in this proceeding which it is required shall be first presented to the trial court by a motion for a new trial. The first inquiry therefore, this proceeding presents to the court for consideration is: Was the overruling of defendant's motion to strike the cause from the docket a ground for a new trial, and the presentation of such error to the trial court by motion for a new trial necessary in order that it may be reviewed in this court? It has been held in numerous cases that errors of law occurring at the trial cannot be reviewed in this court on appeal, unless such errors have been presented to the trial court by motion for a new trial, and exceptions saved to the overruling of the motion for a new trial, and the act of the court in overruling the motion for a new trial assigned as error in the petition in error in this court; but what acts of the court preceding the trial may be assigned as grounds for a new trial, and must be presented in a motion for a new trial before they can be reviewed on appeal, has not been clearly determined in any case.

In *Powell et al. v. Nichols et al.*, 28 Okl.

734, 110 Pac. 762, it was sought to set aside a levy of execution, and it was held that an order of the trial court refusing to set aside the levy was appealable without a motion for a new trial. *Williamson et al. v. Adams et al.*, 31 Okl. 503, 122 Pac. 499, was an appeal from an order overruling a motion to set aside a sale made under execution. Following *Powell et al. v. Nichols et al.*, supra, it was held that no motion for a new trial was necessary in order to review the action of the court complained of. In *Bond et al. v. Cook et al.*, 28 Okl. 446, 114 Pac. 723, it was sought to reverse an order of the lower court dismissing an appeal from a justice court; and it was held that a motion for a new trial was unnecessary for such purpose. But none of these cases are decisive of the question involved in the instant case.

Eight different grounds for a new trial are specified by the statute, which, in the language of the statute, are as follows: "First, irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. Second, misconduct of the jury or prevailing party. Third, accident or surprise, which ordinary prudence could not have guarded against. Fourth, excessive damages, appearing to have been given under the influence of passion or prejudice. Fifth, error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property. Sixth, that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. Seventh, newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. Eighth, error of law occurring at the trial, and excepted to by the party making the application." Section 5825, Comp. Laws 1909.

A motion for a new trial must be made at the term the verdict, report, or decision is rendered, except for newly-discovered evidence and shall be made within three days after the verdict or decision was rendered, unless unavoidably prevented. A new trial as defined by the statute (section 5825, Comp. Laws 1909) is the re-examination of issues of fact arising upon the pleadings. *Powell et al. v. Nichols et al.*, supra. Where there has been no trial upon issues of fact formed by the pleadings, no motion for a new trial is authorized by the statute; and the setting aside of an order made by the court after a final judgment has been entered, which will not result in a trial upon the issues of fact made by the pleadings, is not the granting of a new trial, and motions therefor do not constitute applications for a new trial.

In the *Powell Case* and in the *Williamson*

Case, no motion for a new trial was required, because the relief sought by the complaining parties was not a new trial. The purpose of a new trial is to correct errors in the proceedings of the court that have prevented a fair trial. No action of the trial court after the trial, and after the judgment has become final, however erroneous, can in any way affect the trial; nor is a new trial necessary to correct such an error. The statute does not, therefore, authorize motions for new trials for this purpose, or require that motions for new trials shall be presented as a condition to the right to review of orders made subsequent to the trial. In the Bond Case, there could be no new trial, because there never had been any trial, and no motion therefor was necessary in order to review the judgment of dismissal.

The motion for a new trial, contemplated and authorized by the statute, contemplates that there has been a hearing upon the issues of fact made by the pleadings, and that because of an erroneous action or irregularity in some part of the proceedings, either before or at the trial, on the part of the court, the jury, or the parties to the proceeding, a fair trial has not been had. Where there has been no trial, to hold that right to have reviewed an order of a court made appealable by the statute is waived, unless presented by motion for a new trial, would be to hold that an error may be waived by failure of the party to do that which the statute neither requires nor authorizes. It has been several times held that errors appearing on the judgment roll or record may be corrected on appeal, without exception having been taken thereto, and without their having been presented by a motion for a new trial. *Goodwin et al. v. Bickford*, 20 Okl. 91, 93 Pac. 548, 129 Am. St. Rep. 729; *International Harvester Co. of America v. Cameron*, 25 Okl. 256, 105 Pac. 189; *Epstein v. Handverker*, 29 Okl. 337, 116 Pac. 789. But motions and rulings of the court thereon do not constitute in this jurisdiction part of the judgment roll or record.

Cook et al. v. Larson, 47 Kan. 70, 27 Pac. 113, is not, therefore, decisive of the question here under consideration. In that case it was held that a motion for a continuance may be reviewed without a motion for a new trial, upon the theory that the motion for continuance constituted a part of the judgment roll or record. In *Buxton v. Alton-Dawson Mer. Co.*, 18 Okl. 287, 90 Pac. 19, it was held, on appeal from a motion overruling a new trial, that the action of the court in overruling a motion to quash summons could not be reviewed, where the statutory time for taking an appeal had elapsed since the overruling of the motion to quash, although the appeal from the overruling of the motion for a new trial was taken in due time, because a motion for a new trial was not necessary to review any question arising

upon the motion to quash summons, and that an appeal would lie directly from the action of the court upon the motion to quash. This case, however, was decided by a divided court, and was overruled upon this question by *Spaulding et al. v. Polley*, 28 Okl. 764, 115 Pac. 864.

Adverting to the statute which specifies the grounds upon which motions for new trials may be granted, it has been suggested that only errors of law occurring at the trial constitute grounds for a new trial; but the statute itself contains no such restrictions, and this construction of the statute set out above cannot be made without in a large measure rendering meaningless the first paragraph of the statute. If only errors of law occurring at the trial may be assigned in a motion for a new trial, as authorized by the eighth paragraph of the section, then why was it provided in the first paragraph of the section that "irregularity in the proceedings of the court, * * * any order of the court * * * by which the parties were prevented from having a fair trial," shall be sufficient grounds for a new trial. There is nothing in the language of the statute that indicates that the "irregularities" or "orders" of the court referred to shall be limited to those occurring at the trial, and, if it had been so intended, then there would have been no necessity of the eighth paragraph. We think by this provision of the statute it was intended to provide that wherever there has been a trial in a case, if any irregularity of the court has occurred, or any order has been made by the court at any stage of the proceeding which has prevented a fair trial, such error may be corrected by a motion for a new trial. If a party fails to avail himself of this remedy afforded by the statute to correct an error, he must be held to have waived the error, if the error is not a fundamental one that cannot be waived by the parties to a suit, for it is to the interest of the public that there be an end to litigation. Of course, jurisdictional errors cannot be waived by the parties; and if the court fails to obtain jurisdiction of the subject-matter, or if the petition fails to state a cause of action, such questions may be raised for the first time on appeal. *Epstein v. Handverker*, supra; *International Harvester Co. of America v. Cameron*, supra; *City of Guthrie v. Nix, Halsell & Co.*, 3 Okl. 136, 41 Pac. 343; *Leforce et al. v. Haymes*, 25 Okl. 190, 105 Pac. 644.

But irregularity in setting a case on the trial docket before it is triable under the statute is an error that may be waived by the parties. *Conwill v. Eldridge*, 130 Pac. 912 (decided at this term, not yet officially reported); *Hiatt et al. v. Renk*, 64 Ind. 590. We are therefore of the opinion that it was essential to defendant's right to have reviewed the order of the court refusing to strike the cause from the docket, that it present the

alleged error by motion for new trial to the trial court, and assign as error in his petition in error the overruling of the motion. As supporting this conclusion, the following authorities may be cited also: *Masoner et al. v. Bell*, 20 Okl. 618, 95 Pac. 239, 18 L. R. A. (N. S.) 166; *Scanlin v. Stewart et al.*, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; *Zimmerman v. Gaumer et al.*, 152 Ind. 552, 53 N. E. 829; *State v. Alfred*, 115 Mo., 471, 22 S. W. 363; *Palmer v. Shenkel et al.*, 50 Mo. App. 571.

The foregoing conclusion disposes of the third assignment of error.

[3] Referring to the fourth assignment, it has been suggested that in *Golding et al. v. Eldson et al.*, 2 Kan. App. 307, 48 Pac. 104, it was held that the ruling of a trial court sustaining an objection to the introduction of evidence under the answer of the defendant, on the ground that it stated no defense, was an error of law occurring at the trial for which a new trial could be granted by the trial court, and will be deemed waived on appeal when a motion for a new trial was not filed; but we do not deem it material to decide whether such a ruling must be presented by a motion for a new trial in order to be presented for review in this court, for it may be objected for the first time in this court that a petition does not state a cause of action; but where there has been a trial, and no objection has been made to the petition by demurrer or by motion, an objection to the introduction of evidence under the petition, or an objection to the sufficiency of the petition in this court will be held good only when there is a total failure to allege in the petition some matter essential to the relief sought; and the petition will be liberally construed with a view of sustaining the action. In such instances it is the duty of the court to take into consideration all the pleadings filed in the case, the answer and reply, as well as the petition, and if from all the pleadings the court can find that there is a cause of action in favor of plaintiff, the objection should be overruled. *First Nat. Bank of Pond Creek v. Cochran*, 17 Okl. 538, 87 Pac. 855; *Marshall v. Homler*, 13 Okl. 264, 74 Pac. 368; *Rice v. West*, 10 Okl. 1, 33 Pac. 706.

We are aware that a different rule prevails in many jurisdictions, which requires that a pleading shall at all times be strictly construed against the pleader; but under the conditions of the authorities in this jurisdiction it is unnecessary to review the decisions of the court from other jurisdictions. Applying this rule, we have read the petition carefully, and the objection that it does not state a cause of action is without sufficient merit to require us to set out here in detail the contents of the petition, or to enter into any lengthy discussion thereof.

Since the assignments of error are without

merit, the judgment of the trial court is affirmed. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 576)

PERRY PUBLIC LIBRARY ASS'N et al. v. LOBSITZ et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 100*)—ORDERS APPEALABLE—TEMPORARY INJUNCTION—DENIAL.

By reason of section 8067, Comp. Laws 1909, an order which refuses a temporary injunction may be reviewed by the Supreme Court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

2. MUNICIPAL CORPORATIONS (§ 996*)—PUBLIC LIBRARIES—TRUSTS—ENFORCEMENT—TAXPAYER'S ACTION.

A donor offered to an incorporated city of the first class the sum of \$10,000 with which to construct a free public library upon condition that the city council by resolution would bind the city to furnish a site for said building and maintain said free public library at a cost of not less than \$1,000 per year. The city council by resolution accepted the donation and agreed to comply with the terms thereof by providing a site and by levying an annual tax upon the taxable property of the city sufficient in amount to maintain a free public library in said building at a cost of not less than \$1,000 per year. The building was thereupon constructed in accordance with the plans and specifications approved by the donor, and the cost thereof paid by the donor in the sum of \$10,000. Thereupon a library consisting of 1,300 volumes was placed in said building, and the building and its rooms were occupied as designed in the plans and specifications according to which it was constructed. After all these things had occurred, the city council was proceeding to take charge of said building and to establish therein the offices of the city, including the office of the mayor, city clerk, police judge, chambers of the city council, and authorized the use of a portion of said building for commercial club purposes and for public conventions. Held, that the title to said building was not absolute in the city free of any conditions and restrictions, but that the city's title to same is that of a trustee; and that it holds same for the benefit of the public; and that a court of equity has jurisdiction to compel the execution of the trust in compliance with the terms of the gift; and that the action of the officers of the city in attempting to divert the building or a portion thereof to the above-named uses may be enjoined at the suit of resident taxpayers of the city and beneficiaries of the trust.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2166; Dec. Dig. § 996.*]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR (§ 954*)—DISCRETION—TEMPORARY INJUNCTION.

While the granting or refusal of a temporary injunction is a matter resting largely in the discretion of the trial court or judge, and such order will not be reversed except for abuse of discretion, yet when it appears by the petition that plaintiffs are entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or omission of which will produce injury to the plain-

tiffs, a temporary injunction is authorized by Comp. Laws 1909, § 5756, and a refusal to grant the same will be an abuse of discretion which is reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

Error from District Court, Noble County; W. M. Bowles, Judge.

Suit by the Perry Public Library Association and others against James Lobsitz and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

H. A. Smith, Henry S. Johnston, and P. W. Cress, all of Perry, for plaintiffs in error. Chas. R. Bostick, of Perry, for defendants in error.

HAYES, C. J. This action was originally instituted in the district court of Noble county by the Perry Public Library Association and a large number of taxpayers against James Lobsitz, the mayor of the city of Perry, and the other defendants in error, who constitute the officers of said city, including its city council. Plaintiffs seek by their action to secure an injunction, enjoining defendants, as the officers of the city of Perry, from moving into a certain building in that city, known as the Carnegie Library building, and from establishing the city offices therein, and to enjoin defendants from occupying said building in any way, other than for the purposes for which it was erected, to wit, a free public library. On the 9th day of February, 1911, plaintiffs were granted by the judge of the district court of Noble county a temporary restraining order. At the same time, their petition for temporary injunction was set for hearing by the judge before him on the 11th day of the same month. When the petition for a temporary injunction was presented, evidence was introduced by plaintiffs in support thereof and by defendants in opposition. Whereupon the judge made an order denying to plaintiffs the temporary injunction and dissolving and setting aside the restraining order theretofore granted. It is from this order that the appeal is prosecuted.

[1] Counsel for defendants, at the outset, contend that the order is not such a one as may be reviewed upon appeal. This contention is answered in the negative by the statute. Section 6067, Comp. Laws 1909, in part provides: "The Supreme Court may also reverse, vacate or modify any of the following orders of the district court, or the judge thereof: (1) A final order. (2) An order that grants or refuses a continuance, discharges, vacates or modifies provisional remedies, or grants or refuses to vacate or modify an injunction." The order here involved refuses a temporary injunction, and is, we think, clearly made appealable by the foregoing statute.

[3] It is next urged that the granting or refusal of a temporary injunction is a matter

resting largely within the discretion of the trial court or judge, and such an order will not be reversed by this court, except for an abuse of discretion. This contention correctly states the rule in this jurisdiction. *Reaves v. Oliver*, 3 Okl. 62, 41 Pac. 353. But when it appears by the petition that plaintiffs are entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or omission of which will produce injury to the plaintiffs, a temporary injunction may be granted to restrain such act (section 5756, Comp. Laws 1909); and where only questions of law are presented by the bill upon its face, or by the evidence, errors of the court or judge relative thereto are an abuse of discretion which the appellate courts will review and correct (*High on Injunct.* [4th Ed.] § 1696). The allegations of the petition are supported by the evidence, and there is no material conflict between the evidence introduced on behalf of plaintiffs and the evidence introduced on behalf of defendants. The facts alleged in the petition and established by the evidence are, substantially, as follows:

[2] In the early part of January, 1909, one of the defendants in error wrote to Mr. Andrew Carnegie, soliciting from him a gift of a sum of money to the city of Perry for the purpose of erecting a library building and establishing a free public library. In answer thereto, Mr. Carnegie submitted a proposition that, if the city would agree by resolution of its council to maintain a free public library at a cost of not less than \$1,000 a year and provide a site for a building, he would give \$10,000 with which to erect a free public library building in the city of Perry. On the 2d day of February, 1909, the city council adopted a resolution in response to the proposition of Mr. Carnegie. This resolution proved unsatisfactory to Mr. Carnegie, and on March 19, 1909, the city council adopted the following resolution: "Resolution. To accept the donation of Andrew Carnegie. Whereas, Andrew Carnegie has agreed to furnish ten thousand dollars to the city of Perry, Oklahoma, to erect a free public library building, on condition that said city shall pledge itself by resolution of council to support a free public library, at a cost of not less than one thousand dollars a year, and provide a suitable site for said building; now therefore, be it resolved by the council of the city of Perry, Oklahoma, that said city accepts said donation and it does hereby pledge itself to comply with the requirements of said Andrew Carnegie. Resolved that it will furnish a suitable site for said building and will maintain a free public library in said building when accepted. At a cost of not less than one thousand dollars a year. Resolved that an annual levy shall hereafter be made upon the taxable property of said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

city sufficient in amount to comply with the above requirements."

This resolution was approved by Mr. Carnegie. Plans and specifications for the building were drawn by the city council, showing the different rooms into which the building was to be divided and the use for which they were designed. After these plans and specifications had been approved by Mr. Carnegie, he authorized the city to proceed with the construction of the building and promised that he would pay therefor as the work progressed upon the certificate of the architect. The site was accordingly furnished by the city and the building constructed and paid for by Mr. Carnegie. After its completion, a library, consisting of about 1,300 volumes, that had theretofore been accumulated by the Perry Public Library Association, a voluntary association of the citizens of Perry, organized for the purpose of collecting a library, was placed into the building, and the building and each of its rooms are now occupied as designed in the plans and specifications submitted to Mr. Carnegie. The evidence establishes that a small levy was made by the city for the year preceding the completion of the building, and that, while no levy has been made by the city council for the current year in which this action is brought, it is the intention of the council to make such levy in accordance with its resolution and acceptance of the donation. All the evidence is to the effect that it is the intention of the city council to use the library as a city hall; to establish therein the office of the mayor, the clerk, the chambers of the city council, and the office of police judge; and, in addition thereto, to use a portion of said building for commercial club purposes and as a general convention hall. The testimony on behalf of the defendant is that they do not intend to use the entire building in this manner, and that they intend to maintain a library therein, and that it is not their intention to disturb or interfere with the library; but the evidence on behalf of plaintiffs, on the other hand, is that, in passing to the portions of the building intended to be used by the city council for the purpose of the city, the visitors and officers must pass through the rooms used for reading and sitting rooms to the library. The effect of the donation by Mr. Carnegie to the city is not to make the city the owner of the library building without any restrictions upon its title or the use to which it may be put. The effect of his agreement with the city is to vest this property in the city as trustee for the benefit of the public, and the city holds this property as a trust, which it must administer in accordance with the terms of the trust. The power of the city of Perry as a municipal corporation to accept the donation of Mr. Carnegie with the restrictions imposed thereon has not been questioned by any of the parties to this proceeding; and the doctrine generally support-

ed by the American courts is that, in the absence of disabling or restraining statutes, municipal corporations may take and hold property in trust for purposes not foreign to their institutions, or incompatible with the objects of their organization, and legacies of personal property directly to the corporation for benevolent or public purposes are valid in law. *Dillon on Municip. Corp.* (5th Ed.) § 988.

It is also well settled that as to all property or funds held by a municipal corporation in trust equity, by virtue of its jurisdiction in respect of trusts and trust property, may assert its power to compel the observance of the trust and the discharge by the municipal corporation of its public duties in respect to the subject of the trust. *Dillon on Municip. Corp.* § 1574.

Counsel for plaintiffs in error rest their contention that the municipal officers have authority in the premises to say for what purposes the building may be used upon sections 664 and 690, Comp. Laws 1909. The statutes cited vest in the mayor and council the care, management, and control of the city and its finances, and also authorizes the council to provide for the erection and government of any and all necessary buildings for the city.

Authorities have been cited which hold that buildings erected for public purposes by municipal corporations may by the proper authorities be allowed to be used incidentally for other purposes either gratuitously or for compensation. Among the cases cited are *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166; *Bell v. City of Platteville*, 71 Wis. 139, 36 N. W. 831. But we do not regard that either of these cases or cases of similar character are in point, for the reason that they turn upon statutes vesting the municipal authorities with power to control buildings constructed by the municipal corporations out of funds derived from the public revenue, the title to which and the control thereof is absolute in the municipal corporations, subject, of course, to such limitations as the statute may impose. In the case at bar the title of the municipal corporation to the library is not absolute. In accepting the gift from the donor, the city took it with the obligations and limitations imposed by the donor, which were that the same should be a free public library, and that the city should furnish annually not less than \$1,000 for the support and maintenance thereof.

In *Warren v. Mayor of Lyons City*, 22 Iowa, 351, an owner of land had in 1840 granted to the city a tract of land for a public square. In 1846, the Legislature passed an act authorizing incorporated towns and cities to acquire, hold, improve, and dispose of lands for public squares, parks, commons, and cemeteries. The city subdivided the land theretofore dedicated for a public

square into lots and was about to sell same. In enjoining the city from so doing, the court said in the opinion: "If the Legislature should undertake to authorize an individual to use and appropriate property for a purpose violative of the terms and conditions upon which it was held, no one would be found to claim that such legislative act did not impair and interfere with the obligation of the contract. And why, we ask, is not the like rule applicable, and the like good faith required, as between a corporation, representing the public, and an individual? Why may I not affix the terms, designate the uses and purposes upon and for which I give to the public my farm or my lots? And upon what principle of law or morals is it that the Legislature can say that this property may, at the option of the trustee, be used for another and different purpose? 'A.' dedicates his ground for school purposes, for instance. The corporation, deeming some other place better suited to the object indicated, turns the dedicated property over to fishmongers, and tallow-candlers, or, if you please, to merchant princes, and wealthy householders, defiantly saying, 'You no longer have any interest in this property, but we can misuse the same without limit, and you cannot complain.' Such a doctrine would enable the state at pleasure to trifle with the rights of individuals, and we can scarcely conceive of a doctrine which would more effectively check every disposition to give for public or charitable purposes."

Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765, involves a state of facts somewhat similar to the facts involved in the case at bar. The donor had given to the city of Lexington a gift of \$1,000, in accordance with the terms of a letter which provided that her gift should go to the inhabitants of the town to be held by the board of trustees, consisting of the selectmen and the school committee of the town for the time being and the settled ministers of the place. Her scheme contemplated the establishment of a public library for the benefit of the city, to be supported in part by the income from the fund furnished by her and in part by money supplied by the town. Her letter required the town as a condition precedent to receiving the gift to vote to establish a free public library and to provide a sum of money toward the settlement and support of it. The library was established and the donor made the original gift, which was followed later by other gifts from her, and the library was maintained for a time in compliance with the conditions of the gift. Later the Legislature passed an act which authorized the city to transfer to a corporation all the funds and property held by the city for the purpose of the library; such corporation to take and hold said property un-

der the terms of the donor, and to administer it in the same manner it had been administered by the city. The court held that the statute undertook materially to change the execution of the trust, and it was therefore void. In the opinion it is said: "The acceptance by the town of Maria Cary's proposition contained in her letter created a contract, which was executed on her part by the payment of the money, and which continued binding on the town and the trustees as to their conduct in reference to the charity."

It is fundamental that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another purpose; and a diversion of the subject of the trust from the purposes for which the trust was created may be enjoined. *Warren v. Mayor of Lyons City*, supra; *Church v. City of Portland*, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; *Barnum et al. v. Mayor & City Council of Baltimore*, 62 Md. 275, 50 Am. Rep. 219. Defendants attempt to justify their taking charge of a portion of the building for city hall purposes with the contention that the library may be maintained in a part of the building, without the use of the whole of it for that purpose; but we do not understand that the fact that the cestui que trust may not be in absolute need of the benefits of the trust ever authorizes the trustee to convert the trust, or a portion thereof to his own use. For the same reason, upon receipt of the gift the municipal authorities might have said that a \$5,000 building would prove fully adequate for a public library, and devoted the other \$5,000 to building a separate building for a city hall. But a statement of this contention demonstrates its unsoundness. By accepting the gift, the city bound itself to levy each year the sum of \$1,000 with which to keep up and support the free public library. It cannot levy and collect this sum of money and expend a part thereof in keeping up the library and a part in maintaining the library as a city hall for the accommodation of its officers and of private or public organizations, such as commercial clubs, without a misappropriation of the funds so levied and a violation of the trust; and, to prevent their doing so, they may be enjoined at the suit of the taxpayers of the city and beneficiaries of the trust. *Kellogg v. School Dist. No. 10, Comanche Co.*, 13 Okl. 285, 74 Pac. 110; *Marlow et al. v. School Dist. No. 4, Murray Co. et al.*, 29 Okl. 304, 116 Pac. 797; *Sexton v. Smith et al.*, 32 Okl. 441, 122 Pac. 686.

The order of the judge below is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 685)

JAMIESON v. STATE BOARD OF MEDICAL EXAMINERS.†

(Supreme Court of Oklahoma. Feb. 11, 1913.)

*(Syllabus by the Court.)***1. PROHIBITION (§ 6*).**

A writ of prohibition will not lie to an executive or ministerial board to prohibit it from the performance of ministerial or executive functions.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 81-83; Dec. Dig. § 6*]

2. PROHIBITION (§ 6*)—STATE MEDICAL EXAMINERS—REVOCAION OF LICENSE—MINISTERIAL DUTY.

The state board of medical examiners in hearing charges filed before it pursuant to Comp. Laws 1909, §§ 4242-4264, for the purpose of having revoked a license theretofore issued by it to practice medicine and surgery in the state, on the ground that the same had been obtained through fraud, and also charging the certificate holder with unprofessional conduct, is engaged in the performance of a ministerial duty, and does not exercise judicial power, and a writ of prohibition thereto will not lie.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 81-83; Dec. Dig. § 6*]

Error from District Court, Logan County; A. H. Huston, Judge.

Application by H. L. Jamieson for writ of prohibition against the State Board of Medical Examiners. Writ denied, and plaintiff brings error. Affirmed.

J. M. Springer, of Stillwater, for plaintiff in error. Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for defendant in error.

TURNER, J. On April 1, 1912, H. L. Jamieson, plaintiff in error, filed his petition in the district court of Logan county, and prayed for a writ of prohibition against the state board of medical examiners of the state of Oklahoma and H. C. Manning, J. B. Murphy, and Alta McCarthy, prohibiting the board from proceeding to hear and determine certain charges set forth in a certain complaint filed by Manning and Murphy, president and secretary, respectively, of the board, the object of which was to have revoked the license of plaintiff, theretofore issued by the board, to practice medicine and surgery in the state, on the ground that the same had been obtained through fraud; also from proceeding to hear and determine the complaint of Alta McCarthy charging him with unprofessional conduct, with the same object in view.

[1, 2] From the judgment of the court upon the issues joined on the petition and the return to the writ, the trial court, in effect, held defendant to be an executive or ministerial board, to which the writ could not run, and plaintiff brings the case here. There was no error in this. The inquiry sought to be prohibited by the writ is in no sense the exercise of a judicial function by the board, and hence the writ cannot

rightfully run against it. The act creating the board is found in Comp. Laws 1909, c. 64, and is entitled: "An act to define and regulate the practice of medicine; to create a board of medical examiners for the examination and licensing of physicians and surgeons, and to prescribe their qualifications; to provide for their proper regulation, and to provide for the revocation of their license; to require itinerant vendors to procure a county license and to fix suitable penalties for the violation of this act, and repealing laws and parts of laws in conflict herewith." Section 1 of the act provides for the establishment of the board and for the filling of vacancies thereon. The next section prescribes the oath to be taken by each member of the board, and for its organization. The next three sections provide for the keeping of its records, its meetings, and its rules. The next, in effect, provides that every person before practicing medicine and surgery in the state must have the credentials therein provided for; that, in order to procure them, he must produce satisfactory evidence of good moral character and a diploma issued by some legally chartered medical school or college, the requirements of which shall have been at the time of granting thereof in no particular less than those prescribed by certain colleges therein specified, or come up to another certain standard therein named. It also provides for the examination of the applicant, and makes certain other provisions. The next section provides that the board may at its discretion accept and register upon payment of a fee without examination of the applicant the certificate issued to him by the board of another state. The next section provides for the grading of applicants, and that temporary permits may be granted until a certain time. The next section provides that a certificate shall issue to the applicant when he shows himself possessed of the qualifications therein required, and the next section for the recording of his certificate, and the next, for a medical register. The next section, among other things, provides, in effect, that when a holder of a certificate issued as therein provided shall be guilty of unprofessional conduct as therein defined, and the same is brought to the attention of the board granting said certificate, in the manner therein set forth, it shall be their duty to, and they must, at once revoke the same, and the holder of such certificate shall not thereafter be permitted to practice medicine and surgery in the state, but that no such revocation shall be made unless the holder is cited to appear, and the same proceedings are had as thereinbefore provided in case of refusal to issue certificate. Said procedure is, in effect, that citation is directed to issue to the holder of the certificate sought to be canceled by the board upon complaint filed before it and for the filing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

† Rehearing denied March 25, 1912.

of a written answer under oath within 20 days after the service on him of the said citation. Upon the issues joined, a trial is directed to be had, and judgment rendered by the board for or against the revocation. The section then proceeds to define "unprofessional conduct," and states that the same is not intended to exclude other acts for which license may be revoked on the ground of unprofessional conduct. Further recitation of the act is unnecessary. It is sufficient to say of said act that the same is of like effect to the act under construction in *State ex rel. v. Goodler et al.*, 195 Mo. 551, 93 S. W. 928, which was an application for a writ of prohibition against the state board of health to prohibit it from proceeding to hear a complaint for the revocation of a physician's certificate theretofore issued by the board as here. The writ was denied upon the ground that the same would not run to an executive or an administrative board. The court in passing said: "The state board of health is not a court—is not a judicial tribunal. It can issue no writ. It can try no case—render no judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the form or character of a judicial trial." And in the syllabus: "Under Rev. St. 1899, § 8514, relative to the practice of medicine and surgery, declaring that the state board of health may refuse a license to practice medicine to any one guilty of unprofessional or dishonorable conduct, and may revoke licenses for like causes after giving the accused an opportunity to be heard in his defense before the board, the action of the board in revoking a license is not a judicial action and cannot be regulated by the writ of prohibition." In *State ex rel. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037, the court said: "A writ of prohibition is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming to exercise these functions." And in *Higgins v. Talty*, 157 Mo. 280, 57 S. W. 724, where charges of keeping a disorderly house had been preferred against a dramshop keeper and Higgins, the excise commissioner, had cited him to show cause why his license should not be revoked, and where the dramshop keeper applied to the circuit court for a writ of prohibition against the commissioner to prohibit it from trying him on the charges, because so to try him, he says, was an exercise of a judicial function which, under the Constitution, could be exercised only by a court, the Supreme Court of Missouri said: "The proceeding was merely by way of investigation, and was in no sense a trial; that the excise commissioner, in pro-

ceeding to investigate the charges, 'was not acting judicially, but under the power conferred upon him by statute with respect to the subject-matter over which he has exclusive control'"—and denied the writ.

Further citation of authority is unnecessary, as our own court has practically decided the question here involved in *State of Okla. ex rel. Caldwell v. Vaughn et al.*, 33 Okl. 384, 125 Pac. 899, members constituting the county election board of Custer county. Caldwell brought suit in the superior court of Custer county for a writ of prohibition against the election board in that county to prohibit it from placing the names of proposed candidates upon the primary election ballot for the office of clerk of the superior court in that county, and from placing upon the general election ballots the name of any candidate or nominee for the same. Affirming the judgment of the trial court denying the writ, this court in the syllabus said: "The writ of prohibition will not lie to an executive or ministerial board to control or regulate it in the performance of a ministerial or executive function. A county election board in placing upon the ballots for a primary election the names of candidates for nomination by the different political parties for the different officers to be elected by the county is engaged in the performance of a ministerial duty and does not exercise judicial power." See, also, *Meffert v. Packer et al.*, 95 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350.

It is unnecessary to consider other questions raised in the briefs. The judgment of the trial court is affirmed. All the Justices concur.

(35 Okl. 572)

TONKAWA NAT. BANK v. DYSON et al.
(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

FRAUDULENT CONVEYANCES (§ 98*)—CREDITOR'S ACTION—STATUTES.

Where a daughter received by deed real estate from a parent under a parol agreement that such conveyance was made for the purpose of expediting a sale by the parent, who was about to leave the state, and that the daughter would convey upon such sale's being made, or upon request of the parent, and where no sale was made, but the daughter thereafter by deed reconveyed the property to the parent, such property will not be subjected to the claim of a judgment creditor of the daughter whose judgment was obtained after the agreement had been carried out in good faith by the daughter, merely because, under section 7267, Comp. Laws 1909, she was at liberty to refuse to carry out the parol agreement.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 289-322; Dec. Dig. § 98.*]

Error from District Court, Kay County; Wm. M. Bowles, Judge.

Action by the Tonkawa National Bank against Maud K. Aldrich Dyson and others.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment for defendants, and plaintiff brings error. Affirmed.

W. S. Cline and C. L. Pinkham, both of Newkirk, for plaintiff in error. John S. Burger, of Blackwell, for defendants in error.

HAYES, C. J. Plaintiff in error instituted this action in the court below to obtain a decree of court declaring to be fraudulent and void a certain deed executed by defendants in error F. A. Dyson and his wife, Maud K. Aldrich Dyson, and to set aside and cancel said deed and to have declared that a certain judgment now owned by plaintiff in error constitutes a lien upon the real estate purported to have been conveyed by said deed, and for an order directing the sale of said property to satisfy said lien.

The only specification of error set out in plaintiff's brief with argument and authorities in support thereof in sufficient compliance with rule 23 of this court (95 Pac. viii) to require consideration is that the trial court committed error in sustaining a demurrer to plaintiff's evidence. The evidence consists wholly of the testimony of defendant in error Maud K. Aldrich Dyson, hereafter referred to as Maud K. Dyson, and of certain exhibits introduced in connection with her testimony. The substantial facts established by this evidence are as follows: Maud K. Aldrich is the daughter of her co-defendant, Nancy E. Aldrich. On June 23, 1902, Nancy E. Aldrich was the owner of lot 11 in block 16 in the town of Tonkawa in this state. On this date she and her husband executed to their daughter Maud K. Aldrich a deed. Thereafter their daughter was married to F. A. Dyson, nominal defendant in this action. On January 15, 1906, defendants F. A. Dyson and Maud K. Dyson executed to the Tonkawa State Bank their promissory note for the sum of \$2,500, with interest and attorney's fees, payable 60 days after date. On May 16, 1906, Maud K. Dyson and F. A. Dyson executed and delivered to defendant Nancy E. Aldrich their deed, reconveying to Nancy E. Aldrich the lot in controversy. This deed was duly filed for record on May 9, 1906. On May 3, 1906, the Tonkawa State Bank instituted an action against Maud K. and F. A. Dyson on the above-named promissory note and reduced same to judgment on the 7th day of December, 1907. Thereafter this judgment was duly assigned by the Tonkawa State Bank to plaintiff in error. Prior to the rendition of this judgment an attachment was sued out by the Tonkawa State Bank and levied upon the lot in controversy; but no judgment of any kind upon this attachment was ever rendered. After judgment upon the note was rendered, an execution was issued and a return thereon made that no goods could be found. The circumstances under which the deed of June 23, 1902, was executed by Nancy E. Aldrich to Maud K. Dyson were that

Nancy E. Aldrich and her husband were making preparation to move from the state, and they desired to place the property in controversy, which belonged to Nancy E. Aldrich, in the name of their daughter, who was to remain in the state, in order to facilitate and expedite a sale and conveyance of said property. Maud K. Dyson paid no consideration whatever for said property. At the time of the conveyance to her, there was a mortgage upon it for the sum of \$1,000, payments on which have since been paid by Maud K. Dyson. After the death of her father, it was suggested by one of her brothers to Maud K. Dyson that she should reconvey the property to her mother, in order that, if the mother should die, no embarrassment would result in the administration of the estate, and Maud K. Dyson thereupon executed the deed of conveyance to her mother which recites a consideration of \$2,000 but in fact she received no sum whatever for said conveyance.

By section 7267, Comp. Laws 1909, it is provided that no trust in relation to real property is valid unless created or declared: "(1) By a written instrument, subscribed by the trustee (trustor) or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law." Under this statute and the facts above stated, it is the contention of plaintiff in error that evidence of the parol agreement between the daughter and mother as to the purpose for which the deed to the daughter was made is not competent; and that the reconveyance by the daughter to her mother, without further consideration, was fraudulent as to the creditors of the daughter, Maud K. Dyson. This contention must, we think, both upon authority and sound reason, be overruled. This case does not present a contest between the trustee and the cestui que trust for the enforcement of a trust resting in parol. The trust has already been executed by the parties thereto. The effect of plaintiff in error's contention is that the trustee by executing the parol trust committed fraud against him, her judgment creditor, whose judgment and any lien created thereby was not obtained until after the trust had been executed. However void the parol agreement between Maud K. Dyson and her parents might have been, in an action against her by her parents for the enforcement thereof, it was not so far an absolute nullity that the courts will not protect the trustee in the execution of the trust, where she has chosen to execute it; and will not, as far as possible, protect her mother, the beneficiary, in the enjoyment of such execution. 1 Perry on Trusts, § 76; Karr v. Washburn et al., 56 Wis. 303, 14 N. W. 189. Although there was no contract between Maud K. Dyson and her mother executed in such term prescribed by law that the courts will enforce, it did create a moral obligation

upon Maud K. Dyson to convey the land involved upon request of her parents. She, in fact, had no interest in the property whatever; and her creditors cannot complain that she did not retain property which did not belong to her in order that they might subject it to the payment of her debts to them. In an early and leading case upon this question, it was said: "A debtor will not be permitted to convey away his property, either real or personal, and relieve it from the incumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property, if it has been placed in his hands; nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose." *Sieman v. Austin et al.*, 33 Barb. (N. Y.) 9.

Evidence of the parol agreement between Maud K. Dyson and her parents was not introduced for the purpose of enforcing the trust, but to establish the facts surrounding the transaction by which she conveyed the property back to her mother and to establish that it was not conveyed in fraud of creditors. That it was competent for this purpose, the authorities sustain. *Richmond v. Bloch*, 36 Or. 590, 60 Pac. 385; *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877; *Farnham v. Kennedy*, 28 Minn. 365, 10 N. W. 20; *Gallman v. Perrie et al.*, 47 Miss. 131.

The judgment of the trial court is affirmed. All the justices concur, except WILLIAMS, J., not participating.

(35 Okl. 641)

HAWKINS et al. v. HAWKINS et al.
(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*)—PARTIES—JOINDER—SERVICE.

On appeal all parties to the judgment which it is sought to reverse whose interests will be affected by a reversal of the judgment must either join in the prosecution of an appeal, or be made parties defendant and be brought into this court by service of summons, where they do not voluntarily appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by William Hawkins and another, by their guardian, James H. Kennedy, against Joseph Hawkins, Sr., and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

Thomas, Thomas & Thomas, of Wagoner, for plaintiffs in error. Rittenhouse & Drake, of Wagoner, for defendants in error.

HAYES, C. J. This action was brought originally in the district court of Wagoner

county by William Hawkins and Mack Hawkins, minors, by their guardian, against Joseph Hawkins, Sr., A. F. Parkinson, Matt Stell, Continental Land Company, Cass M. Bradley, Peter Hawkins, Tommie White, and Richie White, and Walter White, for the purpose of quieting title to a certain tract of land and for obtaining a decree of partition. The land involved was originally allotted to Leah Hawkins, a Creek freedman, who died intestate in 1902, and said land thereupon descended to his heirs, under the laws of descent and distribution of the Creek Tribe of Indians. Joseph Hawkins, Sr., appearing as one of the plaintiffs in error in this proceeding, and who, in fact, is the only plaintiff in error, was the husband of said deceased allottee. Peter Hawkins, Tommie White, Richie White, and Walter White were heirs at law of decedent, and the remainder of the defendants in the trial court named above acquired their interests by purchase from other heirs of deceased. The decree of the trial court found the interests of each of the parties in the land involved and decreed a partition thereof. It was found that Joseph Hawkins, Sr., plaintiff in error, inherited an undivided one-tenth interest, but that he had sold and conveyed said interest to his codefendant, Peter Hawkins, and therefore, at the time of the trial, had no interest whatever in the land. The commissioners who were appointed to partition the land and report to the court, after making investigation, reported that the land could not be partitioned in kind to the various persons interested without manifest injury to them, and thereafter the court ordered that the land be advertised and sold, which was done; and after the purchaser paid into the court the sum of \$4,010 as the purchase price the sale was confirmed, and the proceeds thereof distributed among the interested parties. Some nine months thereafter plaintiff in error Joseph Hawkins, Sr., filed a motion to vacate and set aside the judgment of the trial court, finding the interests of the respective parties in the land and decreeing a partition thereof, and the order confirming the sale; upon the sole ground that the trial court was without jurisdiction to make such order. It is from the order overruling this motion to vacate and set aside that this proceeding in error is prosecuted. Joseph Hawkins, Sr., who files this petition in error, has joined with him all of defendants in the trial court, and attempts to prosecute the proceeding against the two plaintiffs in that court; but it is made to appear that he has joined his codefendants as plaintiffs in error here without their knowledge or consent, and it is upon the motion of two of them to dismiss this proceeding that the cause is now pending.

Under the undisputed facts Joseph Hawkins, Sr., is the only person who has un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dertaken to prosecute an appeal. Assuming, without deciding, that the order from which he attempts to appeal is an appealable order, his appeal, nevertheless, must be dismissed; for the relief he seeks cannot be granted without affecting the interests of his codefendants who are parties to the judgment of the lower court. It is well settled that on appeal all parties to the judgment which it is sought to reverse whose interests will be affected by a reversal of the judgment must either join in the prosecution of the appeal, or be made parties defendant and brought into this court by service of summons, where they do not voluntarily appear. *John v. Paullin*, 24 Okl. 636, 104 Pac. 365; *Welsbender v. School Dist. No. 6, Caddo County*, 24 Okl. 173, 106 Pac. 689. It is clear that to vacate and set aside the judgment of the trial court, ordering a partition sale and confirming the sale thereafter made, and distributing the proceeds thereof, would affect the interests of plaintiff in error's codefendants in the trial court, and who without their consent, he has attempted to make co-plaintiffs in error here.

The motion to dismiss is sustained. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 713)

BOARD OF COUNTY COM'RS OF GARFIELD COUNTY v. HUETT et al.

(Supreme Court of Oklahoma. March 15, 1913.)

(Syllabus by the Court.)

1. FINES (§ 20*)—COLLECTION—DISTRIBUTION—RECOVERY BY COUNTY.

Where, prior to the admission of the state into the Union, pursuant to Wilson's Rev. & Ann. St. Okl. 1903, c. 83, entitled "Trusts," on relation of the county attorney, defendant was sued in the name of the territory of Oklahoma to enjoin an unlawful combination in restraint of trade, and where the Attorney General in the name of the state intervened, and recovered \$75,000 as a fine imposed for violations of the provisions of Comp. Laws 1909, c. 113, art. 1 (Laws 1907-08, pp. 750 to 757, inclusive); and where the trial court, pursuant to stipulation of all parties in interest, ordered paid to the county attorney and his successor in office \$15,000 of the fine collected, which was done, held, in a suit against them by the board of county commissioners of the county where such fine was collected to recover said \$15,000, that said board had no interest therein under Comp. Laws 1909, c. 25, art. 62 (section 2852), entitled "Crimes and Punishment."

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 23, 24; Dec. Dig. § 20.*]

(Additional Syllabus by Editorial Staff.)

2. FINES (§ 20*)—DISPOSITION OF PROCEEDS—REVISION—"CHAPTER."

Comp. Laws 1909, c. 25 (entitled "Crimes and Punishment") § 2852, provides that all fines prescribed as a punishment by any of the provisions of the "chapter," when collected, shall be paid into the county treasury. Held, that the word "chapter" was not used in the sense of "code," or "criminal statute," and therefore

did not include fines recovered pursuant to chapter 113 of such compilation, entitled "Trusts and Combinations."

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 23, 24; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 2, p. 1060.]

Error from District Court, Garfield County; James W. Steen, Judge.

Action by the Board of County Commissioners of Garfield County against Daniel Huett and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Charles N. Harmon, County Attorney, of Enid, and Dale & Bierer, of Guthrie, for plaintiff in error. Parker & Simons, D. M. Walker, W. O. Cromwell, and Robberts, Curran & Otjen, all of Enid, for defendants in error.

TURNER, J. On June 7, 1911, the board of county commissioners of Garfield county, plaintiff in error, sued Daniel Huett and H. G. McKeever, defendants in error, in the district court in that county. The petition, after alleging that three certain persons constituted the plaintiff board; that on November 8, 1904, defendant Huett was duly elected county attorney of that county, and subsequently qualified and entered upon the discharge of his duties as such, and performed the same until November 16, 1907; that the next day the defendant McKeever was duly elected county attorney of that county, subsequently qualified and entered upon the discharge of his duties as such, and continued to discharge the same until January 11, 1911, substantially states: That on April 18, 1907, a certain action was commenced in said court entitled "The Territory of Oklahoma, on Information and Relation of Daniel Huett, County Attorney of Garfield County Therein, Plaintiff, v. The Waters-Pierce Oil Company, Defendant"; that therein plaintiff charged defendant with a violation of the trust laws of the state, in that defendant promoted a pool, trust, agreement, and combination in restraint of trade for the purpose of controlling the competition in the production of naphtha, benzine, gasoline, kerosene, lubricating oils, and other products of petroleum sold, and offered for sale in that and other counties of the territory of Oklahoma, and prayed that defendant be enjoined from so doing and for cost; that although said petition was signed and verified by "Charles West, Attorney for Plaintiff," the same was drawn upon the relation of Daniel Huett, county attorney of Garfield county, territory of Oklahoma, who prosecuted the same in behalf of said territory. A copy of said petition was made a part thereof and marked "Exhibit D." The petition further alleged that on October 30, 1906, there was filed in said cause by Charles West, Attorney General for the state of Oklahoma, "a petition in interpleader supplementary," entitled

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

"The Territory of Oklahoma, on the Information and Relation of Daniel Huett, County Attorney of Garfield County Therein, and the State of Oklahoma, on the Information and Relation of Charles West, Attorney General, Plaintiff, v. The Waters-Pierce Oil Company, a Corporation, Defendant"; that therein plaintiffs charged the defendant Waters-Pierce Oil Company with violating the trust laws of the state of Oklahoma, in that said defendant had formed and made a pool, trust, agreement, and combination for the purpose of controlling competition in the sale of naphtha, benzine, gasoline, kerosene, lubricating oils, and other products of petroleum sold and offered for sale by them in Garfield county, state of Oklahoma, in restraint of trade and in violation of article 1, c. 83, pp. 750 to 757, inclusive, of the Session Laws of Oklahoma 1907-08, and prayed judgment for the plaintiff and against defendant, and that it be enjoined from committing any of the acts complained of and from asking and receiving in the state more than a reasonable price for said products, and from discriminating between associations or corporations and sections and communities and citizens in said state, etc., and that the corporate rights of defendant be forfeited, and a receiver appointed to preserve to the public the benefit of the trust in the hands of the defendant, and for cost and penalties thereby incurred in the sum of \$10,000 for each of said offenses and each day thereof. A copy of said petition is made a part thereof, and marked "Exhibit E." The petition further alleges that issues were joined thereon and said cause came on for trial in said court, whereupon on July 7, 1910, there was filed therein a written stipulation signed by said defendants Huett and McKeever as attorneys for Garfield county, and Charles West, Attorney General, for the plaintiff and certain parties (naming them) for defendant; that therein it was agreed that defendant would confess judgment and be fined in the sum of \$75,000, to be paid \$25,000 in 60 days, \$25,000 in six months, and \$25,000 in nine months from that date; that pursuant thereto, upon said stipulation being that day presented to the court, judgment in full settlement of said cause was rendered and entered accordingly. A copy of said judgment is made a part of the petition and marked "Exhibit B." The petition further alleges that on the same day a written application for attorneys' fees alleged to have been earned in said cause was presented to the court, and an order therein obtained, directing that one-fifth of said fine of \$75,000, or \$15,000, be paid to said Huett and McKeever for their services as county attorneys of Garfield county in the prosecution of said cause, and that they as such and upon that authority alone received said sum out of said fine so assessed. Copies of said application and order are made parts of the petition, and marked "Exhibits F and

C." The petition further alleged that said order was coram non judge and void; that defendants failed to turn over said \$15,000 to the county treasurer of Garfield county on demand, but converted the same to their own use; that said sum of right should be paid into the treasury of Garfield county and credited to the school fund. Wherefore the plaintiff board prayed judgment against defendants for said amount with interest and cost. On November 2, 1911, a demurrer was sustained to said petition, and plaintiff refused to plead further, whereupon judgment was rendered and entered accordingly and plaintiff brings the case here.

The following questions are raised by this record, and have been argued by counsel: Have the defendants Daniel Huett, county attorney for Garfield county for the term immediately preceding the erection of the state, and H. G. McKeever, county attorney of said county from the time of the erection of the state up to and including the time of the trial of the action in the lower court when the \$15,000 involved in this action was accepted and retained by them, a right to retain any part of the \$75,000 fine assessed against the Waters-Pierce Oil Company, or should all of said sum so retained have been paid into the county treasury of said county? The order of the trial court is as follows: "Territory of Oklahoma, ex rel. State of Oklahoma, ex rel. Plaintiff, v. Waters-Pierce Oil Company, Defendant. No. 2626. Order. Now, to wit, on the 7th day of July, 1910, the above matter comes up before the court upon an application of H. G. McKeever and Dan Huett for an allowance of attorneys' fees in the above-entitled cause, and for an allowance of a due and just proportion of the fine in the above-entitled cause, proper to be paid to the county of Garfield. And thereupon the court finds that the said H. G. McKeever and Dan Huett are entitled to one-fifth of the fine herein rendered under section 8819 of Snyder's Statutes of Oklahoma, and that they are entitled to receive \$15,000 of the total fine paid by the defendants in the above-entitled cause, and the court further finds that \$10,000 is a just and equitable proportion of the county of Garfield to receive from the said fine, and that the balance of said fine, to wit, \$50,000, should be paid by the defendant herein to the state of Oklahoma. The defendant is therefore ordered and directed to pay H. G. McKeever and Dan Huett the sum of \$15,000, to the treasurer of Garfield county \$10,000, and the remainder of said fine, to wit, \$50,000, to the treasurer of the state of Oklahoma, all of which said payments shall be made in three equal payments, each upon the 6th day of September, 1910, the 6th of January, 1911, and the 6th day of April, 1911."

On the same day, but prior to the entering of said order, the following journal entry had been made: "Now, on the 7th day

of July, 1910, comes the parties hereto, the state of Oklahoma, by its Attorney General, Charles West, H. G. McKeever, county attorney, and Daniel Huett, and the defendant, Waters-Pierce Oil Company, by its attorneys, J. D. Johnson, H. S. Priest, E. B. Perkins, W. A. Ledbetter, and Parker & Simons, and announce ready for trial, a jury being waived, submit the matter of fact as well as the matter of law to the court; and, the pleadings and evidence and stipulations being submitted to the court, the court finds for the plaintiff and against the defendant, the Waters-Pierce Oil Company, upon the allegations of the petitions, and that the defendant, as alleged therein, has not offered its commodities upon reasonable terms without discrimination, as provided by law, and the court confirms and approves the agreement and stipulations of the parties herein, including the agreement that this judgment shall be a bar to all prosecutions for the causes of action alleged in the pleadings, and therefore: It is considered, ordered, and adjudged by the court that the plaintiff, the state of Oklahoma, recover of the defendant, the Waters-Pierce Oil Company, judgment as a fine of the sum of seventy-five thousand dollars, payable twenty-five thousand dollars in sixty days from this date, twenty-five thousand dollars in six months from this date, and twenty-five thousand dollars in nine months from this date, in full settlement of the causes of action alleged in the pleadings, and it is ordered and decreed that the defendant, the Waters-Pierce Oil Company, and all its officers, agents, employes, and servants of every kind and character whatsoever be and are hereby enjoined from making or entering into any agreement, contract, or arrangement, or maintaining any trade practice or practices in restraint of trade in petroleum products in the state of Oklahoma. A. H. Huston, Judge."

Was this order made by the trial judge res judicata, or was the county or state estopped thereby? "A judgment rendered by the trial court having jurisdiction over the subject-matter and the person is unquestionably conclusive and binding on the parties, unless reversed or set aside in some mode or manner prescribed by law. But it is essential to the validity of a judgment in personam that the court should have jurisdiction over the parties, and, if reached without such jurisdiction, it is a mere nullity. Such a judgment is not merely erroneous because of some irregularity in the mode of proceeding, or error on the part of the court in the application of the law to the particular case, and for which the party aggrieved must seek a remedy by appeal or writ of error, but, being a judgment rendered without jurisdiction, it is absolutely void, and may be assailed at all times, and in all proceedings by which it is sought to be enforced." 1 Herman on Estoppel, p. 63. "There are several

elements necessary to a plea of res judicata. They may be designated as principal and collateral; the latter being a final judgment, upon the merits, between the same parties, for the same cause of action. The principal element is that it must be a valid judgment. That is, it must be rendered by a court legally constituted, having jurisdiction of the cause and the person. Without jurisdiction there is no validity or vitality to the judgment." 1 Herman on Estoppel, § 64, p. 65. The action in the lower court was in favor of the state against the Waters-Pierce Oil Company. By section 1594 of the Compiled Laws of Oklahoma 1909, it is made the duty of every county attorney "to appear in the district courts of their respective counties and prosecute and defend, on behalf of the state, or his county, all actions or proceedings, civil or criminal, in which the state or county is interested or a party." The question of the attorneys for the state being entitled to attorney's fees was not an issue in this case.

The case of *Harris v. Beavan et al.*, 74 Ky. (11 Bush) 254, appears to be in point. In that case an order had been made against the commonwealth directing that 50 per cent. of a certain fine be indorsed for the benefit of the commonwealth attorney. This was held to be "not a judicial determination of his right to receive it, the state being unrepresented." In that case the court said: "The rights of the commonwealth were adverse to the rights of one claiming as prosecutor, and it was necessary, before an order of court could divest the right of the state, that there should be opportunity for defense by the commonwealth against the claim asserted by the prosecutor. If a person other than the commonwealth's attorney had made claim as prosecutor to a part of the fund, it may be that an order made when the commonwealth's attorney was in court would have been effectual to vest in the prosecutor a right to the per cent. given him by the statute; but, when the commonwealth's attorney is the person claiming as prosecutor, the commonwealth is unrepresented, and cannot be deemed to have been in court for the purpose of litigation, and the order made must be deemed coram non jure and void."

[1] Under the trust act of December 25, 1890, no civil penalty was provided, but a violation of the act was declared to be a misdemeanor, and upon conviction thereof the defendant was to be fined not less than \$50, and not more than \$500. The trust act approved June 10, 1908, provides for a criminal penalty of not less than \$50 and not more than \$10,000, and further: "And any sum which might be assessed as a fine by way of punishment for a crime as in this act provided, may be recovered by the state as a penalty in civil action in addition to, or irrespective of, the assessment and assessability of said fine, either before, after or simultaneously with the pendency of said

criminal action." Section 6, art. 1, c. 83, Session Laws 1907-08. Section 9 of the act of June 10, 1908, provides: "It shall be the duty of the county attorney of the several counties of this state, as well as the Attorney General of the state, to prosecute all actions to enforce the criminal provisions of this act." This section omits the provision as to the payment of part of the fine to the prosecuting attorney. Section 18 of the Schedule of the Constitution (section 382 Williams' Anno. Const.) provides: "Until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township officers, not otherwise provided by this Constitution, shall be as now provided by the laws of the territory of Oklahoma for like named officers, and the duties and compensation of the probate judge under such laws shall devolve upon and belong to the judge of the county court: Provided, that the term of office of those elected at the time of the adoption of this Constitution, or first appointed under the provisions of the laws extended in force in the state, shall expire on the second Monday of January in the year nineteen hundred and eleven: And provided further, that county attorneys and judges of the county court of the several counties of the state, having a population of more than twenty thousand shall be paid a salary of two thousand dollars per annum; and of counties having a population of more than thirty thousand, a salary of twenty-five hundred dollars per annum; and of counties having a population of more than forty thousand, a salary of three thousand dollars per annum; such salaries to be paid in the same manner as is provided by law in force in the territory of Oklahoma for the payment of salaries to county attorneys." The special federal census taken in the year 1907 shows that the population of Garfield county exceeded 20,000. By statute this census was made the official census for this state. Section 583, Comp. Laws of Oklahoma 1909; Sess. Laws 1907-08, p. 165. The provision of section 18 of the Schedule providing compensation for the county attorney of Garfield county for the term for which the defendant McKeever was elected, which began at the erection of the state, excluded the fee provided by section 6623 of the Statutes of Oklahoma Territory 1890, regardless of whether section 6623, *supra*, was repealed by section 9 of the act of June 10, 1908, *supra*. *Ticer v. State*, 128 Pac. 493. Section 5, Act Dec. 25, 1890 (section 6623 of the Statutes of Okla. Ter. 1890), provides as follows: "It shall be the duty of the prosecuting attorneys in their respective counties, to enforce the foregoing provisions of this act; and any prosecuting attorney securing a conviction under the provisions of this act, shall be entitled in addition to such fee or salary as by law he is allowed for such prosecution,

to one-fifth of the fine received." Even if it be conceded that this conviction or fine was imposed under this act, it was not during the term of the defendant Daniel Huett, and, even if said section 6623 applied, he would not be entitled to any fee therefor. In the judgment the state of Oklahoma recover of the defendant the Waters-Pierce Oil Company judgment as a fine in the sum of \$75,000. This fine was payable to the state, and this claim of the defendants was an adverse claim to the state, and could be only recovered in a proceeding authorized by statute. The defendants could not sue the state for such claim without its consent, and this consent could only be given by the Legislature. *Love et al. v. Filtch et al.*, 124 Pac. 30. We reach the conclusion that the defendants were not entitled to this fee in the sum of \$15,000, or any other amount.

In support of the proposition that the court erred in sustaining the demurrer, plaintiff contends that it is entitled to recover this \$15,000 by reason of Comp. Laws 1909, which reads: "Sec. 2852. All fines, forfeitures and pecuniary penalties prescribed as a punishment by any of the provisions of this chapter, when collected, shall be paid into the treasury and credited to the school fund of the county where such fines are collected." Said section is amendatory of another section. As the section amended appears in the Statutes of 1893, it reads: "Sec. 2606. All fines, forfeitures and pecuniary penalties prescribed as a punishment by any of the provisions of this chapter, when collected, shall be paid into the treasury of the proper county, to be added to the county general fund." This section is identical with section 2606 of the Statutes of Oklahoma 1890. The chapter referred to in each case is chapter 25, entitled "Crimes and Punishment." It will thus be observed that the suit referred to in the petition as resulting in the recovery of the \$75,000, of which this \$15,000 is a part, was commenced in the district court of Garfield county on April 18, 1907, on the relation of Huett, then county attorney, and was not for the purpose of enforcing any of the provisions of said chapter entitled, "Crimes and Punishment," but was for the purpose of enforcing certain provisions of the Statutes of 1893, chapter 83, entitled "Trusts." It will also be observed that this suit was not authorized to be nor was it brought in the name of the county commissioners, but in the name of the territory of Oklahoma, and not to recover the fine imposed for the violation of the provisions of that chapter, but to secure an injunction against the unlawful discrimination denounced therein. It is clear that the board of county commissioners had no interest in that suit. On the admission of the state into the Union came the Attorney General, and on October 30, 1908, intervened in that suit, and on behalf and in the name of the state set forth facts sufficient to con-

stitute a cause of action against the defendant for the violation of the terms of another act, entitled "An act to define a trust, monopoly, unlawful combination in restraint of trade; to provide civil and criminal penalties and punishment for violation thereof and damages thereby caused; to regulate such trusts and monopolies; to promote free competition for all classes of business in the state; and declaring an emergency," approved June 10, 1908, which authorizes him only to prosecute the suit, and which appears in Comp. Laws of 1909, not in chapter 25, entitled "Crimes and Punishment," but in chapter 113, art. 1, entitled "Trusts and Combinations." Thus making it clearly to appear that when the Legislature said, as it did, in the Statute of 1890, section 2808, supra, and again in the Statute of 1893, section 2808, supra, and once again in that section as amended, and as it appears in Comp. Laws of Okla. 1909, section 2852, in each compilation, in chapter 25, entitled "Crimes and Punishment," in effect, that all fines prescribed as a punishment by any of the provisions of that chapter when collected shall be paid into the county treasury, it left no room for construction, but meant just what it said, and had no reference to covering into said treasury any other fine imposed by any other chapter, and, under the rule of expressio unius, excluded this fine recovered as imposed by chapter 113 of the last compilation, and entitled "Trusts and Combinations."

[2] There is no merit in the contention that the word "chapter," as thus used, should be construed to mean "Code" or "criminal statute." To show that the word "chapter" was thus used advisedly, the first two compilations of the statutes already mentioned in chapter 25—"Crimes and Punishment"—art. 1, provide:

"Section 1. This act shall be known as the Penal Code of the Territory of Oklahoma."

"Sec. 2. No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this Code. The words 'this Code' as used in the 'Penal Code' shall be construed to mean 'statutes of this territory.'" The act referred to consists of 59 articles, and was carried into the compilation of 1909 unchanged, except by the substitution of "state" for "territory." Now, had the statute relied on by plaintiff read, "all fines * * * prescribed by any of the provisions of this Code when collected * * *" shall go to the county, as "this Code" would mean "statute of this state," the term would include chapter 113, and the contention would be tenable. But the word used is "chapter" and not "Code," and the intent of the Legislature, which thus weighed those words, to confine the fines payable to the county to those prescribed as a punishment by that chapter only, and not so prescribed anywhere in the entire Code or "statute of the

state," being apparent, we repeat, we believe the word "chapter" means just what it says, and we will so hold.

Neither can it be said with reason that because none of the criminal statutes passed subsequent to those set forth in chapter 25, supra, entitled "Crimes and Punishment," which directs the disposition of fines as indicated, make disposition of the fines to be recovered thereunder, that such omission (if true) is indicative of the intent of the Legislature that such fines should go into the county treasury. Rather do we think that by failing to indicate where those fines should go the Legislature intended them to follow the course of fines at common law and be covered into the treasury of the crown. 13 Am. & Eng. Law, p. 69. Looking at it in the large, here is a sum of money, a fine, recovered in a civil action brought by the Attorney General, not on "information in the Supreme Court," as the controlling act of June 10, 1908, requires, but in the district court. With this suit neither the board of county commissioners or the county attorney are given any concern by that act. Said suit is ingrafted into another civil suit pending in the district court brought by the Attorney General "on relation of the county attorney" to enforce by injunction the terms of another and earlier act by what is termed "a petition in interpleader supplementary." Out of this anomaly a compromise was effected, and a \$75,000 fine was paid in settlement by defendant to the state. Had the earlier suit succeeded, no fine could have been recovered over which to litigate. Hence it is that the fine arising on the suit of the "interpleader" is all with which we have to deal. The amount arising, as it does, from a suit brought by the law officer of the state, in the name of the state, and paid in settlement to the state, and which, in the absence of statute, goes to the whole people of the state, is it asking too much to require those who, in effect, claim it for a comparatively small portion of the people to put their finger on the law which would justify such a deflection of the public moneys? This they have not done.

As the court did not err in sustaining the demurrer to the petition, the judgment is affirmed. All the Justices concur.

(35 Okl. 535)

ALMEDA OIL CO. v. KELLEY.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

INDIANS (§ 16*)—INDIAN LANDS—MINING LEASE—DISAFFIRMANCE—REMOVAL OF RESTRICTIONS.

An allottee of the Cherokee Tribe of Indians prior to the removal of his restrictions executed a mining lease upon his allotment subject to the approval of the Secretary of the Interior. After the lease had been submitted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and while pending before the Secretary of the Interior, lessor's restrictions on alienation of his lands were removed, and he then protested against the approval of the lease, which was denied and the lease approved. On suit brought to cancel the same as a cloud upon the title to the land involved, it was held by the trial court that the lease was invalid. *Held*, error.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

Kane, J., dissenting.

Error from District Court, Washington County; John J. Shea, Judge.

Suit by Fred L. Kelley against the Alameda Oil Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Charles C. Julian, of Bartlesville, for plaintiff in error. W. H. Kornegay, of Vinita, for defendant in error.

DUNN, J. This is an action to remove cloud from title, brought originally by defendant in error, hereinafter called "plaintiff," against plaintiff in error, hereinafter called "defendant," in the United States Court for the Northern Judicial District of the Indian Territory before the admission of the state. After the admission of the state, the cause was transferred under the provisions of the Enabling Act and the Schedule to the Constitution to the district court of Washington county, where there was a trial to the court without a jury, which resulted in a general finding of the facts in favor of plaintiff, and a judgment as prayed for in his petition. The allegations of plaintiff's amended petition, in substance, are that the land in controversy was allotted to one Edward B. Lynch, a citizen of the Cherokee Nation, in 1904; that the restraints upon his power of alienation were removed by the Secretary of the Interior on the 23d day of January, 1906; that thereafter, on the 19th day of February, 1907, Lynch by warranty deed conveyed the land to plaintiff; that on the 13th day of June, 1904, after the allotment of the land to him, Lynch signed and executed an oil and gas lease to defendant covering the land in question, a copy of which lease was embodied in the petition; that the lease was presented to the Secretary of the Interior for his approval and disapproved; that thereafter, after the removal of restrictions upon the alienation of said land, the disapproval of said lease was set aside by the Secretary of the Interior; that the lease over the protest and against the objection of the allottee, Lynch, and without the consent of plaintiff, was approved on the 19th day of August, 1907, and a copy of such lease approved was delivered to defendant; and alleges that defendant has taken no steps to develop the land and has failed to pay the royalties called for in said purported lease for a period of more than 60 days. The evidence as set forth in the abstract of

defendant, and which appears to be undenied, establishes the citizenship of Lynch; that the land in controversy was his allotment; that restraints upon his authority to alienate were removed by the Secretary of the Interior on the 23d day of January, 1906; that on June 13, 1904, an oil and gas lease subject to the approval of the Secretary of the Interior was executed by the allottee to the defendant; that February 19, 1906, Lynch protested in writing to the Department of the Interior, against its approval; that one year later he executed and delivered to plaintiff his warranty deed; that after the sale of the land he continued his efforts to secure the cancellation of the lease; that the protest filed by him against its approval was denied, and the same was finally approved August, 26, 1907; and that this suit to cancel it was filed 38 days thereafter.

The proof eliminates necessity of consideration of all the averments of the petition upon which plaintiff relies, with the exception of the authority of the Secretary of the Interior to approve the lease in the face of the protest of the lessor and after his restrictions on alienation had been removed; but the questions presented by this situation are perplexing and not easy of decision.

The allotment of the grantor was taken by him with restrictions on his right of alienation and his authority to rent the same, and the terms are set forth in section 72 of the act of Congress approved July 1, 1902 (chapter 1375, 32 Stat. 716), which, among other things, provides: "Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

The parties to this contract were both qualified to enter into it; the consideration was valid, the subject-matter legal, and there was a mutuality of obligation depending merely upon the approval of the Secretary of the Interior. The contract is not assailed on any of the grounds which usually render contracts invalid, but solely upon the ground that, prior to the time when the Secretary acted, one of the contracting parties had changed his mind and desired to withdraw therefrom, and further that his right to deal with his land had been finally and complete-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ly vested in him, and hence the Secretary's power or authority to approve it had lapsed.

There is a paucity of authority upon the direct question involved, but in principle the case of *Pickering v. Lomax et al.*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716, and the cases which have since followed it, to wit, *Taylor et al. v. Brown et al.*, 147 U. S. 640, 13 Sup. Ct. 547, 37 L. Ed. 813, *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, *Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485, and *Ingraham et al. v. Ward et al.*, 56 Kan. 550, 44 Pac. 14, are sufficiently akin to render them very persuasive, if not complete, authority for holding that the Secretary of the Interior did not exceed his authority under the circumstances in giving to the lease his sanction and approval.

It is to be noted that the statute above quoted provides that allotments may be rented for mineral purposes with the approval of the Secretary of the Interior and not otherwise. The act does not provide within what time the Secretary of the Interior shall be required to make the approval, and, except for the fact that plaintiff in this case had notice of the lease when he purchased, he would not be bound by it.

The Supreme Court of the United States, in the case of *Pickering v. Lomax et al.*, supra, which related to the leasing and conveyance of lands owned by certain Indians under the treaty of Prairie du Chien, which provided that the same should never be leased or conveyed to any persons whatever without the permission of the President of the United States, discussing the same, said: "The treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Godfrey v. Beardsley*, 2 McLean, 412, Fed. Cas. No. 5,497. It is doubtless, as was said by the Supreme Court of Mississippi in *Doe v. Partier*, 12 Smedes & M. [Miss.] 425, 427, 'a condition precedent to a perfect title' in the grantee; but the neglect in this case to obtain the approval of the President for 13 years only shows that for that length of time the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee the day after the deed was delivered sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay of 13 years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands. If, after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned, the

approval of the President related back to the execution of the deed and validated it from that time. As was said by this court in *Cook v. Tullis*, 85 U. S. (18 Wall.) 332, 338, 21 L. Ed. 933, 936: 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification.'

From the record it appears that the defendant has complied with its part of the contract in all particulars. The approval of the lease by the Secretary of the Interior related back to the date of its execution between the parties and rendered it valid from that time. It occurs to us that, if the removal of restrictions on allottee's complete right to lease would have any effect whatever, it would be to render the contract of the parties complete, to be annulled only on or for some of the grounds under which equity gives relief. This conclusion on our part relieves us of a consideration of the character of the case filed, and we have determined the issues between the parties on the record presented as they are argued in the briefs.

Under these circumstances, the judgment of the trial court should be reversed, which is accordingly done, and the cause remanded, with instructions to set the same aside and enter one in accordance with this opinion.

HAYES, C. J., and TURNER, J., concur.
WILLIAMS, J., concurs in the conclusion.
KANE, J., dissents.

(25 Okl. 648)

BOND, Treasurer of Atoka County, et al. v.
WATSON et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*)—CASE-MADE—
PREPARATION—SERVICE—TIME—EXTENSION.

Appeal dismissed for failure to serve case-made in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Error from District Court, Atoka County;
Robt. M. Rainey, Judge.

Action between Henry J. Bond, as Treasurer of Atoka County, and the Board of County Commissioners of such county, and Pete Watson and another. From a judgment in favor of the latter, the former bring error. Dismissed.

J. W. Jones, Co. Atty., I. L. Cook, and W. S. Farmer, all of Atoka, for plaintiffs in error. J. G. Ralls, of Atoka, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

KANE, J. This cause comes on to be heard upon a motion to dismiss the appeal, upon the ground, among others, that "the judgment in the trial court from which this appeal is prosecuted was rendered on the 8th day of May, 1912, and the plaintiffs in error were given 90 days' extension of time in which to prepare and serve case-made upon the defendants in error, and the plaintiffs in error failed to serve case-made upon these defendants in error within said 90 days, but, without notice to these defendants in error, they did, on the 8th day of August, 1912, secure an order from the trial judge extending the time 60 days from the 8th day of August, 1912; but at the time said extension was granted the 90 days previously granted had expired, and the order of the court entered on the 8th day of August, 1912, being after the 90 days had expired, rendered all extensions of time a nullity." This is a sufficient ground for dismissal.

The motion to dismiss must therefore be sustained. All the Justices concur, except HAYES, C. J., absent.

(35 Okl. 639)

HURST et al. v. WHEELER.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*)—MAKING AND SERVING CASE-MADE—EXTENSION OF TIME.

The trial judge, after the time for making and serving a case-made, as previously extended by the court, has expired, has no power to extend further the time for making and serving a case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by H. S. Hurst and others against Agnes P. Wheeler. Judgment for the latter, and the former bring error. Dismissed.

H. S. Hurst, of Holdenville, and W. F. Harn, of Newkirk, for plaintiffs in error. Stuart, Cruce & Gilbert, of Oklahoma City, for defendant in error.

HAYES, C. J. On the 18th day of April, 1912, which was within the time theretofore granted to plaintiffs in error by the court for making and serving case-made, they obtained from the judge of the court an order further extending their time for making and serving such case-made for a period of 30 days from the 30th day of April, 1912. On the 11th day of June, 1912, upon agreement of the parties, an order was made by the judge as of date of May 18, 1912, by which plaintiffs in error were granted a further extension of time of 15 days from the 20th day of May, 1912, for the purpose of making and serving their case-made. On

June 5, 1912, the time was extended for the further period of 5 days from that date. The case was served on June 10th.

A motion to dismiss is now urged, upon the grounds that the court was without power to make the nunc pro tunc order, and that the last order of extension, made on June 5th, was made after the expiration of the time granted by the previous order. Assuming, without deciding, that the judge had power to order the clerk to enter the nunc pro tunc order extending the time for a period of 15 days from May 20th, the motion must still be sustained, for the reason that the time granted under said order expired on June 4th, and the last order extending the time was made subsequent thereto.

It is urged by counsel for plaintiffs in error that the time asked for, under the language of their application presented to the court at the time of the making of the nunc pro tunc order, did not expire until June 5th. If there were ambiguity in the order of the court as to the period of time granted, we should probably be justified in looking to the application for aid in construing the order; but the order of the court is plain and unambiguous, and definitely states that the extension of time is for a period of 15 days from the 20th day of May, 1912, which time expired on June 4th. The last order of extension, made on June 5th, was therefore after the expiration of the period of time theretofore granted, and service of the case-made within the period of time granted was likewise void. *Turley v. Hayes & Shirk*, 28 Okl. 655, 115 Pac. 769; *Maddox v. Drake*, 27 Okl. 418, 112 Pac. 969; *Ellis et al. v. Carr*, 25 Okl. 874, 108 Pac. 1101.

The motion to dismiss is sustained. All the Justices concur, except WILLIAMS, J., not participating.

(35 Okl. 545)

TERRITORY ex rel. JOHNSTON, Co. Atty., et al. v. WOOLSEY et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 1000*) — FRAUDULENT CLAIMS—SETTLEMENT — TAXPAYERS' ACTION — PERSONS ENTITLED TO SUE.

By reason of sections 7413 and 7414, Comp. Laws 1909, upon the performance of conditions therein prescribed, an action may be maintained in the name of the state on relation of one or more resident taxpayers of a city against any officer of a city who has transferred property of the city or paid out its money in settlement of a claim known to such officer to be fraudulent, or void, or in pursuance of any unauthorized, unlawful, or fraudulent contract and against any person to whom or for whose benefit such money shall have been paid, to recover the property or double the value of the property so transferred, or double the amount of money so misappropriated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2167-2172, 2198; Dec. Dig. § 1000.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§ 1000*) — CLAIMS — FRAUDULENT PAYMENT — ACTION AGAINST OFFICER—PERSONS ENTITLED TO SUE—COUNTY ATTORNEY.

Said statute does not authorize an action to be maintained for the purposes therein mentioned in the name of the state on the relation of the county attorney.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2167-2172, 2198; Dec. Dig. § 1000.*]

3. MUNICIPAL CORPORATIONS (§ 1000*)—PROPERTY UNLAWFULLY DISPOSED OF—ACTION AGAINST OFFICER—LIMITATIONS.

Said statute, in so far as it authorizes an action to be maintained in the name of the state for the recovery of double the value of the property transferred or double the amount of money so misappropriated, or money unlawfully paid out, authorizes the recovery of a penalty; and such action, by reason of section 5560, Comp. Laws 1909, must be brought within one year after the cause of action accrues.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2167-2172, 2198; Dec. Dig. § 1000.*]

4. LIMITATION OF ACTIONS (§ 180*)—RAISING DEFENSE OF STATUTE—DEMURRER.

Where a petition upon its face shows that the cause of action is barred by the statute of limitation, it is proper to sustain a demurrer thereto upon that ground.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.*]

5. PLEADING (§ 252*)—PETITION—AMENDMENT.

Where an amended petition is not made as an amendment to the preceding petition or petitions, but is made as a substitute and is a complete petition in itself and contains no reference to any prior petition or petitions or to the exhibits thereto attached, the allegations of the prior petitions, except as repeated in the amended petition, are abandoned, and the court cannot look to preceding petitions for the purpose of a demurrer to the amended petition.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 736-743; Dec. Dig. § 252.*]

Error from District Court, Noble County; W. L. Barnum, Judge.

Action by Territory of Oklahoma, on relation of Henry S. Johnston, County Attorney, and others, against J. P. Woolsey and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

H. A. Johnson, of Perry, for plaintiffs in error. James B. Diggs, of Tulsa, and S. H. Harris, of Oklahoma City (H. B. Martin, of Tulsa, of counsel), for defendants in error.

HAYES, C. J. This action was instituted in the district court of Noble county in the name of the territory of Oklahoma, on relation of Henry S. Johnston, as county attorney of Noble county, and on the relation of 27 resident taxpayers of the city of Perry. The action was begun and prosecuted for the recovery of \$60,282.34, being double the amount alleged to have been misappropriated by the defendants in error J. P. Woolsey, as mayor of the city of Perry, and W. H. Kirchner, James Lobnitz, J. C. Fleming, L. B. Le Grant, E. R. Stagg, and C. G. Jones, as members of the city council of the city of

Perry, and John Knox, as treasurer of the city, from the funds of said city for the purpose of procuring a right of way for the Arkansas Valley & Western Railway Company through the city.

[1] The action is prosecuted under the authority of an act of the Legislature of March 8, 1901 (Sess. Laws 1901, p. 169; sections 7413, 7414, Comp. Laws 1909). The provisions of the act controlling the case are to be found in sections 2 and 3 thereof, which, in so far as they are applicable to the issues here involved, are as follows:

"That every officer of any * * * city, * * * who shall hereafter order or direct the payment of any money or transfer of any property belonging to such * * * city * * * in settlement of any claim known to such officers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made, or attempted to be made for any such * * * city. * * * by any officer or officers thereof, and every person having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract shall have been made, or to whom, or for whose benefit such money shall hereafter be paid, or such transfer of property shall be made, shall be jointly and severally liable in damage to all innocent persons in any manner injured thereby, and shall be further jointly and severally liable to the * * * city * * * affected for double the amount of all such sums of money so paid, and double the value of the property so transferred as a penalty to be recovered at the suit of the proper officer of said * * * city, * * * or of any resident taxpayer thereof, as hereinafter provided.

"Sec. 3. That upon the refusal, failure or neglect of the proper officer of any * * * city, after written demand made upon them by ten resident taxpayers of such * * * city to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to such * * * city, paid out or transferred by any officer thereof, in pursuance of any unauthorized, unlawful, fraudulent or void contract, made or attempted to be made, by any of its officers for any such * * * city, or for the penalty provided in section 2 of this act, any resident taxpayer of such * * * city affected by such payment or transfer after serving the notice aforesaid and after giving security for costs, may, in the name of the territory of Oklahoma, as plaintiff, institute and maintain any proper action at law or in equity, which the proper officers of the * * * city might institute and maintain for the recovery of such property, or for said penalty, and any such municipality shall in such event be made defendant, and one-half the amount of money, and one-half of the value of the property re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

covered in any action maintained at the expense of a taxpayer under this action, shall be paid to such resident taxpayer as a reward."

To the original petition a motion to make more definite and certain was sustained. An amended petition was filed to which was attached as exhibits the warrants upon which it is alleged the money was illegally paid out by defendants in error. Afterwards, a second amended petition was filed, to which a demurrer was sustained, and, plaintiffs in error refusing to plead further, judgment was rendered, dismissing the cause, from which judgment this appeal is prosecuted.

The demurrer, sustained to the second amended petition, contains numerous grounds, but not all of them were urged in the court below. The principal grounds relied upon are that there is a misjoinder of parties plaintiff, and that the action was barred by the statute of limitations. Counsel for defendants in error state in their brief in this court that the propositions of law raised by their demurrer are: First. A number of persons having a distinct cause of action against a defendant or defendants cannot join in an action as plaintiffs against such defendants for the purpose of enforcing such demands. In order for persons to be joined as plaintiffs in an action, they must have some joint or common interest in the cause of action stated in the petition against the defendants. Second. That the statute authorizes the suit to be maintained upon the relation of one taxpayer only; and that such suit cannot be maintained by several taxpayers jointly. The third and fourth propositions are that the action is barred, either in whole or in part, by the statute of limitations.

In view of the number of times it has been held that the misjoinder of parties plaintiff is no ground for demurrer to the petition under our Code, we cannot treat the proposition presented by the first ground of demurrer as an open one in this jurisdiction, and we therefore shall not review the numerous authorities cited by counsel in their brief from other jurisdictions in support of their contention. *Stiles v. City of Guthrie*, 3 Okl. 26, 41 Pac. 383; *Weber v. Dillon*, 7 Okl. 568, 54 Pac. 894; *Martin v. Clay et al.*, 8 Okl. 46, 56 Pac. 715; *Lee et al. v. Mehew et al.*, 8 Okl. 136, 56 Pac. 1046; *Choctaw, O. & G. Ry. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271.

Assuming, as contended by counsel for defendants in error, that the petition states a separate cause of action in favor of the several taxpayers and not a joint one, and that the demurrer attacks the petition upon the ground of misjoinder of causes of action also, still plaintiffs' action should not have been dismissed. While a petition that states separate causes of action in favor of several parties plaintiff is vulnerable to demurrer on the ground of improper joinder of several causes of action, the trial court in sustain-

ing the demurrer upon such ground should not dismiss the action without giving the plaintiffs an opportunity to file their several petitions, if they desired to further prosecute their respective suits upon request for an opportunity to do so. *Weber et al. v. Dillon*, supra; *Martin v. Clay et al.*, supra. Waiving the foregoing rule, however, the contention of defendants in error that the statute, in that it provides that suit may be instituted and maintained by "any resident taxpayer of such city," authorizes the suit to be prosecuted in the name of the territory or state on the relation of only one taxpayer, is not sound. It is true that the action is a statutory one, and he who seeks to prosecute it must find all of his authority within the terms of the statute; and the statute, in so far as it imposes upon the offending officer a liability for double the amount of any money misappropriated or double the value of any property wrongfully transferred, is penal in its character. All the authorities hold that "penal statutes" include any act which imposes by way of punishment any pecuniary mulct or damages beyond compensation for the benefit of the injured party or recoverable by an informer, or which for like purpose imposes any special burden or takes away or impairs any privilege or right. Section 531, *Lewis' Sutherland*, Stat. Const. This statute clearly falls within the foregoing definition, and is to be, like all penal statutes, strictly construed. *Commonwealth v. Winchester*, 3 Clark (4 Pa. Law J. 371) 34, *Vinton et al. v. Welsh*, 9 Pick. (Mass.) 87, and *Fowler v. Tuttle*, 4 Fost. (24 N. H.) 9, are relied upon to support the contention that "any resident taxpayer" should be strictly construed to mean only one taxpayer. These cases involve statutes in character similar to the one here under consideration, but the decisions therein were made without reference to any statute similar to the one existing in this state, subsequently considered. If any such statute existed in states from which those decisions came, the court did not refer to them.

By section 2964, Comp. Laws 1906, it is provided that in all statutes a word used in the singular number includes the plural, and the plural, the singular, except where a contrary intention plainly appears. It does not plainly appear from this act that it was intended that the singular term used should not include the plural. On the other hand, a consideration of this phrase in connection with the context indicates a different legislative intent. An action cannot be instituted by a taxpayer or taxpayers until two things have occurred, in addition to the unlawful act of the officers: First, the officer whose duty it is to prosecute an action for the recovery of the money misappropriated or the property wrongfully transferred and for the penalty must have failed to prosecute such action; and, second, such failure and refus-

al must have occurred after demand therefor by ten resident taxpayers of the city. In the initial step to prosecute an action under this statute by a taxpayer more than one taxpayer, to wit, ten, must participate. There can be no reason why it should be required that the procedure in part should be participated in by ten taxpayers, but that the remaining steps of the prosecution must be participated in by only one taxpayer. On the other hand, there is reason why fewer than the required number to make the demand upon the officer should be permitted to prosecute the suit; for it could easily occur that taxpayers, knowing the violation of the law and the misappropriation of property by the officer of the municipality, would be willing to demand that the officer whose duty it is to bring suit should perform his duty, and yet not be willing, out of aversion to litigation or unwillingness to incur expense by participating in the prosecution of an action, to join in the prosecution of the action. A suit prosecuted by and on the relation of more than one taxpayer places upon the defendant no greater burden than a suit prosecuted by one. It in no way increases his liability. One penalty only is demanded, and any defense he may have cannot be prejudiced by the joinder of plaintiffs. In this contention we are supported by the following cases in point: *Wells v. Cooper*, 57 Conn. 52, 17 Atl. 281; *Chaput v. Robert*, 14 Ont. App. Rep. 354; *State ex rel. Carter v. Wilmington & Weldon R. R. Co.*, 126 N. C. 437, 36 S. E. 14.

[2] The statute, however, does not authorize the action to be maintained in the name of the territory or state on relation of the county attorney. The state has no interest in the action; it receives no benefit from its prosecution; and, although it is made by the statute the nominal party, the real parties in interest are the informers and the city, which, by the statute, is required to be made a defendant; and the only persons authorized to inform and prosecute the action in the name of the state are resident taxpayers. In so far as the statute authorizes the recovery of a penalty, the rule of strict construction applies as to who may recover, and only those named in the statute may prosecute the action; and, since the county attorney is not named, he is without authority to prosecute the action, either in his own name, or in the name of the state.

The second amended petition of defendants in error is divided into two paragraphs. In the first paragraph, in addition to alleging jurisdictional facts, they allege the misappropriation by the defendant city officers of the sum of \$30,141.17 of money belonging to the city of Perry, which they allege was paid out by the city officers in pursuance of an unauthorized, unlawful, and void contract attempted to be made between the officers and the railway company. The date of

this contract they allege is unknown to them. They then refer to the foregoing act of 1901, and allege that by reason thereof the defendants and each of them are liable to the city for the sum unlawfully paid out; and, after alleging demand upon the officers of the city whose duty it is to prosecute this action, and failure of such officers to do so, they ask judgment for the sum of \$30,141.17 as the amount of money misappropriated. The second paragraph, by reference, realleges all the facts alleged in the first paragraph, and, in addition thereto, alleges that by reason of the act of the legislature of 1901 the defendants are severally and jointly liable for the money so paid out as a penalty, and that plaintiffs are entitled to recover the further sum of \$30,141.17 as a penalty. Although it appears that they have attempted by thus dividing up their two amended petitions to state two causes of action, the petition as a whole states in fact but one cause of action, which is the right to recover the penalty imposed by the statute in double the amount of the money misappropriated. The second section of the statute, *supra*, creates two liabilities and authorizes two actions: First, an action by any innocent person for any damages he may have sustained by reason of the unlawful act of the officers' misappropriating or unlawfully transferring the property; and, second, an action by the city or by the resident taxpayers for double the amount of any money misappropriated or the value of any property illegally transferred as a penalty. Section 3 prescribes the procedure that must be taken by the taxpayers in the prosecution of an action by them when they have not sustained any damage by the unlawful acts of the delinquent officer or officers. Under the procedure prescribed, the right of action to a taxpayer does not accrue, unless the officers of the city whose duty it is to prosecute the action for the city refuse to do so after demand made by ten resident taxpayers of the city. In the event such officer or officers refuse to institute or diligently prosecute such an action "for the recovery of any money or property belonging to such city, * * * or for the penalty provided in section 2, * * *" then the resident taxpayers may institute and maintain an action "for the recovery of such property or for such penalty," one half of the money or one half of the value of the property recovered in the action maintained by the taxpayer goes to the taxpayer as reward for his services, and the other half to the city.

It will be observed that the demand is to be made upon the proper officers of the city to bring action "for any money or property belonging to the city"; but the authority of the taxpayer to bring the suit is to bring an action for the recovery of such property or for said penalty. The legislative purpose of these provisions undoubtedly was to provide

a sure means for the city to recover property or money unlawfully expended or transferred by its officers at as little loss to the city as possible. Hence it was provided that, where property had been transferred, the taxpayer may bring suit to recover the identical property transferred. This is important, for in many instances a personal judgment for double the value of the property might be worthless; and, by refusal of the proper officers to prosecute the action, authority to the taxpayer to prosecute the action for a money judgment only would afford the city no relief. On the other hand, where the action is to be prosecuted by the taxpayer for a money judgment as for the value of the property or for the amount of money misappropriated, such action must result in loss to the city, in that one-half of the amount recovered goes to the informer as his reward. Hence the authority to the taxpayer is to prosecute an action, not for the money misappropriated, but for the penalty provided by section 2, which is double the amount misappropriated or double the value of the property transferred; and, although one-half of the recovery is paid to the taxpayer who has borne the expense of the litigation, the municipality is wholly restored in its loss.

[3] We are of the opinion that the only action authorized to be prosecuted by a taxpayer or taxpayers in the name of the state is for a recovery of the identical property unlawfully transferred, or for double the value thereof; or, where money has been misappropriated, for double the sum misappropriated as the penalty named in section 2 of the act. The facts stated in plaintiffs' petition state a cause of action for recovery of the penalty in double of the sum misappropriated, and the petition should be so treated. Actions for the recovery of penalties must be brought within one year after the cause of action accrues. Section 5550, Comp. Laws 1909.

[4] Where a petition upon its face shows that the cause of action set out therein is barred by the statute of limitations, it is proper to sustain a demurrer thereto, urged specially on that ground. *Fox v. Ziehme*, 30 Okl. 673, 120 Pac. 285; *Reeves v. Turner*, 20 Okl. 492, 94 Pac. 543; *Betz v. Wilson*, 17 Okl. 383, 87 Pac. 844. But the second amended petition to which the demurrer was directed and sustained does not disclose upon its face that the action is barred. It is not alleged in this amended petition when the money was paid out by the officers. Defendants in error seek to supply this fact in order to render the second amended petition demurrable by asking that certain exhibits attached to the first amended petition be considered. Those exhibits consist of the warrants upon which it is alleged in the first amended petition the money was paid out, and upon

the face of which warrants are certain indorsements which defendants in error contend establishes the time of the misappropriation of the funds.

[5] But the second amended petition is not made as an amendment to the preceding amended petition, but is made as a substitute and is a complete petition in itself, and contains no reference to the prior petitions, or to exhibits thereto attached. The allegations of the first amended petition, except as repeated in the second amended petition, have been abandoned and are out of the case; and the court cannot look to them for the purpose of the demurrer. *State v. Simpkins*, 77 Iowa, 876, 42 N. W. 516; *Long Bros. v. Hubbard*, 6 Kan. App. 878, 50 Pac. 968; *Hawkins v. Massie et al.*, 62 Mo. 552; *McFadden v. Ellsworth Mill & Min. Co.*, 8 Nev. 57; 1 Encyc. of Plead. & Pr. 625. "An amended pleading, filed as a substitute for the original pleading, supersedes it, and the original pleading ceases to be part of the record, except for the purpose of deciding when the action was in fact commenced, and whether a new cause of action has been introduced." 31 Cyc. 465.

A consideration of some of the questions we have determined could have been obviated, for the reason that they are not essential to a decision in this case, although presented in the brief of counsel either for the plaintiffs in error or defendants in error; but as it is apparent that most, if not all, of them are likely to arise in the subsequent proceeding in this cause, we thought best to consider them.

The judgment of the trial court is reversed, and the cause remanded. All the Justices concur.

EWERS v. KILGORE.

(38 Okl. 196)

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 141*)—REVIEW OF DECISIONS—TRIAL DE NOVO.

The superior courts of the state have jurisdiction to hear and determine de novo causes appealed from justices of the peace.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 467-476; Dec. Dig. § 141.*]

2. JUSTICES OF THE PEACE (§ 190*)—REVIEW OF DECISION—REMAND OF CAUSE.

Where, on an appeal from a judgment of a justice of the peace, in an action for the recovery of rent due for the use of real estate, it is apparent from the evidence that the title of the land is in dispute or called in question, the court should refuse to take further cognizance of the case and remand the same to the justice of the peace court, with directions to proceed in accordance with section 6276, Comp. Laws 1909.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 734; Dec. Dig. § 190.*]

Error from Superior Court, Muskogee County; *Farrar L. McCain*, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by H. C. Ewers against John B. Kilgore. Judgment for defendant, and plaintiff brings error. Modified and affirmed.

Samuel E. Gidney, of Muskogee, for plaintiff in error. Baker, Pursel, Gavin & Leith, of Muskogee, for defendant in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, before a justice of the peace, for the purpose of recovering a certain sum alleged to be due plaintiff from the defendant for the use of certain real estate. Upon trial before the justice of the peace, there was judgment for the plaintiff, from which judgment the defendant appealed to the superior court of Muskogee county, where the judgment of the justice of the peace court was reversed, and the cause remanded, with directions to dismiss the same.

There are two questions presented by counsel for plaintiff in error in their brief: (1) The superior court was without jurisdiction to hear and determine this cause, and erred in overruling plaintiff's motion to dismiss the appeal. (2) The court erred in refusing to allow plaintiff to introduce evidence attacking the validity of the lease under which defendant claimed to hold, and in sustaining the objections of the defendant in error to the introduction of such evidence.

[1] In our judgment, the superior courts of the state have jurisdiction to hear and determine de novo causes appealed from justices of the peace. The Constitution clothed the county courts with jurisdiction over such appeals, "until otherwise provided by law." Section 1966, Comp. Laws 1909, of the act which created the superior courts, provides: "Every such court shall have and exercise concurrent jurisdiction with the district court in all proceedings, causes or matters, and concurrent jurisdiction with the county court in all civil and criminal matters, except matters of probate." In *Oklahoma Fire Insurance Co. v. Phillip*, 27 Okl. 234, 111 Pac. 334, it was held: "A case pending on appeal in a county court from a judgment of a justice of the peace, may be transferred on motion of plaintiff to a superior court, and held, tried, and determined by it." In discussing the question involved in that case, after quoting the part of the statute above set out, Mr. Chief Justice Dunn says: "In the section of the statute last referred to, there is no limitation whatsoever upon the character of the jurisdiction taken by the superior court under this act, with the exception of matters of probate. In all other things, aside from matters of probate, the superior court has jurisdiction identical with the county court, in matters within that court's jurisdiction."

As the county courts had jurisdiction over appeals from justices of the peace prior to

the creation of the superior courts, it follows that upon the creation of the superior courts, "with jurisdiction identical with the county court, aside from matters of probate," that as the case at bar does not involve a matter of probate, the superior court must have appellate jurisdiction over it.

[2] The second question also seems to have been settled by a former decision of this court (*Marshall v. Burden*, 25 Okl. 554, 106 Pac. 846), wherein it is held: "Where it is apparent from the evidence or from an agreed statement of facts, made in an action pending in the county court, that the title of land is in dispute or called in question, the court should refuse to take further cognizance of the case, and should, by reason of the provisions of section 12, art. 7, Const., dismiss the same for want of jurisdiction." As the Constitution, § 18, art. 7, provides that justices of the peace in a certain class of cases shall have jurisdiction "concurrent with the county court," it follows that that case is exactly in point here, except that, under another statute applicable to justices of the peace alone, the appeal therein should not be dismissed. Both actions are actions for rent alleged to be due for the use of real estate, and in both it transpired that, in order to determine the question involved, it was necessary to call in question the title of the land.

Section 6276, Comp. Laws 1909, provides: "If in any action commenced before a justice it appears to the satisfaction of the justice that the title or boundaries of land is in dispute in such action, said justice shall, within ten days thereafter, certify said case, and transmit all papers and process therein to the clerk of the district court of his county, and said case shall be docketed and thereafter proceeded with in the district court as if originally commenced therein; the justice before whom said action is commenced shall require of the defendant setting up said title or boundary, to set forth in his answer or bill of particulars a full and specific statement of the facts constituting his defense of said title or boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is bona fide and not made for vexation or delay, but for the promotion of justice."

As that section of the statute does not seem to be repugnant to any provision of the Constitution, and is not locally inapplicable, we think the proper action of the court below would have been to dismiss the appeal and remand the cause to the court below, with directions to proceed in conformity with its provisions. As thus modified, the judgment of the court below is affirmed. All the Justices concur, except WILLIAMS and DUNN, JJ., absent.

(35 Okl. 532)

ATCHISON, T. & S. F. R. CO. v. STATE
et al.

(Supreme Court of Oklahoma. March 11, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 18*)—JURY (§ 21*)—VERIFICATION OF INFORMATION—WAIVER—RIGHT TO JURY TRIAL.

In a proceeding in contempt for the punishment of a corporation for the violation of an order of the Corporation Commission, pursuant to Act May 29, 1908 (Sess. Laws Okl. 1907-08, p. 228), verification of the information filed with the Commission is waived by answering to the merits. *Held*, further, that in such proceeding the contemnor is not entitled to a trial by jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 13; * Jury, Cent. Dig. §§ 134-142; Dec. Dig. § 21.*]

2. CARRIERS (§ 18*)—SHIPMENT OF FREIGHT—REGULATION BY RAILROAD COMMISSION.

Evidence examined, and *held*, that the prima facie presumption of reasonableness and justness attending the order of the Commission fining appellant for violating rule 6 of order No. 168, requiring carriers to begin the forward movement of freight towards its destination within 24 hours after the bill of lading is signed, has not been overcome.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 13.*]

Appeal from an Order of the Corporation Commission.

Action by the State and others against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Cottingham & Bledsoe, of Oklahoma City, for appellant. Chas. West, Chas. L. Moore, and C. J. Davenport, all of Oklahoma City, for appellees.

TURNER, J. On November 6, 1909, appellee, the Plainsifter Milling Company, a corporation, by unverified petition, informed the Corporation Commission, concerning appellant:

"That on November 2, 1909, about 4 p. m., we billed out car flour and bran #32599 C.R.I.&P. destined to Moore, Okl., and received B-L from their agent for same at this time. We called them by telephone on 11-3, 11-4, 11-5, and insisted upon same being pulled from our mill and started on destination. We took the matter up with Mr. Teasdale, D. F. A. of said road, and he had to wire Supt. W. K. Etter before they moved car, which was done about 5:30 p. m. on November 5th."

On November 9, 1909, the Corporation Commission issued its citation, directed to appellant, and attached thereto a copy of said information, alleged a violation of the Commission's order No. 168, and cited appellant to appear before the Commission on a day certain and show cause why a fine should not be assessed against it for contempt. On January 12, 1910, came appellant and answered, and for cause, among other things, alleged that insufficient trackage in Oklahoma City caused a congestion of traffic, which resulted in the car in question not being moved until November 5th, at which time it was moved from the switch to the company's track, and began its further movement to destination on November 6th. On January 12, 1910, after hearing duly had, the Commission found that appellant had violated rule 6 of the order No. 168 requiring freight to begin its forward movement towards its destination within 24 hours after the bill of lading is signed, and fined appellant \$200 and cost for the violation of said order, in that it had failed to move the car delivered to it in the time thereby prescribed. The company brings the case here.

[1] The information was unverified, but the Commission nevertheless had jurisdiction of the subject-matter. In *St. Louis & S. F. R. Co. v. State et al.*, 26 Okl. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137, which was, as this, a contempt proceeding, we said:

"On May 29, 1908, the Legislature enacted a statute providing for the punishment of any corporation, person, or firm for contempt for the violation of any order or requirement of the Corporation Commission. Sess. Laws 1907-08, p. 228. Section 1 of the act makes any corporation, person, or firm that violates an order of the Commission subject to a fine of not exceeding \$500, and each continuance of the violation a separate offense. Section 2 of the act prescribes the procedure for contempt proceedings. It is provided that such proceeding may be instituted by any citizen of the state, or other parties affected by the order of the Commission, by filing an affidavit with the Corporation Commission setting forth the acts of omission or failure to comply with such order or requirement. Since the adjudication provided by the statute in these proceedings is wholly punitive, a proceeding thereunder must be deemed quasi criminal, if not criminal, and, in the prosecution of such proceeding, the procedure prescribed by the statute should be strictly pursued. 4 Encyc. of Plead. & Prac. pp. 767, 770, and authorities there cited. Before any proceeding for contempt may be begun, an affidavit setting forth the fact prescribed by the statute must be presented to and filed with the Commission. * * * State ex rel. v. Lavery, 31 Or. 77, 49 Pac. 852; State v. Kaiser, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584. See, also, *Back et al. v. State of Nebraska*, 75 Neb. 603, 106 N. W. 787."

What is said in that case is confined to a proceeding by affidavit. There was also a motion to quash. Section 2 also provides that the procedure may be by information. Further on the section reads: "Upon the filing of such affidavit or information above mentioned"—i. e., information setting forth the acts of omission or failure to comply with any order or requirement of the Commission—"it shall be the duty of the Commission to forward to such offending corporation * * * a copy of such affidavit or information. * * * Section 3 provides that the default of defendant shall be deemed an admission of the material allegations in such affidavit or information, etc. As *Bouvier's Law Dictionary* defines an information to be "a complaint or accusation exhibited against a person for some criminal offense," it would seem that this statute intended to provide that in civil constructive contempts the procedure should be by affidavit, and in criminal or quasi criminal constructive contempts by information; but upon this we express no opinion. It is sufficient to say that in contempts of this kind, proceeded against by information, verification thereof is unnecessary to vest the court with jurisdiction.

People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912, was a proceeding by the Attorney General, by unverified information, in contempt against defendant for the publication of a newspaper article reflecting upon the court. The contempt alleged was declared by the court to be criminal, which, quoting from *Rapalje on Contempts*, § 21, was defined to be "all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute." The objection was to the jurisdiction of the court, on the ground that the information was unverified. But the court overruled the same, and held verification to be unnecessary, and said: "No common-law right of the respondent was violated, because, as will be seen by the au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

thorities hereinafter cited, it was permissible at common law to initiate this proceeding on unverified information"—citing *People v. Court Sessions*, 82 Hun, 242, 31 N. Y. Supp. 375; *State v. Morrill*, 16 Ark. 384; *State v. Frew*, 24 W. Va. 418, 49 Am. Rep. 257; *Sturoc's Case*, 48 N. H. 428, 97 Am. Dec. 626; *R. R. Co. v. Androscoggin R. Co.*, 49 Me. 392; *Bate's Case*, 55 N. H. 326; *Dandridge's Case*, 4 Va. 408; *Moore's Case*, 63 N. C. 397; *In re Deaton*, 105 N. C. 59, 11 S. E. 244; *Telegraph Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280; and also *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

But, however this may be, if this information was by the statute (Comp. Laws Okl. § 6644) required to be verified, being intended for the personal benefit of the appellant, it may waive the same, and did so by answering to the information, without moving to quash or set it aside. *In re Talley*, 4 Okl. Cr. R. 308, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

It is next contended that, as rule 6 only applies to intrastate shipments, the order is void as an interference with interstate commerce. As the finding of the Commission was, in effect, that the car in question was not so engaged, the burden of showing the contrary is upon appellant, as the order is prima facie just, reasonable, and correct. Upon this point it is disclosed by the record that such contention was not set up in the answer, nor was any attempt made by appellant to prove it before the Corporation Commission. The nearest approach thereto was, when appellant was attempting to prove that petitioner had defrauded it by securing a rate to which he was not entitled, and hence, had it known such to be a fact, the same would have justified a refusal on its part to remove the car at all, petitioner testified: "Q. Did you not use the milling in transit privilege in the billing of that car from Enterprise, Kan., when you billed that car out from your mill to Moore, Okl.? A. I used the billing on it that applied from Enterprise." This was manifestly insufficient to prove the shipment was one interstate, the best evidence of which were the records of appellant. As such would have disclosed the character of this shipment, it is but fair to presume that, had they been produced, the disclosure would not have been to the advantage of appellant. We therefore conclude that the shipment was not interstate, and being intrastate, as found, the order must stand. *A. T. & S. F. Ry. Co. v. State et al.*, 124 Pac. 56.

There is no merit in the contention that appellant was entitled to a trial by jury. Concerning contempt, in *People v. News Company*, supra, quoting from section 21 of *Rapalje on Contempts*, the court said:

"The framers of our Constitution never intended to thus interfere with the due and orderly administration of justice. It was not their purpose to have the procedure designated in the sections mentioned cover contempts of court, and thus give this class of offenses a status theretofore unknown in either the statutory or the common law. The constitutional guaranties apply to such acts as constitute violation of public and general laws. They leave contempts, which are simply acts in disobedience of judicial mandates or process, or which tend to obstruct the dignified and effective administration of justice, to be dealt with in the summary manner theretofore universally followed." But see Const. art. 2, § 25, as to orders of injunction or restraint.

[2] For the reason that, after reading the entire evidence, we are unable to say that the failure to comply with the Commission's order was occasioned by a congestion of traffic which appellant did its best to relieve by theretofore and up to that time attempting in good faith to

extend its trackage facilities, as contended, we are unable to say that the prima facie presumption of reasonableness and justness attending the order has been overcome, the same must prevail; and the order is affirmed.

(35 Okl. 563)

ST. LOUIS & S. F. R. CO. v. TATE, County Treasurer, et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. TOWNS (§ 56*)—LEVY OF TAXES—TOWNSHIP BOARD—BUDGET.

Comp. Laws of Okl. 1909, §§ 7624-7626, 8730-8735, construed, and held to require the township board of directors to make out an estimate of the amount of money necessary to defray the township expenses during the ensuing year; the same to be attested and filed with the clerk of the county to enable the county commissioners to proceed with the levy.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 98; Dec. Dig. § 56.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—SCHOOL TAX—ESTIMATE OF EXPENDITURES.

Const. art. 10, § 19, Comp. Laws of Okl. 1909, §§ 8056, 8093, 8117, construed, and held to require the local legislative body of the school district to distribute the tax voted at the annual school meeting of the district in payment of an estimate of the expenditures authorized to be incurred by Comp. Laws of Okl. 1909, § 8056, and thus show for what purpose the tax was levied, and certify the same to the district clerk.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.*]

3. MUNICIPAL CORPORATIONS (§ 968*)—INCORPORATED TOWN TAX—LEVY—COLLECTION.

Const. art. 10, § 19, construed, and held to require board of trustees of an incorporated town, in assessing annual taxes pursuant to Comp. Laws of Okl. 1909, § 847, and in order to specify distinctly the purpose for which said tax is levied, by resolution or order, to adopt an estimate of expenditures and fix a tax levy to raise it and certify the same to the county commissioners, to be by them levied and collected as other taxes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2070-2074; Dec. Dig. § 968.*]

4. TAXATION (§ 608*)—EXCESSIVE LEVY—COLLECTION—INJUNCTION.

Where, in certain school districts, towns, and townships, a tax of a certain number of mills, for the purpose of paying their respective estimates of expenses for the ensuing year, was levied when a lesser levy would be more than sufficient to raise the amount necessary to pay said estimates, and where the lesser has been paid, and where the county treasurer and the sheriff are threatening to collect from plaintiff the balance, held, that said balance is excessive and illegal, and that it was error to refuse to restrain its collection.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

Error from District Court, Noble County; Wm. Bowles, Judge.

Suit by the St. Louis & San Francisco Railroad Company against J. B. Tate, as County Treasurer of Noble County, and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. H. E. St. Clair, Deputy Co. Atty., of Perry, for defendants in error.

TURNER, J. This is an action brought by the St. Louis & San Francisco Railroad Company, plaintiff in error, against the county treasurer and the sheriff of Noble county to enjoin the collection of certain taxes which defendants were threatening to collect from said company, assessed against its property for the fiscal year July 1, 1909, to June 30, 1910. On April 16, 1910, judgment was rendered and entered in favor of defendant, and plaintiff brings the case here. It contends that the taxes levied for that year on its property were excessive in certain school districts, towns and townships in Noble county; that the amount raised therefor exceeded the necessary expense in those taxing jurisdictions, as shown by the estimate of expenses filed by the respective officers thereof. Prior to the suit, plaintiff paid said county all that was exacted, save the sum of \$416.17. The question for us to determine is whether this sum in the aggregate is excessive and void. Taking, for example, one of each class of the taxing jurisdictions involved pursuant to the allegations of the petition, the facts disclose: "As to the town or city of Morrison, the estimate of the amount required to be raised by taxes for the fiscal year in question, as filed with the county clerk, was \$612.06. The levy made was 5 mills. The total valuation of all property in said town was \$204,046. Therefore, a five-mill levy would produce \$1,020. The valuation of the property of plaintiff in said town was \$23,397." As to this incorporated town it is claimed: " * * * That, as a part of the amount of taxes still claimed by said defendant, J. B. Tate, as such county treasurer, to be due from said plaintiff, there is the sum of \$23.40, being a levy of 1 mill for Morrison city, in the county of Noble, state of Oklahoma, which is in excess of the lawful requirements for said Morrison city for the year in question, and said levy so claimed constitutes an illegal and unjust demand, which said Morrison city had no power or authority to make." The facts further disclose that: "In Morrison township the estimate of the amount necessary to be raised by taxation was \$1,523.13. The levy was 3 mills. The total valuation of all property in the township was \$682,860. The levy would therefore raise \$2,046. The total valuation of the property of plaintiff in this township was \$127,332." As to this township it is claimed: "That as a part of the amount of taxes still claimed by said defendant, J. B. Tate, as such county treasurer, to be due from said plaintiff, there is the sum of \$63.67, being a levy of 0.5 mills for Morrison township, in the county of Noble, state of Oklahoma, which is in excess of the lawful requirements for said township for the year in question, and said levy so claimed constitutes an illegal and unjust demand, which said township had no power or authority to make."

By plaintiff it is urged that: "Given the assessed value of property upon which to levy a tax, there are certain provisions of law which are mandatory and must be com-

plied with before a valid levy can be made: (1) It must be ascertained, as required by law, what the actual need of the township, school district, or town is by the officer or officers authorized to ascertain same. It is a judicial prerequisite to a valid levy that the needs of a taxing jurisdiction be thus ascertained and furnished the body making the levy prior to the time the levy is made. (2) The levy must not exceed the constitutional or statutory limit, and should be fixed so as to produce only the necessary expense of the taxing jurisdiction for the ensuing year. The spirit of the Oklahoma law is admittedly that taxing jurisdictions should be required to make an estimate of the amount required for such expenses during the ensuing fiscal year. As regards both townships and school districts, such an estimate is specifically required by law." In other words, the plaintiff contends that the statute requires that these three classes of taxing jurisdictions shall make an estimate of the amount required annually to defray the expense of the jurisdiction, and that this was done, but that the amount raised by the levy was in excess of the estimate, and void as to that excess. On the other hand, it is contended that no such estimate is required; that those filed with the county clerk are brutum fulmen; and the levy, being within the constitutional limit, must stand. Plaintiff's contention is the law.

[1] After providing in Comp. Laws of Okl. 1909, § 7625, for making the county levy, the next section provides: "All levies for cities, towns and townships and school district taxes for the period hereinbefore indicated, shall be made in the manner provided by law on or before the second Monday in July of each year, and shall be certified to the county clerk immediately thereafter, and by him extended upon the tax rolls in the manner provided by law." After section 8726 makes it the duty of the township board "to levy all taxes for township, road and bridge purposes," and section 8730 defines township charges, section 8731 reads: "The money necessary to defray the township charges of each township shall be levied on taxable property in each township in the manner prescribed in the general revenue law for state and county purposes"—which means that such levy is proceeded with by the board of county commissioners in the manner prescribed by section 7625, supra, which is based on an estimate. But such estimates are specifically required to be filed by townships.

[2] Comp. Laws of Okl. 1909, § 8735 (Wilson's Stat. of Oklahoma 1903, § 6685), reads: "The township board of directors shall make out an account of the amount of money necessary to defray the township expenses during the next ensuing year; said amount shall be made out not more than sixty nor less than twenty days prior to the meeting of the county commissioners at which the assessment for county purposes is made. Said account shall be signed by the president of the board and attested and filed with the clerk of the county on or before the first day of said session of the county commissioners, who shall cause the same to be placed upon the tax books of said township: Provided, that said expense shall not, to-

gether with the amount levied for road purposes and special bridge tax, exceed in any one year one hundred cents on the one hundred dollars valuation." This was in effect our holding in *Nelson, Sheriff, v. Oklahoma City et al.*, 24 Okl. 617, 104 Pac. 42, on the strength of which we hold that when the statute says, as it does, that the directors of the township shall make out an account of the amount of money necessary to defray the township expense, it means that they shall make a statement or estimate of the amount required annually to defray the expense of that jurisdiction.

The same is true as to school districts. Comp. Laws of Okl. § 8058, provides: "The inhabitants qualified to vote at a school meeting lawfully assembled, shall have power" "to vote annually a tax not exceeding two per cent. on all the taxable property in the district, as the meeting shall deem sufficient for the various school purposes, and distribute the amount as the meeting shall deem proper in the payment of teachers' wages, and to build, hire, or purchase a school house and to keep it in repair and to furnish the same with necessary fuel and appendages, and to purchase or lease a site: Provided. * * * This is, in effect, providing that, when the power granted is exercised, the voter shall distribute the amount as the meeting shall deem proper in the payment of certain expenses, which means that an estimate of those expenses shall be then and there made, and a sufficient amount provided by the levy to pay them. This is required to show the purpose for which the tax was levied. After this is done, section 8093 provides: "The district clerk shall within five (5) days report to the county clerk the amount of tax levied at the annual meeting and for what purpose the same was levied. * * * Section 8117 provides: "It shall be the duty of the school district board of the various school districts of the respective counties of the state to cause to be certified by the school district clerk to the county clerk of their respective counties, on or before the twenty-fifth day of August, annually, the aggregate percentage by them levied on the real and personal property in each district, as returned on the assessment roll of the county; and the county clerk is hereby authorized and required to place the same on the tax roll of said county, in a separate column or columns, designating the purpose for which said taxes were levied. * * *"—which seems to contemplate that, after the tax has been voted and the estimate adopted by order or resolution of the board, the district clerk shall certify the same to the county clerk.

This method of showing for what purpose the tax was levied has been held sufficient in *McInerney, Sheriff, v. Huefeldt*, 116 Ky. 28, 75 S. W. 237, construing their Constitution, § 180, which is identical with ours (Const. art. 10, § 19), and provides: "Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied. * * * In the syllabus of this case it is said: "The resolution of the fiscal court of a county levying a tax of 38 cents

on the \$100, which recited that it was apportioned as follows: "Three cents for the purpose of creating a sinking fund with which to purchase a poorfarm and erect suitable building thereon, 10 cents for the maintenance and repair of the public roads and bridges of the county, and 25 cents to defray the general county expenses"—specified the purpose of the levy with sufficient distinctness." The same is true of an incorporated town, acting through its board of trustees in imposing an annual tax. Comp. Laws of Okl. 1909, § 847, reads: "The board of trustees shall have the following powers, viz.: (16) To assess annual taxes not exceeding fifty cents on the one hundred dollars valuation on all property subject by law to taxation within the town and certify the same to the county commissioners to be by them levied and collected as other taxes." But in exercising their power the spirit of the law requires that the board comply with Const. art. 10, § 19, supra, and specify distinctly, as here, by resolution or order, adopting an estimate and fixing a tax levy to raise it, the purpose for which the tax is levied. On this point what we have just said concerning the *McInerney* Case is equally applicable here. There, we repeat, it was held that a similar method adopted by the fiscal court was held to comply with the constitutional requirement, and specified the purpose of the levy with sufficient distinctness.

Morrell Refrigerator Car Co. v. Commonwealth, 128 Ky. 447, 108 S. W. 926, disposes adversely to defendant of his contention that the levy being within the constitutional limit, without more, must stand. There the court in the syllabus said: "Const. 180, provides that every resolution passed by any county, city, town, etc., levying a tax shall specify the purpose for which the tax is levied. A resolution of the trustees of a school district declared that a property tax of 50 cents on each \$100 worth of taxable property should be levied. Held, that the levy was void, as omitting to state the purpose thereof."

[3] We are therefore of opinion that, before the local legislative body of the school district, town, or township here involved can exercise the taxing power under consideration, they must comply with Const. art. 10, § 19, and the respective sections of the statute, supra, and state directly the purpose for which the tax was levied by an estimate of their respective expenses filed, and that the estimates here filed sufficiently comply therewith.

[4] As the allegations of the petition and the facts disclose that a tax of 5 mills was levied by the local legislative body for the purpose of paying the estimated expenses of the incorporated town of Morrison, when 4 mills would be more than sufficient for that purpose, which plaintiff has paid; that 5 mills was levied by the local legislative body for the purpose of paying the estimated expense of Morrison township, when 2.5 mills would have been more than sufficient for that purpose, which plaintiff has paid; that 3 mills was levied by the local legislative body for the purpose of paying the estimated expense of Watkins township, when 2.5 mills would have been more than sufficient

for that purpose, which plaintiff has paid; that a tax of 5 mills was levied by the local legislative body for the purpose of paying the estimated expenses of Warren Valley township, when 1.75 mills would be more than sufficient for that purpose, which plaintiff has paid; that a tax of 3 mills was levied by the local legislative body of school district No. 43 for the purpose of paying the estimated expenses of that district, when 2 mills would be more than sufficient for that purpose, which plaintiff has paid; that a tax of 4 mills was levied by the local legislative body of school district No. 42 for the purpose of paying the estimated expenses of that district, when 2 mills would have been more than sufficient for that purpose, which plaintiff has paid; that a tax of 3 mills was levied by the local legislative body of school district No. 15 for the purpose of paying the estimated expenses of the district, when 2 mills would have been more than sufficient for that purpose, which plaintiff has paid; and that defendants are threatening to, and will, collect the balance of the tax so levied unless enjoined—the question for us to determine is whether said balance is legally imposed and its collection can be restrained.

In *A. T. & S. F. Ry. Co. v. Wiggins*, Treasurer, 5 Okl. 477, 49 Pac. 1019, it is held that a tax levy, which is clearly in excess of the amount which the board of county commissioners is authorized to levy for a particular purpose, is illegal, and that the remedy is injunction to restrain, if threatened enforcement. The court in the syllabus said: "A petition which alleges facts to show that a tax levy of 14 mills, for the purpose of paying the salaries of county officers for the ensuing year, was made by the board of county commissioners, when 8 mills would be more than sufficient for such purpose, and that plaintiff has paid 8 mills of the tax, and that the county treasurer is threatening to collect and will issue his warrant for the collection of the balance of the tax so levied unless enjoined from so doing, states a good cause of action, and it is error to sustain a demurrer to such a petition." And in the body of the opinion (5 Okl. 483, 49 Pac. 1020): "The limit of the levy for the payment of salaries may be much more difficult of ascertainment than for these funds which have prescribed boundaries; but it as surely exists, and that may be said to be where the necessity ceases, when enough has been levied to meet the demand on the fund for the year. It is for that purpose that this public exaction is permitted; and when that has

been satisfied, the exercise of the authority is complete. The complete exercise of power furnishes its own limitation upon the authority. When what has been done is all that there has been given authority to do, a limitation is as surely presented as though stated in express language. A clear absence of authority to do an official act has always been held to render the act void"—citing *Hurt v. Hamilton*, 25 Kan. 76; *Board of County Commissioners of Osborne County v. Blake*, 25 Kan. 356; *Burlington, etc., Ry. Co. v. Saunders County*, 16 Neb. 123, 19 N. W. 698; *Libby v. Burnham*, 15 Mass. 144; *Appeal of Conners et al.*, 103 Pa. 356; and *Joyner v. School District No. 3*, 3 Cush. (Mass.) 587, where the court said: "Assuming all other proceedings to have been regular, the excess in the amount of the tax assessed, beyond the sum voted to be raised by the district, would alone vitiate the assessment, and render the tax illegal. Under the vote of the district to raise \$250, the assessors assessed the sum of \$285.01, an amount far exceeding the excess which is allowed by the statute. This is a fatal objection to the validity of the tax."

When the *Wiggins* Case was again before the court (9 Okl. 118, 59 Pac. 248), in the syllabus it was said: "By section 3, art. 2, c. 43, Sess. Laws 1895, the board of county commissioners of each county is directed to levy an assessment for each particular fund, including the county salary fund, the respective amounts of which shall be estimated by the board of county commissioners, and they are required to state the amount of revenue necessary to be raised for each fund, and to this amount must be added 25 per cent. thereof to cover delinquencies. This statute fixes a maximum limitation as to the amount of the salaries for the entire year, plus the 25 per cent. additional to cover delinquent taxes; and, where a board of county commissioners makes a levy for an amount greatly in excess of this sum, such excess is illegal, and, upon proper application, the collection thereof will be enjoined." See, also, *St. L., etc., R. R. Co. v. Thompson et al.*, 128 Pac. 685.

We are therefore of opinion that excessive levies complained of in the various taxing jurisdictions, which we have mentioned, are illegal and void, and should be enjoined, and that the lower court erred in refusing so to do. The cause is accordingly reversed and remanded, with directions so to do, and to make the same perpetual. All Justices concur.

(35 Okl. 644)

POWELL et al. v. JOHNSON-LARIMER
DRY GOODS CO. et al.(Supreme Court of Oklahoma. March 11,
1913.)*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 356*)—WRIT OF
ERROR—FILING—TIME.**

By reason of chapter 18, p. 35, Sess. Laws 1910-11, this court is without jurisdiction to entertain an appeal commenced in this court more than six months after the rendition of the judgment or final order complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

**2. APPEAL AND ERROR (§ 347*)—PERFECTING
APPEAL—TIME.**

The time within which to perfect an appeal under said statute dates from the rendition of the judgment or order appealed from, and not from the entry thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 347.*]

Error from Superior Court, Custer County;
J. W. Lawter, Judge.

Action between H. C. Powell and another and the Johnson-Larimer Dry Goods Company and others. Judgment in favor of the latter, and the former bring error. Dismissed.

M. L. Holcombe, of Clinton, for plaintiffs in error. A. J. Welch, of Clinton, for defendants in error.

HAYES, C. J. [1] A motion to dismiss this appeal upon several grounds has been filed. We need to notice only one of the grounds urged. Judgment was rendered in the court below on March 13, 1912. On the 18th day of the same month a motion for a new trial was overruled. A journal entry overruling the motion for a new trial was agreed to and filed and entered on the 27th day of the same month. The petition in error was filed in this court on the 26th day of September, 1912, more than six months from the date of the overruling of the motion for a new trial, and hence after the time allowed by chapter 18, p. 35, Sess. Laws 1910-11, which provides that "all proceedings for reversing, vacating or modifying judgments, or final orders, shall be commenced within six months from the rendition of the judgment or final order complained of."

It is well settled that this court is without jurisdiction to entertain an appeal that is not commenced within the statutory time for commencing same. Healy v. Davis, 32 Okl. 296, 122 Pac. 157; Fairbanks-Morse & Co. v. Thurmond, 31 Okl. 612, 122 Pac. 167.

[2] Nor does the fact that the entry of the order overruling the motion for a new trial did not occur until several days after the rendition of the order have the effect to extend the time in which to perfect the appeal; for the statute provides that the time shall commence to run from the "rendition of the

judgment or order complained of," and not from the entry of such judgment or order. Iliff v. Arnott, 31 Kan. 672, 3 Pac. 525; Brown v. Clark et al., 31 Kan. 521, 3 Pac. 415; 2 Cyc. 797.

The appeal is therefore dismissed. All the Justices concur.

(35 Okl. 649)

HONLEY et al. v. FIRST NAT. BANK OF
HOLDENVILLE.(Supreme Court of Oklahoma. March 11,
1913.)*(Syllabus by the Court.)***APPEAL AND ERROR (§ 356*)—TIME FOR TAK-
ING PROCEEDINGS—DISMISSAL.**

Under chapter 18, p. 35, Sess. Laws of Oklahoma 1910-11, proceedings in error in the Supreme Court must be brought within six months from the date of the rendition of the judgment or order from which the appeal is sought to be taken; and when not so brought this court is without jurisdiction, and the same will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action between Frank Honley and another and the First National Bank of Holdenville. From the judgment, Honley and another bring error. Dismissed.

D. O. Jennings, of Holdenville, and J. A. Baker, of Wewoka, for plaintiffs in error. Warren & Miller, of Holdenville, for defendant in error.

DUNN, J. This case presents error from the district court of Seminole county, and is brought for the purpose of having reviewed errors alleged to have occurred on the trial of the cause. The motion for a new trial was denied on June 24, 1912, and the petition in error was not filed in this court until January 13, 1913, or a period of more than six months from the rendition of the judgment or order of which complaint is made.

Chapter 18, Sess. Laws 1911, p. 35, provides that "all proceedings for reversing, vacating or modifying judgments, or final orders shall be commenced within six months from the rendition of the judgment or final order complained of." Under the foregoing statute the motion to dismiss the appeal filed by the defendant in error must be sustained, as the statutory period within which an appeal is allowable had expired when it was filed. See Healy v. Davis, 32 Okl. 296, 122 Pac. 157; Rolater v. Strain, 31 Okl. 58, 119 Pac. 992; Fairbanks-Morse & Co. v. Thurmond et al., 31 Okl. 612, 122 Pac. 167; Lewis v. Kidd, 127 Pac. 257; Brooks et al. v. United Mine Workers of America et al., 128 Pac. 236. The appeal is accordingly dismissed.

HAYES, C. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., absent.

(35 Okl. 584)

CARSON v. VANCE.

(Supreme Court of Oklahoma. March 11, 1913.)

*(Syllabus by the Court.)***1. BROKERS (§ 54*) — COMPENSATION — PERFORMANCE OF CONTRACT.**

A real estate agent authorized to sell land for another for a stated price for a certain compensation has earned his commission when he produces a purchaser ready, willing, and financially able to purchase the land upon the terms and conditions agreed upon.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

2. APPEAL AND ERROR (§ 889*) — REVIEW — AMENDMENTS REGARDED AS MADE.

Where, in an action for his commission on a sale of land, plaintiff declares upon an express contract to pay him 5 per cent. therefor, and evidence is introduced without objection in effect that such commission is usual and customary, *held*, that the pleading is presumed to be amended so as to conform to the proof, that an instruction submitting to the jury the question of what is a reasonable commission is proper, and that the same having been found to be 5 per cent. will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

Error from Oklahoma County Court.

Action by Asa J. Vance against Mary C. Carson. From a judgment for plaintiff defendant brings error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiff in error. Everest, Smith & Campbell, of Oklahoma City, for defendant in error.

TURNER, J. This action was commenced by Asa J. Vance, defendant in error, against Mary C. Carson, plaintiff in error, before a justice of the peace in Oklahoma City, to recover a commission on a sale of real estate. From a judgment for plaintiff defendant appealed to the county court, and from a judgment against her there to this court. The bill of particulars upon which the case was tried in the county court states: " * * * That the plaintiff was an agent and broker engaged in the selling of real estate upon commission. That on or about the 19th day of March the defendant listed with the plaintiff lots 9 and 10, block 6, in the Northwest addition to Oklahoma City, and promised and agreed to pay to the plaintiff 5 per cent. of such price as plaintiff might obtain for her. That the plaintiff procured a purchaser for the said real estate, who was then and there willing, ready, and able to purchase the same at and for the sum of \$2,000, which price and terms of sale were acceptable to and were agreed to by the said Mary C. Carson. Wherefore, the plaintiff prayed judgment for the sum of \$100."

As the evidence, in that it shows that

plaintiff, pursuant to his contract, produced a purchaser who was ready, willing, and financially able to make the purchase at the price and upon the terms fixed by defendant, reasonably tends to support the verdict, the judgment will not be disturbed. It discloses that in the early part of the year 1909 plaintiff was a resident of and engaged in the real estate business in Oklahoma City; that defendant was a resident of Omaha, Neb., and the owner of the lots described in the bill of particulars; that about that time several letters were exchanged between plaintiff and defendant with reference to a sale of the property by plaintiff for a commission; that about the middle of March she came to see plaintiff, and talked with him about the sale of the property, and listed the same with him for sale with no understanding as to his commission; that, after making several ineffectual efforts to sell, he finally succeeded in getting an offer from a Mr. Henley for \$2,000, one-half cash and the balance payable in 6 and 12 months, secured by a mortgage on the lots, with interest, which she refused to accept, insisting on \$2,000 cash. Later she again called at the office of plaintiff, at which time he called Henley up over the telephone, and after some talk with him, which plaintiff then and there repeated to defendant, the minds of Henley and defendant met, and she agreed to accept his offer of \$2,000, to be paid \$1,000 cash when the papers were signed, \$300 as soon thereafter as certain notes of the purchaser, whose discount in bank had been arranged for, could be cashed, and \$200 payable in 60 days, evidenced by Henley's notes payable to her; that, as soon as this contract was made, defendant told plaintiff to get Henley's check, and that she would meet him again there at his office at 2 o'clock that afternoon, and execute the necessary papers; that plaintiff did as she requested, and got check for \$500, and met plaintiff as appointed, whereupon she refused to be bound, stating that she had sold the property to another for \$2,000 cash, and, refusing to pay the commission, plaintiff brought this suit.

[1] The testimony further discloses that Henley was ready, willing, and financially able to buy, and would have done so, had defendant stood by her contract; that the usual and customary commission was 5 per cent., or \$100, as allowed by the jury. This case is governed by the law laid down by us in *Birch v. McNaught*, 23 Okl. 634, 101 Pac. 1049, where in the syllabus we said: "To entitle McNaught to recover, the burden of proof was upon him to show that he had found and produced a purchaser who was ready, willing, and financially able to make the purchase of the property at the price, and within the time, and upon the terms fixed by Birch." This for the reason that such was all the agent undertook to do.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Index

"The general rule is that, in order for a real estate broker to be entitled to compensation or commission, he must have performed his full duty towards his employer, and have accomplished all he undertook to do." 28 Am. & Enc. Law, 914.

[2] We are therefore of the opinion that plaintiff is entitled to recover—that is, unless there is merit in defendant's next contention, which is: "That evidence nowhere discloses that there was ever any promise or agreement upon the part of the defendant to pay a commission of 5 per cent. The plaintiff himself makes no attempt to prove that there was such an agreement. The only attempt to prove the amount of compensation to be allowed was when, after the instructions had been given to the jury, he obtained leave to reopen the case, and put Mr. Vance on the stand, who testified that the usual and customary commission for the sale of real estate during the month of March, 1909, in Oklahoma City, was 5 per cent. He did not testify that 5 per cent. was a reasonable commission, but only that it was the usual and customary commission." All of which is true, and from which defendant contends that: "Even though under the pleadings the instruction given was permissible, the evidence offered or produced by the plaintiff wholly fails to establish what a reasonable commission is." The instruction complained of reads: "Now if the plaintiff establishes this, as stated, he is entitled to recover whatever you believe is a reasonable commission for his services performed in the matter, not to exceed the amount sued for in this case, to wit, \$100." While the bill of particulars declares upon an express promise to pay plaintiff a 5 per cent. commission, and the proof fails as to that allegation, yet as the evidence, introduced without objection, proves that such a per cent. was usual and customary, the pleading is presumed amended so as to conform to the proof and to justify the instruction. *St. Paul, etc., Ins. Co. v. Griffin*, 124 Pac. 300. That being true, what we said in *Roberts v. Markham*, 26 Okl. 387, 109 Pac. 127, disposes of this point: "It is contended by plaintiff in error that there was no evidence tending to establish the amount of the agent's compensation by contract. If there was evidence tending to show an express or implied contract as to the agency, and no agreement as to the amount of compensation, there being evidence introduced without objection as to the reasonable or customary value of such compensation, such evidence would be sufficient to sustain the finding of the court."

Finding no error in the record, the judgment is affirmed. All the Justices concur, except WILLIAMS, J., absent, and not participating.

(35 Okl. 616)

BOARD OF COUNTY COM'RS OF LINCOLN COUNTY v. ROBERTSON.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 70*)—MOTION FOR JUDGMENT ON PLEADINGS—ENTRY OF JUDGMENT.

A motion for judgment on the pleadings is in effect a general demurrer, and under section 6067, Comp. Laws 1909, an order denying the same is appealable to the Supreme Court although no judgment on the issues is rendered thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-378, 386, 411; Dec. Dig. § 70.*]

2. DRAINS (§ 18*)—DISTRICT AND PROSECUTING ATTORNEYS (§ 9*)—COMMISSIONERS FOR DRAINAGE DISTRICT—EMPLOYMENT OF ATTORNEY—AUTHORITY.

A board of county commissioners acting as commissioners for a drainage district has authority to employ attorneys in order to prosecute or defend the formation of such district, and it is not part of the official duty of the county attorney of the county within which such district is located to act as such.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. § 18.* District and Prosecuting Attorneys, Cent. Dig. §§ 36, 37; Dec. Dig. § 9.*]

3. COUNTIES (§ 204*)—DRAINAGE DISTRICT—CLAIMS—ALLOWANCE—REVIEW BY COUNTY COMMISSIONERS.

The board of county commissioners as such has no authority or jurisdiction to re-audit and disallow a legal claim previously audited and allowed by such board while acting as drainage commissioners in the formation of a drainage district.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312, 316-321, 337; Dec. Dig. § 204.*]

Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Proceeding by J. B. A. Robertson for the allowance of his account as attorney for a drainage district in Lincoln County. A motion for a judgment on the pleadings by Robertson having been denied, the Board of County Commissioners brings error, and Robertson alleges cross-errors. Reversed and remanded.

Dale & Blerer, of Guthrie, and W. L. Johnson, of Chandler, for plaintiff in error. J. B. A. Robertson, of Oklahoma City, pro se.

DUNN, J. This case presents error from the district court of Lincoln county, and arises out of the employment by the board of county commissioners, acting as commissioners for the Deep Fork drainage district, located in that county, of J. B. A. Robertson, Esq., defendant in error, as its attorney, in the organization and litigation growing out of the creation of that district. The record discloses that on August 12, 1910, defendant in error presented to the said board of county commissioners so acting the following application: "To the Honorable Board of County Commissioners of Lincoln County, Okla-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

homa—Gentlemen: I hereby make application to your honorable board to be employed by you as counsel for the legal work to be done and required in the so-called Deep Fork drainage district, said employment to be made by virtue and authority of the drainage law of the state, and paid for as provided by law and the estimate of the viewers filed in the office of the county clerk; the value of said service to be fixed by you in accordance to the amount and value of services performed. Respectfully submitted, J. B. A. Robertson."

Whereupon the said board, taking action thereon, unanimously passed the following resolution: "Whereas, by virtue of the contemplated public improvement about to be made in Lincoln county, Oklahoma, commonly known as the Deep Fork drainage ditch, and the other supplementary ditches thereto, there is absolute need of legal advice and assistance in addition to the county attorney, the work entailing more labor than one man can do and perform, and this board, the county clerk, the county surveyor and engineer and other interested parties needing the constant advice on the many questions arising by reason of the improvements aforesaid; and whereas, great damage will be done to the interested parties in said drainage district if the work is not properly done and the various interests of the county and the individuals properly protected; and whereas, said service will require the entire time of at least one competent attorney in addition to the county attorney; whereas, Mr. J. B. A. Robertson has made application to this board to be employed as such attorney and he being a competent attorney and not disqualified in any way: Therefore, be it resolved by the board of county commissioners of Lincoln county, Oklahoma, in session assembled this 13th day of August, 1910, that the proposition of employment made by said J. B. A. Robertson to this board this day be and the same is hereby accepted; and he is hereby employed by the board as assistant to the county attorney for the aforesaid purpose, i. e., to advise this board, the county officers having duties to perform by virtue of said proposed Deep Fork drainage district and to appear in any and all courts and to prepare and file all necessary suits and to answer and defend any and all suits and to prepare all necessary papers and to do and perform fully all the duties pertaining to his said office as attorney in such matter in conjunction with the county attorney or by himself alone as may be necessary to facilitate the said work, and he is hereby authorized to proceed at once to the discharge of his duties as such attorney and his services shall be paid out of the special assessment (as provided by law) in said public improvement and to be in such sum as the amount and character of his said services shall be worth."

Thereafter, and on January 6, 1911, the question of the amount of fees earned and

due to the said attorney for the said employment came before the said board of drainage commissioners for action, and the following agreement or account stated was entered into between them:

"In the matter of compensation of attorney for Deep Fork drainage district No. 1, agreement as to fees due attorney: Whereas, this board by resolution, passed on the — day of —, 1910, employed J. B. A. Robertson as attorney for Deep Fork drainage district No. 1, Lincoln county; and, whereas, said attorney at once entered upon the discharge of his duties as such attorney and has in a manner satisfactory to the board and the best interests of the said district discharged all the duties of his said office; and, whereas, the term of all members of the board are about to expire and it is necessary that the compensation of the said attorney be fixed by this board before the end of the official year; and, whereas, it is within the personal knowledge of all the members of this board that said attorney has appeared in the federal court for the Western district of Oklahoma, in three railway injunction cases, and has made appearance in the Circuit Court of Appeals of the United States, at St. Louis, in the three appealed cases by the said railways, and has tried about fifty cases before this board and several in the district court, including one appealed from this board in the matter of issuance of county warrants, and has prepared copy for the issue of bonds already printed and has proof read the same, and has corresponded with bond buyers and contractors at his own expense, and has at all times since his said employment been constantly employed in and about the proposed improvement and has advised this board since his said employment at all times concerning the said improvement; and, whereas, said improvement required various trips to the capital of the state for consultation with the State Treasurer and the Commissioners of the School Land Office, as well as the Governor and members of the state Legislature relative to the payments of the assessments against the school lands embraced in said district, and said attorney has done and performed the preliminary work looking to the introduction and passage of a bill appropriating the said assessments due in money; and whereas, the said improvement being a gigantic undertaking entailing an estimated cost of over \$800,000.00 and practically all the time of the said attorney has been taken up with the said work, the same entailing great worry, effort and energy on his part: It is therefore agreed by the parties hereto that the said J. B. A. Robertson, as such attorney, shall have and receive as and for his full compensation (including retainer fee for the entire work) up to January 1, 1911, the sum of five thousand dollars to be paid out of the assessments levied against the property in said Deep Fork drainage district No. 1, Lincoln county, Oklahoma, this to be the ad-

dition to the sum of seventy-five dollars due the county for office rent from the said J. B. A. Robertson. Witness our hand this 6th day of January, 1911. George F. Clark, Chairman, R. A. Morrow.

"I certify that Judge Robertson did to the best of my knowledge perform services claimed but am not in a position to say what said services are worth. Jacob Amberg.

"I accept the above sum in full settlement up to January 1, 1911. J. B. A. Robertson, Attorney for Deep Fork Drainage District No. 1."

Subsequently the personnel of the board of county commissioners changed, and, on defendant in error filing his approved account properly verified before it for allowance, it was disallowed, and an appeal was prosecuted to the district court. On coming on for hearing before the said court, defendant in error filed a motion for judgment on the pleadings, which, after consideration by the court, was denied. On the approval of the account by the said drainage board which made the contract, a number of private citizens petitioned the county attorney to take an appeal from its action to the district court, which was attempted to be done, but which appeal in the district court was dismissed, from which action the county attorney appealed to this court, which, however, after its lodgment here, he filed motion to dismiss, thereby disposing of that branch of the case. From the action taken by the court in denying his motion for judgment on the pleadings, defendant in error filed a cross-petition in error, and insists here that the said motion should have been sustained. The cases in the district court were consolidated and are argued and briefed together in this court.

Three propositions are urged against the allowance of the judgment asked for by defendant in error: First, that an appeal does not lie from the order denying the motion for judgment on the pleadings; second, that the board of county commissioners acting as commissioners for the drainage district lacked the authority to make the employment; third, that if possessed of the authority, the amount allowed was excessive.

[1] Considering these objections in the order named, this court, following the Supreme Court of Kansas, has held, in the case of Cobb v. Wm. Kenefick Co., 23 Okl. 440, 100 Pac. 545, that a motion for judgment on the pleadings, although unknown to the Code, is a common and permissible practice and is in effect a demurrer. Section 6067, Comp. Laws 1909, provides that "the Supreme Court may also reverse, vacate or modify any of the following orders of the district court or a judge thereof: First * * * which * * * sustains or overrules a demurrer." And that such order is appealable although no final judgment is rendered thereon, see

Burdick New Trials and Appeals, § 163; United States Express Co. v. State, 125 Pac. 449; Bartholomew v. Guthrie, 71 Kan. 705, 81 Pac. 491. In the case last cited it is held on this identical section of the Kansas statute that error would lie to the Supreme Court from a decision of the district court which sustained or overruled a demurrer, even when no judgment on the issues was rendered. Under these circumstances, the motion of plaintiff in error to dismiss the appeal of defendant in error must fail.

[2] The insistence that it was the official duty of the county attorney of the county to serve as the attorney of the board of drainage commissioners arises from a misconception of both the scope of his duties as laid down and provided for by the statute and also from the character and nature of the said board. Under the drainage act and its amendments (chapter 32 of Comp. Laws 1909, and chapter 79, Sess. Laws 1910), a drainage district is a separate, independent, and distinct entity from the county itself. It is not brought into existence or created for the purpose of either county, township, or any other species of municipal government. It presents merely a voluntary or involuntary association of a number of people whose lands lie within a certain drainage belt under which certain improvements are made which increase the utility and value of the lands therein, and which is recognized and controlled by the statutes of the state for the reason that it conduces to the general welfare of the people of the county or of the state. The people primarily interested in the project are always those whose lands are benefited or damaged and who either pay for the benefits or receive pay for the damages. The statute fixing the duties of the county attorney relates in no particular whatsoever to such a project as this, and he is neither elected nor paid by the county to devote his time and attention to prosecuting or defending the necessary legal details essential to the proper formation of such district. Moreover, in the present case the agreement entered into with defendant in error and the board of drainage commissioners shows that the services contemplated and required to be performed were not only in the courts held within Lincoln county, but that his duties carried him to the capital of the state, to the federal courts within the state, and the federal Circuit Court at St. Louis, all of which employment was manifestly beyond the official duty of the county attorney to perform. Under these circumstances the employment of defendant in error by the board of county commissioners acting as commissioners for the drainage district was in our judgment a valid and legal charge against the said district.

[3] We next come to the proposition that the amount of the fee allowed by the drain-

age commissioners was in excess of the value of the services, and that the board of county commissioners acting as the commissioners for the county, or the district court on the appeal from the disallowance of the agreed price when presented to the said county commissioners, could revise and had jurisdiction and authority to determine the amount thereof. This contention is likewise in our judgment predicated upon a failure to properly understand the nature of the board of drainage commissioners, and grows out of the fact that, under the provisions of the drainage act of Oklahoma, it happens that the auditing board of the county, to wit, the board of county commissioners, is made the commissioners of the drainage district. Acts similar to the one here under construction are contained in a great many of the states, and different bodies are selected as commissioners to organize drainage districts. For instance, in North Dakota, three freeholders are selected by the board of county commissioners to act as the board of drainage commissioners. Rev. Codes of North Dakota 1895, § 1445. In Illinois, under different proceedings, the commissioners of highway of each township are drainage commissioners. Rev. Stats. of Illinois 1909, c. 43, § 75. And under section 129, Id., the commissioners are elected by the landowners within the district. In Missouri a board of supervisors are likewise elected. 2 Rev. Stats. Missouri 1909, § 5507. In Indiana the drainage commissioner is appointed by the board of county commissioners. Rev. Stats. of Indiana 1897, § 5844. In Wisconsin, after the organization of the district by the court in which the petition is filed, the court appoints three competent persons to act as commissioners. Wisconsin Stats. 1911, § 1379. In California, the board of supervisors of the county wherein the district lies appoints three persons to serve as trustees. 5 Gen. Laws of California, p. 370. In Nebraska, after the organization of the district by the court on petition filed, the owners of the real estate therein elect a board of five supervisors to conduct its affairs. Cobbey's Ann. Stats. of Nebraska 1911, § 5565.

The duties of all of these different boards are virtually the same as the duties of the board of county commissioners acting as such drainage commissioners under the Oklahoma drainage act. They are set forth in section 3045, Comp. Laws 1909, as follows: "Said commissioners shall have exclusive jurisdiction to hear and determine all contests and objections to the creation of such district and all matters pertaining to the same, and said commissioners shall have exclusive jurisdiction in all subsequent proceedings of the district when organized except as hereinafter provided, and may adjourn hearing on any matter connected therewith from day to day, and all judgments rendered by said commis-

sioners in relation thereto shall be final, except as herein otherwise provided. The term 'commissioner' as used in this act, shall mean the board of county commissioners." Section 3054, Id., as amended by section 5, c. 79, Sess. Laws 1910, provides for the method of payment of the costs incident to the organization of the district, and reads as follows: "No assessment shall be made for the benefit to any land upon any other principle than that of such benefits derived, and all the assessments shall be made on the basis of benefits accorded by reason of the construction of the improvement and of giving an outlet for drainage, and the various tracts included in the whole acreage benefited, in proportion to the benefits to each tract accorded. In estimating damages the viewers and commissioners shall take into consideration the land and drains appropriated and the direction of the drain across the land. The estimate for location expenses shall include the amount of costs reported by the viewers, and reasonable provision for properly inspecting and receiving the work, and all fees of officers, as herein provided, including making of record and executing all orders and processes of the commissioners, together with the fees of clerks, engineers and other experts, and the fees for all publications required by this act."

It is the fact that in Oklahoma the board of county commissioners have been made the drainage commissioners which has produced the confusion. If some other body had been selected to perform the duties of the drainage commissioners as in the states above referred to, the agreed or stated account on coming to the board of county commissioners for allowance would have and should have been without question allowed, and warrant issued therefor. With the amount of the bill presented, the board of county commissioners as such had absolutely no jurisdiction and no authority. Its sole duty was to ascertain whether it has been properly allowed by the drainage commissioners and was properly presented to it, and, when it had done this, the balance of its duty was purely ministerial, and defendant in error would have been entitled to a writ of mandamus compelling its auditing and allowance. The claim presented did not create an indebtedness of the county, but was an indebtedness incurred by the drainage district and was due and owing by it; the county temporarily advancing the necessary funds to enable the parties interested in such district to create the same. Section 3064, Comp. Laws 1909. This same question appears to have arisen both in Illinois and North Dakota, whose acts are in many particulars similar to the one in this state. The Supreme Court of Illinois, in the case of *Vandalia Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715, disposing of this proposition, said: "A fair construction of this act requires that in its practical enforcement such incidental expens-

es as attorneys', engineers', surveyors', and commissioners' fees must be incurred in the necessary preliminary work before the assessment is spread or levied, but must be included in the original estimate and paid out of the original assessment."

The Supreme Court of North Dakota, in the case of Erickson et al. v. Cass County et al., 11 N. D. 494, 92 N. W. 841, said: "Neither do we find that charges for unauthorized items were included in the cost of the drain, as alleged by appellants. The items objected to are bridges, attorneys' fees, interest, incidental expenses, publishing notices, clerks' fees, office rent, furniture, printing, books, and supplies. It is patent that a work of the magnitude of this ditch might very properly involve expenditures such as are objected to. It was plainly the intention of the Legislature to provide for the allowance and inclusion of all items of expense which would fairly contribute to the establishment, construction, and maintenance of drains—a course which is absolutely necessary under any practical drainage law. Drains cannot be constructed unless funds are provided to pay such expenses as properly enter into their construction, and no other source exists for obtaining funds than assessments of benefits. Section 1466, Rev. Codes, provides that the cost of the drain shall include all the expense of locating and establishing the same, including the cost of the right of way, the drain commissioners' fees, cost of survey, cost of building bridges and culverts, interest on warrants issued or to be issued, amount of the contracts, and 'all other expenses.' This section is broad enough to include all of the items to which appellants object, and all of which we find contributed to the establishment and construction of the drain, and were therefore legitimate charges to be contracted for and allowed by the board in the exercise of a sound and reasonable discretion. Whether the sums allowed in each instance were correct, we need not inquire. They met the approval of the tribunal created by law to pass upon them. The board acted within its jurisdiction in making the allowances, and there is no claim that they acted fraudulently. That the items were proper expenditures cannot be doubted. See *Butler v. City of Toledo*, 5 Ohio St. 225. It hardly need be said that the authority of drainage boards is not arbitrary or unlimited, and that landowners and others interested are not remediless against usurpations of jurisdiction. They may invoke the same remedies against attempted usurpations of authority as are available as against other inferior boards acting in excess of their jurisdiction."

There is no claim in the case at bar that there was any irregularity or fraud entering into the presentation or allowance of the claim here in question. Under these circum-

stances, the motion for judgment on the pleadings should have been sustained, and the case is remanded to the district court with authority to proceed as provided for in section 1694, Comp. Laws 1909, to render judgment or to return the claim to the board with an order to proceed, requiring it to allow the claim in accordance with law.

HAYES, O. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., not participating.

(35 Okl. 733)

In re BOARD OF EDUCATION OF CITY OF PERRY.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 675*)—RES JUDICATA—PARTIES—INTERVENTION.

The owner of several judgments against a board of education is not concluded by a judgment against their validity in a suit by the board against its treasurer to mandamus him to pay certain judgments, in which said suit the dormancy of the judgments sought to be concluded was directly involved, although the owner of said judgments employed counsel in that suit, and urged their validity, and assumed the conduct of and actually engaged in said suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. § 675.*]

2. LIMITATION OF ACTIONS (§ 15*)—AGREEMENT TO WAIVE—ESTOPPEL.

Where public property of a board of education cannot be seized on execution, and the board enters into a valid agreement with judgment creditors to apply the judgment fund to judgments in order of entry and complies therewith, it cannot, after the expiration of the statutory period when a judgment becomes dormant for failure to issue execution, plead the statute of limitations as a bar to those judgments not yet reached for payment under the agreement. The board of education is estopped both on the contract and on the ground of equitable estoppel.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 62-65; Dec. Dig. § 15.*]

Error from District Court, Noble County; Wm. Bowles, Judge.

Proceeding by the Board of Education of the City of Perry to fund certain judgment indebtedness of the board and to determine the validity of certain of the judgments, in which J. B. Beadles and others, owners of certain of the judgments, intervened. From a decree declaring the judgments void, and not a legal indebtedness against the board, Beadles brings error. Reversed and remanded.

Devereux & Hildreth and Dale, Bierer & Hegler, all of Guthrie, for plaintiff in error. H. E. St. Clair and H. A. Johnson, both of Perry, for defendant in error.

TURNER, J. On June 8, 1910, "the board of education of the city of Perry of the state

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Oklahoma," a corporation, commenced proceedings in the district court of Noble county, the object of which was to fund certain judgments outstanding against the board by an issue of negotiable coupon bonds pursuant to section 25 of the Schedule to the Constitution, and an act entitled "An act to enable counties, municipal corporations and boards of education of any city or school districts to refund their indebtedness, approved March 11, 1905." Laws 1905, c. 9, art. 3. The petition set forth a list of its outstanding judgment indebtedness accrued prior to November 16, 1907, marked "Exhibit A," which is admitted to be valid; also a list of judgments marked "Exhibit B," rendered and entered against the board prior to that time, which it alleged were dormant, and constituted no part of the judgment indebtedness of the board, for the reason that the same had been rendered and entered more than six years prior to said date and had not been revived, and for the further reason that no process had issued to enforce the payment of the same.

The petition, among other things, sought to have the validity of said judgment indebtedness determined, and alleged that an arrangement had been made with all valid judgment holders for funding the same at par and accrued interest with the funding bonds of the school district; that, by prior resolution of said board, said bonds had been duly authorized and directed to issue upon the adjudication and approval of the court; that the form of bonds and interest coupons had been prescribed, and due provision made for the necessary tax to pay said interest when due, and to provide a sinking fund to pay said bonds at maturity, and prayed that the amount of the valid judgment indebtedness outstanding against said board be determined by the court, and that the board be ordered to issue, etc. Thereafter came J. B. Beadles, L. N. Beadles, partners as J. B. Beadles & Sons, and, in effect, alleged themselves to be the owners and assignees of 16 of the 26 judgments set forth in Exhibit B, and by answer put in issue the validity of said judgments, and alleged that for certain reasons the board was estopped to assert their dormancy. Like answers were filed by the owners of the remaining judgments set forth in said exhibit. After reply, in effect, that said Beadles were estopped to assert the validity of said judgments, and that the other judgments were barred by the statute of limitations, there was trial to the court and judgment for the board declaring said judgments and each of them "void and dormant, and no legal indebtedness against said board." The Beadles alone bring the case here.

The sole question involved is the dormancy of their judgments. The record discloses that, being pressed by judgment creditors, the board met July 14, 1899, when, as shown

by its minutes: "The matter of paying off judgments pro rata and bonding was referred to finance committee, and they to confer with Attorney Quick and report at next meeting." On June 4, 1900, it was: "Moved that Treasurer Todd is hereby requested to pay out money pro rata—money now held by him—pro rata, on judgments against the district. Motion received no second. On motion the matter was referred to finance committee and Attorney Quick." On July 6, 1900: "On motion, Treasurer Todd was requested to hold the money now in his hands belonging to the district as a judgment fund until further directed by the board. On motion the attorney for the board was instructed to defend all cases where there is any doubt as to the legality of their claim." And on November 5, 1900: "Letter read by secretary from R. J. Edwards, of Oklahoma City, this territory, regarding the payment of judgment against this district in order of their rendition. Said Edwards writes both as an attorney and as holder of about fifteen thousand dollars of the judgment against the board. Mr. Beadles holding five or six thousand dollars represents with him about four-fifths of the judgment indebtedness. They agree upon the plan. Plan proposed by letter discussed. It being perfectly fair and reasonable it was moved and seconded that this board acquaint Mr. Todd, treasurer of this school district, with their desire to proceed after the plan already mentioned, namely, paying judgment indebtedness in the order of their rendition, as the only practical way to wipe out the total debt in the near future. Motion carried." Thereafter Mr. Todd wrote thus: "To the Judgment Creditors of the School District 52, Board of Education of the City of Perry, Oklahoma: I, as treasurer, through the advice and consent of the board of education, have formulated the following plan to liquidate the judgment indebtedness of said school district. All creditors who are conversant with the facts know that on October 3rd, 1894, the school district bonded for \$18,000.00, having at that time a floating warrant indebtedness of \$10,000.00, making a total indebtedness of \$28,000.00, the limit of indebtedness that could be legally contracted under the United States Statutes, limiting the amount of debt which municipal corporations can create to four per cent. of the assessed valuation. The assessed value at that time being in round numbers \$700,000.00, four per cent. making a possible legal indebtedness of \$28,000. Shortly after this debt was created it was decided that lots in the city of Perry not deeded by the town site board to the individuals were not subject to taxation, this item with the subsequent depreciation of the value of city property, reduced the valuation to below \$400,000.00, which has since steadily increased until now we have a valuation approximately \$450,000.00. In the meantime school

buildings have been erected costing far in excess of the amount raised by bonds, buildings more expensive than the original estimates. This with a yearly deficit of funds in the early days to meet the current expense run up a warrant indebtedness of \$29,000.00, of this amount about \$19,000.00 has been put into judgments. At this point the school board thought it advisable to allow no more judgments, hence informed the warrant holders that in the future the 4 per cent. limit would be pleaded, and no judgments have been taken for about one year. Eighteen months ago a peremptory mandamus was asked by one judgment creditor in the Supreme Court, requesting an order (2) to compel a levy to be made sufficient to pay judgments, which was refused by the Supreme Court of the territory. In consideration of all these facts we are placed in the position, as public servants, to decide between standing on the technical legal rights and refusing payment in total or recognizing our moral obligations to pay the debt. Public sentiment is divided with a predominant disposition to finally pay out if it can be done without oppressing the taxpayer. It is a controverted legal point as to whether payment on the judgments shall be made in order of rendition or pro rata and no party at interest has ever been willing to take the initiatory steps to determine the issue. The payment pro rata involves an endless complication of court records in entering the pro rata payments which under the present laws and valuations could not exceed six or seven per cent. per annum, not as much annually as the accruing interest—many of the judgments are small. In view of these facts, we have thought that if a written waiver of the right (if such right exists) of each judgment creditor who may be affected to payment pro rata be signed by each creditor, we might then see our way clear to finally liquidate the whole judgment indebtedness; and if such waiver be signed by each creditor, we as a board pledge our official and personal influence to carry out the above plan and ask that the inclosed waiver be signed and mailed to us by return mail. Geo. Todd." To which each judgment creditor, save one, responded by signing said waiver, which reads: "I, the undersigned judgment creditor, holding judgment of record against the board of education of the city of Perry, Noble county, Oklahoma territory, hereby ask that the school treasurer pay all judgments against the board of education of the city of Perry, in order of rendition, hereby waiving right (if such right exists), to payment pro rata and this waiver shall apply to grantees and assigns; said judgment was rendered ———, 18——, for the sum of ——— dollars."

The record further discloses that pursuant to this arrangement, which was made with all judgment holders save one, the board of education paid all judgments in

the order of their rendition down to judgment No. 29, belonging to J. B. Beadles after which, in the fall of 1905, it stopped payment, and refused to pay any more, including the judgments in question. It is insisted by the board, as to the 16 judgments set forth in Exhibit B as belonging to said Beadles, that they are estopped to assert their validity by reason of the record in the case of Chas. L. Wenner v. Board of Education of the City of Perry, Okl., 25 Okl. 515, 106 Pac. 821. As these 16 judgments are conceded to be the same judgments passed on in that case, where they were held to be dormant and to constitute no valid indebtedness against the district, it seems that the point is well taken; that is, if the Beadles are bound by the judgment in that case, and if all that was there decided, or might have been, is *res judicata* as to them. That was a suit in mandamus brought by said board against Charles L. Wenner, treasurer of the board, to compel him to pay these and other judgments out of a judgment fund in his hands. The question was, as here, whether these judgments were dormant because of section 4635 of Wilson's Statutes of Oklahoma (Snyder's Statutes of Okl. 1909, § 5669), which reads: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this territory, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." And that, too, notwithstanding section 6196 of Wilson's Statutes of Oklahoma (Snyder's Stats. of Oklahoma 1909, § 8120), which reads: "Whenever any final judgment shall be obtained against any school district, the district board shall levy a tax on all taxable property in the district for the payment thereof; such taxes shall be collected as other school district taxes, but no execution shall issue on such judgment against the school district; and in case the district board neglect to levy a tax as aforesaid, for the space of thirty days after such judgment shall become final, or in case the proper officer shall neglect to collect the tax levied within the time and in the manner provided by law, then the judgment creditor of the district may have and recover a judgment against the officer or officers or his or their sureties, so in default, for the costs, upon which execution shall issue." And such they were held to be by the court, which in the syllabus said: "Section 437, art. 20, c. 66 (section 4635), Wilson's Rev. & Ann. St. Oklahoma 1903, providing that a judgment shall become dormant if execution be not sued out thereon within five years, is applicable to judgment against school districts notwithstanding section 68, art. 8, c. 77 (section

6196), same statutes, provided that the district board shall levy a tax for the payment thereof, and no execution shall issue thereon; this for the purpose that a writ of mandamus to enforce payment in such case is the legal equivalent to the statutory writ of execution."

[1] Whether this opinion is right or wrong we need not say, as nothing there decided is res adjudicata as to the Beadles, for the reason that they were not parties or privies to that suit, and hence are not bound thereby, although it appears that they employed counsel to there urge the validity of these same judgments, and assumed the conduct of and actively engaged in said suit. In *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129, the court, quoting from *Greenleaf on Evidence*, §§ 522, 523, said: "Justice requires," he says, "that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between the same parties, should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he is a stranger, but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be bound. Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings." "The ground, therefore, upon which persons standing in his relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and whenever this identity is found to exist all are alike concluded." *Litchfield v. Goodnow*, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199, was a suit to recover taxes paid under the circumstances set forth in *Stryker v. Goodnow*, 123 U. S. at page 527, 8 Sup. Ct. 203, 31 L. Ed. 194. The suit was brought by Goodnow, assignee of the Iowa Homestead Company, in his lifetime, against Mrs. Litchfield in her lifetime, to recover the amount of certain taxes for certain years paid by said company on certain lands on the Des Moines river owned by her by and through conveyances from another company. As a defense to the action, the prior adjudication in a certain case was pleaded in bar, but the court said: "The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had.

At the time of the commencement of the suit, she was the owner of her lands, and they were described in the bill, but neither she nor any one who represented her title was named as a defendant. She interested herself in securing a favorable decision of the question involved as far as they were applicable to her own interests, and paid part of the expense; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation. *Greenleaf*, in his treatise on the Law of Evidence, Vol. 1, § 523, states the rule applicable to this class thus: "Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term "privity" denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and, whenever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood or in law, are estopped from litigating that which is conclusive on him with whom they are in privity." The correctness of this statement has been often affirmed by this court (*Lovejoy v. Murray*, 3 Wall. 1, 19 [18 L. Ed. 129]; *Robbins v. Chicago City*, 4 Wall. 657, 673 [18 L. Ed. 427]), and the principle has been recognized in many cases. Indeed, it is elementary. *Hale v. Finch*, 104 U. S. 261 [26 L. Ed. 732]; *Butterfield v. Smith*, 101 U. S. 570 [25 L. Ed. 868]. In the condition of parties to the record during the whole course of the litigation between the Homestead Company and

those who were named as defendants, Mrs. Litchfield had no right to make a defense in her own name, neither could she control the proceedings, nor appeal from the decree. She could not in her own right adduce testimony or cross-examine witnesses. Neither was she identified in interest with any one who was a party. She owned her lands; the parties to the suit owned theirs; her rights were all separate and distinct from the rest, and there was no mutual or successive relationship between her and the other owners. She was neither a party to the suit, nor in privity with those who were parties; consequently, she was in law a stranger to the proceeding, and in no way bound thereby. As she was not bound, the Homestead Company and its assigns were not. Estoppels, to be good, must be mutual"—and affirmed the judgment of the trial court.

State ex. rel. Kane v. Johnson, Comptroller (Mo.) 25 S. W. 855, was a suit by relator as chief of the city fire department to mandamus respondent, the comptroller of the city, to countersign his salary warrant drawn upon the city treasury. Among other defenses interposed was a judgment in a suit by a taxpayer to restrain payment of the salary, in which Kane was not a party, though he employed counsel to defend the suit. In that suit Gilmer, the auditor of the city, as well as respondent, were defendants who by the judgment and decree rendered and entered were perpetually enjoined and restrained from ever signing or countersigning any warrant of similar character. The court said: "Is he estopped by the suit of Ransom against respondent and Gilmer? The rule on this subject is that a matter once adjudicated by a court of competent jurisdiction may be invoked as an estoppel in any collateral suit in any court of law or equity, or in admiralty, when the same parties or their personal representatives, or one of the parties and the privy or privies of the other, allege anything contradictory to it; and those who assume a right to control or actively participate in the trial or its management, though not formal parties, will be concluded." Henry v. Woods, 77 Mo. 277; Stoddard v. Thompson, 31 Iowa, 80; Strong v. Insurance Co., 62 Mo. 289 [21 Am. Rep. 417]; Wood v. Ensel, 63 Mo. 193; Landis v. Hamilton, 77 Mo. 554; Conger v. Chilcote, 42 Iowa, 18. In order to make an estoppel, however, the action must be between the same parties as the former suit or their privies. Parties are understood to be 'all persons having the right to control the proceedings, to make defense, to adduce or examine witnesses, and to appeal from the decision, if an appeal lies.' 1 Greenl. Ev. § 535. 'Personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of facts,' are privies. Id. § 189. The relator was not a party to

the suit by Ransom against the respondent and Gilmer, nor could he have appealed from the judgment rendered therein. The mere fact that he employed attorneys to defend that suit, who participated in its trial and the examination of witnesses, ought not to estop him from now asserting his rights, as he claims nothing by, through, or under them. While relator might have become a party defendant to that suit had he felt so inclined, he was under no obligations to do so. If the purpose of the suit was to pass upon his rights, he should have been made a party. Hope v. Mayor, etc., 72 Ga. 246. Sam is v. King, 40 Conn. 298, was a suit by injunction to restrain the payment of salary to policemen not legally appointed, brought against the clerk, auditor, and treasurer of the city, but the city itself was not made a party defendant; and it was held that it was not enough that the city assumed the defense of the case through its attorney; that the city was a necessary party; and that, so long as it did not appear upon the record, no decree could be passed against it."

[2] We are therefore of opinion that there is nothing in the Wenner Case to estop the plaintiff in this. Adhering, then, to the Wenner Case, in which we held that these judgments would otherwise be dormant, on account of the bar of the statute, but for the arrangement, supra, between the board and the others thereof, relied on in support of the Beadles plea of estoppel, can it be said in view of this arrangement, whereby these judgment creditors were induced to forego the right to enforce their collection by taking such steps as the law permitted, that the board has any right thereunder or in equity and good conscience to successfully interpose the bar of the statute invoked in that case? We say no. Rather will we hold that said arrangement is nothing less, in effect, than a contract between the parties in interest to stay proceedings pending their payment, and of itself and in equity and good conscience is sufficient to preclude the board from asserting the bar of the statute. That the effect of this, or a similar arrangement, pleaded under like circumstances, was to work an estoppel against a municipality was held by the Supreme Court of the United States in Beadles v. Smyser, Mayor, etc., 209 U. S. 393, 28 Sup. Ct. 522, 52 L. Ed. 849, on error to the Supreme Court of Oklahoma Territory reported in 17 Okl. 162, 87 Pac. 292, which was followed in the Wenner Case, which followed Beadles v. Fry, 15 Okl. 428, 82 Pac. 1041, 2 L. R. A. (N. S.) 855. In reversing Beadles v. Smyser, Mayor, etc., 17 Okl. 162, 87 Pac. 292, the court said: "Accepting the decision of the Supreme Court of Oklahoma, rendered in 15 Oklahoma, supra, construing the statute so as to permit the issuance of execution against the municipality, with the right to levy upon the private property of the corporation if it has any, could the city take advantage of

the failure to issue execution under the circumstances shown in this case? * * *

That the principles of right and justice, upon which the doctrine of estoppel in pais rests, are applicable to municipal corporations, is recognized by text-writers and in well-considered cases. In 1 Dillon on Municipal Corporations (4th Ed.), in a note to section 417, that learned author says: 'Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officer had done, will work an estoppel.' And this case does not rest on the ground of equitable estoppel alone. The manner of liquidation of these judgments was the subject of express contract between the parties. In the present case, by the action of the city council, the judgment creditors were so placed that during the time, at least while the city council were carrying out the arrangement of December 3, 1901, in good faith, they could not consistently, with fair dealing and the terms of the contract on their part, issue an execution to seize the property of the municipality; had they undertaken to do so, a court of equity would have promptly restrained such proceedings. It is averred, and not denied, that up until the year 1905 the city council made a levy each year for the largest amount which the statute permitted, to create a judgment fund out of which to pay, and out of which was regularly paid, the outstanding judgments against the city, and that these payments continued until the plaintiff's judgments were reached, which were next in order. While thus acting to the limit to which the law permitted, and in good faith carrying out the arrangement between the parties, it is perfectly apparent that the plaintiff was not in a position to seize by execution any property of the municipality. * * *

As we said, the principles of natural justice and fair dealing are alike applicable to municipal corporations as to individuals, and to permit the city to escape the payment of judgments, whose validity is not otherwise questioned, for failure to issue execution or sue out a writ of mandamus during the time when the action of the city officers was such as to prevent the exercise of the right, would be to permit the action of the representatives of the city, who have had the benefit of the contract during the time both parties were observing its obligations, to work a gross injustice upon the creditors holding valid judgments against the municipality. * * *

It is not argued at the bar in this case that the arrangement with the judgment creditors was void for want of power in the municipality to make the arrangement of December, 1901, and we fail to see any valid reason why the municipality might not enter into this arrangement. It was permitted by law to make an annual levy of five mills

on the dollar. I Wilson's Statutes 1903, § 468. If the judgment creditors and the municipality saw fit to make an arrangement by which the amount of this annual levy might be distributed by the consent of the creditors among them in accordance with the priority of their judgments we perceive no reason why this may not be legally done. The effect of this arrangement was to prevent the judgment creditor from taking such steps as the law permitted to collect his judgment, and upon principles of common right and justice it would not do to permit the city to carry out such an arrangement during nearly all the five years' period, and then meet its obligation by a plea of the statute of limitations upon the ground that the judgments had become dormant, while both parties were recognizing their binding obligation and doing all that the law permitted, to effect their satisfaction, and had entered into a contract which prevented the judgment creditors from taking steps to avail themselves of their right to collect their judgments by execution or by writ of mandamus."

We are therefor of opinion that the board is estopped to assert the bar of the statute and the consequent dormancy of the judgments set forth in Exhibit B as belonging to the Beades, that the same constitute valid and subsisting outstanding indebtedness against the board, and should be funded in the same manner as those set forth in Exhibit A, and that this cause should be reversed and remanded, to be proceeded with according to this opinion. It is so ordered. All the Justices concur, except WILLIAMS, J., absent and not participating.

(35 Okl. 677)

BEATY v. STATE ex rel. LEE.

(Supreme Court of Oklahoma. March 25, 1913. Rehearing Denied.)

(Syllabus by the Court.)

1. CLERKS OF COURTS (§ 1*)—"COUNTY OFFICE."

The office of clerk of the superior court is a county office.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1663-1663.]

2. CLERKS OF COURTS (§ 7*)—TERM OF OFFICE—REPEAL OF STATUTE.

Section 8 of the act of March 6, 1909 (sections 1985-1976, Comp. Laws 1909; chapter 14, art. 7, Sess. Laws 1909), in so far as it affects the term of the clerk of the superior court, is repealed by section 19 of the act of March 19, 1910 (chapter 69, Sess. Laws 1910 [Ex. Sess.] pp. 129, 143).

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 21-25; Dec. Dig. § 7.*]

3. CLERKS OF COURTS (§ 3*)—ELECTION.

The laws in force in this state at the time of the holding of the election for county officers in November, 1912, provided for the election of the clerk of the superior court.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by the State of Oklahoma, on the relation of Harold Lee, against James Beaty. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn, Chambers, Lowe & Richardson, Harris & Nowlin, and Wm. H. Zwick, all of Oklahoma City, for plaintiff in error. G. A. Paul and Giddings & Giddings, all of Oklahoma City, for defendant in error.

WILLIAMS, J. The following questions are presented for our consideration:

(1) Is the office of the clerk of the superior court a county office?

(2) Was section 8 of the act of March 6, 1909, creating and establishing a county superior court for each county of the state having a population of 30,000 and a city therein of 8,000, and fixing the jurisdiction of said courts, for fixing the procedure, providing for judges of said courts, for the election, appointment, term of office, and compensation of said judges, providing for a clerk and stenographer, fixing compensation of the same, and declaring an emergency (chapter 24, art. 4, Comp. Laws 1909; chapter 14, art. 7, Sess. Laws 1909), in so far as it fixes the term of the clerk of the superior court, repealed by section 19 of the act of March 19, 1910 (chapter 69, Sess. Laws, pp. 129, 143), entitled "An act relating to certain county and district officers"?

(3) Did the law provide for the election of a clerk of the superior court at the general election held in November, 1912?

1. Section 8 of the act of March 6, 1909, creating superior courts (section 1972, Comp. Laws 1909), provides: "The judge of each of said courts shall appoint a clerk who shall serve until the second Monday in January, 1911, or until his successor is elected and qualified; and such clerk shall be elected at every similar election every fourth year thereafter. The duties of such clerk shall be the same relative to the said court as are provided for the clerk of the district court, and he shall give bond for the faithful performance of his duties as required of the clerk of the district court. The clerk of said court under and by direction of the judge thereof shall procure a seal for said court, which shall have engraved thereon the words 'Superior Court of _____ County, Oklahoma,' (naming county) and said clerk shall receive the same fees and be paid in the same manner as provided for the clerk of the district court." By this section it is intended that the clerk of said court was to be elected at the general election for county officers to be held in 1910. The act of March 19, 1910 (chapter 69, Sess. Laws 1910, pp. 129, 143), relates to certain county and district officers. Section 1 prescribes the fees to be charged by the clerk of the superior, county, and district courts; sections 2, 3, 4,

5, and 6, respectively, the fees to be charged by the county judge, register of deeds, county clerk, county treasurer, and sheriff. Section 7 of said act provides that the county shall in no case be responsible for any fees, salaries, or expenses for any county or subdivision officer, unless expressly allowed by law. Section 9 also provides that at each monthly meeting of the board of county commissioners the clerk of the district court, the clerk of the superior court, the clerk of the county court, the county clerk, and the register of deeds shall each file a verified report of the work of the preceding month showing the total fees charged in each case, and the total fees collected in each case, and shall pay all of such fees into the county treasury, and file duplicate receipts therefor with the county clerk. Section 10 provides for the rendering of an itemized and verified report of the work of the sheriff for the preceding month, etc. Section 11 permits the county commissioners in their discretion to allow a jailer. Section 12 relates to the appointment of deputy sheriffs. Section 13 prescribes the fees to be taxed and collected in all criminal cases to be known as county attorney's fees, which shall be paid into the county treasury. Section 28 fixes the salary of the judge of the superior court; section 29 the salary of the county judge and county attorney; section 30 that of the clerk of the district courts, superior courts, county clerk, county treasurer, and register of deeds. Section 36 prescribes the fees to be charged by justices of the peace, and section 38 the fees to be charged by notaries and section 39 that for bailiffs. The superior court, though its jurisdiction is confined to the limits of the county, is a part of the judicial department of the state, with practically the same functions as that of the district court, and the judge of said court has for that reason been held not to be a county officer. *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okl. 275, 114 Pac. 333; *State ex rel. West, Atty. Gen., v. Breckinridge*, 126 Pac. 806.

Jefferson v. Toomer, 28 Okl. 658, 115 Pac. 793, was disposed of on the assumption that the clerk of the superior court was a county officer, as counsel for all parties in their briefs so treated it. The fact that the act creating superior courts provided for the judges of said courts to be elected at the time the county officers are elected did not of itself have the effect of making such office a county office, especially in view of the character of such office. The clerk of the district court, a court of equal rank, was specifically made by law a county officer. Said clerk and the clerk of the superior court in said act of March 19, 1910, are treated on a parity and in the same manner by the Legislature.

[1] It is obvious that the Legislature has not only treated the clerk of the superior court as a county officer, but intended that

it should be such. There being nothing in the character of his position that would overcome such legislative intention manifested by the history of this legislation, we conclude that the clerk of the superior court is a county officer. Section 19 of the act of March 19, 1910, provides that: "All county, township and district officers elected at the general election in the year 1910 enter upon the duties of their office on the second Monday in January, 1911, and shall hold until the first Monday, in January, 1913, and until their successors are elected and qualified; and thereafter the terms of all such officers shall be for two years and until their successors are elected and qualified. Provided that the county treasurer and superintendent of public instruction shall hold office until the first Monday in July, 1913, and thereafter their terms of office shall be for two years, and until their successors are elected and qualified." The terms of all county and township officers, including those elected at the time of the adoption of the Constitution, as well as those appointed under the provision of the laws extended in force in the state at the time of its erection, expired on the second Monday in January, 1911, and thereafter the terms of county officers and township officers were to be as provided by the laws of the territory of Oklahoma for like named officers, except as otherwise provided in the Constitution. Section 18, Schedule to the Constitution; section 382, Williams' Anno. Const. By section 2, art. 17, of the Constitution (section 320a, Williams' Anno. Const.), there was created, subject to change by the Legislature, in and for each organized county of this state, the offices of the judge of the county court, county attorney, clerk of the district court, county clerk, sheriff, county treasurer, register of deeds, county surveyor, superintendent of public instruction, three county commissioners, and such municipal township officers as were then provided for under the laws of the territory of Oklahoma; except as otherwise provided in the Constitution. Under the territory of Oklahoma each district court appointed its clerk which held office subject to the pleasure of the court. Organic Act May 2, 1890; section 9, Statutes of Oklahoma Territory 1893, p. 43; 26 Stat. 81, c. 182. The term for the district clerk, after the expiration of the term of such clerk elected at the time of the ratification of the Constitution, which expired on the second Monday in January, 1911, had not been fixed by law prior to the time of the passage of the act of March 19, 1910, relative to certain county and district officers. By section 19 of this act the terms of all county, township, and district officers were ultimately to be two years. The county treasurer and superintendent of public instruction were to hold until the first Monday in July, 1913. This provision was inserted evidently with a view that their terms might expire with the fiscal

year, after which time their offices would regularly be for the term of two years. When two acts, one relating generally to a subject and another to a special part or class of such subject, unless they are absolutely irreconcilable, effect should be given, if possible, to both. This is a general rule of construction. *Kuchler v. Weaver*, 23 Okl. 420, 109 Pac. 915, 18 Ann. Cas. 462.

In *Trapp v. Wells Fargo Express Co.*, 22 Okl. 377, 97 Pac. 1003, it is said: "Statutes may not be revoked or altered by construction when the words may have their proper operation without it, but, in the nature of things, contradictions cannot stand together; and where there is an act or provision which is general and applicable, actual or potential, to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate, according to its terms, on all the subjects embraced therein, except the particular one which is the subject of the special act, which would be deemed an exception, unless the terms of the latter, which were general, manifestly intended to exclude the exception." See, also, to the same effect *McKeever v. Colvin*, 31 Okl. 715, 123 Pac. 156; *Incorporated Town of Valiant v. Mills et al.*, 28 Okl. 811, 116 Pac. 190; *Showers v. Caddo County*, 14 Okl. 157, 77 Pac. 189; *McMillan v. Board of County Commissioners*, 14 Okl. 669, 79 Pac. 898; *Carpenter v. Russell*, 13 Okl. 277, 73 Pac. 930; *A. T. & S. F. Ry. Co. et al. v. Haynes*, 8 Okl. 576, 58 Pac. 738; *Goodson v. United States*, 7 Okl. 117, 54 Pac. 423. In *Maben v. Roeser et al.*, 24 Okl. 588, 103 Pac. 674, recognizing the foregoing rule of construction, it is said: "It is true that this rule of construction must yield to that other and always superior canon of construction which declares that, in construing a statute, the primary object shall be the intention of the lawmakers, and, when any rule of construction defeats that intention, it must be abandoned. Rules of construction are but aids to the accomplishment of this primary object." Where the meaning intended by the use of a certain word or phrases of certain words in a statute is uncertain, the intention will be ascertained by consideration of the entire statute and other statutes concerning the subject-matter and the history and surrounding conditions at the time. *Rakowski v. Wagoner*, 24 Okl. 282, 103 Pac. 632; *Trapp v. Wells Fargo & Co.*, 22 Okl. 377, 97 Pac. 1003; *Winslow v. France*, 20 Okl. 308, 94 Pac. 689; *Territory of Oklahoma ex rel. Sampson v. Clark*, 2 Okl. 82, 35 Pac. 882.

[2] Construing the act in the light of its title, to wit, "An act relating to certain county

and district officers," clerks of the district, superior, and county courts, county judges, registers of deeds, county stenographers, county attorneys, assistant county attorneys, judges of the superior courts, county commissioners, county superintendent of public instruction, justices of the peace, court bailiffs, and notaries, and the history of this legislation, we conclude that as the term is used in the title of said act the clerk of the superior court is a county officer and the judge of said court a district officer. Section 5 of the act of March 6, 1909 (chapter 14, art. 7, p. 182; section 1969, Comp. Laws of Oklahoma 1909), is as follows: "At the general election of county officers to be held in the year 1910, and at every similar election every fourth year thereafter, the qualified electors of such county wherein a superior court has been established, as provided in this act, shall elect a judge of said court for such county to serve from the second Monday of the following January until the second Monday of January four years thereafter and until his successor shall be elected and qualified." The third Legislature evidently construed section 19, c. 69, Session Laws of the Extraordinary Session 1910, p. 137, as by implication repealing said section 5, and fixing the term of the judges of the superior courts at two years, for on March 16, 1911, it enacted that: "At the general election of county officers to be held in the year 1914, and at every similar election every fourth year thereafter, the qualified electors of all counties wherein a superior court has been established shall select a judge of said court for such county to serve from the first Monday of the following January until the first Monday in January, four years thereafter, and until his successor shall be elected and qualified." Section 1, c. 94, Session Laws 1911, p. 206. Section 2 of said act also provides: "All acts and parts of acts in conflict herewith and all acts and parts of acts providing for the election of judges of the superior courts at the general election to be held in the year 1912 are hereby repealed."

In *Tiger v. Western Investment Co.*, 221 U. S. 286, 81 Sup. Ct. 578, 55 L. Ed. 738, the rule of construction is announced that subsequent congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject. The acts of Congress under consideration in the *Tiger* Case were passed by different Congresses. It may be urged that the act of March 16, 1911, providing for the election of the judges of the superior courts, the first election to be held in 1914 and every four years thereafter, repealing section 16 of the act of March 19, 1910, as far as it affected the judges of the superior courts, would have the effect of extending the term

of office of such judges, as were elected at the state election in 1910, for an additional period of two years. Such is not the case, for, if that had been intended by the Legislature, said act would be repugnant to section 10, art. 23, of the Constitution. It is a well-settled rule of construction that where an act is susceptible of two constructions, one of which would render it valid and the other invalid, that must be adopted which sustains the act. 2 Lewis' Sutherland Statutory Const. (2d Ed.) § 498, p. 927. The act of March 6, 1909 (chapter 14, art. 7, p. 182, Sess. Laws 1909; section 1969, Comp. Laws of Oklahoma 1909), provides that such judge as may be elected in the year 1910 shall serve " * * * until his successor shall be elected and qualified." It is suggested that, as said provision does not provide that he shall serve until his successor is elected or appointed and qualified, therefore, no vacancy has occurred which can be filled by the Governor under section 13, art. 6 (section 162, Williams' Anno. Const.), of the Constitution of this state. That question is not essential here to be determined in order to dispose of this case and no opinion is, therefore, expressed thereon. The entire act or statute is to be examined with a view of arriving at the true intention of each part, and effect, if reasonably possible, is to be given to the whole act, and to every section or clause. If different portions seem to conflict, courts must harmonize them, if practicable, favoring that construction which will render every word operative, rather than one which makes some words idle and nugatory. *Trapp v. Wells Fargo Express Co.*, supra; *Territory v. Clark*, supra.

[3] Following this rule of construction the foregoing conclusions give effect to the entire act of March 19, 1910, and bring about harmony in the tenure of offices of like kind in the state, to wit, judges of the superior courts and district courts to hold for four years and all county and township officers to hold for a period of two years. In reaching this conclusion, we believe that we have unerringly carried out the intention of the Legislature.

It follows that the judgment of the trial court must be affirmed. All the Justices concur.

(35 Okl. 559)

SPAULDING MFG. CO. v. LOWE.

(Supreme Court of Oklahoma. March 11, 1918.)

(Syllabus by the Court.)

1. SALES (§ 347*)—REMEDIES OF PARTIES—RECOVERY OF PRICE.

Where an agent for plaintiff, a manufacturing concern, delivered a buggy with a defective wheel to defendant with the understanding at the time that no purchase was made unless a new and perfect wheel was fur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nished, recovery cannot be had upon the note given for the purchase price, where the wheel was not furnished as agreed, and the buggy was tendered back.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.*]

2. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.

Where controverted questions of fact are submitted to a jury, and there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the trial court in its instructions to the jury fairly states the issues and fixes the burden thereon as the same are presented by the pleadings and evidence, and a verdict is rendered which from all the facts appears to meet the requirements of justice, which is approved by the trial court, and judgment is rendered in accordance therewith, this court will not reverse the order of the trial court denying a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Error from Beckham County Court; John O. Hendrix, Judge.

Action by the Spaulding Manufacturing Company against J. L. Lowe. Judgment for defendant, and plaintiff brings error. Affirmed.

T. R. Wise, of Sayre, for plaintiff in error.
J. A. Minton, of Erick, for defendant in error.

DUNN, J. This case presents an appeal by the Spaulding Manufacturing Company from an order of the county court of Beckham county denying a motion for new trial and a judgment in favor of the defendant in an action brought by the said company upon a note made in its favor by the defendant. The statement of facts as set forth in the abstract of plaintiff in error shows that on or about October 17, 1907, the plaintiff sold to the defendant a secondhand or used buggy, which was sound in every particular except that the front wheel had a spoke or two broken out of it. It was agreed at the time of the sale that the company would replace the defective wheel by shipping the defendant a new one. In payment for the buggy defendant gave his note payable to plaintiff, and on the margin of which was written, "Due one front wheel prepaid to Erick, Oklahoma." The bill of particulars of plaintiff was in the ordinary form of a suit on a note to which the defendant answered: That, at the time he signed the said note, plaintiff, as a part of its consideration, agreed to deliver to him one front wheel for said buggy, freight prepaid to Erick, Okl. Further, that the note was without a valid consideration for the reason that said buggy was worthless to defendant in its present condition, being a special make of buggies, a Spaulding buggy, and that he had been unable to supply same with a new wheel, and the note was wholly without consideration. That defendant has repeatedly offered to turn said buggy back to plaintiff

and asked plaintiff to return his said note, and plaintiff has refused to comply with his part of said contract and refused to return defendant's note to him. Defendant's evidence in chief is set forth by plaintiff in error in his brief as follows: "That Mr. Newby, agent of the Spaulding Manufacturing Company, brought to defendant's place, in the fall of 1907, a buggy which had a broken wheel, and wanted to sell it to defendant. That defendant told Newby that he did not want the buggy at all; that if he bought a buggy he would want one that would give him some service. That Newby said: 'I'll fix it so that it will be all right. I'll furnish you a new wheel.' That defendant wanted to know when he would send the wheel, and Newby said right away, in about four or five days. That defendant told Newby to take plenty of time, and Newby said that the wheel would be at Erick in two weeks. That defendant answered, 'All right, I will take the buggy under that contract. Understand, now, if that wheel don't come in two weeks, your time, you can come and get the buggy, because I don't consider that I have made any contract for it unless I get the wheel in the time you have specified.' That Newby said, 'It will certainly be there in two weeks.' That defendant went to Erick at the end of the two weeks, but the wheel had not been sent. That about a month after he made another demand on another of plaintiff's agents, A. M. Daniel, for the wheel. That at the request of Daniel he consented to keep the buggy two weeks longer on the promise of Daniel that the wheel would be sent within that time. That the plaintiff never furnished the wheel. That defendant made four trips to Erick to get the wheel, using the buggy. That defendant was always ready and willing and able to comply with his part of the contract and to pay the note when it became due, if plaintiff had furnished the wheel as it had promised to do. That defendant tendered the buggy back to plaintiff, the first time, something like a month after he had bought it, when he had the arrangement with Mr. Daniel to hold the buggy another two weeks. That he actually turned the buggy over when he brought it to Erick at the time he was sued on the note in the justice court and left it at Stubb's livery barn when he turned it back to Mr. Wise, the attorney prosecuting the suit. That he wrote two letters to plaintiff about the buggy; the first one about June following the fall that he bought the buggy, and the second letter some time after the fall following the writing of the first letter, before plaintiff had made any demand for payment. That on the 'first one I just wrote them the trade, stated the contract, that I had ordered from the agent, and that he had never complied with it, and I would like to have a wheel or they could come and get the

buggy. 'That was the first letter.' That in the second letter he just wrote that he had their buggy there, and that they had fallen down on their contract and he wanted them to come and get the buggy."

On cross-examination it developed that defendant, while he had held the buggy awaiting on plaintiff to furnish the wheel or call for it or indicate disposition, had used it on a number of occasions. The plaintiff asked the court to instruct the jury that if it found that it had promised defendant to deliver him a new wheel and that he failed to deliver the same, but that the buggy in all other respects fulfilled the warranty under which it was bought, that such an agreement was known as a subsidiary promise, and a failure on the part of plaintiff in that respect would not release the defendant from his obligation to pay the note in accordance with its terms, but that he was entitled to an offset for what a new wheel such as plaintiff agreed to furnish was worth. The court instructed the jury that the burden of establishing his defense was upon the defendant, and that a partial failure of consideration was not sufficient to defeat the action on the note; but if it found that the defective buggy wheel referred to in defendant's answer was to be replaced in a specific time by a new and perfect wheel, and if it was further found that the failure on the part of plaintiff to furnish the said new wheel at the time specified greatly impaired or destroyed the use of the buggy, and that the defendant, acting upon his right, attempted to or used all of his efforts to rescind his contract and redelivered the buggy back to the company, that it would then be its duty to find for the defendant.

[1] From the testimony of the defendant it is noted that his contract for the buggy contained the condition precedent that he was to have a new wheel, because, as he states in his evidence, "I do not consider that I have made any contract for it unless I get the wheel in the time you have specified." The wheel did not come, and defendant's temporary retention of the buggy was, as is seen above, at least as to a part of it, under the solicitation of plaintiff's agent. The buggy was not delivered to the defendant in the city, but at his own home, and he would have been strictly within his rights if he had delivered the buggy to the plaintiff at the place plaintiff delivered it to him. However, the plaintiff, taking no action upon either its failure to provide the wheel as contracted for or to retake as it had a right to do and which was in accord with the defendant's wish, brought suit, whereupon defendant brought the buggy to town and delivered it as above set forth. Under these circumstances, in our judgment the verdict of the trial court was correct.

[2] The instructions given by the court fairly presented the issues to the jury, and

the rule has been frequently announced by this court that where there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the trial court in its instructions to the jury fully and fairly states the issues and fixes the burden thereon as the same are presented by the pleadings and evidence, and a verdict is rendered which from all the facts appears to meet the requirements of justice, which is approved by the trial court, and judgment is rendered in accordance therewith, this court will not reverse the order of the trial court denying a motion for new trial.

The judgment of the trial court is, accordingly, affirmed.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(35 Okl. 529)

HAMPTON et al. v. THOMAS et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 773*)—DEFENDANT IN ERROR—FAILURE TO FILE BRIEF—REVIEW.

Where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS.

Where a case is tried before a court without a jury, as where it is tried before a jury, if there is absence of any evidence reasonably tending to support the finding of the court, the finding of the court and the judgment thereon will be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1010.*]

Error from District Court, Mayes County; T. L. Brown, Judge.

Action by Thomas C. Thomas and others against Bettie Hampton and another. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

J. G. Austin, of Grove, for plaintiffs in error.

HAYES, C. J. Defendants in error, who, with plaintiff in error Bettie Hampton, are the joint owners of a certain tract of land situated in Mayes county, brought this action against plaintiffs in error Bettie Hampton and her husband, Bert Hampton, to ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—61

tain a decree of partition, and for a money judgment against plaintiff in error Bert Hampton for rents and profits that they allege said plaintiff in error has received and collected from the land during the years 1907, 1908, and 1909. The trial was to the court without a jury, and resulted in findings of fact in favor of defendants in error, and judgment decreeing a partition, and also judgment in their favor against plaintiff in error Bert Hampton for the sum of \$175. To reverse this latter judgment this appeal is prosecuted.

[1] Plaintiffs in error have, in full compliance with rule of this court, filed their brief herein, but no brief has been filed by defendants in error or excuse made for such failure. By reason of Rule 7 (95 Pac. vi), where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of error, reverse the cause in accordance with the prayer of the petition in error. *Ellis v. Outler*, 25 Okl. 469, 106 Pac. 957; *Buckner v. Okla. Nat. Bank of Shawnee et al.*, 25 Okl. 472, 106 Pac. 959; *Flanagan v. Davis et al.*, 27 Okl. 422, 112 Pac. 990; *Rudd v. Wilson et al.*, 32 Okl. 85, 121 Pac. 252.

[2] One of the assignments of error urged in plaintiff in error's brief for reversal is that the findings and judgment of the trial court are not sustained by the evidence. In investigating this assignment we have not only reviewed the evidence as contained in the abstract in plaintiff's brief, but have carefully read the record, and are of the opinion that it should be sustained. There is an absence of any evidence tending to show that plaintiff in error Bert Hampton was in possession of the premises during the years 1907, 1908, and 1909, or that he collected the rents or received any rents or benefits therefrom for said years. There is also an absence of evidence tending to show the rental value of the land in controversy during said period of time. Where a case is tried before a court without a jury, as where it is tried before a jury, if there is absence of any evidence reasonably tending to support the finding of the court, the finding of the court and the judgment thereon will be set aside on appeal. *Reeves & Co. v. Brennan*, 25 Okl. 544, 106 Pac. 959.

There are other errors assigned in plaintiff in error's brief, but they are without merit.

For the reasons above stated, the judgment of the trial court is reversed and the cause remanded. All the Justices concur, except WILLIAMS, J., not participating.

(3 Okl. Cr. 94)

STATE ex rel. TUCKER v. DAVIS et al.
(Criminal Court of Appeals of Oklahoma.
March 29, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 641*)—PERSON CONFINED—RIGHT TO CONSULT COUNSEL—PRIVATE CONSULTATION—COURTS—DUTY TO CONTROL EXECUTIVE OFFICERS.

(a) Where a person is confined in jail pending a trial upon a criminal prosecution, he has the right to have an opportunity to consult freely with his counsel without having any person present to hear what passes between them, whose presence is objectionable to such defendant.

(b) It is the duty of officers having custody of persons charged with the commission of crime to afford them a reasonable opportunity to privately consult their attorneys, and no officer has the right to be present and hear what is said during such consultation; but the officers must take such precautions as may be necessary, according to the circumstances of each case, to prevent the escape of such prisoners.

(c) It is the duty of the trial courts of Oklahoma to make such orders as will secure to every person imprisoned upon an accusation of crime a reasonable opportunity to consult privately and freely with his counsel, without let or hindrance from any sheriff, jailer, or other officer.

(d) As to just when and where consultations between prisoners and their attorneys may be had will vary with the circumstances of each case, within the discretion of the officer having the custody of such prisoner; but this discretion is subject to the review of the courts, and it must not be arbitrarily used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1505; Dec. Dig. § 641.*]

2. CONTEMPT (§§ 20, 33*)—COURTS (§ 206*)—CRIMINAL COURT OF APPEALS—JURISDICTION—POWERS—ENFORCEMENT OF JUDGMENT BY EXECUTIVE OFFICERS.

(a) The Criminal Court of Appeals is charged with the duty of seeing that we have a uniform system of criminal jurisprudence in Oklahoma, and it is the court of last resort and the supreme arbitrator for the settlement of all questions relating to criminal law in this state.

(b) The Criminal Court of Appeals, independent of authority granted by statute, has the inherent power to enforce obedience to its orders by contempt proceedings. Such power is essential to the due administration of justice.

(c) It is the duty of all officers of the state to render unquestioning obedience to the judgments of the courts. If the courts are in error, they alone have the power to correct such errors.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62, 95-98; Dec. Dig. §§ 20, 33;* Courts, Cent. Dig. §§ 499-791; Dec. Dig. § 206.*]

Contempt proceedings by the State, on the relation of H. S. Tucker, against Barney Davis and another. Judgment for relator.

Owing to the disposition made of this case, it is not necessary to make more than a condensed statement of the facts involved. H. S. Tucker was confined as a prisoner in the county jail of Custer county, Okl., upon a charge of rape pending against him in the superior court of said county. He presented an application to the Criminal Court of Appeals, in which it appears that, being unable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to employ counsel to conduct his defense, the judge of said superior court had appointed T. B. Norfleet and P. S. Hillman, members of the Custer county bar, to defend him; that, owing to the gravity of the charge pending against said Tucker, it was necessary that he should have an opportunity to confer privately and fully with his said attorneys with reference to his defense in this case, but that Barney Davis, sheriff of Custer county, and W. M. Van Bibber, jailer of said county, refused to permit the said Tucker to confer with his said counsel, except in the presence of said sheriff or jailer. It was further made to appear that there was no suitable place in the jail at which a private conference could be had, but that some room might be selected in the courthouse, which was adjacent to the jail, in which such private conference could be had. It was further made to appear that Hon. J. W. Lawter, judge of the superior court of Custer county, was absent from the county, and therefore could not afford the relief desired. Upon this showing the Criminal Court of Appeals issued an order addressed to said sheriff and said jailer of said Custer county, Okl., ordering and directing that they at any reasonable time, upon the request of his said attorneys of record, should take said H. S. Tucker from the jail to some room in the courthouse of said county, to be selected by said officer or officers, and that the said H. S. Tucker be there permitted to consult privately with said attorneys. A copy of said order was served upon both the sheriff and jailer of said Custer county. It was further made to appear to the court that after the service of such order, and in total disobedience thereof, said sheriff and said jailer of Custer county refused to permit the said Tucker to privately consult his said attorneys as directed in said order, although so requested to do. Thereupon a citation was addressed to both of said officers, requiring them to appear before the Criminal Court of Appeals and show what cause, if any, they had for disobeying said order, and why they should not be punished for contempt. The matter coming on to be heard, both of said officers appeared and denied that they had disobeyed the said order of the court. A great deal of testimony was offered by both sides, a detail statement of which is unnecessary.

Thomas W. Conner, of Oklahoma City, P. S. Hillman, of Clinton, and Thomas B. Norfleet, of Arapaho, for relator. Phillips & Mills, of Arapaho, and A. C. Cruce, of Oklahoma City, for respondents.

FURMAN, J. (after stating the facts as above). [1] First. It would be a cheap subterfuge of and shameless mockery upon justice for the state to put a man on trial in its courts charged with an offense which involved his life, liberty, or character, and then place him in such a position that he could

not prepare to make his defense. It would be just as reasonable to place shackles upon a man's limbs, and then tell him that it is his right and duty to defend himself against an impending physical assault. If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete. In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights. This is so fundamentally just, and is so highly prized by the people of Oklahoma, that it is embodied, not only in our statute law, but is further safeguarded and rendered inviolate by a number of constitutional provisions. Section 15, Williams' Const. of Okl., in express terms declares that no person shall be deprived of life, liberty, or property without due process of law. There can be no such thing as due process of law where a party to a case has been deprived of an opportunity to prepare for trial. Section 28, Williams' Const. of Okl., provides that in all criminal prosecutions the accused shall have a right to a speedy public trial by an impartial jury of the county in which the crime shall have been committed; that he shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his own behalf; and that he shall have the right to be heard by himself and by counsel.

Due process of law would be a libel on justice if it did not carry with it the absolute right of preparation for trial. The right to be informed of the nature and cause of the accusation against him, and have a copy thereof, would be only so much idle buffoonery if the accused was not allowed to prepare to defend himself. All of these rights would amount to but little if the accused did not also have the right to be represented by counsel who was learned in the law and trained in the matter of presenting cases in court. These principles are not only embodied in our Constitution, but they or similar provisions will be found in the Constitution of every state of the American Union and also in the Constitution of the United States. They therefore cannot be minimized, but constitute the fundamental and universal principles of American criminal law; and no Legislature or court can ignore or violate them. The absolute right of every defendant in a criminal case to be represented by counsel learned in the law was discussed and recognized by the unanimous decision of this court in the case of *Baker v. State*, 130 Pac. 820, in an opinion by Judge Doyle, decided at the present term of the court. The right to be heard by counsel would, in the language of Saint Paul, 1 Cor. 13, 1, "become as sounding brass, or a tinkling cymbal," if it did not include the right to a full and confidential

consultation with such counsel, with no other persons present to hear what was said. This is a material, substantial right, essential to justice.

Section 257, Comp. Laws 1909, among other things, provides that it is the duty of an attorney and counselor at law "to maintain inviolate the confidence and at any peril to himself to preserve the secrets of his client." This is not only the statute law of our state, but it is also a settled principle of the common law. While this rule is rigidly enforced as between client and attorney, yet it does not extend to persons who may hear what passes between clients and their attorneys. If clients disclose secrets to their attorneys in the presence of others, the law closes the mouths of the attorneys, and will not permit them to reveal secrets so disclosed; but no such inhibition is placed by law upon others present who may hear such secrets, unless such other persons are the helpers or assistants of such attorneys. Therefore, if parties in prison and charged with crime are compelled to consult their attorneys in the presence of an officer or officers of the law, the very object and purpose of the Constitution and of the statute would be defeated, because such officer or officers could testify as to any statements passing between such defendants and their attorneys, or could otherwise disclose such secrets against the will and to the injury of such defendant. This alone would render such consultations a miserable and contemptible farce. It therefore necessarily follows that it is the absolute right of parties charged with crime to consult privately with their attorneys, and that it is an illegal abridgment of this right for a sheriff, jailer, or other officer to deny to a defendant the right to consult his attorneys, except in the presence of such officer. We think that this question is too plain for argument, and that the statement of the proposition amounts to its demonstration.

This court has repeatedly held that fairness is an essential element in the trial of criminal cases in Oklahoma, and that unfairness and justice cannot be harmonized with each other, and that whenever it is made to appear that there was any unfairness in the trial of a criminal case such unfairness will be ground for reversal, unless it affirmatively appears from the record that it could not have materially affected a verdict of conviction.

It is the duty of officers having the custody of persons charged with crime to afford them a reasonable opportunity to privately consult with their attorneys, without having other persons present, taking such precautions as may be necessary, according to the circumstances of each case, to prevent the escape of such prisoner. It is therefore the duty of the trial courts of Oklahoma to make such orders as will secure to every person imprisoned upon an

accusation of crime a reasonable opportunity to consult privately and freely with his counsel, without let or hindrance from any sheriff, jailer, or other officer. As to what, when and where such consultations may be had may vary with circumstances, and is a matter within the discretion of the trial court, but this is not an arbitrary discretion, and it must not be so used; otherwise it may become the means of defeating justice.

It matters not what the officers may think of the guilt of a defendant, the law presumes that he is innocent until his guilt has been legally pronounced by an impartial jury in a fair trial. It matters not how humble, poor, or friendless he may be, or how strong and influential the feeling against him, it is his absolute right to have a fair opportunity to prepare for trial and to present his defense. The law is not hunting for victims or seeking to offer up vicarious atonements. Punishment should never be inflicted as such before a conviction, and there should be no conviction, unless it be legally established to the satisfaction of the jury, beyond a reasonable doubt, that the defendant is guilty of the crime charged against him. No attempt to railroad any man to the penitentiary or to the gallows, it matters not how guilty he may be, should for one moment be tolerated by any court. If a defendant cannot be convicted without denying him a reasonable opportunity to prepare for trial and a fair trial, he should not be convicted at all. Any other rule would make a myth of justice and a snare and a delusion of courts.

Second. It would be difficult, if not impossible, to include in one general definition everything which constitutes contempt of court. Even if this were possible, it is not necessary to do so in this case; for the specific charge against respondents is a willful disregard and disobedience of the order of this court.

[2] The Criminal Court of Appeals is the court of last resort in all criminal cases and for the settlement of all questions involving a construction of the criminal laws of Oklahoma. This court is charged with the duty of seeing that we have a uniform system of criminal jurisprudence in the state. It would be utterly impossible for the court to discharge this duty, unless it has the power and the courage to protect its character and enforce obedience to its orders; otherwise its decisions would be a mere matter of advice or recommendation, which the subordinate courts and the officers of the state would be at liberty to follow or disregard at pleasure, and the court itself would be a puerile, impotent, and contemptible thing, and its usefulness would be destroyed.

Article 4 of the Constitution of this state divides the state government into three separate, distinct, and co-ordinate departments, viz., the legislative, executive, and judicial. See section 50, Williams' Const. of Okla. By the express terms of the Constitution the

Criminal Court of Appeals has exclusive appellate jurisdiction of all criminal cases. See section 187, Williams' Const. of Okla. That which is exclusive cannot be divided or shared, either in whole or in part, with any other person or tribunal or department of the state government. It therefore necessarily follows that the Criminal Court of Appeals is the supreme tribunal for the settlement of all questions relating to criminal law.

As to the powers of this court with reference to matters of criminal law, in the case of *State ex rel. Ikard v. Russell*, 33 Okl. 141, 124 Pac. 1092, the Supreme Court of Oklahoma said: "It is the settled policy of this court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction. *Ex parte Justus*, 26 Okl. 101, 110 Pac. 907; *Flood v. State ex rel.*, 27 Okl. 852, 113 Pac. 914; *Herndon v. Hammond*, County Judge, 28 Okl. 616, 115 Pac. 775."

Our decisions as to the criminal laws of this state are not only binding on every department of this state government, but they are also binding upon the Supreme Court of the United States, when nothing is involved of national authority.

Mr. Cooley, in his work on *Constitutional Limitations*, on page 31, says: "But the same reason which requires that the final decision upon all questions of national jurisdiction should be left to the national courts will also hold the national courts bound to respect the decisions of the state courts upon all questions arising under the state Constitutions and laws, where nothing is involved of national authority, or of right under the Constitution, laws, or treaties of the United States, and to accept the state decisions as correct, and to follow them whenever the same questions arise in the national courts."

In *Beauregard v. New Orleans*, 18 How. 497, 502 (15 L. Ed. 462), Mr. Justice Campbell, speaking for the Supreme Court of the United States, says: "The constitution of this court requires it to follow the laws of the several states as rules of decision wherever they apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state."

In *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, 524 (7 L. Ed. 496), it was argued that the exclusive power of state courts to construe legislative acts did not extend to the paramount law, so as to enable them to give efficacy to an act which was contrary to the state Constitution; but Marshall, C. J., speaking for the Supreme Court of the United States, said: "We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law."

Again, in *Elmendorf v. Taylor*, 10 Wheat.

152, 159 (6 L. Ed. 289), the same eminent judge says: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

The opinions of the Criminal Court of Appeals of Oklahoma upon all questions of criminal law are binding upon the Supreme Court of the United States and the Supreme Court of this state, the Governor, and all state officers. Certainly, then, the sheriff and jailor of a county are without the slightest power or authority to disregard and disobey the orders of this court, and such disobedience and disregard of the orders of this court constitute contempt of court. The power of the court to punish for contempt is clearly stated in the ninth volume of Cyc. p. 26, as follows: "Independent of authority granted by statute, courts of record of superior jurisdiction, whether civil or criminal, possess inherent power to punish for contempt of court. Such power is essential to the due administration of justice, and the Legislature cannot take it away or abridge it."

Upon the hearing of this matter a great mass of conflicting testimony was introduced, and if the court was disposed to take a harsh and extreme view of the facts presented there is ample evidence in the record to justify the court in adjudging respondent guilty of contempt and in inflicting severe punishment therefor.

We are satisfied from the testimony that the respondent Davis did not render that ready and unquestioning obedience to the order of the court which it was his duty to do; that a personal difficulty took place between respondent Davis and the attorneys for relator in which some highly improper language was used; but it also appears from the testimony that the respondent Davis has been a fearless, zealous, and faithful officer, and that when he had time for reflection he complied with the order of the court. We are inclined to the opinion that the hesitancy which relator first manifested with reference to obeying the order of the court, and what he then said, was due more to the personal feeling existing between relator and the attorneys for respondent than to a disposition to defy this court. While this constitutes no defense to the charge of contempt, yet we feel that in justice we should take it into consideration in pronouncing judgment against relator. This court has no desire to resort to arbitrary measures, especially against the peace officers of the state. All that it asks and requires is that its order shall be obeyed. No officer has the right to question the judgment of this court. If the court is in error as to any matter, an application must be made to the court for its correction. While the respondent Davis is guilty of contempt for not rendering unquestioning obedience to the order of the court, yet, in view of his past character as

an officer and the fact that before the matter was reported to the court he did comply with and obey said order, this court will suspend for the present pronouncing any judgment of punishment against him, except that he be directed to pay the costs of this proceeding, and when said costs are paid the clerk of this court is directed to enter a judgment discharging respondent Davis entirely in this proceeding.

The death of the respondent William Van Bibber having been suggested to the court, this proceeding is abated as to him.

ARMSTRONG, P. J., and DOYLE, J., concur.

(47 Mont. 119)

CHICAGO, M. & ST. P. RY. CO. v. SWINDLEHURST, Secretary of State.

(Supreme Court of Montana. March 8, 1913.)

COMMERCE (§ 69*)—INTERSTATE COMMERCE—STATE REGULATION—TAXATION.

Rev. Codes, § 165, provides that the secretary of state, for services performed in his office, must charge and collect: (4) For filing and recording each certificate of incorporation and each certificate of increase of capital stock, 50 cents per \$1,000 on amounts up to \$100,000, and a lesser amount per \$1,000 upon greater amounts, graduated as stated; and (10) for filing each certified copy of charter or articles of incorporation of any foreign corporation the same fee shall be charged as is provided for domestic corporations in article 4 of the section. *Held*, that the section, as applied to foreign corporations doing interstate commerce, was unconstitutional as imposing a burden upon interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. § 69.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by the Chicago, Milwaukee & St. Paul Railway Company against T. M. Swindlehurst, Secretary of State of the State of Montana. From a judgment for plaintiff, defendant appeals. Affirmed.

D. M. Kelly, Atty. Gen., for appellant. Gunn, Rasch & Hall, of Helena, for respondent.

BRANTLY, C. J. The Chicago, Milwaukee & St. Paul Railway Company is a railroad corporation, organized and existing under the laws of the state of Wisconsin, having a capital stock of \$232,623,100. It is engaged in the operation of its railroad, as a common carrier of passengers and freight, in and through the states of Wisconsin, Minnesota, Iowa, South Dakota, and other states. The Chicago, Milwaukee & Puget Sound Railway Company, a railroad corporation organized and existing under the laws of the state of Washington, is likewise a common carrier of passengers and freight in and through the states of Washington, Idaho, Montana, and to the Missouri river

in the state of North Dakota, where the lines of the two companies connect. The St. Paul Company, desiring and being about to purchase the railroad property of the Puget Sound Company, for the purpose of availing itself of the benefits of section 4299 of the Revised Codes of Montana, which requires the filing of its charter or articles of incorporation with the secretary of state, tendered to him for filing a true copy of its articles of incorporation, and also the sum of \$1 in payment of the filing fee. The secretary of state refused to receive and file the articles upon the tender so made, but demanded payment of a fee amounting to \$23,447.31, basing his demand upon the requirements of the provisions of section 165 of the Revised Codes. Upon his refusal to receive and file the articles without such payment, the amount so demanded was paid, under protest, however, with notice that an action would be brought to recover it back, on the grounds that said section 165, to the extent that it authorizes and requires the secretary of state to charge and collect a fee for the filing of articles of incorporation on the basis of a percentage of the entire capital stock of the St. Paul Company, is in conflict with and repugnant to the commerce clause of the Constitution of the United States, in that it imposes a tax upon the interstate business of the company, and that the exaction and collection of the fee in question amounted to a taking of property without due process of law, in violation of the fourteenth amendment to the Constitution. The cause was submitted to the district court upon an agreed statement of facts sufficient in detail to present the questions raised by the position assumed by the plaintiff. The district court held the statute void, and rendered judgment for the plaintiff. The defendant has appealed.

Section 4299, *supra*, provides, among other things, that "any railroad company may sell or lease the whole or any part of its railroad or branches within this state constructed or to be constructed, together with all property and rights, privileges and franchises pertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States or of any state or territory of the United States; * * * and the railroad company of any other state or territory of the United States which shall so purchase or lease a railroad, or any part thereof in this state, or shall extend or construct its road or any portion or branch thereof in this state, shall possess and may exercise and enjoy, as to the control, management and operation of the said road, and as to the location, construction and operation of any extension or branch thereof, all the rights, powers, privileges and franchises possessed by railroad corporations organized under the laws of this state, including the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

exercise of the power of eminent domain:
 * * * Provided further, that before any railroad corporation organized under the laws of any other state or territory or of the United States shall be permitted to avail itself of the benefits of this act, such corporation shall file with the secretary of state a true copy of its charter or articles of incorporation." The part of section 165, the validity of which is brought in question, is the following: "The secretary of state, for services performed in his office, must charge and collect the following fees: * * * IV. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged: Amounts up to \$100,000, fifty cents per thousand dollars. Additional from \$100,000 to \$250,000, forty cents per thousand dollars. Additional from \$250,000 to \$500,000, thirty cents per thousand dollars. Additional from \$500,000 to \$1,000,000, twenty cents per thousand dollars. Additional over \$1,000,000, ten cents per thousand dollars.
 * * * X. For filing each certified copy of charter or articles of incorporation of any foreign corporation, the same fee shall be charged as is provided for in article IV of this section, for domestic corporations."

The question submitted for decision is whether section 165 is invalid for either or both reasons assigned by the plaintiff. In support of their contentions counsel for plaintiff cite *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, later approved by the same court in *Pullman Co. v. State of Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, and *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103. These cases, particularly the first, are directly in point. In the first there was brought in question the validity of a provision of the General Laws of the state of Kansas, which, besides requiring a corporation seeking to engage in business in the state of Kansas, after having secured permission from the state charter board upon formal application made for that purpose, also required it to "pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent.; and for each million or major portion thereof over and above the sum of five hundred thousand dollars, two hundred dollars." General Statutes Kansas 1901, § 1264. In an elaborate opinion by Mr. Justice Harlan, in which there is an extensive review of the prior decisions of the

court upon the same or analogous questions, the conclusion was reached that it is not competent for a state Legislature to require a foreign corporation engaged in interstate commerce, as a condition precedent to its beginning or continuing to do business in that state, to pay a given per cent. of its capital stock, representing all of its business everywhere within and outside of the state, because (1) it operates as a burden and tax on the interstate business of the corporation, in violation of the commerce clause of the Constitution, and (2) because it is a tax upon the property of the corporation beyond the limits of the state, inconsistent with the due process of law enjoined by the fourteenth amendment.

It is true that the method prescribed for ascertaining the tax imposed by section 165, supra, is a charge of a fixed number of cents per \$1,000 of the par value of the capital stock, graduated in proportion to the amount of the capital stock; whereas, under the Kansas statute, up to \$400,000 it was to be calculated by a graduated percentage, and thereafter at a uniform fixed sum per \$1,000,000. This divergence in method, however, is immaterial. The vice of such legislation, as the reasoning of the court shows, consists in the nature of the burden imposed by it, and not in the amount. The method adopted for the ascertainment of the amount cannot be material, so long as the result is the same. This is apparent from the decision in *Ludwig v. Western Union Telegraph Co.* In this case was brought in question the validity of a statute of the state of Arkansas, the purpose and effect of which was the same as that of the Kansas statute, supra. It required the payment of a license tax upon the whole of the capital stock of both domestic and foreign corporations, to be ascertained by a charge of a fixed sum, the amount of which was graduated according to the amount of the capital stock. It was held open to the same objection as was the Kansas statute. The case of *Pullman Co. v. Kansas*, and that of *International Text-Book Co. v. Pigg*, involved other provisions of the Kansas statute; but in both the court approves the decision in *Western Union Telegraph Co. v. Kansas* as the settled law on the subject, and in the latter of them expressly declares that section 1283 of the General Statutes of Kansas, which required foreign corporations engaged in interstate commerce, as a condition precedent to doing business in the state, to obtain a license, was invalid under the commerce clause of the Constitution.

This court is concluded by these decisions, and hence must declare section 165, supra, in so far as it applies to foreign corporations seeking to engage in interstate commerce in this state, inoperative and void.

Some effort was made by counsel for appellant to maintain the contention that in each of the cases cited the question involved

was whether the corporations which were already doing business in a state should be excluded therefrom; whereas in this case the question is whether a corporation shall be permitted to come into this state to engage in business. A reading of these cases, however, leads to the conclusion that this difference in the situation of the parties cannot affect the result.

The judgment is affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 99)

WRIGHT v. BROOKS et al.

(Supreme Court of Montana. March 4, 1913.)

1. ACTION (§ 38*)—SPECIFIC PERFORMANCE—QUIETING TITLE—COMPLAINT.

The complaint alleged that plaintiff bought two lots from B., the then owner, and immediately went into possession, and has since been in "actual, quiet, open, notorious, undisturbed, and exclusive possession," and has placed valuable improvements thereon; that B. died leaving a will, under which defendant was residuary legatee, and that the lots had been distributed to defendant, as such, by judicial decree, and that defendant has sold the lots; that defendant had notice before B.'s death of plaintiff's rights, as did the purchaser from defendant before he purchased; and that plaintiff has always been ready and willing to pay for the lots upon conveyance to him, and has at various times demanded a conveyance both from B. and defendant and offered to pay the purchase price, but acceptance of payment has been refused. The prayer was that plaintiff be adjudged owner of the lots, and defendant be required to convey to him upon payment of the price, and be enjoined from interfering therewith. *Held*, that the complaint alleged a cause of action for specific performance, and was not demurrable for joining therewith an action to quiet title, based upon prescription.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

2. EQUITY (§ 87*)—LACHES.

Laches will not be presumed merely from a delay short of the period of limitation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. § 87.*]

3. SPECIFIC PERFORMANCE (§ 47*)—ORAL CONTRACT—POSSESSION BY VENDEE.

Specific performance of an oral contract for the sale of real estate may be decreed where possession was thereunder taken with the vendor's knowledge or consent, and was followed by improvement of the property, though no part of the price has been paid.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132; Dec. Dig. § 47.*]

4. LIMITATION OF ACTIONS (§ 103*)—ACTION—LIMITATIONS.

Where the vendee has repeatedly offered to pay the price and to receive a conveyance, and is able and willing to do so, vendor holds the legal title in trust for the vendee; and limitations do not begin to run against an action for specific performance until the vendor repudiated such trust, as by a refusal to convey or recognize the contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. § 103.* Trusts, Cent. Dig. § 570.]

5. SPECIFIC PERFORMANCE (§ 105*)—ACTIONS—LIMITATIONS.

A vendee in possession is not barred from suing for specific performance by delay for any period in bringing the action; his possession being a continued assertion of his claim.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

6. PARTNERSHIP (§ 55*)—EXISTENCE OF RELATION—EVIDENCE.

Evidence, in an action for specific performance of a contract to convey land, *held* to sustain a finding that the person contracting with plaintiff to convey acted for others, who were his copartners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 78, 79, 81; Dec. Dig. § 55.*]

7. PARTNERSHIP (§ 68*)—CONVEYANCE BY PARTNER.

Since, under a conveyance to "B. & Bro.," copartners, B. had the legal title to the property, he could convey the complete legal title thereto, leaving his copartners to their remedy for an accounting for the proceeds.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-111; Dec. Dig. § 68.*]

8. SPECIFIC PERFORMANCE (§ 47*)—ORAL CONTRACT—PART PERFORMANCE.

Where the improvements placed by the vendee upon lots, agreed to be purchased under an oral contract for a consideration of \$200, consisted of fencing and a barn, lathed and plastered in the lower part, used as a chicken house, all of which were valued at \$600 or \$700, there was a sufficient part performance to authorize a specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132; Dec. Dig. § 47.*]

9. VENDOR AND PURCHASER (§ 198*)—PAYMENT BY DEFENDANT—TAXES.

Payment of taxes by the vendor after his contract to convey will not entitle him to recover such payment, where he is himself at fault for delay in performance; he only being entitled to the legal rate of interest on the purchase price up to the time of performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig. § 198.*]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by Frank E. Wright against John Brooks and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

W. M. Blackford and John A. Coleman, both of Lewistown, for appellants. Rudolf Von Tobel, of Lewistown, and Henry G. Smith, of Helena, for respondent.

SANNER, J. The amended complaint alleges, substantially, that in July, 1898, the respondent bought two certain lots in the city of Lewistown at the price of \$200 from Henry P. Brooks, who was then the owner; that the respondent immediately went into possession, and has since been in the "actual, quiet, open, notorious, undisturbed, and exclusive possession" of said lots, and has placed valuable improvements thereon; that Henry P. Brooks died leaving a will, under which the appellant, John Brooks, was made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

residuary legatee, and by judicial decree the said lots have been distributed to John Brooks as residuary legatee; that John Brooks has sold said lots to appellant Kettleson; that prior to the death of Henry P. Brooks, and when the distribution occurred, the appellant John Brooks had actual notice of the rights and claims of respondent and of the existence of said agreement, and that the appellant Kettleson, prior to his purchase, had actual notice of the rights and claims of respondent; that respondent has always been ready and willing to pay for the lots upon conveyance of the same to him; that at divers times he demanded a conveyance of Henry P. Brooks, and also of John Brooks, and offered to pay the purchase price, but acceptance of payment and issuance of deed have been refused; that about August 30, 1911, the appellant Kettleson, without the consent and against the instructions of respondent, went upon the said lots and tore down the fence inclosing the same, and tore down the fence inclosing his poultry yard, and is making preparations to erect a house upon said lots. It is prayed, among other things, that respondent be adjudged the owner of said lots; that a decree be entered requiring appellant to convey upon payment of \$200; and that appellants be enjoined from asserting any interest or title in the lots or interfering with the same.

This pleading was attacked by a demurrer on three grounds, two of which are that it does not state facts sufficient to constitute a cause of action, and that there is improperly united therein a cause of action based upon adverse possession for more than 10 years with a cause of action for the specific performance of an alleged contract of sale.

[1] We will first dispose of the question of misjoinder. Upon it we have not been favored with any argument in appellants' brief, and should be inclined to rule the point as waived but for the fact that respondent himself insists here that he has stated an action to quiet title as well as for specific performance, and that under the pleadings, evidence, and findings he is entitled to prevail upon either theory of the case. It is possible, by selecting certain allegations and ignoring others, to carve from the amended complaint a claim of title by prescription, but the allegations necessary to be so selected are entirely pertinent to, and are not inharmonious with, the prayer for specific performance; whereas the allegations to be ignored and the pleading, taken as a whole, are inconsistent with any claim of legal title, since one possessing lands under a contract of sale holds, not adversely, but in subordination to, the legal title. *Lamme v. Dodson*, 4 Mont. 594, 595, 2 Pac. 298. We therefore conclude that the amended complaint should be viewed, as, in fact, it was viewed throughout the proceedings below, as seeking specific perform-

ance only, and not open to attack for misjoinder.

[2] The point of the general demurrer is that the agreement was made in July, 1898, and the suit was commenced in September, 1911, thus disclosing a period of over 13 years in which respondent did nothing in assertion of his rights; that, in the absence of excusatory averments, this is laches appearing upon the face of the pleading by which equity is negated, and therefore a general demurrer will lie. The argument is plausible, but ineffective. Assuming that, where laches appears on the face of the complaint, advantage thereof may be taken by demurrer for substance, and conceding that, following the maxim, "Equity aids the vigilant," laches may arise from an unexplained delay short of the period fixed by the statute of limitation (*American Mining Co. v. Basin & Bay State Min. Co.*, 39 Mont. 483, 104 Pac. 525, 24 L. R. A. [N. S.] 305; *Wolf v. Great Falls W. P. & T. Co.*, 15 Mont. 49, 38 Pac. 115) still laches will not be presumed from such a delay alone. 16 Cyc. 179; *Lux v. Haggin*, 69 Cal. 267, 4 Pac. 919, 10 Pac. 674; *Marsh v. Lott*, 156 Cal. 647, 105 Pac. 968. Now, the statute invoked here is section 6451, Revised Codes, and whether we apply it as in itself a bar, or as a test for laches, the question arises: When, as to this case, did it commence to run?

[3-5] It is the recognized rule, followed by this court, that specific performance of an oral contract for the sale of real estate may be decreed where possession thereunder, taken by the vendee with the vendor's knowledge or consent, is followed by improvement of the property, even though no part of the purchase price has been paid. *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805. In such a case, where the payment and conveyance are to be concurrent acts, and where the vendee has made repeated efforts to pay, and stands ready, able, and willing to pay, the vendor is placed in the same position as though payment had been made; that is to say, he holds the legal title in trust for the vendee. *Cobban v. Hecklen*, supra; *Finlen v. Heinze*, supra; *Ives v. Cress*, 5 Pa. 118, 47 Am. Dec. 401; *Willis v. Wozencraft*, 22 Cal. 608; *Whittier v. Stege*, 61 Cal. 241; *Howell v. Budd*, 91 Cal. 351, 27 Pac. 747. On this theory the statute of limitation does not commence to run until the vendor has in some manner disavowed his trust (36 Cyc. 732, *1*), which disavowal may, in cases such as this, consist of a flat refusal to convey or to recognize the contract. Turning, now, to the amended complaint, we find the charge that both Henry P. Brooks and John Brooks have refused and neglected to convey, notwithstanding demand. But when? It may have been more than five years before the commencement of the action; it may have been

less. This condition of the pleading, however it may be subject to a demurrer for ambiguity, certainly does not require the conclusion that the statute has run. Moreover, the weight of authority is that the vendee in possession cannot be barred from specific performance by mere delay, however long, because his possession is a continued assertion of his claim. He may rest in security until his title or right of possession is attacked. 16 Cyc. 174; 36 Cyc. 732; *Love v. Watkins*, 40 Cal. 504, 6 Am. Rep. 624; *Gilbert v. Sleeper*, 71 Cal. 294, 12 Pac. 172; *Snider v. Johnson*, 25 Or. 331, 35 Pac. 846. We are therefore of opinion that the amended complaint is good as against the general demurrer.

The trial resulted in certain findings of fact by the court, from which conclusions of law were drawn, in effect directing a decree of specific performance as prayed by respondent, and such decree was thereafter duly entered. These findings of fact are vigorously assailed for what they contain and for what they do not contain. As to their content, we say that, although a remarkable situation is disclosed by the evidence, yet the evidence does not preponderate against the findings. They have sufficient support in the evidence to require their acceptance by this court as the established facts in the case. *Boyd v. Huffine*, 44 Mont. 306, 120 Pac. 228; *Pope v. Alexander*, 36 Mont. 90, 92 Pac. 203, 565. As to their alleged deficiencies, these are not in themselves, singly or collectively, of sufficient importance to demand a reversal of this case. They consist, for the most part, of facts or circumstances not necessary to a determination of the case, or of alleged facts or circumstances not required by the evidence; and the failure to find them could not, with the possible exception of the payment of taxes, which we shall consider later, have operated to the prejudice of the appellants. Certain questions of law, however, are raised by the evidence and the findings, to which we shall briefly advert.

[6] It is said that when the agreement was made Henry P. Brooks was not the sole owner of the property; that respondent then knew it; and that under such circumstances specific performance will not be decreed. Appellants forget that there was a visible occupancy of these premises for 13 years immediately following the agreement, and that the evidence furnished by themselves tends to establish that when the agreement was made the title was in "H. P. Brooks & Bro."; that "H. P. Brooks & Bro." was a "concern"—apparently a partnership—composed of Henry P. Brooks, Anthony Brooks, and the appellant John Brooks, having business other than the owning of these lots, and owning them as it owned its other property; that Anthony Brooks and John Brooks possessed interests in these lots only as they were interested in the "concern"; that Henry P.

Brooks tended to its business, particularly at the Lewistown end; that John Brooks for 8 or 10 years personally knew of respondent's occupancy and inclosure of the premises, and made no objection of any kind. It is nowhere asserted by John Brooks that Henry P. Brooks was without authority to contract in behalf of the other members of the "concern"; and it appears that when respondent broached the subject of a deed to John Brooks he said respondent would have to see Henry P. Brooks about the matter. We think this was ample to justify the findings that in the agreement with respondent Henry P. Brooks acted in behalf of his associates as well as of himself, and to estop any denial of John Brooks in that regard. Under these findings the case fails, not within *Cochran v. Blunt et al.*, 161 U. S. 350, 16 Sup. Ct. 454, 40 L. Ed. 729, cited by appellants, but within the rule recognized by this court in *Cobban v. Hecklen*, supra. But there is another aspect of this matter which is decisive against appellants.

[7] Upon well-recognized principles the legal title to the lots in question, at the time the agreement was made, stood wholly in Henry P. Brooks by virtue of the deed from De Witt to H. P. Brooks & Bro. *Barnett v. Lachman*, 12 Nev. 361; *Winter v. Stock*, 29 Cal. 408, 89 Am. Dec. 57; *Arthur v. Weston*, 22 Mo. 378; *Ennis v. Brown*, 1 App. Div. 22, 36 N. Y. Supp. 737. As long as it so remained, Henry P. Brooks could convey the legal title, leaving his associates to their remedy of accounting for the proceeds (*Barnett v. Lachman*, supra); and if he could do that he could make the agreement in question.

[8] It is contended that the improvements placed upon the lots by respondent were not such as to constitute part performance, because they did not equal or exceed the rental value of the lots while occupied by him. We do not know what the rental value may have been. The purchase price agreed upon was \$200. The improvements consisted of fencing and of a barn, lathed and plastered in the lower part, used as a chicken house; and there was evidence to the effect that the value of these improvements amounted to six or seven hundred dollars. We think this a sufficient showing of substantial and permanent improvement.

[9] The evidence established that throughout the entire period of respondent's occupancy the taxes and public charges upon the lots were paid by Henry P. Brooks or John Brooks, and error is assigned because the trial court did not so find. We see no error here. This court has held that in an action to quiet title, with taxes paid by the defendant in good faith, it is the duty of the trial court to require reimbursement as a condition to the relief (*Larson v. Peppard*, 38 Mont. 133, 99 Pac. 136, 129 Am. St. Rep. 630, 16 Ann. Cas. 800) and we think counsel confuse that situation with the totally different one now presented. Whether the

payment of the taxes by Brooks is considered to be of importance on account of the failure of the trial court to impose reimbursement as a condition to the relief granted, or as affecting the respondent's right to any relief, we are not clearly informed. But in either view it is decisive that the court found, not the respondent, but Henry P. Brooks and John Brooks, to have been at fault, and fixed upon them the blame for the long continuance of the legal title in their names. While public charges against real estate are properly assessed to the holder of the legal title, and it is his privilege to pay them in order to protect it, yet in this case he could at any time have shifted that burden to the shoulders of the respondent by simply keeping the agreement. Such public charges as are to be expected in the usual course of events are like increases in value or depreciation in the currency after contract of sale and pending conveyance, in that they will not absolve the vendor, nor entitle him to any added recompense, where he is at fault for delay in performance. *Gotthelf v. Stranahan* (City Ct. Brook.) 19 N. Y. Supp. 161; 138 N. Y. 351, 34 N. E. 286, 20 L. R. A. 455; *King v. Raab*, 123 Iowa, 632, 99 N. W. 307; *Pomeroy*, Spec. Per. § 322. However, the court did require the respondent to pay interest at the legal rate on the purchase price for the entire period since the date of the agreement. This was sufficient.

Much space is devoted in the brief of appellants to the statute of limitations and to the question of laches. We have discussed these matters, so far as raised by the demurrer to the amended complaint, and the question now is whether limitation or laches is disclosed by the evidence. According to the evidence respondent made several demands on Henry P. Brooks for a deed, which was promised, but deferred; in the year of, or the year before, the death of Henry P. Brooks, respondent made a final demand upon him, as well as upon John Brooks, and then occurred the first refusal to complete the agreement; Henry P. Brooks died in February, 1909; the first hostile invasion of respondent's possession occurred August 30, 1911, and this action was commenced on September 9, 1911. We fail to see how this action can be held barred by the provision argued in the brief (Rev. Codes, § 6451), or by any of the statutes pleaded in the answers. And if it is borne in mind that, where payment, which is to be concurrent with the conveyance, is prevented by the vendor's fault, the case is the same as though payment were made, it can be readily seen that the authorities cited in support of the contention of appellants do, when rightly understood, make for the very opposite conclusion. See *Edwards v. Beck*, 57 Wash. 80, 106 Pac. 492; *Love v. Watkins*, supra; *Brennan v. Ford*, 46 Cal. 14; *Gerdes v. Moody*, 41 Cal. 350.

As to laches, we have already indicated that the weight of authority denies the appli-

cation of this doctrine to the vendee in possession prior to challenge of his title or right of possession. But, the appellants cite, among others, three decisions of this court: *Wolf v. Great Falls W. P. & T. Co.*, supra, *American Min. Co. v. Basin & Bay State Min. Co.*, supra, and *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36, upon which we are asked to decide that laches did, as a matter of fact, appear upon the trial of this case. These citations are not in point; the last two are not even suggestive, except as to certain general statements, to the effect that laches may or may not exist independently of the statute of limitations, but depending upon the circumstances of the individual case. In *Wolf v. Great Falls W. P. & T. Co.*, however, a case of laches was held established in an action for specific performance, upon the theory that abandonment of his claim by the vendee was shown by the following circumstances: A written agreement was made for the sale of a town lot in Great Falls for the purchase price of \$350, payable in installments at fixed times; it was expressly stipulated that "the above premises are sold to said second party for improvement, and the said party of the second part agrees and obligated himself, heirs and assigns, that he or they will on or before the first day of August, 1887, build and construct a frame building of the value not less than \$500;" the vendee was also to pay the taxes; the execution and delivery of the deed was made contingent upon the prior performance of the conditions imposed upon the vendee, and the vendee was given possession under the agreement; the vendee did not pay the installments of the purchase price, nor the taxes; nor did he construct to completion the improvement as agreed; the successor in interest of the vendor took possession after default in these matters; later, and on October 22, 1887, the vendee tendered the balance of the purchase price, which was refused; on April 29, 1891, he commenced his action for specific performance, and no explanation was offered in the pleadings or at the trial for the delay. The above not only shows how divergent was the situation from the case at bar, but illuminates the following language of the decision: "We have confined the consideration to the question as to whether the plaintiff was guilty of inexcusable laches in commencing his suit for specific performance after he was ousted from the possession of the real estate in question, and knew that the defendant would not comply with the contract of sale thereof, unless compelled to do so." Equally inept, for appellants' purposes, is the decision in *Marsh v. Lott*, supra, in which the Supreme Court of California said: "Of course, notwithstanding the delay in moving to enforce the alleged contract, the circumstances may be such as to prevent any presumption of acquiescence or abandonment, as, for instance, where a vendee is in posses-

slon of the property under the alleged contract and continues in such possession, claiming under the contract, notwithstanding the attempted repudiation."

We think that all the findings are sufficiently supported by the evidence, and that the case, taken as a whole, authorizes the decree.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(47 Mont. 115)

IVANHOFF v. TEALE.

(Supreme Court of Montana. March 7, 1913.)

1. PLEADING (§ 406*)—COMPLAINT—UNCERTAINTY—WAIVER BY ANSWER.

An apparent inadvertent substitution of the word "defendant" for "plaintiff" in the complaint merely makes the pleading subject to objection by special demurrer for uncertainty; an objection which, under Rev. Codes, § 6539, is waived by answer to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1367; Dec. Dig. § 406.*]

2. CONTRACTS (§ 335*)—PERFORMANCE—PLEADING.

Performance by plaintiff of his contract for services is sufficiently pleaded by his allegation that he completed all the work and labor to be by him performed under it, and did all the things in it of him required to be done; Rev. Codes, § 6572, providing performance of conditions precedent in a contract may be pleaded by a statement generally that the party duly performed all the conditions on his part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664-1676; Dec. Dig. § 335.*]

3. AGRICULTURE (§ 15*)—LIENS—PERFECTING—INCONSISTENT DESCRIPTIONS OF LAND.

A decree for a lien for clearing land cannot be sustained; the descriptions of the property in the complaint, notice of lien, and decree being inconsistent each with the others.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. § 15.*]

4. AGRICULTURE (§ 12*)—LIENS—PERFECTING—DESCRIPTION IN NOTICE.

It is a prerequisite to validity of a lien for clearing land that, as required by Rev. Codes, § 7291, the description of the property in the notice of lien be such that the property can be identified therefrom.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 40, 41; Dec. Dig. § 12.*]

Appeal from District Court, Ravalli County; J. B. Poindexter, Judge.

Action by Peter Ivanhoff against Sarah C. Teale. Judgment for plaintiff; defendant appeals. Remanded, with directions.

Baker & Kurtz and O. M. Parr, all of Hamilton, for appellant. O'Hara, Edwards & Madeen, of Hamilton, for respondent.

BRANTLY, C. J. This action was brought to foreclose a statutory lien for a balance alleged to be due to plaintiff for services rendered by him under a contract, by the terms of which he agreed to clear certain

lands, situated in Ravalli county, belonging to defendant at a stipulated price of \$25 per acre. Subsequent to the making of the original contract, its terms were, by mutual consent of the parties, extended so as to include other lands. The complaint alleges "that on the 20th day of April, 1910, plaintiff entered upon the performance of said contract, and the defendant actually completed all of the work and labor to be by him performed under said contract and did all of the things in said contract of him required to be done; that by reason of said work and labor performed defendant became indebted to said plaintiff for the clearing of 88 acres at \$25 per acre, making a total sum of \$2,200, of which said amount defendant paid to the plaintiff \$949, leaving a balance due and owing and unpaid of \$1,251, no part of which has been paid." It then alleges the filing of the notice of lien with the clerk and recorder of the county within 90 days after completion of the work, as required by section 7291, Revised Codes. A copy of the notice of lien is attached to the complaint as an exhibit. The issue tried was whether the work had been performed by the plaintiff in accordance with the terms of the contract and had been so accepted by the defendant. The court found for the plaintiff, and that there was due him a balance of \$651. It rendered a decree declaring this amount to be a lien on defendant's lands, and ordered them to be sold to satisfy it. The appeal is from the decree.

[1] It is contended that the complaint does not state facts sufficient to constitute a cause of action, in that it alleges "the defendant actually completed all of the work," etc. This contention is without merit. It is apparent that the pleader, in drawing the complaint, inadvertently substituted the term "defendant" where he intended to use the term "plaintiff." At most, this substitution of terms served only to render the pleading open to objection by special demurrer on the ground of uncertainty. Such a defect is waived by answer to the merits. *Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239; Rev. Codes, § 6539.

[2] It is also argued that the complaint does not allege the performance of the contract on the part of plaintiff in terms sufficiently direct and certain. If the pleading be construed according to its purport as indicated above, it can mean nothing less than that the plaintiff fully performed all the conditions of the contract to be by him performed. This meets the requirement of the statute. Rev. Codes, § 6572.

[3, 4] The last contention is that the decree does not conform to the allegations of the complaint, and hence that the relief granted is not warranted by it. When we come to compare the description of the lands in question, as set out in the complaint, with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that contained in the notice of lien and also with that found in the decree, we find it wholly inconsistent with them, not only with reference to the section subdivisions, but also with reference to their situation in the section, township, and range. In the complaint they are described as situated in sections 14 and 28, in township 5 N., range 21 W. In the notice they are described as situated in sections 14, 27, and 28, in the same township and range. In the decree we find two descriptions. It is first recited that the plaintiff filed with the clerk and recorder his notice of lien upon certain lands described therein. These are described as situated in part in section 14, township 3 N., range 21 W., and the rest as situated in sections 27 and 28, township 5 N., range 21 W. Later those described as subject to the lien are referred to as situated in the same townships and ranges, but the subdivisions of the sections mentioned are different. Besides, when the section subdivisions mentioned in the several descriptions are compared, no two of the descriptions are consistent. Such is the confusion and uncertainty in the record in this respect that it is impossible for us to ascertain whether any of the lands described are subject to the lien. The statute requires the description to be such as to identify the property sought to be affected by the lien. Rev. Codes, § 7291. This is a prerequisite to the validity of the lien; for, in order to perfect the claim, all the different requirements of the statute must be substantially complied with. *Yerrick v. Higgins*, 22 Mont. 502, 57 Pac. 95; *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

Under the findings the plaintiff is entitled to a personal judgment against defendant for the amount found due, in any event. Whether he is also entitled to a lien must, under the circumstances, be determined by the district court, after the plaintiff has been afforded the opportunity, if this can be done, to amend the complaint so as to make the description therein agree with the description in the notice of lien.

The cause is therefore remanded to the district court, with directions to set aside the decree, and, upon further proceedings not inconsistent with the suggestions herein, to ascertain what portion of the lands, if any, are sufficiently described in the notice to identify them. That court will then enter a decree declaring the balance found due plaintiff a lien thereon. If, upon such further proceedings, the description contained in the notice is found insufficient to identify any portion of the lands, the court will render and enter a personal judgment against the defendant for the amount found due, with costs.

Remanded, with directions.

HOLLOWAY and SANNER, JJ., concur.

DUNLAP v. LEWIS.

(Supreme Court of Oregon. March 25, 1913.)

1. EVIDENCE (§ 461*)—VENDOR AND PURCHASER (§ 46*)—TITLE BOND—DELIVERY.

There is no set form in which delivery of a bond for a deed must be made, but the intention of the parties must be gathered from their language or conduct or both, and the legal effect of what they say cannot be altered or modified by their undisclosed intention or secret understanding.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461; **Vendor and Purchaser*, Dec. Dig. § 46.*]

2. VENDOR AND PURCHASER (§§ 25, 107*)—TITLE BOND—DELIVERY.

When a bond for a deed is once accepted by the obligee, he cannot subsequently reject it so as to make it void.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 30, 188-192; Dec. Dig. §§ 25, 107.*]

3. VENDOR AND PURCHASER (§ 82*)—TITLE BOND—DELIVERY.

A contract for the sale of land provided for a bond for a deed to be substituted therefor within 30 days. A copy of the contract with a certificate of deposit for the down payment and notes for the balance were placed in escrow. A bond for a deed was executed containing a stipulation not contained in the contract that the purchaser would pay all taxes and assessments thereafter levied or assessed, and was given to the purchaser, the certificate of deposit and the notes being obtained from the bank with which they were left in escrow and delivered to the vendor. Subsequently the purchaser rejected the bond because of the provision respecting taxes and assessments. *Held*, that the trial court was justified in finding that the delivery of the bond was complete and effectual; the acts performed evidencing an intent to perfect the instrument.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.*]

4. VENDOR AND PURCHASER (§ 107*)—TITLE BOND—DELIVERY.

Where a purchaser was given possession of land under a title bond, and his possession had not been disturbed, he could not subsequently to the delivery of the bond reject it because it contained no provision that he should have possession.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 188-192; Dec. Dig. § 107.*]

5. VENDOR AND PURCHASER (§ 198*)—TAXES AND ASSESSMENTS—ENFORCEMENT BY VENDOR.

Where a title bond bound the purchaser to pay all taxes and assessments, the vendor could sue to compel him to pay liens created by taxes and assessments in order to preserve his security for the deferred payments.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 408-412; Dec. Dig. § 198.*]

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by H. R. Dunlap against Arthur C. Lewis. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Rutenic, of Klamath Falls, for appellant. C. F. Stone, of Klamath Falls (Stone & Barrett, of Klamath Falls, on the brief), for respondent.

BEAN, J. On April 19, 1910, plaintiff and defendant executed a written contract whereby Dunlap sold and agreed to convey to Lewis by warranty deed free from incumbrance lots 1 and 2, block 38, in the city of Klamath Falls, Klamath county, Or., for the sum of \$12,000, payable, \$1,500 in cash, which was paid on the date of the execution of the contract, a certain other lot as payment of \$2,500, and the balance in annual payments, the last of which was to be paid on or before April 19, 1915, according to the tenor of five promissory notes executed by Lewis. It was stipulated that the contract would be taken up within 30 days, and that a bond for a deed of the two lots, conditioned upon making the deferred payments, would be given in lieu thereof; that the money paid should be held by the First National Bank during the preparation and examination of the abstract of title. The contract was executed in duplicate, and contained other stipulations. It contained no agreement as to the payment of taxes and assessments. One copy of the contract, together with a certificate of deposit for \$1,500, and the notes, were placed in escrow at the bank. Lewis was given possession of the lots, and has since retained the same. On May 13, 1910, Dunlap executed a bond for a deed of the lots in the sum of \$25,000, with the stipulated conditions, and containing the following clause: "Arthur C. Lewis agrees to pay all taxes and assessments hereinafter levied or assessed against said lots." The bond was read to Mr. Lewis, who made no objection thereto at the time. Both parties went to the First National Bank and obtained the certificate of deposit, notes, and copy of contract. They then went to the Klamath County Bank, where Dunlap did business. The certificate of deposit and the notes were delivered to Dunlap, and the bond for a deed to Lewis. Soon afterwards, just how long is disputed, Mr. Lewis objected to the bond for a deed because it contained no provision that he should retain possession of the lots, and on account of the clause therein regarding taxes and assessments. He contends that he returned the bond to Mr. Dunlap, who took the same away. On the next day the bond was found on the desk of Lewis' attorney. Later taxes for 1910, amounting to \$87.73, were levied upon the lots. During 1910 and 1911 the city of Klamath Falls levied an assessment of \$2,434.53 on the same for the purpose of paving the adjoining streets, which, being unpaid, became a lien upon the property. Defendant caused the contract to be recorded in the county records. The bond remained at the attorney's office, and was filed in court with the answer. The deed to Dunlap of the lot agreed to be taken as a part payment was executed April 21, 1910, and delivered to him on or about May 19, 1910. Dunlap asserts that Lewis then made objection to the bond for a deed for the first time. On April 19, 1911, Lewis made the \$1,000 payment then due. It ap-

pears that Lewis paid a sewer assessment on the lots, and also petitioned the city council for a portion of the street improvements for which the assessment was made. Lewis refuses to accept the bond. In his answer he asks that Mr. Dunlap be required to execute a bond for a deed in accordance with the contract.

Defendant contends that the bond was never accepted, and that, according to the contract which he claims is still in force, plaintiff should pay the taxes and assessments. Plaintiff claims that the bond was delivered and accepted by defendant, and that he should be compelled to make such payments. Wilbur White, a real estate agent, accompanied Dunlap and Lewis to the bank when the papers were transferred and both he and Lealle Rogers, assistant cashier of the Klamath County Bank, testified in regard to the transaction when the bond was delivered. Defendant's claim is based upon his refusal to accept the bond made after the delivery and the return thereof.

[1, 2] There is no precise and set form in which delivery of a bond must be made. The intention of the parties must be gathered from their language or their conduct or both, and the legal effect of what they say and do cannot be altered or modified by the undisclosed intention or secret understanding of either, and, when once accepted by the obligee, he cannot subsequently disagree to it so as to make it void. 5 Cyc. 740, 741; National Building & Loan Association, v. Day (Ky.) 63 S. W. 591.

[3] The trial court found that the delivery of the bond for a deed by Dunlap was complete and effectual. After a careful consideration of the evidence, we think that the same fully justifies such finding. Upon the transfer of the bond for a deed, the certificate of deposit, and notes, Dunlap parted unconditionally with the instrument in question, and had no further right to it. The acts performed evinced an intent on the part of Dunlap to perfect the instrument, and to make it at once the absolute property of Lewis.

[4, 5] Lewis has been given possession of the real property. This possession does not appear to have been disturbed; therefore he has no cause for complaint on account of that matter. Plaintiff is entitled to have the defendant compelled to pay the liens created by the taxes and assessments in order to preserve his security for the payment of the notes. In framing the decree in the lower court a provision was included for an execution to enforce the payment of any taxes or assessments levied during the life of the bond for a deed in the event of default being made by defendant in the payment of the same. This provision should be eliminated. With this correction, the decree should be affirmed, plaintiff to recover his costs and disbursements; and it is so ordered.

(64 Or. 486)

LADD & TILTON BANK v. COMMERCIAL STATE BANK et al.

(Supreme Court of Oregon. March 25, 1913.)

1. CARRIERS (§ 58*)—BILL OF LADING—RIGHTS OF TRANSFEREE.

The bank, which received a bill of lading attached to a sight draft for the price of a shipment and credited the amount of the draft to the shipper, had a right to the property shipped prior to that of a subsequent attachment creditor, whether the transaction constituted a transfer of the absolute title to it or merely a pledge to secure an indebtedness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58; * Sales, Cent. Dig. § 649.]

2. ESTOPPEL (§ 77*)—INCONSISTENCY OF ACTS AND CONDUCT.

Where a purchaser of a shipment of broom corn to whom the shipper was indebted paid the amount of a sight draft attached to the bill of lading to a bank, which had credited the shipper therewith, thus recognizing the bank as the owner of the shipment, it could not repudiate the bank's title, and attach the proceeds as the property of the shipper.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 198-203; Dec. Dig. § 77.*]

3. CARRIERS (§ 58*)—BILL OF LADING—RIGHTS OF TRANSFEREE.

The chattels represented by a bill of lading are transferred by the delivery of such bill, if nothing else is shown.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58; * Sales, Cent. Dig. § 649.]

Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Bill of interpleader by the Ladd & Tilton Bank against the Commercial State Bank, the Standard Broom Company, and others. From a judgment in favor of the Standard Broom Company, the Commercial State Bank appeals. Reversed and decree entered for appellant.

Joseph Simon, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for appellant. H. R. Dickinson, of Portland, for respondent.

BURNETT, J. The plaintiff bank instituted this suit in interpleader against the Standard Broom Company, which will be called for convenience the company, the Commercial State Bank, which will be called the bank, the Interstate National Bank, and W. P. Nelson, an individual. It appears that Nelson bought from the growers in Kansas enough broom corn to make a car load, which he consigned to the company upon whom he drew a sight draft to the order of the bank, with the bill of lading for the corn attached, for \$1,324.95, and delivered the draft and the attached bill of lading to the bank. The latter forwarded these papers to its correspondent, the Interstate National Bank, a corporation, for collection, and it, in turn, forwarded them, for a like purpose, to the

plaintiff. The company, upon presentation thereof, paid the draft, took up the bill of lading, received the property represented thereby, and immediately began an action in the circuit court of Multnomah county against Nelson, then a resident of Kansas, on his promissory note held by the company, attaching the proceeds of the draft in the hands of the plaintiff. The bill of interpleader was the result, and, the plaintiff having paid the money into court to abide its decree, the contest is here waged between the company and the bank, each claiming the money, the latter by absolute title and the former by virtue of having attached it as the property of Nelson. The Interstate Bank was eliminated as having no interest in the matter, the papers having been in its possession only for collection, and Nelson answered also, disclaiming all interest in the funds or the property from which it was derived. At a hearing the circuit court passed a decree in favor of the company, directing, in substance, that out of the money the plaintiff had paid into court, upon the order of interpleader, the clerk should pay any judgment that might be afterwards recovered by the company against Nelson, who should receive the overplus if any remained, and that the answer of the bank be dismissed with costs and disbursements. It appears in testimony, that Nelson had a checking account with the bank, and that he paid for the broom corn by checks against that account. According to the usual course of business between Nelson and the bank, he drew the sight draft, annexed it to the bill of lading, delivered both of them to the bank, and was credited on his account by the bank with the face of the draft less exchange. Afterwards and before the commencement of the action against him by the company, he drew checks against the balance of the account in his favor, augmented as it was by the amount of the sight draft.

[1] The legal effect of the sight draft with the bill of lading attached was to transfer the property to the bank. It can make no difference whether this was a transfer of the absolute title to the broom corn, or whether it was a pledge to secure indebtedness. In either case the bank is entitled to the property and to the proceeds thereof as against the company, claiming by subsequent attachment, so far as appears in the pleadings or evidence before us.

[2] The substance of the transaction between the company and the bank was as if the latter had said to the former: "Here is a car load of broom corn sold to us by Mr. Nelson which we will convey to you if you will pay this sight draft accompanying the bill of lading." The company accepted this offer, and participated in the deal as its own by paying the sight draft and taking up the bill of lading. It cannot adopt a part of the transaction without adopting all of it. If, in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fact, the broom corn was the property of Nelson, the company might have attached it in that form; but, having become a party to a transaction based upon the corn being the property of the bank, it is too late for it to repudiate that arrangement, and treat the proceeds of the sale of the corn as the property of Nelson.

[3] It is well settled by the authorities that the chattels represented by a bill of lading are transferred by the delivery of such a document if nothing else is shown. Under circumstances similar to those here disclosed, it is an apt and usual way of passing title to personalty in the ordinary course of trade. The undisputed testimony is that such was the transaction between Nelson and the bank. No fraud is alleged or shown. Although Nelson may have been indebted to the company, he had a right to transfer the title of the corn to the bank as against anything appearing here, and such was the effect of the transaction disclosed by the testimony relating to the bill of lading and the sight draft. *Temple Nat. Bank v. Louisville, etc. (Ky.)* 82 S. W. 253; *Bank of New Roads v. Kentucky (Ky.)* 85 S. W. 1103; *Bank v. Wright*, 48 N. Y. 1; *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *First Nat. Bank of Kansas City v. Mt. Pleasant Milling Co.*, 103 Iowa, 518, 72 N. W. 689; *Central Mercantile Co. v. Oklahoma State Bank*, 83 Kan. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954.

It was argued at the trial that because the bank had a right to look to Nelson for the amount of the draft, if the same had been dishonored, the whole transaction amounted to only an agency in the bank by which it undertook to collect the draft for the account of Nelson, thus leaving it none the less the property of the latter and so subject to attachment. But the draft was not dishonored, and all who had anything to do with the matter as actors say that it was the intention to vest the title in the bank. The privilege of looking to the drawer of paper for reimbursement in case it is dishonored attaches to all commercial paper to protect and not to destroy it.

Some authorities were cited to the point that mere crediting of paper to a customer does not transfer the title to the bank. *Armstrong v. Boyertown Nat. Bank*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553, *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608, and *First Nat. Bank of Clarion v. Gregg*, 79 Pa. 384, are such precedents, but they and other cases cited were instances where the paper had been sent for collection, illustrating the situation here as between the three banks, or else they depended on peculiar circumstances not here appearing. The decree of the circuit court is reversed, and one here entered according to the prayer of the answer of the Commercial State Bank.

(65 Or. 236)

MERCHANT LAND CO. v. BARBOUR.

(Supreme Court of Oregon. March 25, 1912.)

1. VENDOR AND PURCHASER (§ 214*) — CONTRACT—ASSIGNMENT—CONSTRUCTION.

One who had contracted with plaintiff for the purchase of land, and paid part of the price, afterwards executed a contract with defendant, reciting that he thereby assigned to defendant a one-half interest in the land covered by the contract with plaintiff; that the assignment to defendant was made subject to all the conditions of the contract, which were thereby assumed by defendant equally with assignor; that defendant should pay assignor interest upon his share of the amount already paid, and upon his share of any other advances made by assignor, until repaid by defendant; and that, when the original land contract was complied with, the deed from plaintiff should convey an undivided half interest each to defendant and his assignor, and that after such conveyances the proceeds of further sales of the land might be used by assignor in the construction of a railroad, provided defendant's interest therein was secured. *Held*, that the contract did not establish any privity of contract between plaintiff and defendant, but, at best, merely defined contractual relations between defendant and his assignor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 436, 442-448; Dec. Dig. § 214.*]

2. SPECIFIC PERFORMANCE (§ 97*)—RIGHT.

One who had purchased land from plaintiff, and made partial payments under an executory contract, executed an agreement with defendant in 1890 by which he assigned to defendant a one-half interest in the land contract, defendant assuming all of the conditions of the contract equally with his assignor, and the contract provided that, when the land was paid for, an undivided half interest should be conveyed to defendant and his assignor, but defendant never paid anything on the land. *Held*, that it would be an abuse of judicial discretion to decree a conveyance of any interest in the land to defendant, in view of the long time elapsing, and of the fact that defendant had never paid anything on the land.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Action by the Merchant Land Company against J. H. Barbour. From a judgment for plaintiff, defendant appeals. *Affirmed*.

The plaintiff, claiming to be the owner in fee simple and in possession of certain described real estate which is not in the possession of any other person, brought this suit to determine the adverse claim of the defendants to the realty in question, alleging that the defendant has no right, title, interest, or estate therein. The answer traversed every allegation of the complaint, except that of the corporate character of the plaintiff. It further sets out what for the purposes of this opinion may be termed an agreement entered into between O. H. Merchant and his wife as parties of the first part and R. A. Graham as party of the second part under date of October 16, 1890, whereby the Merchants agreed to sell to Graham and he agreed to buy from the Merchants the realty in question. It al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so alleges that Graham had paid \$10,000 on the purchase price of \$90,000 required by the contract, and that on November 8, 1890, Graham executed and delivered to the defendant the following writing: "For and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I hereby sell, assign and transfer to J. H. Barbour of San Diego, California, an equal, one-half interest in a certain land contract recently executed to me by C. H. Merchant and wife of Marshfield, Oregon, by which said Merchant agrees to convey to me for the sum of ninety thousand dollars payable as specified in said contract, that tract of land near the town of Marshfield described in said contract, and comprised in what is known as the 'Railroad Addition' to Marshfield, according to the map of said addition on file in the clerk's office of the county of Coos, Oregon. This assignment is made subject to all the conditions of said contract which are hereby assumed by Barbour, equally with myself. The first two payments under the said contract having been already made by me, said Barbour is to pay me interest at the rate of ten per cent. per annum upon his share thereof, and upon his share of any other advances made or to be made by me until the same are repaid by him. In like manner he is to be allowed by me at the same rate upon any advances in excess of his one-half proportion for such period as such advances are used. When the terms of said contract are complied with, and the deed for the land becomes due thereunder from said C. H. Merchant, the deed shall be made to said Graham and said Barbour and convey an undivided one-half interest to each, it being expressly understood that all money or property received for any portion of said land shall be applied upon the purchase payment of \$90,000 until the payment therefor shall be fully completed. After the completion of all payments to C. H. Merchant on account of said land purchase and the execution of deed conveying a one half interest therein to said Barbour, the proceeds of any further sales thereof may be used by said Graham at the rate of interest heretofore specified on said Barbour's half thereof, in the execution of this contract to build a line of railroad from Coos Bay to Roseburg, until January 1st, 1893; provided, however, that the share of said Barbour in the moneys so used shall be secured to him by the deposit with him by said Graham of the first mortgage bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, at the rate of fifty per centum of their par value, to an amount equal to the share of said Barbour in said moneys so used by said Graham, or by other collateral acceptable to said Barbour. The land contract herein referred to bears date October 1st, 1890, and is recorded in the office of the county clerk of Coos county, Oregon. In witness whereof, I have hereunto set my hand and seal this 8th

day of November, 1890. R. A. Graham. [Seal.]" The answer further asserts, in substance, that the plaintiff took title to the premises from Merchant and his wife with full knowledge of the rights of the defendant therein; that the plaintiff and its predecessors in interest had sold and conveyed parcels of the property in dispute for more than enough to pay the purchase price under the contract together with all taxes and assessments which have been levied thereon since October 16, 1890; that Graham and the defendant have fully performed all the provisions of the contract of sale by them to be observed; and that, although Graham and his wife on or about March 20, 1894, remised, released, and quitclaimed the property to C. H. Merchant, yet it did not include the interest of the defendant, who now demands a decree of specific performance of the contract to convey an undivided half interest in the property.

The reply traverses the answer in all material particulars except that it admits the execution of the quitclaim deed from Graham to Merchant, but denies that it included less than the entire estate in the land arising from the contract for the sale of the same. That pleading further avers the rescission of the contract by Graham on account of failure of the other party thereto to comply with its terms and conditions, the abandonment of the same by Graham and the defendant, the resumption by Merchant of the exclusive possession of the property on October 1, 1891, and continuous adverse possession of the same since then, and that the defendant was not seised, or possessed of any part of the lands within 10 years next before the commencement of the suit. After a hearing on the issues involved, the circuit court entered a decree in favor of the plaintiff, from which the defendant has appealed.

Joseph W. Bennett, of Marshfield (Bennett Swanton and Tom T. Bennett, both of Marshfield, on the brief), for appellant. Cassius R. Peck, of Marshfield, for respondent.

BURNETT, J. (after stating the facts as above). [1] It will be observed that the writing executed by Graham November 8, 1890, and delivered to the defendant does not purport to be a conveyance of any interest in any land, neither does it convey the impression of having been agreed to by Merchant or of establishing any privity of contract between him and the defendant. At best, that instrument can be construed only as attempting to define contractual relations between Graham and Barbour. It is not pretended in the testimony that the defendant ever paid anything whatever to Merchant or his successor in interest, the plaintiff, on account of the realty in question. As to Graham, it seems from the evidence that the paper of November 8, 1890, was designed as a kind of bonus to Barbour for his influence

to be used in favor of the former in financing the construction of a railroad in Coos county. Nothing appears to have been accomplished in that direction, as Barbour could not float the railroad bonds, and it is certain he paid no money to Graham. The defendant paid no attention to the property in any way, never saw it, and never exercised any act of ownership over it. Called upon by this suit to declare his interest in the real property, the defendant, by his answer and cross-complaint filed September 6, 1910, for the first time, and that nearly 20 years after the transaction he describes, asserts in terms that he is the equitable owner of one-half of the premises and calls upon the plaintiff to specifically perform a contract to convey to him the legal title thereto.

[2] The pleading does not show any privity of estate or of contract with the plaintiff. Granting, however, that he stood in Graham's shoes as against the plaintiff for one-half of the estate, it is incumbent upon him to perform his part of the dependent covenants of the contract before he can invoke judicial aid to enforce performance by the other party. Not having put anything into the land, it is certain he can take nothing out, at least as against the plaintiff. His grievance, if any, must be adjusted with the man with whom he contracted. His pseudo title cannot rise above its source, R. A. Graham. The latter divested himself of his estate by the deed already mentioned, and with it fell the pretensions of ownership in which the defendant may have indulged. In any event, a decree of specific performance rests in the discretion of the court, and it would be a gross abuse of that judicial prerogative to decree a conveyance to one who has never paid a dollar on the land, besides sleeping on his claim for nearly two decades.

The decree of the circuit court is affirmed.

(64 Or. 395)

UNION PAC. LIFE INS. CO. v. FERGUSON,
State Ins. Com'r.

(Supreme Court of Oregon. March 25, 1913.)

1. MANDAMUS (§ 163*)—DEMURRER TO ALTERNATIVE WRIT — SUFFICIENCY OF ALLEGATIONS.

An alternative writ of mandamus to compel the Insurance Commissioner to issue a certificate permitting relator to do business alleged "that said corporation has a paid-up, unimpaired cash capital exceeding \$100,000," but in another paragraph it was alleged that the authorized capital stock was \$100,000; that this was divided into 10,000 shares; that a certain proportion of these had been issued and fully paid for; that another portion had been subscribed for, but only partially paid for; that another portion had been subscribed, but no payment had been received; and that another portion had been issued, but no cash payment made thereon; and that a certain portion of the said capital stock had not been subscribed for or issued at all. *Held*, on demurrer to the writ, that the allegation that the corporation had a

paid-up, unimpaired cash capital exceeding \$100,000 should not be taken as true.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 341-343; Dec. Dig. § 163.*]

2. MANDAMUS (§ 187*)—ALTERNATIVE WRIT OF MANDAMUS—DEMURRER—CONSIDERATION ON APPEAL.

Where, on demurrer to an alternative writ of mandamus to compel the State Insurance Commissioner to issue a certificate authorizing relator to carry on an insurance business in the state, the case is not tried on the demurrer alone, but facts were stipulated and the annual statement of the corporation submitted, the case, on appeal from a judgment granting a peremptory writ, will not be considered solely on the demurrer.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

3. MANDAMUS (§ 187*)—REVIEW—INTRODUCTION OF ADDITIONAL EVIDENCE.

On appeal from a judgment granting a peremptory writ of mandamus, affidavits as to the right of plaintiff to the writ will not be received, where they are not introduced in the court below, as the appellate court can only review the action of the circuit court, and cannot permit a new case to be made on the evidence.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

On motion for rehearing. Petition denied. For former opinion, see 129 Pac. 529.

EAKIN, J. [1, 2] Upon the motion for rehearing it is contended that, as the sufficiency of the writ of mandamus was tested by demurrer, the allegation of the writ "that said corporation has a paid-up, unimpaired cash capital exceeding \$100,000," must be taken as true; but counsel overlooked the fact that the fourth paragraph of the writ says: "The authorized capital stock of the corporation is \$100,000, divided into 10,000 shares of the par value of \$10 a share; that 7,541¹/₂ shares of said stock have been issued and fully paid for; that 416 shares of said stock have been subscribed for, but only partially paid for; that 55 shares have been issued and only partly paid for; that 64 shares of said stock have been subscribed for, but no payment on account of said subscription has yet been made; that 25 shares have been issued, but no cash payment made thereon; that 1898¹/₂ shares of said capital stock have not been subscribed for or issued at all." The case was not tried in the circuit court on the demurrer alone, nor was it so submitted here, but certain facts were stipulated, which include the annual statement of the corporation to the commission, as shown by the bill of exceptions. Therefore the record before us shows that the corporation did not have a paid-up cash capital of \$100,000.

[3] In connection with the motion plaintiff presents proofs by affidavits that the stockholders and directors, on February 27, 1913, by resolution duly adopted by them, set apart as a basis of credit for policy holders and creditors of the corporation all assets of the corporation, amounting to \$106,-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

600 and being invested in mortgage loans and bonds, which include surplus and undivided profits, and declared the same capital of the corporation with like effect as though the said assets represented \$100,000 capital stock subscribed and fully paid up at not less than par, and that it shall not be subject to withdrawal. On the basis of this new showing we are asked to issue the writ of mandamus to the Commissioner, requiring him to issue the license. This we deem beyond the power or province of this court. The case being before us on appeal, we can only review the action of the circuit court, and cannot permit a new case to be made here on the evidence. The showing presented here might be a proper showing before the Commissioner upon application for the issuance of a license. It is held in the case of *Sun Mutual Ins. Co. v. Mayor, etc., of New York*, 8 N. Y. 250: "In ordinary copartnerships, where profits, by the agreement of the partners, are directed to accumulate as a basis of credit or of more extended operations in a particular business, they become capital; and in the case before us the Legislature has provided for an accumulation to the amount of \$500,000; and in addition the agents of the corporation, in 1846, determined, by a formal resolution, as they rightfully could do, that no division of the profits shall be made until the accumulated earnings shall exceed \$1,000,000. These accumulations became capital." But, as this question is not properly before us, it is not necessary for us to decide it now.

The petition is denied.

(65 Or. 296)

TRIPHONOFF v. SWEENEY et al.

(Supreme Court of Oregon. March 18, 1913.)

1. BILLS AND NOTES (§ 149*) — POSTDATED CHECKS — NEGOTIABILITY — "NEGOTIABLE INSTRUMENT."

An instrument directing a bank to pay a specified amount to a specified person is a negotiable instrument, though postdated.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 873; Dec. Dig. § 149.*]

For other definitions, see Words and Phrases, vol. 5, pp. 7467-7470; vol. 8, p. 7731.]

2. BILLS AND NOTES (§ 837*) — POSTDATED CHECKS — DEFENSES.

Under L. O. L. § 5861, making absence or failure of consideration for a negotiable instrument a defense against any person not a holder in due course, and under section 5885, defining a holder in due course, a postdated check negotiated before maturity is not subject to defenses available to the maker against the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.*]

3. BILLS AND NOTES (§ 489*) — ACTIONS — EVIDENCE — CONFORMITY TO PROOF.

Defendants in an action on a check, having pleaded want of consideration available

against plaintiff, a transferee, could not change its position during the trial by asserting payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.*]

4. PARTIES (§ 76*) — CAPACITY TO SUE — OBJECTION — SUFFICIENCY.

A defense that an action is not prosecuted by the real party in interest must state facts showing that conclusion.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 117-121; Dec. Dig. § 76.*]

5. PARTIES (§ 76*) — DEFECTS — WAIVER.

Under L. O. L. § 68, making a complaint demurrable for a defect of parties, and under section 72, providing that defects, except as to jurisdiction, in a complaint are waived by failure to object by demurrer or answer, the objection that one suing as holder of a check was not the real party in interest was waived by defendant's failure to plead the contrary.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 117-121; Dec. Dig. § 76.*]

6. SUNDAY (§ 22*) — SUNDAY CONTRACT — DEFENSES — NECESSITY FOR PLEADING.

To be available, a defense that a note was negotiated on Sunday must be pleaded.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 76; Dec. Dig. § 22.*]

7. WITNESSES (§ 345*) — IMPEACHMENT — "CONVICTION OF CRIME."

A conviction under a municipal ordinance is not a conviction of a crime within L. O. L. § 863, so as to give ground for his impeachment as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345.*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by M. H. Triphonoff against J. W. Sweeney and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action to recover money. The cause was tried before a jury, and a verdict found in favor of plaintiff. From a judgment rendered thereon, defendants appeal.

The action is based on the following instrument: "No. 12413. Portland, Ore., April 15th, 1911. The United States National Bank of Portland, Oregon: Pay to the order of Dan Malcheff, twenty-two hundred ninety-four and 78-100 (\$2294.78) dollars. J. W. Sweeney Construction Co., by S. M. Blumauer." The instrument was executed on or about the 25th day of March, 1911, and postdated on the 15th day of April, 1911. Thereafter, and before maturity, the same was indorsed and transferred to plaintiff, as he avers, in due course of business and for a valuable consideration, plaintiff having no knowledge whatsoever at the time that the check had been dishonored or that payment thereof had been stopped, or that any infirmity in the instrument, or defect in the title, existed. After the execution of the check, the J. W. Sweeney Construction Company stopped the payment. About the 17th day of April, 1911, plaintiff, as holder of the instrument or check, presented the same for payment to the United States National Bank,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which subsequently returned it to plaintiff, with the following stamped across the face thereof: "Payment Stopped"—and refused to honor the same. Plaintiff then instituted this action. The defendants answered, admitting the execution of the instrument, and denying its indorsement in due course or for value, and denying its presentment and dishonor. They further averred that the check was executed without any consideration; that Dan Malcheff, the payee, who had been engaged in work for the defendant J. W. Sweeney Construction Company, presented to defendant company a false and forged estimate of the work done by him, upon which estimate the check was issued; that the check was postdated; that the plaintiff knew of such fraudulent estimate of work, and did not act in good faith in securing the check; that the transfer was without consideration. Plaintiff's reply put in issue the new matter of the answer. Defendants assign as error the holding of the court that the check in controversy was a negotiable instrument.

Alex Bernstein, of Portland (Bernstein & Cohen, of Portland, on the brief), for appellants. G. G. Schmitt, of Portland, for respondent.

BEAN, J. (after stating the facts as above). [1] Counsel for defendants contend that the fact that the check was postdated was sufficient to put the plaintiff upon inquiry as to any infirmity in the instrument, or defect in the title, and that the court erred in refusing to instruct the jury as requested by defendants' counsel, as follows: "That a postdated check is not a negotiable instrument if taken before the date on which demand can be made for payment, but is simply an assignment of the rights of the payee and opens the check to all the equity." Section 5834, L. O. L., being a part of the negotiable instruments law of this state, provides that a negotiable instrument must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5), where the instrument is addressed to a drawee, he must be named or otherwise indicated therein within reasonable certainty. However we may designate the instrument in suit, we think there can be no question but that it complies with all the necessary requirements of the law as to a negotiable instrument. It is full and complete upon its face. It is worthy of note that section 5834, L. O. L., does not require a negotiable instrument to be dated. Section 6018, L. O. L., defines a check as follows: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of

exchange payable on demand apply to a check." Section 5845, L. O. L., purports that the instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. It is the position of counsel for defendants that this section renders an antedated or postdated instrument merely legal, and does not make it negotiable. We fail to see any reason why it was necessary for this enactment in order that the issuance of such an instrument should not be in violation of any statute or law. The purpose of the negotiable instruments law is to direct the proper method of dealing with such an instrument. This section has a broader signification, and renders a postdated or antedated check full, complete, and valid.

Independent of any statutory regulation, it makes no difference whether a check be postdated or antedated, it is still payable according to its express terms. The drawing of a postdated check is an everyday occurrence in the commercial world, and the uniform understanding of the parties is that, when a check is postdated, it is payable on the day it purports to be drawn, even though it be negotiated beforehand. 2 Daniel on Negotiable Instruments (5th Ed.) § 1578; *Frazier v. Trow's P. & B. Co.*, 24 Hun (N. Y.) 281; *Champion v. Gordon*, 70 Pa. 474, 10 Am. Rep. 681. It is said in 5 Amer. & Eng. Enc. of Law (2d Ed.) p. 1032, that: "A postdated check, or one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date." The rule is laid down in *Selover on Negotiable Instruments Law*, § 18, that an antedated or postdated instrument may, of course, be negotiated after or before the date given, and any one to whom such an instrument is given acquires title thereto as of the date of delivery. The contention of the defendants is that the instrument was not a check, for the reason that it was not payable on demand, and that the same was not negotiable. We incline to the belief that the instrument was a check, payable on demand on or after April 15, 1911. This conclusion is in harmony with cases wherein it is held that a postdated instrument of this nature is a check, and not a bill of exchange, which would authorize the holder to present the same for acceptance prior to the time when it would be payable. *Way v. Towle*, 155 Mass. 374, 29 N. E. 506, 31 Am. St. Rep. 552.

[2] The real question in the case at bar is: Was the instrument subject to any available defense as between maker and payee, after it was negotiated to plaintiff? In the consideration of these cases it should be borne in mind that the negotiable instruments law was adopted by several of the

states for the purpose of uniformity, and we think that this should be one of the aims of courts. Section 5861, L. O. L., directs that absence or failure of consideration is matter of defense as against any person not a holder in due course. Section 5885 prescribes that a holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 5889 provides that, to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. According to section 5890, a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

In the case of *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, the fact that at the time a check was transferred the payee stated that the drawer had asked him to wait two or three days for presentation of the check did not charge the indorsee with notice of any infirmity in the contract. The payment of the check was stopped before presentation at the bank for payment. No inquiry having been made as to the validity of the check, it was held that it was for the jury to determine whether or not the check was taken in good faith, the purchaser not being bound, as a matter of law, with facts calculated to arouse suspicion, nor charged with the duty of making active inquiry. The case of *Albert v. Hoffman*, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043, decided since the enactment of the negotiable instruments law in that state, which is similar to ours, is very much like the case at bar. There the plaintiff declared on a postdated check made by the defendant Hoffman to the order of H. Feinberg & Son. The latter indorsed the same to plaintiff for value, but the payment was stopped by the maker before presentation. The defendant separately defended on the grounds that the check was postdated, that no consideration passed therefor between the maker and the payee, and that the plaintiff came into possession thereof without having given any valuable consideration therefor, and with full knowledge on her part of the facts and circumstances attending the making and delivery of the check. On page 88 of 64 Misc.

Rep., on page 1044 of 117 N. Y. Supp., Justice MacLean said: "Under section 31 of the negotiable instruments law [Laws 1897, c. 612] * * * then in force, 'the instrument,' a negotiable instrument, as was the check in question, as defined by section 2 of the same law, 'is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose,' and the plaintiff, as indorsee, was not put upon inquiry merely because of the negotiation of the check prior to the day of its date." New York is a state of the largest commercial interests, and we deem it safe to follow the above rule, unless there is good reason for doing otherwise. We hold that the plaintiff, as indorsee of the check, was not as a matter of law put upon inquiry by reason of the check's being negotiated prior to the day of its date; therefore, the instruction requested was properly refused. The testimony tended to show, and the jury found, that the plaintiff took the check in good faith and for full value, and at that time as a matter of fact had no notice of any infirmity in the instrument. This feature of the case is therefore settled by the verdict of the jury.

[3] It is claimed by the defendant company that the check in question was paid to plaintiff by the United States National Bank of Portland upon which it was drawn; that by reason thereof the check had run its course; that the trial court erred in excluding the question of payment from the jury. The defendants in their answer pleaded and wholly relied upon the matters heretofore referred to as the basis of their defense, all of which was submitted to a determination by the jury. The defendants could not during the progress of the trial change their position from that of their pleadings, and show payment of the check without having pleaded the same. *Farmers' National Bank v. Hunter*, 35 Or. 193, 57 Pac. 424; *Clark v. Wick*, 25 Or. 446, 36 Pac. 165; *Benicia Ag'l Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676. The trial of a cause can proceed only on the issues raised by the pleadings. *Coos Bay R. R. Co. v. Siglin*, 26 Or. 387, 390, 38 Pac. 192.

[4] It is not suggested in any way that the defendant J. W. Sweeney Construction Company paid the check. This claim is tantamount to the contention that the action is not prosecuted by the real party in interest. In making such a defense, where the same does not appear upon the face of the complaint, the defendant must state facts which constitute the defense and which show that the plaintiff is not the real party in interest. *Pomeroy Code Remedies* (3d Ed.) § 711; *Simon v. Trummer*, 57 Or. 153, 159, 110 Pac. 786. See, also, *Sturgis v. Baker*, 43 Or. 236, 241, 72 Pac. 744.

[5] Section 68, L. O. L., provides that the defendant may demur to the complaint when

it appears upon the face thereof that there is a defect of parties plaintiff or defendant. Section 72 is to the effect that if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. It appears upon the face of the complaint that plaintiff is the holder of the check, and that the defendant, not having pleaded to the contrary, thereby waived this question. *Hillman v. Young*, 127 Pac. 793.

[6] Defendants requested the court to instruct the jury as follows: "If you find that the indorsement of the check in controversy from Malcheff to Triphonoff, the plaintiff herein, was made on March 28, 1911, that the money passed at that date, and the check was then delivered and the transaction completed, you must find that the contract was made on Sunday, and is therefore void, and that the plaintiff cannot recover on this check, and your verdict must be for defendants." The defense set up in defendants' answer did not allege that the check in question was invalid by reason of having been executed on Sunday; therefore, this attempted defense and requested instruction stand upon the same footing as the one last mentioned, and the instruction was properly refused. The defendants must proceed upon the theory of their case as shown by their answer until the end of the trial. *Whitten v. Griswold*, 60 Or. 318, 118 Pac. 1018; *U. S. Nat. Bank v. First Trust & Savings Bank*, 60 Or. 266, 119 Pac. 343. The other instructions requested, except in so far as given by the court in its charge to the jury, involved the question as to the date of the check heretofore noted, and need not be further referred to. The questions of the indorsement of the check to plaintiff for a valuable consideration, of his taking the same in good faith, and of his having at the time no knowledge or notice of any infirmity in the instrument were fairly submitted to the jury by the trial court.

[7] The defendants requested the trial court to open the case after it had been closed, and also filed a motion for a new trial supported by affidavits (which are not contained in the record), in order to allow the defendants to show that the plaintiff had been convicted of a violation of an ordinance of the city of Portland. Defendants claim that the trial court abused its discretion in denying the same. It is well settled that to disqualify a witness, or to be used to affect his credibility, a conviction must be of an offense against the law of the land. A conviction under a municipal ordinance is not a conviction of such an offense within the meaning of section 863, L. O. L. *State v. Crawford*, 58 Or. 116, 113 Pac. 440, Ann. Cas.

1913A, 325, and note thereto. Inasmuch as the affidavits for a new trial are not contained in the bill of exceptions, we cannot say that the trial court abused its discretion in this respect.

Finding no error in the record, the judgment of the lower court is affirmed.

(64 Or. 404)

CITY OF PORTLAND v. TIGARD et al.
(Supreme Court of Oregon. March 25, 1913.)
EVIDENCE (§ 524*) — EXPERT EVIDENCE — VALUE.

In a street opening proceeding an expert, duly qualified for the purpose of showing the increased market value of defendant's property resulting from the opening of the street, was properly permitted to answer a question calling for his opinion as to the amount of benefit which at that time would be conferred on certain adjoining property by the opening and extending of the street.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2332; Dec. Dig. § 524.*]

On rehearing. Rehearing denied.

For former opinion, see 129 Pac. 755.

ELAKIN, J. By motion for rehearing it is strongly urged that this decision conflicts with and is contrary to the holding in the case of *Pacific Railway & Navigation Co. v. Elmore Packing Co.*, 60 Or. 534, 120 Pac. 389. There is no question but the holding in that case states the law correctly, and the reason it was not referred to in the opinion in this case was because the facts in the two cases are not similar. The question asked and answered in that case, which was held error, was: "State what, in your opinion, is the damage that defendant will sustain by the appropriation of the right of way involved in this case and shown by your map, * * * his buildings and land." The witness answered: "Two hundred and fifty dollars, I would judge from the settlement we have made with adjoining property, would be ample for the land, and \$150 for the buildings; \$400, total"—which was clearly error.

In the bill of exceptions in this case it is said that the witness Simmons was called as an expert witness, and duly qualified as such for the purpose of showing the increased market value of the property of defendant resulting from the opening of the street, and he was asked: "What would you consider the benefit at that time to the south 20 feet of lot 2, block 31, by opening and extending Ainsworth avenue?" In the motion for rehearing counsel admits that the witness might be allowed to give his opinion to the jury as to the increased market value of the lot, and that such would be proper expert testimony. The question actually asked was: "What would you consider the benefit to the lot by opening the street?" The objection did not seek to confine the question to the increase of the market value, and was to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

effect that the question was usurping the province of the jury. When the question was repeated, counsel further objected that it called for benefits without reference to damages, thus showing that the objection was very indefinite. The question, in substance, was, How much will the value of the lot be increased by the opening of the street? not, as in *Pacific Railway & Navigation Co. v. Elmore Packing Co.*, supra, "What, in your opinion, is the damage that defendant will sustain," etc.? which covers the whole issue. We think the opinion in this case comes clearly within the rule as announced by this court in the cases cited therein, and in no way conflicts with or tends to weaken the rule in the case above cited. In that case the question asked the witness was equivalent to asking what verdict the jury should render. Not so in this case, but rather what benefit the street would be to the lot—how much greater would be its value. In referring to this subject Justice McBride, in *Ellott v. Wallowa County*, 57 Or. 243, 109 Pac. 133, Ann. Cas. 1913A, 117, says: "It has been held in this state that a witness will not be allowed to state upon a question of general damages the amount of such damage [referring to the very point covered by the opinion in the case of *Pacific Railway & Navigation Co. v. Elmore Packing Co.*, supra]. * * * But this court seems to have held, in cases of like character, that witnesses, otherwise competent, may testify directly as to the amount of damages. * * * But where this is permitted the witnesses, while not technically experts, must show knowledge of the facts beyond that which the jury would be able to derive from testimony as to physical facts." The witness must show some special and actual knowledge as to value.

The motion for rehearing is denied.

(64 Or. 421)

STATE v. WELLS FARGO & CO.

(Supreme Court of Oregon. March 25, 1913.)

1. TAXATION (§ 113*)—CORPORATE PROPERTY—STATUTORY PROVISIONS.

If the Gross Earnings Tax Law, enacted under the initiative in June, 1906 (Sess. Laws 1907, pp. 7, 8), imposing on express companies a tax of 3 per cent. on their gross receipts received in the state, was not repealed by the new tax code of 1907 (Sess. Laws 1907, p. 453), and the statute supplementary thereto (Sess. Laws 1907 p. 485), it was impliedly repealed by the act of 1909 (Sess. Laws 1909, p. 345), creating the board of tax commissioners, requiring it to make an annual assessment of the property of express companies, and containing a complete and comprehensive scheme for the assessment and taxation of express, telephone, and telegraph companies.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 207; Dec. Dig. § 113.*]

2. TAXATION (§ 113*)—CORPORATE PROPERTY—STATUTORY PROVISIONS.

The gross earnings tax levied in 1908 on express companies under the Gross Earnings

Tax Law of 1906 (Sess. Laws 1907, pp. 7, 8) did not become due and payable notwithstanding the repeal of that law by the act of 1909 (Sess. Laws 1909, p. 345), dealing with the same subject, since, under the act of 1906, the tax for 1908 did not become due and owing until March 31, 1909, and the act of 1909, repealing the earlier act, was in full force and effect on February 24, 1909.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 207; Dec. Dig. § 113.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by the State against Wells Fargo & Co. From a judgment in favor of defendant, the State appeals. Affirmed.

See, also, 126 Pac. 611.

This is an action brought by the state of Oregon to recover certain sums of money claimed to be owing by respondent under the gross earnings tax law enacted under the initiative in June, 1906. The complaint contained three counts; the first thereof claiming the tax due on the earnings of respondent in the fractional year 1906, the second thereof on the earnings of respondent in the calendar year 1907, and the third thereof on the earnings in the calendar year 1908. Judgment was entered in the court below in favor of appellant and against respondent for the amounts claimed for the years 1906 and 1907, and that judgment was paid by respondent.

The lower court on demurrer to the answers to the third count in the complaint held that the initiative law for 1906 had been repealed by the tax law of 1907, found in the Session Laws for that year at pages 485 to 497, and that the gross earnings tax law had also been repealed by the act of 1909 creating the board of tax commissioners, found in the Session Laws for that year at pages 345 to 364. Judgment was entered for respondent on the third count of the complaint for the tax claimed on its earnings in 1908. The question presented by this appeal is whether the act of 1906 is repealed by either or both of the acts aforesaid. For an understanding of the questions raised on this appeal, it is necessary to recite the three acts in question. The gross earnings statute enacted by initiative in 1906, in so far as it is important for present purposes, is as follows (Session Laws 1907, pp. 7, 8): "Section 1. That every express company or corporation doing business in this state shall pay to the state of Oregon a license of three (3) per centum upon the gross receipts of such company or corporation received in this state, and every telephone company or corporation doing business in this state, and every telegraph company or corporation doing business in this state, shall pay to the state of Oregon a license of two (2) per centum upon the gross receipts of such company or corporation received in this state; which license shall be

paid annually by such company or corporation to the Treasurer of this state. And for the purpose of ascertaining the amount of the same, it shall be the duty of the president, secretary, and treasurer, or such of them as reside in this state, or if neither of said officers reside in this state, then of the general manager or other officer or agent of such company or corporation having general control, management or supervision of its business within this state, to transmit to the State Treasurer, on or before the first day of March of each year, a statement, under oath, of the gross receipts of said company or corporation for business transacted within this state during the preceding year, ending December 31st of said year; and if such company or corporation shall fail to make such statement, or to pay any such license, for the period of thirty (30) days from and after such statement is required by this act to be made, or after such license is due and payable, as herein provided, the amount thereof, with the addition of ten (10) per centum thereon for such failure, shall be collected of such company or corporation, for the use of the state, and the same is hereby declared to be and is made a debt due and owing from such company or corporation to the state of Oregon. * * *

In 1907 the Legislature enacted a new tax code consisting of 80 sections, found on pages 453 to 484 of the Session Laws of 1907, and in connection therewith enacted a statute supplementary thereto, found in the Session Laws of 1907, at pages 485 to 497. Section 1 of this latter statute provides for an amendment of section 3037 of the B. & C. Comp., so that the same shall read as follows: "All real property within this state, and all personal property situated or owned within this state, except such as may be specifically exempted by law, shall be subject to assessment and taxation in equal and ratable proportions." Section 2 of this statute proceeds to define what shall be deemed real property as follows: "The terms land, real estate, and real property, as used in this act, shall be construed to include the land itself, whether laid out in town lots, or otherwise, above and under water, all buildings, structures, substructures, superstructures, and improvements erected upon, under, or above or affixed to the same, and all rights and privileges thereto belonging or in any wise appertaining; and all franchises and privileges granted by or pursuant to any law of this state or municipal ordinance or resolution, owned or used by any person or corporation, other than the right to be a corporation; and all mines, minerals, quarries, fossils, and trees in, under, or upon the land." The statute proceeds in section 3 to define personal estate, and in section 4 to enumerate the property exempt from taxation. It defines the manner in which property, both real and personal, shall be as-

essed and taxed, and the jurisdiction in which such assessment and tax shall be levied. Section 39 provides for the repeal of all acts and parts of acts in conflict with the statute of 1907. Section 40 provides that the act shall be without prejudice to the assessment which would otherwise be levied as of March 1, 1907. The act of 1909 creates the board of tax commissioners, and by subdivision 15 of section 4 thereof requires this board: "To make an annual assessment, upon an assessment roll to be prepared by said board, of the property having a situs in this state, as hereinafter defined, of all * * * express companies, telegraph companies, telephone companies. * * *" Section 5 of this statute reads, in part, as follows: "The term 'property,' as used in this act, shall be deemed to include all property, real and personal, subject to assessment for taxation under this act belonging to the corporation, or held by it as occupant, lessee, or otherwise, and shall include the rights of way, roadbed, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph, telephone and transmission poles, wires, conduits, switchboards, machinery, appliances, appurtenances, and all other property of a like or different kind, used in the carrying on of the business of said corporation, and owned, leased, or operated by them respectively, and all other real and personal property, and all franchises and special franchises; provided, however, that this definition shall not include, apply to, or subject to assessment for taxation by said board, such real estate as is owned and can be conveyed by such corporation under the laws of this state, which is not actually occupied in the exercise of its franchise, or in use in the operation of their corporate business. * * *" Section 7 provides that each corporation, between the 1st day of April and the 15th day of May of each year, shall file with the tax commissioners a statement, under oath. This statement is a comprehensive one. It must set up the par value and the market value of the stock, a statement of the bonds, if any, and of their market value, a list of the real property situate in the state of Oregon and an appraisal of its value, a statement of the personal property owned by the corporation in Oregon and of the value thereof, the total value of the real estate of the corporation outside the state of Oregon, the total value of its personal property outside the state of Oregon, the total length of its lines, and the length of its lines in Oregon. The thirteenth subdivision of section 7 requires the corporation to give "a statement in detail of the entire gross receipts and net earnings of the company from all sources, stated separately, for the fiscal year next preceding the date of the report." Section 9 requires the board of tax commissioners, prior to the first Monday of October of each year, to levy an as-

assessment on the property of the company subject to taxation under the act. This section contains the following language:

" * * * For the purpose of arriving at the amount and character and true cash value of the property belonging to said companies as appearing upon the assessment roll for the purpose of assessment for taxation under this act, the said board * * * may take into consideration the statements filed under this act, the reports, statements or returns of said companies filed in the office of any board, office or commission of this state, or any county thereof, the earning power of said companies, the franchises and special franchises owned or used by said companies (said franchises and special franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property), the assessed valuation of any property of said companies, used in the operation of the business of the companies, and by law required to be assessed by county assessors, and such other evidence of any kinds as may be obtainable bearing thereon. * * * In determining the true cash value of the property assessable for taxation by the said board of state tax commissioners of the companies in this act enumerated, when said companies own, lease, operate or use rail, pipe or wire lines or property within and without this state, if this board shall value the entire property within and without the state as a unit, as provided in the next section the said board shall be controlled in ascertaining the property subject to taxation in Oregon by the proportion which the number of miles of main track (meaning thereby main, stem and branch lines), miles of wire, or miles of main pipe lines controlled or used by said company as owner, lessee, or otherwise, within the state of Oregon bears to the entire mileage of main track as aforesaid, miles of wire or main pipe line controlled or used by said company, as owner, lessee or otherwise." This act declared an emergency, and became operative on the 24th of February, 1909.

I. H. Van Winkle, Asst. Atty. Gen. (A. M. Crawford, Atty. Gen., and James W. Crawford, Asst. Atty. Gen., on the brief), for the State. Wallace McCamant, of Portland (E. S. Pillsbury, of San Francisco, Cal., and Snow & McCamant, of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] It is not now necessary to decide whether or not the act of 1907 heretofore quoted repealed the act of 1906. In any event, we think it clear that the act of 1909, which is comprehensive in its terms and covers the whole field of taxation embraced in the act of 1906, effected a repeal of that act. It covers the same ground,

deals with the same subject, and was, no doubt, intended to be a complete and comprehensive scheme of taxation, revising and taking the place of previous laws for the assessment and taxation of express, telephone, and telegraph companies; and therefore repeals such previous statutes by implication. *Little v. Cogswell*, 20 Or. 345, 25 Pac. 727; *Continental Ins. Co. v. Riggen*, 31 Or. 336, 48 Pac. 476; *Reed v. Dunbar*, 41 Or. 509, 69 Pac. 451.

[2] The contention that the tax for 1908 is due notwithstanding the repeal of the act by the Legislature of 1909 cannot be upheld. The tax which was levied in 1908 under the act of 1906 did not become payable until March 31, 1909, at which date, in the language of the act, it is "made a debt due and owing from such company or corporation to the state of Oregon." The act of February 24, 1909, contained an emergency clause, and was in full force and effect from that date, so that no debt existed on account of the gross earnings tax of 1908 at the time the law of 1906 was repealed.

The judgment of the circuit court is affirmed.

BURNETT, J., took no part in the consideration of this case.

(64 Or. 473)

STATE v. BROWN.

(Supreme Court of Oregon. March 25, 1913.)

1. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—DENTISTS—PRACTICING WITHOUT RECORDING CERTIFICATE.

L. O. L. § 4780, provides that any person who shall practice dentistry, or who for reward or hire shall do any act of dentistry, without having filed for record and having recorded in the office of the county recorder of the county wherein he shall so practice or do such act a certificate from the board of dental examiners entitling him to so practice, shall be guilty of a misdemeanor, etc. *Held*, that such section may be violated either by practicing dentistry in any manner whatever, without having first recorded the certificate, and also by doing an act of dentistry for reward or hire; and hence an indictment in the language of the statute for violating the first clause of the section was not defective for failure to set out specific acts of dentistry which the defendant performed, or to allege that he performed them for reward or hire.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. CONSTITUTIONAL LAW (§ 205*)—DENTISTS—DISCRIMINATION—REGULATION—RECORDING CERTIFICATE—STATUTE.

Such section was applicable to all dentists, and was not, therefore, unconstitutional as discriminating in favor of nonresidents as against residents.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

3. PHYSICIANS AND SURGEONS (§ 2*)—POLICE POWER—DENTISTS—REGULATION.

L. O. L. § 4780, making it a misdemeanor for any person to practice dentistry, or to do

any act of dentistry for reward or hire, without having first recorded his certificate in the county wherein he is engaged in such practice or does such act, is a proper police regulation intended to protect the public against the practice of dentistry by disqualified persons.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. § 2.*]

Appeal from Circuit Court, Coos County; John S. Coke, Judge.

H. M. Brown was indicted for practicing dentistry without recording his certificate, and he appeals. Affirmed.

The defendant was indicted for the crime of practicing dentistry without recording his certificate. The indictment is as follows: "H. M. Brown is accused by the grand jury of the county of Coos, state of Oregon, by this indictment of the crime of practicing dentistry without recording certificate, committed as follows: That said H. M. Brown, on the 15th day of April, 1912, in the county of Coos and state of Oregon, then and there being, did then and there wrongfully and unlawfully practice dentistry, without having filed for record and having recorded in the office of the county recorder or county clerk of Coos county, state of Oregon, a certificate from the board of dental examiners of the state of Oregon entitling him, the said H. M. Brown, to so practice, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon." A general demurrer was interposed and overruled. Whereupon the defendant, refusing to plead further, was duly adjudged guilty and sentenced to pay a fine of \$100 and costs, from which judgment he appeals.

G. T. Treadgold, of Bandon, for appellant. Geo. M. Brown, Pros. Atty., of Roseburg, and L. A. Liljeqvist, of Coquille, for the State.

McBRIDE, C. J. (after stating the facts as above). [1] The first objection urged is that the indictment does not set forth the specific acts of dentistry which the defendant performed, or that he performed them for reward or hire. Section 4780, L. O. L., is as follows: "Any person who, as principal, agent, employer, employé, assistant, or in any manner whatever, shall practice dentistry, or who for reward or hire shall do any act of dentistry, without having filed for record and having recorded in the office of the county recorder of the county wherein he shall so practice or do such act a certificate from said board of dental examiners entitling him to so practice, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$50 nor more than \$200, or be confined for any period not exceeding six months in the county jail, for each and every offense. All fines recovered under this act shall be paid into the common school fund of the county in which conviction is had." It will be noticed that the section quoted indicates that the dental law may be violated (1) by practicing dentistry in any

manner whatever without first having recorded the certificate; (2) by doing any act of dentistry for reward or hire. The defendant is indicted for violating the first subdivision or clause of the section, and as to that it is not prescribed that he shall have practiced for reward or hire to render him amenable to its provisions. As to the other objection, that the acts of dentistry are not set forth in the indictment, it is sufficient to say, as we have said frequently, that, the crime being a creature of the statute, it is sufficient to describe it in the language of the statute. *State v. Carr*, 6 Or. 133; *State v. Miller*, 54 Or. 381, 103 Pac. 519.

[2, 3] It is claimed that section 4780, L. O. L., is unconstitutional, in that it requires any person practicing dentistry to have his certificate recorded in any county in which he shall practice, thereby, it is urged, discriminating between resident and nonresident dentists. There is no such discrimination. The law applies to all dentists, and is a reasonable police regulation intended to protect the public against quacks, and is not in policy different from laws that require peddlers, venders of liquor, and persons engaged in various occupations to secure licenses in every county in which they do business. The nonresident dentist practicing in Coos county is required to record his certificate, and the resident dentist is required to do the same. A resident of Multnomah county purchasing land in Coos county is required to have his deed recorded in Coos county, for the obvious reason that to record it in the county where he resides would not give notice of the transfer to the public in Coos county, where the land is situated. A dentist residing in Multnomah county, if he intends practicing his art in Coos county, is required to record his certificate in that county for the same reason, namely, that the people of that county may have notice of his qualifications. The requirement is not burdensome, and no qualified person would hesitate to comply with it.

The judgment is affirmed.

(68 Or. 36)

PUTNAM v. PACIFIC MONTHLY CO.

(Supreme Court of Oregon. March 25, 1913.)

1. MASTER AND SERVANT (§ 257*)—INJURIES TO SERVANT—CONSTRUCTION OF COMPLAINT—EXISTENCE OF RELATION.

A complaint, in an action for death, alleging that decedent was employed by defendant on the fourth floor of a building, and that in order to reach her work she was compelled to use an elevator operated by another employé of defendant whose negligent operation of the elevator caused decedent's death, charges that her injuries occurred while acting as a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 813, 814; Dec. Dig. § 257.*]

2. MASTER AND SERVANT (§ 88*)—EXISTENCE OF RELATION—INJURY WHILE BEING CARRIED TO WORK.

If, as a part of the compensation to an employé, the carrier transports him to and fro

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

between certain points when not engaged in actual service, or when the travel is not closely connected with the employment, the employé is then a passenger, but if the carriage is merely for the mutual convenience of the parties, or either of them, in connection with the master's business, the relation of passenger and carrier does not exist between them, so that, where an employer furnishes an elevator for the use of employés in the upper stories of a building, the carriage of the employés on the elevator to their work is the act of an employer and not of a carrier, and the measure of care due from the employer is the same as in any other case founded on the same relation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.*]

3. MASTER AND SERVANT (§§ 101, 102*)—NEGLECT OF MASTER—CARE AS TO OPERATION OF ELEVATOR.

Where a master furnishes an elevator for the use of employés employed in the upper stories of a building, he is only bound to use ordinary care and prudence commensurate with the danger to be reasonably apprehended, but not the degree of care, required of a common carrier of passengers, as he is only bound to exercise ordinary care to provide a reasonably safe place and reasonably safe appliances for the convenience of the employés in connection with the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 173, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 197*)—WHO ARE "FELLOW SERVANTS."

One who is employed on the fourth floor of a building is a "fellow servant" of the operator of an elevator which is run by the master to transport employés to and from the floor where they work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 489, 490; Dec. Dig. § 197.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

5. JURY (§ 88*)—INTEREST OF JUROR—STOCKHOLDER IN INSURANCE COMPANY.

Under L. O. L. § 122, subd. 4, making the interest of a juror in the result of an action ground of challenge for implied bias, a juror who is a stockholder or interested in an insurance company warranting against loss by the injury forming the basis of pending litigation would be subject to challenge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 409, 410; Dec. Dig. § 88.*]

6. TRIAL (§ 108½, New, vol. 3 Key-No. Series)—EXAMINATION OF JUROR—DISCRETION OF COURT.

Under L. O. L. § 856, providing "that the court may exercise a reasonable control over the mode of interrogation so as to make it as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be," a prospective juror may be interrogated as to his interest, but the party interrogating him has no right to abuse his privilege, or try to prejudice the jury with irrelevant matter and in an action against an employer for the death of an employé, in which defendant was insured against losses of that kind, it was error for the court to allow questions to the jurors which would tend to prejudice the case in the minds of the jury because of the existence of such insurance.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Myrtle Putnam, administratrix of Mabel Putnam, deceased, against the Pacific

Monthly Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to enter a judgment of nonsuit.

For the purpose of its enterprise the defendant occupied the fourth floor of a building in the city of Portland, and had the exclusive control and management of an elevator used by the general public and its employés in going to and from its place of business. Among other things, the complaint alleges: "That on September 2, 1910, Mabel Putnam was employed by the above-named defendant, the Pacific Monthly Company, in its office on the fourth floor of said building, and in order to reach her work as such employé was compelled to take and use said elevator in going from the first floor of said building to the fourth floor thereof; that on said day, while going to her work as such employé, she entered said elevator on the first floor of said building, and which was at the time being operated by one J. P. Gerardy, the regular elevator operator in the employ of the said defendant, the Pacific Monthly Company; that when said elevator reached the fourth floor of said building the said operator thereof opened the door for the purpose of allowing and permitting the said Mabel Putnam to pass from said elevator onto the floor of said building, and, while in the act of passing out of said elevator as aforesaid, the said elevator operator so unskillfully, negligently, and carelessly manipulated, handled, and operated said elevator that the same suddenly and without warning to the said Mabel Putnam began to descend very rapidly, and continued so to descend until it reached a point between the third and second floor of said building, and the said Mabel Putnam was thereby caught between said elevator and the floor of the third and the ceiling of the second floor and was fatally wounded, crushed, and mangled, from the effects of which she immediately died." The compulsion to use the elevator and the negligence of the operator set forth in this allegation are both denied; otherwise it is admitted. It is alleged by the plaintiff and denied by the defendant that the latter in running and operating the elevator, as stated in the complaint, was a common carrier in transporting employés and the general public from the first floor to the fourth floor of the building. The defendant's occupancy of that story with the control and management of the elevator and its use by the general public and its employés in going to and from the place of business were admitted by the answer. The allegation of damage to the estate of Mabel Putnam was traversed. The substance of the affirmative defense was that the elevator operator and the decedent were fellow servants and that the injuries sustained by the latter were due to the negligence and carelessness of the associate employé of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the deceased, and not of the defendant. This in turn was traversed by the reply. A jury trial resulted in a verdict and judgment for the plaintiff, from which the defendant appeals.

R. A. Leiter, of Portland (Griffith & Leiter, F. J. Lonergan, and Clarence L. Eaton, all of Portland, on the brief), for appellant. Samuel White, of Portland (Manning & White and E. S. J. McAllister, all of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). The plaintiff's theory, adopted by the court in the trial of the cause, is that, as a matter of law, the defendant in running and operating the elevator as stated in the complaint was a common carrier of passengers and bound to exercise, as such, a high degree of care to those using the elevator. The contention of the defendant is that the operation of an elevator is not a matter of common carriage and that, if it were, the relation of passenger and carrier did not exist between decedent and defendant at the time of the accident, but, on the contrary, that she was an employé to whom its measure of duty was to exercise only ordinary care in providing for her a reasonably safe appliance by which to reach her employment. Over the exception of the defendant the court took from the jury the defense of the negligence of a fellow servant by instructing them peremptorily that the decedent and the operator of the elevator were not fellow servants and directing the jury not to consider the defense of the negligence of one standing in that relation to plaintiff's intestate. The court, likewise disregarding the objection of the defendant, instructed the jury in consonance with the theory that the deceased was a passenger and the defendant a common carrier of passengers from which relation sprang the duty of the defendant to use a high degree of care to prevent accidents.

The authorities are not agreed upon the question of whether an elevator is an appliance of common carriage. A wide distinction in fact exists between the skyscrapers of New York, Chicago, and other large cities in which many elevators are in constant use and a small building in a country town having an elevator for one or two stories. In the one case the elevators in a building may carry thousands of persons daily, while in the other it will be only used by comparatively few in a week. We do not find it necessary to establish an unvarying rule on the subject in this instance.

[1] Conceding, however, as a postulate, for the purposes of this case only, that the defendant was a common carrier in the operation of the elevator, it does not necessarily follow that it sustained that relation to the decedent, or that there was due to her from the defendant that high degree of care incumbent upon a common carrier as to its passen-

gers. Neither is it necessary to indulge in a discussion of whether or not the decedent was at the time of the injury a passenger or an employé, as the complaint itself has put her in the latter class, for it says she was employed by the defendant in its office on the fourth floor of the building, and that in order to reach her work as such employé she was compelled to take and use the elevator, and that while going to her work as such employé she entered the elevator which was operated by another employé of the defendant. Hence, even if we should hold as a general rule that the operation and control of an elevator is or amounted to engaging in the business of common carrier of passengers, the initial pleading in the case has taken the decedent entirely out of that category and placed her in the class of employés.

The plain deduction from the testimony also is that the unfortunate girl was on her way to her work, for it shows that the distressing accident took place only ten minutes before the hour at which she was required to begin her labors. It is not shown that her compensation was increased or diminished by reason of her use of the elevator in going to her work. That contrivance was manifestly maintained for the convenience of those going to and from the place of business of the defendant, and it is so stated in substance in the complaint. On this distinction between passenger and employé as upon the main question of whether an elevator owner is a common carrier or not, the authorities are not agreed. In *Knahtla v. Oregon Short-Line, etc., Ry. Co.*, 21 Or. 136, 148, 27 Pac. 91, it was held that a laborer going from one point to another on a train engaged in clearing a railway track of obstructions is not a passenger. In *Self v. Adel Lbr. Co.*, 5 Ga. App. 848, 64 S. E. 112, an employé riding on a log train in connection with his employment going to and from his work was not a passenger. To like effect is *St. Louis, Iron Mt. & S. Ry. Co. v. Wiggam*, 98 Ark. 259, 135 S. W. 889. In *Eidem v. Chicago, R. I. & P. Ry. Co.*, 158 Ill. App. 82, it was ruled that, where transportation to and fro is part of the contract of employment, the employé is not a passenger. In *Manville v. Cleveland & T. R. R. Co.*, 11 Ohio St. 417, the plaintiff as manager of a gravel train was ordered to go to a certain place to get a train and went on a passenger train beyond his destination and passed the night. Returning by train the next morning he was injured by negligence of the engineer before reaching his destination, and it was determined that he was an employé and not a passenger. Section hands carried on a car from place to place for work are deemed to be employés and not passengers in Ind., etc., *Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145; *South Ind. Co. v. Messick*, 35 Ind. App. 876, 74 N. E. 1097. In the case of *Ionnone v. N. Y., N. H. & H. R. Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812, it was con-

cluded that a snow shoveler being carried from one point to another in the progress of the work is not a passenger. In *Shannon v. Union R. Co.*, 27 R. I. 475, 63 Atl. 488, a switch cleaner going on a train from one switch to another was not a passenger. In *Kilduff v. Boston Elevated Ry. Co.*, 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873, a track layer being transported to and from his work was said not to be a passenger, and to the same effect is *Birmingham Ry., L. & P. Co. v. Sawyer*, 156 Ala. 199, 47 South. 67, 19 L. R. A. (N. S.) 717. In *Sanderson v. Panther Lbr. Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841, the foreman of a logging camp going on a log train to the main office of the company to see about hay for his horses is still an employé and not a passenger. In *Walsh v. Cullen*, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911, a waitress lived in a hotel where she was employed, and, returning one evening from a walk, after her working hours, was injured by the operation of the elevator which she took for the purpose of going to her room for the night. The court ruled that she was not a passenger but an employé. In *Watt v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104, the janitor in a building in which there was an elevator used that appliance himself and was killed in the operation of it. It was stated that he was a servant and not a passenger, and that the master or owner of the building was bound to use only ordinary care in providing a safe place for him to work, although it be an elevator. In *McDonough v. Lanpher*, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541, the employés of the defendant using the whole of a five-story building were permitted to ride in the freight elevator to and from their places of work, although they were not required to do so, and it was held that while so riding they were employés and not passengers, and that the degree of care required of the defendant was that of the master for his servant and not that imposed on a common carrier of passengers. In *McDonald v. Simpson*, 114 App. Div. 859, 100 N. Y. Supp. 269, a saleswoman in a mercantile establishment was going up in an elevator to get her street clothes at the end of her day's work and was injured, but the principle was adhered to that she was still an employé. In *Kappes v. Brown Shoe Co.*, 116 Mo. App. 154, 90 S. W. 1158, a large number of employés of the defendant were waiting for an elevator to take them down and out of the building at the end of a day's work. While thus waiting a boy was crowded under the gate barring the entrance to the elevator and fell down the shaft, and the rule was applied that he was still an employé of the company and not occupying the relation of a passenger.

On the other hand, the case of *Haas v. St. Louis, etc., R. Co.*, 111 Mo. App. 706, 90 S. W. 1155, announced that a laborer being trans-

ferred from one place to another for the purpose of engaging in employment is a passenger. In the *L. N. N. R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674, 50 L. R. A. 381, it is held that travel by an employé wholly disconnected from his service made him a passenger. *Chattanooga R. T. Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886, states that gratuitous carriage to and from the work is passenger service. To the same effect is *Johnson v. Texas Central Road. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433. In *Enos v. R. I. Sub. Ry. Co.*, 28 R. I. 291, 67 Atl. 5, 12 L. R. A. (N. S.) 244, the plaintiff earned from the defendant \$8 and 14 passenger tickets per week, and it was held that when he was traveling on those tickets he was a passenger. In *Doyle v. Fitchburg Road. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335, an employé traveling entirely for his own purpose and disconnected with his employment was classed as a passenger. In *McNulty v. Pa. R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721, it was decided that, where the transportation was a part of the pay of the employé, his travel when not connected with actual service made him a passenger. To the same effect is *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284. A like doctrine is taught in *Simmons v. Or. Ry. Co.*, 41 Or. 151, 69 Pac. 440, 1022, where the plaintiff, although generally in the employment of the defendant, was at the time of the injury traveling on his own private business. In *Williams v. Oregon Short Line Co.*, 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777, the plaintiff was traveling on a pass to a place where he expected to obtain employment from the defendant, but the service was not to begin until he arrived at his destination. On this account he was held not to be an employé but a passenger. In *Harris v. Puget Sound Elec. Ry. Co.*, 52 Wash. 289, 100 Pac. 838, the pass was issued as a part of the compensation to the employé. That made him a passenger on a train with the operation of which he had nothing to do, although he was going to a distant place to work and his wages were going on at the time of the injury.

[2, 3] Many other cases might be cited on this question, and it is impossible to reconcile them all to a certain standard; but upon mature consideration we deduce this result: If, as part of the compensation to the employé, the carrier agrees to transport the former to and fro between certain points when not engaged in actual service or when the travel is not closely connected with the employment, the employé must be considered a passenger because the carriage is for hire or is in a sense paid for by the work which the employé performs. On the other hand, if the carriage is merely for the mutual convenience of the parties or either of them in

connection with the business in which the master is engaged, the relation of passenger and carrier does not exist between them, although as to the general public the employer is a carrier of passengers. In such cases as the latter the master is only bound to use ordinary care and prudence in supplying carriage for the employé, commensurate, indeed, with the danger to be reasonably apprehended, but not the highest degree of care due from a common carrier to passengers as such. A greater degree of absolute care is due from the master to the servant in a powder factory than in a milliner shop; but in each instance the employer is only required to exercise ordinary care to provide a reasonably safe place in which to work and reasonably safe appliances for the convenience of the employés in connection with the enterprise, all in proportion to the inherent danger of the employment.

In the case in hand the elevator was immediately connected with the place of employment as a convenience both to employer and employé. It was a part of the duty of the latter to attend at the place to begin work at a stated hour, and, aside from the pleading on that subject, the decedent was so manifestly going to her work and her presence in the elevator was so immediately connected with her employment that she must be held to be an employé rather than a passenger. In her capacity as employé the measure of care due from master to servant is not different in this case from any other founded on the same relation, and the court was in error in instructing the jury on the basis of passenger and carrier as between the defendant and the unfortunate girl.

[4] It appears by the complaint that the elevator in question was used and operated by the defendant in connection with its business and that the elevator operator and the decedent were both employés of the defendant. In *Brunell v. S. P. Co.*, 34 Or. 256, 265, 56 Pac. 129, 131, this court, speaking through Mr. Justice Moore, quotes with approval the definition of "fellow servant" given by Judge Thompson in his work on Negligence (volume 2, p. 1203), as follows: "That all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants who take the risk of each other's negligence." Again, in *Mast v. Kern*, 34 Or. 247, 250, 54 Pac. 950, 951 (75 Am. St. Rep. 580), the court, speaking by Mr. Justice Bean, said: "The rule and the one now unquestionably established, and supported by the great weight of authority, both in this country and in England, is that the liability of the master depends upon the character of the act in performance of which the injury arises, and not

the grade or rank of the negligent employé. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the servant or employé to whom it is intrusted; but, if it is one pertaining only to the duty of an operative, the employé performing it is a fellow servant with his collaborators, whatever his rank, for whose negligence the master is not liable." It is further said in the same opinion: "It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe material to work upon, suitable and competent fellow servants to work with them, and to make rules and regulations needful for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured, by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in place of the master, and he is liable for the negligence of such employé to the same extent as if he had himself performed the act or been guilty of the negligence. But when the master has performed his duty in this regard and provided competent employés, a reasonably safe place to work, suitable material, tools, and appliances to work with, and needful rules and regulations, and the like, he has discharged his whole duty in the premises and is not liable to his servant for the negligence of another servant while engaged as an operative.

The complaint itself discloses all the elements in the definition of "fellow servant" as given by Judge Thompson and approved by this court. The plaintiff does not pretend to say that the elevator was not a fit appliance and in good order for the purpose for which it was intended. The essence of the complaint is centered in the allegation of the negligence and carelessness of the man who operated the elevator. The testimony for the plaintiff shows that the elevator was found to be in good order immediately after the accident, except that a fuse was blown out, and this was explained by those witnesses speaking for the plaintiff as being caused by the contact of the body of the decedent between the elevator and the floor of the building. It thus appears, or at least is not challenged by the complaint, that the defendant furnished a reasonably safe elevator for the convenience of its business and the use of its employés, and that the fault, if any, causing the tragedy, was the negligence of the operative. Under the doctrine of *Mast v. Kern* supra, the defendant had thus discharged its whole duty to the decedent employé. On the face of the complaint, as well as upon the testimony, the deceased and the

operator of the elevator were fellow servants, and the court was wrong in its instructions to the jury that they were not occupying that relation. The complaint was amenable to a general demurrer on the ground that it appears from that pleading that the injury to the deceased was on account of the negligence of her co-worker. It is argued that, because the deceased had nothing to do with the operation of the elevator, she was not a fellow servant with the elevator man, although they were in the employment of the same principal and drew their pay from the same source. The same might be said of a brakeman and a fireman on the same railroad train, or the man at the wheel, the fireman, and the engineer of a steamboat. In either of these cases neither person has anything to do with the duties of the other, yet it has often been held and is a rule of common sense that they are fellow servants. The fellow-servant doctrine has been established by so many precedents in this state through a long series of years that it is now impolitic to disturb it except by legislation.

[6] Another question, not necessary to the decision of this case under the circumstances already noted, but which ought to be settled as a matter of general practice, is based on the contention of the defendant that the plaintiff's counsel in examining the jurors on the voir dire, by the form of the questions, purposely intimated to the jury that the defendant was protected against liability for accident by insurance in the Employers' Liability Assurance Corporation of London, England, and that persistence in this course of examination extended so far as to amount to reversible error on the ground of misconduct of counsel. The matter is made the subject of 21 different assignments of error in the bill of exceptions. This line of interrogation seems to have been made a feature in the examination of every juror, in various forms, from asking whether the juror was acquainted with the corporation to whether he was a stockholder in it.

In the first place, it is quite as admissible to insure against loss by accident as against damage by fire. By as much as it is legitimate to provide protection by insurance against all manner of conflagrations whether started by the incendiary or the flash of lightning, by so much is it competent to arrange beforehand for defense against litigation beforehand for defense against litigation before initiated by the legitimate lawyer or the perniciously active ambulance chaser. A defendant is not to be mulcted because he is prudent enough to provide in advance by insurance against adverse contingencies in business. The mere fact, therefore, that in cases of this kind the defendant is insured against loss by accident and defended by counsel chosen or employed by the indemnifying company, cannot lawfully affect the decision of the issues in any manner whatever. Under such circumstances,

the insured has the same right to call upon the insurer to defend, as the grantee of real property under covenant of warranty has to demand that his grantor defend in litigation attacking the title to the realty described in the conveyance. Speaking by Mr. Justice McBride, in *Tuohy v. Columbia Steel Co.*, 61 Or. 527, 531, 122 Pac. 36, 37, this court has already said that: "It has been frequently held that a willful attempt by a plaintiff in a personal injury case to show that the defendant was protected by insurance constitutes reversible error. The ground for this holding is that a knowledge that the defendant has such protection might have a tendency to render the jurors careless as to the amount of the verdict." On the other hand, "interest on the part of a juror in the event of the action or the principal question involved therein" in good common sense as well as by our statute is a ground of challenge for implied bias. L. O. L. § 122, subdiv. 4. This provision would certainly be available against a juror who was in fact a stockholder or interested in an insurance company warranting against loss by the injury forming the basis of pending litigation. Many authorities hold flatly that it is reversible error to bring before the jury in any form, even by examination on the voir dire, the fact that the defendant is insured against any adverse result of the action on trial. *Cosselmon v. Dunfee*, 172 N. Y. 607, 65 N. E. 494; *Brewing Co. v. Voith* (Tex. Civ. App.) 84 S. W. 1160; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Lowsit v. Seattle Lbr. Co.*, 38 Wash. 290, 80 Pac. 431; *Eckhart & Swan Milling Co. v. Schaefer*, 101 Ill. App. 500; *Lassig v. Barsky* (Sup.) 87 N. Y. Supp. 425; *Hoyt v. J. E. Davis Mann Co.*, 112 App. Div. 755, 98 N. Y. Supp. 1031; *Stratton v. Nichols Lbr. Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; *Harry Bros. Co. v. Brady* (Tex. Civ. App.) 86 S. W. 615; *Lipschutz v. Ross* (Sup.) 84 N. Y. Supp. 632.

On the other extreme some precedents allow them to question the jurors not only about their possible interest in a given insurance company, but also as a basis therefor to show that the defendant is insured in that particular concern. *Dow Wire Works v. Morgan* (Ky.) 96 S. W. 530; *M. O'Conner & Co. v. Gillaspy*, 170 Ind. 423, 83 N. E. 738; *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125; *Goff v. Kokomo Brass Wks.*, 43 Ind. App. 642, 88 N. E. 312; *Aetitis v. Spr. Val. Coal Co.*, 150 Ill. App. 497; *Vindicator, etc., Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1106; *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; *Saller v. Friedman Bros. Shoe Co.*, 130 Mo. App. 712, 109 S. W. 794; *Iroquois Furnace Co. v. McCrea*, 191 Ill. 840, 61 N. E. 79; *Hoyt v. Independent Asphalt Pav. Co.*, 52 Wash. 672, 101 Pac. 367; *Heydman v. Red Wing Brick Co.*, 112 Minn. 153, 137 N. W.

561; *Foley v. Cudahy Packing Co.*, 119 Iowa, 246, 93 N. W. 284; *Girard v. Grosvenordale Co.*, 82 Conn. 271, 73 Atl. 747; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079.

Between the two extremes are many varieties of opinion shading into each other like the colors of the spectrum so that it is impossible to deduce from them any fixed rule by which all disputes may be mathematically settled. Among many sensible statements on this vexed question, the following is here quoted: "Parties have the legal right to ascertain whether or not jurors have a pecuniary interest in the litigation, and the exercise of this right necessarily authorizes them to elicit information from them on this subject. This, however, in no way gives counsel a license to communicate improper matters to the jurors or to the court within their hearing in connection with such inquiry. Such an examination should be held strictly within the limits of such right and by direct question on the subject unaccompanied by suggestion or comment from counsel which may convey improper and prejudicial information to jurors. * * * The line of demarcation between prejudicial and non-prejudicial remarks of this character cannot be readily drawn. Each case depends largely upon the circumstances by which they are elicited and the probable effect upon the jurors." *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 563, 102 N. W. 1049, 1052.

[§] The examination of a juror is nothing more or less than the taking of testimony on the issues to be raised as to his qualifications to sit in the cause on trial. It is said in section 856, L. O. L., that: "The court may exercise a reasonable control over the mode of interrogation so as to make it as distinct, as little annoying to the witness and as effective for the extraction of the truth as may be." In our judgment the only reasonable principle to be laid down is that in taking testimony on such an issue as on any other the scope of the examination is subject to the discretion of the court. The court should, as near as possible, steer a safe course between the Scylla of a packed jury on the one hand and the Charybdis of pettifoggery on the other. The plaintiff has the right to inquire about the interest, direct or indirect, of the jurors that may affect their verdict; but he has no right to abuse that privilege or make it a stratagem by which he can prejudice the jury with irrelevant matter. Any defendant has a right to a fair trial of the actual issues joined, unbiased by the popular prejudice against foreign insurance corporations—needlessly injected into a case, even by indirection, where such concerns are not immediately involved. The trial court ought to control the interrogatories so as to exclude the element in question as far as consistent with the administration of exact

justice in the case made. If needful to prevent putting the insurance of the defendant into the case unnecessarily, the court would be authorized to take repressive measures, even to dismissing the jury and continuing the case for a trial de novo. It would have been easy and would have served every legitimate purpose in the case to ask the jurors if they had any interest directly or indirectly in the result of the case or in the principal question involved. Considering the remoteness of probability that the average juror of Multnomah county would be a stockholder or interested in a corporation of London, England, it was an indiscretion of the court to allow that institution to be made such a prominent feature in the process of impaneling the jury.

The judgment of the circuit court is reversed, and the cause remanded, with direction to enter a judgment of nonsuit.

(23 Idaho 501)

KEYSER v. MOREHEAD et al.

(Supreme Court of Idaho. March 4, 1913.)

1. TENANCY IN COMMON (§ 3*)—WATER DITCH—CONSTRUCTION.

Where several parties construct a lateral ditch for the purpose of taking water from a main ditch to the lands of such parties for a beneficial use, and it is understood that said lateral shall become the property of such persons in proportion to the quantity of water owned by each landowner, and water is conveyed through said lateral ditch to such lands, such persons so constructing said ditch are co-owners and tenants in common, and are entitled to the use of the same for the carriage of water to irrigate their lands.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 5-17; Dec. Dig. § 3.*]

2. TENANCY IN COMMON (§ 32*)—IRRIGATION DITCH—PRESERVATION OF COMMON PROPERTY.

A tenant in common is entitled to contribution for expenditures absolutely necessary for the benefit and preservation of the common property, and to charge the cotenants with their proportion of the reasonable expenses incurred fairly and in good faith for the benefit of the common property.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 97; Dec. Dig. § 32.*]

3. TENANCY IN COMMON (§ 29*)—RIGHTS OF COTENANTS—CONTRIBUTION TO IMPROVEMENTS—DEPRIVATION OF INTEREST.

Where a lateral ditch has been constructed by several persons as co-owners, and it becomes necessary to repair said ditch, and all the co-owners agree upon the improvement, and such improvement is made by all the co-owners except one, who does not contribute to the same, and such improvement is used as a part of the ditch, and permission is given to the cotenant, who refused to contribute to use said ditch for one year, and thereafter he demands his water through said pipe line and through the said ditch, and offers to pay his share, the co-owners who constructed the same cannot deprive him of his interest in said canal and the portion improved by the pipe upon his paying his share of such expenses.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 89-92, 94; Dec. Dig. § 29.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by Samuel K. Keyser against James M. Morehead and others to establish right and title to improvements in a lateral ditch. Judgment for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Lot L. Feltham and Frank D. Ryan, both of Welser, for appellant. Harris & Smith, of Welser, for respondents.

STEWART, J. This action was brought by the appellant against the defendants for the purpose of establishing his right and interest in a certain pipe line to the extent of 20 miner's inches upon plaintiff's paying into court his proportional share of the expense of purchasing and laying said pipe line. The defendants by their answer put in issue the allegations of the complaint.

It appears from the record that the appellant and the respondents own lands in the same neighborhood, and that such parties have been taking water from what is known as the Lower Payette ditch and its extensions, and that such water has been carried from the main ditch to the lands of the parties to this action through one lateral ditch; that the land over which this lateral passes is of such a character as has made it necessary to build a flume or pipe for a distance of about one thousand feet. When the lateral ditch was first constructed, a flume was built across this portion of the line of the lateral, which was used by all the parties for the purpose of carrying water to their said lands from the main ditch, and it served such purpose up to and including the year 1910. The lands of the parties to this action were below and beyond the flume, and below the point where the pipe line delivered the water to the lateral below the depression, where the same water was delivered from the lateral into the pipe line. There is no dispute between the parties as to the respective rights of the different parties to convey water through the lateral from the main ditch to the lands each owned and described in the pleadings in this case.

In the latter part of 1910 the flume, from long use, became unserviceable, and would not carry the water through it so as to supply the necessary water upon the lands of both plaintiff and the defendants, and the defendants proposed among themselves, and submitted such proposition to the plaintiff, that the flume should be removed and that a pipe line be constructed by all parties across the depression the full span of the old flume. The evidence is conflicting as to whether the plaintiff consented with the defendants and agreed to this arrangement. Nevertheless the defendants determined in December, 1910, that the old flume over the depression was not sufficient to carry the water, and removed the old wooden flume,

and constructed the pipe line across the depression. After the pipe line was constructed and was finished in May, 1911, and water was being carried through the same, the appellant requested the right to carry through the pipe the amount of water he had previously been using upon his land the same as it had been carried through the old flume, and upon such request he was permitted to carry the water through the pipe line during the year 1911. Thereafter, in April, 1912, the appellant asked permission to purchase an interest in the pipe line, and this was refused. In this connection it is proper to observe that the company owning the lateral ditch, of which the flume was a part, was not the owner of the land occupied by the old flume, the land where the pipe line is laid, and has never acquired by conveyance a right of way therefor, but has used the flume over the depression for a number of years. The lateral ditch above referred to and the flume were constructed by four different persons, Monteith, Waite, Pence, and Rhea, and these four persons furnished the money and material and secured the right of way for the lateral ditch and the construction of the flume where the pipe line was afterward constructed and the plaintiff and defendants are the successors in interest of the parties who built the lateral ditch. The lateral ditch was constructed for the purpose of taking water from the main ditch to water the lands owned by the parties who constructed the same, and the title to such lands and the lateral ditch passed from such persons to the plaintiff and the defendants.

[1] We think it is also clear from the evidence, when considered altogether, that the parties to this suit acquired the lateral ditch as co-owners and used the same as tenants in common, and that each is entitled to the use of the same for the carriage of water to irrigate their respective lands. The pipe line constructed by the defendants was a necessary repair and improvement of the lateral ditch, and was used for the purpose above named. It was constructed to carry the waters of the lateral ditch underground, and poured it back into the lateral ditch at a point lower down, and at a point where the flume delivered the water prior to the construction of the pipe. The pipe was laid along the right of way formerly occupied by the flume, and thus occupied the same right of way that was occupied by the flume, and by such construction the pipe line became a part of the lateral ditch, and was necessary for the operation of the same. It also appears that, if the plaintiff is not allowed to purchase an interest in such pipe line, he will be compelled to build a separate pipe line for his own use across the depression in order to carry water to his land, and that this will necessitate his purchasing or securing a right of way to do so, and that large and unnecessary expense will be imposed upon him. It is shown that, when the

pipe line was constructed, it was upon the theory and for the purpose that the same was of sufficient capacity to carry water to supply the demands of the defendants and also the plaintiff in irrigating their lands. The cause was tried to the court, and findings were made and judgment was rendered in favor of the defendants, and the judgment denied the plaintiff any right, title, claim, or interest in the pipe line, or that he was entitled to purchase any interest therein, and that he was not entitled to an injunction.

The appellant presents two questions to this court: First, whether there was an agreement in good faith between the plaintiff and defendants for mutual co-operation in the construction of the pipe line section connecting the two parts of the old lateral ditch, and whether it was carried out in good faith by the plaintiff or violated by the defendants; second, whether under all the facts of this case the appellant has the same interest in said pipe line as he had in the flume, which it replaced, prior to the construction of the pipe line, upon his paying his proportionate share of the construction of said pipe line.

[2] In 38 Cyc. p. 53, par. B, the author summarizes the general rule as recognized by the authorities with reference to duty and right to repair property belonging to tenants in common, and it is said: "Tenants in common are not as such agents for each other, nor are they bound to protect each other's interests and to prevent them from deteriorating in value; the duty to repair is equal; and where a cotenant improves the common property at his own expense, thereby putting it to its only beneficial use, he is not liable to his cotenants for trespass. If there be authority by agreement or otherwise to improve the property at the expense of the cotenants therein, then the cotenant so improving will be entitled to contribution from his cotenants if he act prudently and in good faith, and, under such circumstances, the cotenant so improving will not be held responsible to others for mere errors of judgment either as to the character of the improvement or the construction thereof." The same author, on page 54 of the same volume, also says: "A tenant in common is held to be entitled to contribution for expenditures absolutely necessary for the benefit and preservation of the common property, and the right is even extended to charge the cotenant with a just proportion of the reasonable expenses incurred fairly and in good faith for the benefit of the common property or such as were from necessity dispensed for the common estate, even though the conduct of the paying tenant may not have been strictly equitable."

The authorities collated and cited by the author are numerous, and an examination of the same seem to support the rule announced

by the author. As an illustration: The Supreme Court of Illinois in the case of *Mix v. White*, 38 Ill. 484, and *Haven v. Mehlgarten*, 19 Ill. 91, held that cotenants of a ferry privilege, which required the owners to construct and maintain the ferry in proper repair for public use, having knowledge of repairs made thereon and no demand having been made upon them for payment therefor, are liable to contribute toward such repairs made by their cotenants. This rule of law is also approved in the case of *Carnes v. Dalton*, 56 Or. 596, 110 Pac. 170, and the case of *Arthur v. Coyne*, 32 Okl. 527, 122 Pac. 688. In the case of *Armijo v. Neher*, 11 N. M. 645, 72 Pac. 12, the Supreme Court of New Mexico, in dealing specifically with the question of repair by one cotenant, says: "As to the repairs, it is not shown that they were necessary, further than is to be inferred from the fact that they were made." The court approves in that opinion the admission of counsel that, if the expenses were necessary, the co-owners would be properly chargeable with their share of the costs, and this rule seems to be approved by the Supreme Court of Oregon in the case of *Carnes v. Dalton*, 56 Or. 596, 110 Pac. 170, and the Supreme Court of Oklahoma in the case of *Arthur v. Coyne*, 32 Okl. 527, 122 Pac. 688.

[3] We believe that these authorities apply to the facts in this case. The evidence shows the circumstances which necessitated the placing of the pipe under the ground where the depression was as a substitute for the flume which went over the depression and which had become worthless, and was in such a decayed condition that it would not carry the water across the depression on the line of the lateral ditch, and that the parties interested in the lateral ditch talked the matter over of putting in the pipe, and that the plaintiff and the defendants agreed that it was necessary, but that the plaintiff declined, when the proper time came for putting it in, to participate or contribute at that time to the costs of the construction, and that, after the pipe was put in, the parties all agreed that the plaintiff should take water through the pipe during the year 1911, and that afterward he asked permission to purchase an interest in the pipe line. Upon these facts, it is clear that these co-owners in the lateral ditch determined that it was necessary to make this improvement, and that the improvement was made by the parties who had an interest in the property and the repair of the ditch, so that it would properly carry the water. By making this improvement the pipe became a part of the ditch, and the plaintiff, being an owner in the ditch and in the flume removed, likewise became an owner in the pipe made a part of the ditch, and became liable to the defendants, who paid for the improvement, for his proportionate share. Under the facts of this case, the plaintiff is entitled to relief in this action and

to have a decree in this case establishing his right upon his contributing his proportionate share of the costs of such improvement.

The judgment in this case is reversed and a new trial ordered, and the trial court is directed to hear proof of all the parties, and find the cost of the improvement made and the amount that plaintiff owes defendants, and to require such sum to be paid to the defendants or to the clerk of the district court, and upon such payment a decree should be entered in favor of the plaintiff declaring his title in said pipe as a part of the lateral ditch, and the right to convey water through the pipe laid by the defendants as a part of the lateral ditch.

The costs in the district court and also the costs on this appeal are to be paid in the same proportion as the water taken through the lateral ditch by the respective parties to this suit.

AILSHIE, C. J., and SULLIVAN, J., concur.

(38 Idaho 467)

JONES et ux. v. CITY OF CALDWELL.
(Supreme Court of Idaho. Feb. 26, 1913.)

1. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE SIDEWALK—INJURIES TO PEDESTRIANS—QUESTION FOR JURY.

Evidence examined and held sufficient to go to the jury as tending to establish the fact that the plaintiff sustained injuries from falling on a defective sidewalk, and that the fall was the primary cause of the injuries sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

2. DAMAGES (§ 166*) — PERSONAL INJURY — CAUSES—EVIDENCE.

Where a woman walking upon the sidewalk of a city fell through a hole in the walk, and it was thereafter found necessary for her to undergo a surgical operation, and there was doubt and conflict in the evidence as to whether the operation was caused primarily by the fall or by a previously existing diseased and affected condition of the parts operated upon, and expert testimony introduced was indefinite and uncertain as to the primary cause which rendered the operation necessary, the fact that the operation was considered necessary by the attending physicians soon after the accident occurred, and that the operation was actually performed, are circumstances which the jury had a right to consider in concluding that the fall was the primary cause of the operation and of the consequent damages sustained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 479, 481; Dec. Dig. § 166.*]

3. WITNESSES (§ 209*)—PRIVILEGE—PHYSICIAN.

Where the attending physician deems a surgical operation necessary upon his patient, and another physician or surgeon is called to assist in the performance of the operation, and actually performs the operation or assists therein, and subsequently, upon a trial which brings in issue the facts and circumstances which led up to and rendered necessary the operation, any information acquired by the attending physicians at the operation or subsequently acquired by

examination of the parts removed by the operation is privileged information under the provisions of section 5958 of the Revised Codes, and cannot be given in evidence without the consent of the patient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 771; Dec. Dig. § 209.*]

4. WITNESSES (§ 209*)—PRIVILEGE — PHYSICIANS.

The fact that certain information was gathered from examination and inspection of the injured or diseased parts removed by the operation a considerable time after the operation had been performed, and the physician had acted and prescribed for the patient, does not change the privileged character of the information and permit the physician to testify concerning the same.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 771; Dec. Dig. § 209.*]

(Additional Syllabus by Editorial Staff.)

5. APPEAL AND ERROR (§ 1058*)—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries, a physician was permitted to give a full and detailed account of his examination of plaintiff, and the conditions that he found, defendant was not prejudiced by the exclusion of a question whether the witness found the tissues broken down, referring to the condition of parts removed by a surgical operation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

Sullivan, J., dissenting in part.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by E. C. Jones and wife against the City of Caldwell. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. E. Wallace and J. J. Plowhead, both of Caldwell, for appellant. John F. MacLane, of Boise, and W. A. Stone, of Caldwell, for respondents.

AILSHIE, C. J. This action was commenced for the recovery of damages from the city of Caldwell for injuries sustained by falling through a defective sidewalk. The case went to trial, and a verdict was returned in favor of the plaintiff for \$850, and she appealed to this court, alleging errors committed against her in the course of the trial. The judgment was reversed, and the cause was sent back for a new trial. Jones v. City of Caldwell, 20 Idaho, 5, 116 Pac. 110. The case was again tried in the district court, and a verdict and judgment were rendered and entered in favor of the plaintiff for \$2,500, and the defendant thereupon appealed.

The appellant has assigned three errors, which we will consider in the order in which they were presented.

[1, 2] 1. It is urged that the evidence is insufficient to justify the verdict and judgment. The real cause of appellant's complaint as to the sufficiency of the evidence rests upon the nature of the injury or the cause from which the injury arose. The respondent contended on the trial in the lower court that the fall through the sidewalk rendered it necessary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that she undergo a surgical operation, and that this would not have been necessary except for the fall through the sidewalk. The appellant insists that the evidence shows that this operation was rendered necessary by an infectious disease that the respondent had prior to the accident, and that the operation resulted therefrom, and was not caused by the fall. It stands as an established fact that the operation was performed. The evidence shows that the respondent had been able to perform her duties as a nurse for a long time prior to this accident. It also shows that she was in ill health for a long while after the fall and operation. The operation which resulted in the removal of the Falloplan tubes was rendered necessary by reason of an infection which set in and the attendant pain and suffering. The evidence of the physician is by no means clear as to whether the primary cause for this was the fall or a previously existing diseased condition. As we view the evidence with reference to the previous condition of health of the respondent and her subsequent condition, and the facts touching her medical examination and the surgical operation following, we think there was sufficient evidence to justify the jury in reaching the conclusion they arrived at, and we are not inclined to disturb the verdict on account of insufficiency of the evidence.

[5] 2. It is contended that the court erred in sustaining the respondent's objection to the following question asked of Dr. Miller, "Did you find the tissues broken down?" which question had reference to the condition of the Falloplan tube. It would have been entirely proper to allow this question answered; but we fail to find any prejudicial error in the ruling of the court. The record shows that the witness gave quite a full and detailed account of his examination and the conditions as he found them.

[3, 4] 3. Special stress is placed upon the ruling of the court in sustaining respondent's objection to a question asked of witness Dr. Stewart, who assisted in the surgical operation. It seems that Dr. Miller was the respondent's attending physician, and that he brought respondent to a hospital in Boise for the purpose of this operation. When he reached Boise, Dr. Stewart was called in to perform the operation or assist in its performance. It seems that some time after the removal of the affected and injured parts Dr. Stewart made an examination of the parts removed, and the appellant sought to have the doctor testify as to the condition in which he found it, and give his opinion as to the real cause which led to the operation and which had caused the pain and suffering that rendered it necessary to have the operation performed. The court sustained an objection to the question and ruled out such evidence on the ground that, under the provisions of section 5958 of the Revised Codes, a physician may not testify, without

the consent of his patient, concerning any matter which would disclose "information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." *Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110. Appellant contends that this evidence was admissible, for the reason that the information was not acquired by the surgeon at the time of his employment, and was not "necessary to enable him to prescribe or act for the patient." Appellant contends that the operation had been performed, the tube had been removed, and that it was no longer necessary to make an examination of the removed portion, and that the information acquired from the examination was not necessary to enable him to prescribe or act for the patient. Literally and technically speaking, this may be true; but such a construction of the statute would rob it of its true spirit and the purpose and intent thereof. Had the physician not been called upon to perform this service in his professional character, he would never have been able to acquire the information about which appellant sought to have him testify. He acquired it as a physician and surgeon and in no other capacity; and he acquired it as physician and surgeon for this respondent, and by reason of his employment in his professional capacity to serve the respondent.

Dr. Stewart realized the difficulty and danger of attempting to segregate knowledge and information acquired in this way. He was asked the question, "Did you acquire any information concerning the cause which necessitated this operation after the operation itself was completed, and which information was not necessary and did not enable you to prescribe or act for this patient?" To this question the doctor gave the following answer: "I will have to answer that 'No.' It is practically impossible for me to separate the true condition; that is, as to what would be necessary and what would not." Again the witness was asked, "Did you at any time acquire any information concerning the cause which necessitated the operation, and which information was not necessary to enable you to prescribe or act for this patient?" And again he said, "I answered that question 'No' before, and, if you will pardon the explanation to the question, as I understand it, 'No,' on the basis that all information that is secured at the time of treatment of the patient from the time you are engaged for the treatment of a patient until the patient is discharged from your care. All information that is secured in that time is necessary for the treatment, because you can seldom have enough information, and that is the basis I am answering that upon, because all information that is obtained during that time is essential to the treatment of the patient."

We are satisfied that the ruling of the court was correct, and that the witness

should not have been allowed to disclose the information he acquired by reason of having performed this surgical operation. Such testimony is excluded by the provisions of the statute (section 5958, Rev. Codes).

The judgment should be affirmed, and it is so ordered, with costs in favor of the respondent.

STEWART, J., concurs.

SULLIVAN, J. I concur in the conclusion reached, but dissent on the point that the information acquired by Dr. Stewart some time after the operation was performed on the plaintiff was privileged under the provisions of subdivision 4 of section 5958, Rev. Codes. That subdivision is as follows: "A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." The information which the doctor had and was sought to be elicited from him on his examination was not the information acquired in attending the patient which was necessary "to enable him to prescribe or act for the patient." The information sought from the witness was information that he had obtained some time after he had prescribed for the patient and performed the operation. He had already discharged his patient when he acquired the information which was sought on the trial. He did not have the information referred to until some time after he had performed the operation on the patient. If that information had been acquired in attending the patient, and was necessary to enable the doctor to prescribe or act for the patient, then it would come within the provisions of said section; but he did not have the information referred to until some time after he had acted, and it was not information that was necessary to enable him to operate on his patient, as he had operated long before he got this information.

Under the provisions of that section, what information is privileged? "Information acquired in attending the patient," which information "was necessary to enable him to prescribe or act for the patient." The privileged information, then, is the information which was necessary to enable him to prescribe or act for the patient. As he had operated on the patient before he obtained the information referred to, it seems to me that it does not come within the letter nor within the meaning and spirit of that statute. The testimony of the doctor, in the case at bar, was not the same as the testimony referred to in the former decision of this case (20 Idaho, 5, 116 Pac. 110); and I do not think any construction should be placed upon said statute that would make any information privileged that does not

come clearly within its terms. 4 Wigmore on Evidence, §§ 2380 to 2390, inclusive, reviews the history and policy of the statute in regard to privileged and confidential communications and relations, and says: "In actions for personal injury, the permission to claim the privilege is a burlesque upon logic and justice." Believing that statement to be absolutely true, I do not believe that the court should extend that privilege to information that does not come clearly within its provisions. However, since the evidence shows that the fall on the sidewalk was the proximate cause of the injury, I do not think it was reversible error to reject the offered testimony on the trial. I simply desire here to express my views of the proper construction of said provision of the statute.

(23 Idaho 530)

SWEENEY v. JOHNSON.

(Supreme Court of Idaho. March 7, 1913.)

1. PLEADING (§ 311*)—COPY OF INSTRUMENT—EXHIBITS—ISSUES.

Pleading an instrument by attaching a copy to the complaint as an exhibit thereto does not tender an issue or involve an assertion of the truth of the statements and recitals contained in the exhibit; and, in order to tender an issue as to the truth or correctness of statements and recitals contained in such exhibit, it is necessary to plead them in appropriate terms; and a defendant is not called upon to deny or traverse the statement and recitals contained in an exhibit unless the pleading to which such exhibit is attached alleges, in appropriate terms, the truth and correctness of the statement or statements which it is intended to tender as an issue or issues.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 945; Dec. Dig. § 311.*]

2. APPEAL AND ERROR (§ 1041*)—RULINGS ON PLEADINGS—REVIEW.

Where a trial court has admitted evidence on the part of plaintiff, over the objection of the defendant, on the theory that statements and allegations contained in an exhibit were allegations of the complaint, and should be taken as part of the pleading, and, after the evidence is all in, the plaintiff has moved the court for leave to amend the pleading by alleging the fact stated in the exhibit, and on which evidence has been admitted in order to make the pleading conform to the facts proven, and the motion is denied on the objection of the defendant, *held*, that the rulings of the court have not prejudiced any substantial right of the defendant, and that the judgment should not be reversed on account of such erroneous rulings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

Appeal from District Court, Twin Falls County; Edward A. Walters, Judge.

Action to foreclose a mechanic's lien by Dan J. Sweeney against James G. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Bowen and J. W. Porter, both of Twin Falls, for appellant. James H. Wise, of Twin Falls, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

AILSHIE, C. J. The only question to be determined on this appeal is the effect of pleading a written instrument by setting it out and attaching it to the complaint as an exhibit. This action was instituted to foreclose a mechanic's lien. The plaintiff attached a copy of his claim of lien to the complaint as an exhibit. Paragraph 4 of the complaint alleges that on the 19th day of October, 1910, the plaintiff duly filed, as required by law, his claim of lien for the amount due and owing plaintiff, and this is followed by a statement of the general purport of the claim and the fact that it was recorded, and concludes in the following words: "A copy of which is hereto annexed and made a part of this complaint and marked Exhibit A." The claim of lien recites that the claimant entered into a verbal contract with the defendant for the construction of a two-story brick building, and that the labor and material furnished was "reasonably worth" the sums claimed in the lien. It was not alleged that there was any stipulated price; and the complaint is silent as to the value of the services. The complaint contains no allegation that the labor and material furnished was of the reasonable value of the amount claimed. The defendant answered the complaint and denied all the material allegations thereof, except the allegation that plaintiff had made and filed his claim of lien in accordance with the statute, and that allegation was admitted. The defendant did not demur to the complaint, and upon the trial defendant objected to the introduction of evidence as to the reasonable value of the service, labor, and material. The court overruled the objection and held that the allegation contained in the claim of lien, which was attached to the complaint as an exhibit, amounted to the allegation that the service, labor, and material was reasonably worth the amount claimed. The ruling of the court on this question was clearly erroneous.

[1] As we understand, it is a well-established rule of practice that pleading a document by attaching it as an exhibit does not amount to an allegation that the statements and recitals contained in the document are true and correct, or that it is the intention of the pleader to tender every statement and recital therein contained as an issue in the case. On the other hand, a defendant who is called upon to answer such pleading is never expected to traverse the statement and recitals contained in an exhibit. If the defendant controverts the existence of such a document, its execution, or the fact that it contained such statements and recitals, he must deny those facts; in other words, when the pleader pleads an exhibit, he is understood thereby to charge that the exhibit exists, that it has been duly executed, and that it contains the statements and recitals shown upon the exhibit; and these are really the only issuable facts presented or tendered by

attaching an exhibit to a complaint. This rule is well recognized by the authorities.

City of Los Angeles v. Signoret, 50 Cal. 298, was an action to enforce a lien on a lot in the city of Los Angeles for a sewer assessment. The lien was attached to the complaint with the allegation, "and to which exhibit, for all particular allegations therein contained, reference is hereby made"; and the court held that the pleader had not tendered an issue as to any of the recitals found in the exhibit by mere reference to them, and that, in order to tender an issue thereon, he must plead them as facts. That case has been approved and followed by the same court in *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151.

In *Lambert v. Haskell*, the court referred to the original case and said: "The case of *Los Angeles v. Signoret* is not at all in conflict with the decisions above cited. It merely establishes what seems to us to be an obvious and necessary qualification of the rule, namely, that matters of substance, which are preliminary or collateral to the instrument pleaded, cannot be supplied by the recitals of the instrument. This must be true. All that is accomplished by setting forth an instrument in full is to allege its existence and character. It does not involve an assertion of the truth of preliminary or collateral matters recited in the instrument. Whatever may be the effect of such recitals as evidence, they cannot serve as allegations in pleading."

In *Sprague v. Wells*, 47 Minn. 504, 50 N. W. 535, the Supreme Court of Minnesota said: "The recitals contained in a copy of a written instrument annexed to a complaint do not, as a matter of pleading, serve the purpose of an allegation that the facts are as recited." This case was approved by the same court and followed in *Union Sewer Pipe Co. v. Olsen*, 82 Minn. 187, 84 N. W. 756. *City of Los Angeles v. Signoret*, supra, was followed and approved by the Supreme Court of South Dakota in *Aultman & Co. v. Siglinger*, 2 S. D. 442, 50 N. W. 911. See, also, note to *Burkett v. Griffith*, 13 L. R. A. 707.

It was error for the court to hold that the recital in the claim of lien that the service, labor, and material was reasonably worth a specified sum amounted to an allegation of the complaint to that effect, and rendered it necessary for the defendant to traverse or deny such recital. We are of the opinion, however, that this error will not justify a reversal of the judgment under the circumstances of the present case.

[2] The court did admit evidence as to the reasonable value of the service, labor, and material, although it was over the objection of the defendant. After the evidence was all in, the plaintiff moved the court for permission to amend the complaint to conform to the proofs by alleging "that the reasona-

ble value of the plaintiff's services, in building and superintending the construction of the aforesaid described building, is reasonably worth the sum of \$1,500, and that the reasonable value of materials furnished by the plaintiff in the construction of said building is \$251." The defendant resisted this motion, and the court accordingly denied the request to amend the pleading, but appears to have done so on the theory that it did not need amendment, and that the recital in the exhibit was equivalent to the allegation proposed by the amendment. The amendment should have been allowed. Sections 4225, 4226, 4229, and 4231 of the Revised Codes are clearly intended to cover just such cases as this, and it was within the power of the trial court to order the amendment requested in this case, and we think it was his duty to grant the request. *Snowy Peak, etc., Co. v. Tamarack, etc., Co.*, 17 Idaho, 642, 107 Pac. 60; *Johnson v. Gary*, 18 Idaho, 623, 111 Pac. 855; *Pennsylvania, etc., Mining Co. v. Gallagher*, 19 Idaho, 101, 112 Pac. 1044.

Under the circumstances of this case, we feel that the judgment should be affirmed. The plaintiff introduced proofs to show that the labor, service, and material was reasonably worth the amount claimed, the defendant had notice that the court considered that was an issue in the case, and defendant had an opportunity to rebut the proofs tendered on this question, and defendant also resisted an application to amend the pleadings to conform to the proofs. We do not think he has been prejudiced in any substantial right.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

(28 Idaho 487)

McCORMICK v. SMITH.

(Supreme Court of Idaho. March 8, 1913.)

1. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR.

Where it clearly appears from the allegations of the complaint that a clerical mistake was made in a date, and the whole pleading taken together clearly shows the correct date, the judgment will not be reversed because of such clerical error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

2. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR.

Section 4207, Rev. Codes, provides for a liberal construction of the pleadings, with a view to substantial justice between the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

3. PLEADING (§ 84*)—CONSTRUCTION.

A pleading should be so construed as to allege all of the facts that can be implied by

fair and reasonable intendment from the facts expressly alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 84.*]

4. COURTS (§ 130*)—DISTRICT COURTS—JURISDICTION.

Under the provisions of article 5, § 20, of the Constitution of Idaho, and the provisions of section 3830, Rev. Codes, the district court has original jurisdiction in all cases both in law and in equity.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 130.*]

5. COURTS (§ 489*)—FEDERAL COURTS—JURISDICTION.

The provisions of the United States Judiciary Act March 3, 1911, c. 231, 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 128), do not confer exclusive jurisdiction upon federal courts in actions upon contracts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324, 1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

6. COURTS (§ 489*)—FEDERAL COURTS—EXCLUSIVE JURISDICTION — RECOVERY OF ASSESSMENTS ON NATIONAL BANKS.

Section 256 of said Judiciary Act (Act March 3, 1911, c. 231, 36 Stat. 1160 [U. S. Comp. St. Supp. 1911, p. 234]) declares the jurisdiction of the federal District Courts to be exclusive of the state courts in the particular cases set forth in said section, but this section does not include such actions as the one at bar.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324, 1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

7. COURTS (§ 489*)—STATE COURTS—CONCURRENT JURISDICTION.

The state courts have concurrent jurisdiction in all matters wherein the jurisdiction of federal courts is not made exclusive by the Constitution or acts of Congress.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324, 1330, 1333, 1341, 1372-1374; Dec. Dig. § 489.*]

8. COURTS (§ 489*)—STATE COURTS—JURISDICTION.

Unless the jurisdiction conferred by the Constitution and laws of the United States upon the federal courts is made exclusive of the state courts, state courts retain jurisdiction of all actions, wherein they are competent to take jurisdiction under the state laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324, 1330, 1333, 1341, 1372-1374; Dec. Dig. § 489.*]

9. COURTS (§ 489*)—STATE COURTS—JURISDICTION.

Said courts have jurisdiction of actions to enforce liabilities of stockholders of national banks on stock assessments.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324, 1330, 1333, 1341, 1372-1374; Dec. Dig. § 489.*]

10. DISTRICT AND PROSECUTING ATTORNEYS (§ 9*)—CIVIL ACTIONS—NATIONAL BANKS—ASSESSMENTS AGAINST STOCKHOLDERS—ACTION BY RECEIVER'S ATTORNEY.

The provisions of section 380, Rev. St. of the United States (U. S. Comp. St. 1901, p. 213), requiring actions brought by an officer of the United States to be conducted by the United States district attorney, are merely directory, as an action of that character may be brought by the receiver's special attorney.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 86, 87; Dec. Dig. § 9.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Lemhi County; Jas. M. Stevens, Judge.

Action by Frank R. McCormick, receiver of the First National Bank of Salmon, against William C. Smith, administrator of John C. Sinclair. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Whitcomb, of Salmon City, for appellant. F. J. Cowen, of Salmon, for respondent.

SULLIVAN, J. This action was brought to recover judgment against the defendant as administrator of the estate of John C. Sinclair, deceased, for the sum of \$9,500, with interest, for an assessment levied on national bank stock.

It appears from the record that said deceased was a stockholder, and held 95 shares of the capital stock of the First National Bank of Salmon, which bank was doing a general banking business in Salmon City until about June 8, 1911, when it voluntarily suspended business; that thereafter, on August 8, 1911, the United States Comptroller of the Currency, who was in charge of said bank, determined the same to be in an insolvent condition, and appointed a receiver therefor, who thereupon took charge of the business of said bank for the purpose of winding up its affairs; that the plaintiff in this action was the duly appointed and qualified receiver; that Sinclair died on or about September 4, 1911, and at the time of his death was the owner of said 95 shares of the capital stock of said bank; that the defendant was the duly appointed, qualified, and acting administrator of the estate of said deceased; that on January 11, 1911, the Comptroller of the Currency of the United States levied an assessment upon the capital stock and stockholders of said bank to the full amount of the capital stock, or the sum of \$100 per share on the entire capital stock of said bank; that on January 22, 1912, the plaintiff demanded from the defendant as administrator of the estate of said deceased the payment of the amount so levied upon said shares; that on March 30, 1911 (1912), the plaintiff presented to the said administrator an account duly verified for allowance, and that the defendant as administrator disallowed said claim, and refused and failed to pay said sum of \$9,500 or any part thereof.

A general demurrer was filed, based on two grounds: (1) That the complaint did not state a cause of action; (2) that the court had no jurisdiction in the matter. The court overruled said demurrer, and the defendant failed and refused to answer further, and a judgment by default was entered against him to the full amount of said sum of \$9,500, with interest. The appeal is from the judgment.

[1] 1. The main specification of error is to the effect that there is no allegation in the

complaint that the claim sued for was duly verified and presented to the administrator within the time prescribed by law, and this contention is based on the ground that the allegation in regard to that matter averred that said claim was presented to said administrator for allowance on March 30, "1911," instead of March 30, "1912." From the allegations of the complaint it is clear that the claim was presented on the 30th of March, 1912, and that the use of the figures "1911" is purely a clerical error. It is well settled that errors which are obviously clerical and leave the meaning unimpaired will be disregarded. 1 Sutherland on Code Pleading, § 93, and authorities there cited. It was conceded on oral argument that this clerical error was not called to the attention of the court on the argument of the demurrer. It no doubt would have been corrected there had the court's attention been called to it. It is alleged in the complaint that the bank suspended business on June 8, 1911; that the bank was declared insolvent and a receiver appointed on or about August 8, 1911; that Sinclair died on or about September 4, 1911; and that thereafter an assessment was levied upon the capital stock of said bank on January 11, "1911." If Sinclair did not die until September 4, 1911, and the assessment was not levied until after the bank had been declared insolvent in August, 1911, the assessment could not have been levied on January 11, 1911, but must have been levied on January 11, 1912, and since the administrator was not appointed until after the death of Sinclair on September 4, 1911, the claim could not have been presented to him as administrator of said deceased's estate on March 30, 1911. Those dates are thus shown to be clerical errors, and should have been "1912," instead of "1911." These clerical errors are too apparent on their face to justify the court in sustaining the contention of appellant in regard to them. Had the trial court's attention been called to the errors in those two dates, they no doubt would have been corrected instantaneously. It was certainly carelessness on the part of the pleader not to have his dates correct, but the whole pleading, taken together, clearly indicates that said errors were only clerical, and the judgment should not be reversed because of them.

[2] Section 4207, Rev. Codes, provides for a liberal construction of pleadings with a view to substantial justice between the parties. It does not appear that the defendant has been misled because of the clerical errors in those dates.

[3] A pleading should be construed so as to allege all of the facts that can be implied by fair and reasonable intendment from the facts expressly stated. 31 Cyc. pp. 79, 80, and note 5; 4 Ency. Pl. & Fr. p. 749, and note. This contention is without merit.

[4] 2. It is next contended that the Dis-

trict Court of the United States has original and exclusive jurisdiction in this action, and counsel cites U. S. Judicial Code, c. 2, § 24 (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]), 5 Fed. Stats. Ann. p. 193, and other authorities. This contention is without merit. This is an action upon a contract, and does not come within the provisions of the laws of Congress conferring exclusive jurisdiction upon United States District Courts in certain cases, but does come within the jurisdiction conferred by our state Constitution and statutes upon the district courts of this state. Article 5, § 20, Const. of Idaho; section 3330, Rev. Codes.

[5] United States Judiciary Act March 3, 1911, does not confer exclusive jurisdiction upon the federal courts in actions upon contracts. That portion of the act which refers to national banks is found in subdivision 16, § 24, Hopkins' Judicial Code, p. 24.

[6] Section 256 of the same Code declares the jurisdiction of the federal District Courts to be exclusive of the state courts in the particular cases set forth in said section, and none of such cases include causes of action such as the one at bar.

[7] It is well established that the state courts have concurrent jurisdiction in all matters wherein the jurisdiction of the federal courts is not made exclusive by the Constitution or acts of Congress. *Clafin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *First Nat. Bank of Charlotte v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282; *Ordway v. Central C. N. Bank*, 47 Md. 217, 28 Am. Rep. 455; *Bletz v. Columbia N. B.*, 87 Pa. 87, 30 Am. Rep. 343. But jurisdiction is expressly conferred upon state courts by the latter part of section 5198, Rev. Stats. of the U. S. (U. S. Comp. St. 1901, p. 3498).

[8] Unless the jurisdiction conferred by the Constitution and laws of the United States upon the federal courts is made exclusive of the state courts, state courts retain jurisdiction of all actions wherein they are competent to take jurisdiction under their own laws. *Clafin v. Houseman*, supra; *Raisler v. Oliver*, 97 Ala. 710, 12 South. 238, 38 Am. St. Rep. 213; *Peters v. Foster*, 56 Hun. 607, 10 N. Y. Supp. 389; *Platt v. Crawford*, 8 Abb. Prac. (N. S., N. Y.) 297.

[9] The state courts have entertained jurisdiction of actions to enforce the liability of stockholders of national banks, and their right to do so is conceded. *Dent v. Matteson*, 73 Minn. 170, 75 N. W. 1041, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571.

[10] Section 380 of the Rev. Stats. of the U. S. (U. S. Comp. St. 1901, p. 213), requiring actions brought by an officer of the United States to be conducted by the United States District Attorney, is held in the case of *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476, to be merely directory, and that an ac-

tion of this character may be brought by the receiver's special attorney.

The judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

(23 Idaho 508)

EDWARDS v. ANDERSON.

(Supreme Court of Idaho. March 4, 1913.)

1. APPEAL AND ERROR (§ 553*)—STENOGRAPHER'S TRANSCRIPT — SETTLEMENT BY TRIAL JUDGE.

Under the provisions of subdivision 3 of section 4434, Rev. Codes, as amended by Laws of 1911, p. 379, c. 119, the transcript of the evidence certified to by the stenographer must be settled by the trial judge in order to have the same reviewed upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.*]

2. APPEAL AND ERROR (§ 553*)—MOTION TO DISMISS—GROUNDS—SETTLEMENT OF BILL OF EXCEPTIONS.

Where a motion to dismiss an appeal is made on the ground that the stenographer's transcript was not settled as required by the provisions of subdivision 3 of section 4434, and such motion is made within the time required by rule 54 (96 Pac. xii) of the rules of this court, the motion must be granted and the appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.*]

3. MERITS—AFFIRMANCE OF JUDGMENT.

Held, under the record, that the judgment of the trial court should be affirmed on the merits.

Appeal from District Court, Lemhi County; Jas. M. Stevens, Judge.

Action by E. E. Edwards against Percy Anderson. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. W. Padgham and John H. Padgham, both of Salmon City, for appellant. A. C. Cherry, of Salmon City, for respondent.

SULLIVAN, J. This action was brought to recover a balance of \$308.20 alleged to be due on open book account. The defense was the statute of limitations. The action was tried to the court without a jury, and judgment entered in favor of the plaintiff in the sum of \$302.20, with interest thereon, and costs. The appeal is from the judgment.

We are first met by a motion to dismiss the appeal on several grounds, among which is the ground that the reporter's transcript was not settled as required by law. On an examination of the transcript, we find that it was not settled by the judge, as required by the provisions of subdivision 3 of section 4434, as amended by the Laws of 1911, p. 379. This court had this question before it in *Grisinger v. Hubbard*, 21 Idaho, 469, 122 Pac. 853, and held that, under the provisions of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said section 4434, the party appealing must procure a transcript of the stenographer's notes, and have the same settled and allowed by the trial judge in accordance with the provisions of subdivision 3 of said section. And in *Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676, this court held that the transcript of the evidence certified to by the stenographer must be settled by the trial judge in order to have the same reviewed upon appeal to this court. Those decisions are decisive of this motion, and the motion must be sustained and the appeal dismissed. Said motion was made within the time prescribed by rule 54 (96 Pac. xii) of the rules of this court. We have, however, carefully examined the record in the case, and find no error in the record that would warrant a reversal of the judgment.

The judgment is therefore affirmed on its merits, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

(23 Idaho 486)

CRAMER v. WALKER.

(Supreme Court of Idaho. March 4, 1918.)

1. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—CROSS-EXAMINATION—EFFECT OF TESTIMONY.

In a suit to quiet title, where the defense sets up title by adverse possession, and offers to prove payment of taxes by oral testimony, and objection is sustained to such evidence on the ground that it is not the best evidence, and the facts of the payment of taxes are brought out by the same witness on cross-examination, where no objection is made, the evidence is competent, and must receive consideration by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

2. ADVERSE POSSESSION (§ 109*)—PAYMENT OF TAXES—TIME.

Where W. settled upon, inclosed, and occupied a town lot, and continued to occupy and possess the same from 1881 until the commencement of an action to quiet title in 1910, and it appears that W. paid the taxes levied and assessed against the property from 1881 down to the time of the commencement of the action, and that M., the holder of the legal title, did not pay any taxes until June 1889, *held*, that W. had matured and perfected his title by adverse possession and the payment of taxes for a continuous period of five years prior to the payment of any taxes by M., and that the question of priority of payment of taxes thereafter or the right of either party to have the property thereafter assessed in his name and to pay the taxes thereon does not arise, and is immaterial for the purposes of determining the rights of the parties under their respective claims of ownership and adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 629-635; Dec. Dig. § 109.*]

3. ADVERSE POSSESSION (§ 109*)—REQUISITES—PAYMENT OF TAXES—TIME.

Where one claims title to property by adverse possession under section 4043, Rev.

Codes, it is not necessary that the five years continuous, exclusive adverse possession and payment of taxes should have been immediately preceding the commencement of the action, or at any special or particular time, but it is sufficient if the party claiming such title can establish any continuous five-year period subsequent to the acquisition of the legal title by the adverse party, during which he has complied with the statute in maintaining his open, notorious, continuous adverse possession and payment of taxes for such period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 629-635; Dec. Dig. § 109.*]

4. ADVERSE POSSESSION (§ 7*)—OCCUPATION—PAYMENT OF TAXES PRIOR TO PATENT.

Under the territorial statute of 1875 (Laws 1874-75, p. 479), "the ownership of or claim to or right of possession to any land within the territory" was defined to be "real estate," and "the claim by or possession of any person, firm, corporation, association, or company to any land" was taxable, and, under that condition of the statute where a controversy subsequently and after the issuance of patent from the government arises between the holder of the legal title and one claiming by adverse possession, the claimant by adverse possession may show that he occupied the land adversely and paid taxes thereon prior to the issuance of patent from the government.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

5. ADVERSE POSSESSION (§ 94*)—PAYMENT OF TAXES.

On the question of payment of taxes annually, both by the holder of the legal title and the claimant by adverse possession, and as to the right of one to have the property assessed against himself, and to pay the taxes thereon for the purpose of acquiring adverse possession against the true owner, who also pays the taxes, concurring opinion in *Cavanaugh v. Jackson*, 99 Cal. 672, 84 Pac. 509, and *Carpenter v. Lewis*, 119 Cal. 18, 60 Pac. 925, cited with approval.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 528, 529; Dec. Dig. § 94.*]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by Hugh Cramer against L. W. Walker to quiet title. Judgment for plaintiff, and defendant appeals. Reversed and remanded; with directions.

Richards & Haga and McKen F. Morrow, all of Boise, for appellant. McFadden & Broadhead, of Halley, for respondent.

AILSHIE, C. J. This case involves the question of adverse possession. About 1881 the appellant went into possession of block 9, in the townsite of Halley. He owned lot 8 and built his residence, so that it stood on both lots 8 and 9, extending about 8 or 10 feet onto lot 9. The evidence shows that he has occupied this property continuously since that time. Respondent's predecessor in interest, J. W. Morse, acquired the legal title to lot 9 some time in 1884, but prior to that he had laid claim to this lot. The townsite of Halley had been platted and laid out by John Halley, who entered the land under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

desert land laws, but the patent did not issue until April 5, 1884. The evidence shows that the appellant has paid the taxes on the property continuously since 1881, and it also shows that respondent and his predecessor have paid the taxes on the same property continuously since 1889.

[1] The proof on the part of appellant of the payment of taxes from 1881 to 1889 consists of the oral testimony of the appellant himself. This evidence was objected to by counsel for respondent, and, after the testimony had been given, the objection was sustained by the court. The objection was based upon the ground apparently that this testimony was not the best evidence, but that the records would be the best evidence. Notwithstanding this objection and the ruling of the court sustaining the same, counsel for respondent on cross-examination brought out all these facts, and appellant testified positively that he had paid the taxes on the property continuously since 1881. This was clearly competent and admissible testimony, and the only objection that could be urged to it was that it was not the best evidence. Respondent, having brought it out, however, on cross-examination, cannot now on appeal object to its competency.

[2] This evidence is clear and unequivocal that the appellant has paid the taxes on the property continuously since 1881. It has been suggested, however, that payment of taxes on the land prior to the issuance of a patent from the government and while the title was in the government of the United States would not serve to satisfy the requirements of the statute vesting title by adverse possession.

[3] It is clear that the payment of taxes on unpatented land could not vest any right or title as against the government, but this contest and controversy is waged between two adverse claimants to the property, where it is admitted that the title has passed from the government. As between these claimants, we see no reason why, if the property had been assessed, the payment of taxes thereon would not serve the same purpose in acquiring title by adverse possession as it would serve if the title had already passed from the government. Under the statutes of this territory in force in 1881, possessory claims were taxable.

[4] Real estate was defined to include "the ownership of or claim to or possession of or right of possession to any land within the territory," and section 5 of the Revenue Act of 1875 (Sess. Laws 1874-75, p. 479) provided that "the claim by or possession of any person, firm, corporation, association or company to any land shall be listed under the head of real estate." If, however, it be conceded, which may be done for the purposes of this case, that the payment of taxes could not inure to the benefit of one claiming title by adverse possession until after the title

passed from the government, still the appellant shows that he had paid the taxes for at least five years continuously before respondent's predecessor appears to have ever paid taxes on this property. Patent issued for this land to John Halley on the 5th of April, 1884. Respondent's predecessor, Morse, never paid any taxes on this lot until the 29th of June, 1889. On the other hand, if appellant had been, as the evidence shows, in the continuous adverse possession of the property from April 5, 1884, and had paid the taxes assessed against the property continuously during that period of time, his claim by adverse possession had matured and ripened into title on the 5th of April, 1889. The evidence shows that appellant paid the taxes that year 11 days prior to the payment by Morse, respondent's predecessor, or on the 18th of June. It is clear, therefore, to us that, under the statute and the well-established rules of law applicable to acquiring title by adverse possession, appellant had acquired the title to this property prior to June 29, 1889, the date on which Morse paid the first taxes. Walker's title by adverse possession was then perfect. Payment of taxes thereafter by the original owner of the legal title would not alter condition of appellant's title. Where one claims title to real estate by adverse possession, when the five-year period is completed, he is under no more obligation to pay the taxes thereafter than he would be on any other property. In other words, the subsequent payment of taxes after the adverse title is complete is no longer necessary or essential to successfully defend or prosecute an action in support of such title. Under a claim of title to property by adverse possession, authorized by section 4043, Rev. Codes, it is not necessary that the five years' continuous, exclusive, adverse possession and payment of taxes should have been immediately preceding the commencement of the action, or at any special or particular time, but it is sufficient if the party claiming such title can establish any continuous five-year period prior to commencement of the action and subsequent to the acquisition of the legal title by the adverse party during which he has complied with the statute in maintaining his open, notorious, adverse possession, and payment of taxes for such period. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828.

[5] Counsel have indulged in considerable argument over the rule of law applicable to the facts disclosed in this case with reference to the payment of taxes commencing with and subsequent to June, 1889. It seems that each party has paid the taxes every year since that time. Sometimes one party has paid the taxes first and other years the other party has been the first to make payment. It is not material to the determination of this case that we determine the rule of law

which should apply in such cases. It seems, however, to us that the rule announced by Mr. Justice Harrison in his concurring opinion in *Cavanaugh v. Jackson*, 99 Cal. 672, 34 Pac. 509, is the correct rule to be applied in such cases. The same rule was adopted and followed in *Carpenter v. Lewis*, 119 Cal. 18, 50 Pac. 925.

From what has been said it follows that the judgment in this case should be reversed. Judgment reversed and cause remanded, with direction that a new trial be granted, if respondent desires a trial, on the question of payment of taxes by either party from 1881 to 1889. Costs awarded in favor of appellant.

STEWART, J., concurs. SULLIVAN, J., sat at the hearing, but took no part in the decision.

(54 Colo. 402)

FARMERS' RESERVOIR & IRRIGATION CO. v. COOPER et al.

(Supreme Court of Colorado. March 3, 1913.)

1. PLEADING (§ 36*)—ADMISSIONS—OWNERSHIP.

The institution of condemnation proceedings against defendants, as the persons in whom title was vested, in effect admitted that defendants owned the land in question and its appurtenances, including water rights, in the absence of a contrary averment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 56; Dec. Dig. § 36.*]

2. EMINENT DOMAIN (§ 84*)—EVIDENCE—OWNERSHIP OF LAND.

Water which originated on the land condemned, and which had for many years been applied to beneficial uses upon the land by the owners thereof and their grantors, prima facie belonged to the landowners, in absence of a contrary showing.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

3. EMINENT DOMAIN (§ 141*)—DAMAGES—DAMAGE TO REMAINDER.

The owner of land across which a right of way is condemned is entitled to damages to the remainder equal to the diminution thereof in market value for any use to which it may reasonably be put, so that, where the condemnation of a strip necessarily interfered with the landowner's use of spring water upon the land remaining, condemnor would be liable in damages for depreciation in the market value of the remainder by depriving the owner of the use of the water.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

4. EMINENT DOMAIN (§ 112*)—DAMAGES.

All damages present and prospective, which are the necessary or reasonable incident of taking property, are recoverable, excluding, however, damages anticipated from the negligent or unlawful construction of an improvement by condemnor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 299, 300; Dec. Dig. § 112.*]

5. EMINENT DOMAIN (§ 203*)—PROCEEDINGS—DAMAGES—IMPROVEMENTS.

Double damages are not recoverable in condemnation proceedings, and the value of im-

provements on a part of land not taken, which were injured or destroyed by such taking, should not be considered alone, but only in estimating the depreciation of the market value of the remainder, so that evidence as to the value of improvements, crops, and orchards on the land not condemned, and the extent to which its market value was depreciated by their destruction, was admissible where the court limited its consideration to the determination of the depreciation of the fair market value of the remainder.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.*]

6. EMINENT DOMAIN (§ 103*)—DAMAGES—ITEMS OF DAMAGE—FENCING.

If the future use of land not taken would necessitate additional fencing, the cost of such fencing could be considered, not as a separate item of damage, but upon the depreciation in the value of the land not condemned by placing an increased burden thereon.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 274-277; Dec. Dig. § 103.*]

7. EMINENT DOMAIN (§ 203*)—PROCEEDINGS—DAMAGES—ELEMENTS—INCOME.

Where land is injured by the condemnation of a part thereof, the income from the land for a period reasonably proximate to the time damages are assessed may be considered; but evidence of rent received prior to 1908 was properly stricken as too remote.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.*]

Appeal from District Court, Jefferson County; John T. Shumate, Judge.

Action by the Farmers' Reservoir & Irrigation Company against A. A. Cooper and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. A. Dier, of Golden, Smith, Brock & Ferguson, of Denver, and W. W. Platt, of Alamosa, for appellant. F. T. Johnson, of Denver, for appellees.

GABBERT, J. The Farmers' Reservoir & Irrigation Company instituted proceedings under the eminent domain act to condemn a right of way for its canal across a quarter section of land owned by A. A. Cooper and occupied by Frank Merrick, as tenant, under a lease from Cooper, both of whom were made parties to the proceeding. The case was tried to a jury and a verdict brought in, fixing the value of the land actually taken at \$747.50, and the damages to the residue at \$6,229, and a judgment rendered accordingly. From this judgment the company has appealed. For convenience, we shall hereafter refer to the appellant as petitioner, and the appellees as respondents; that being their relation in the court below.

The quarter section is crossed by a depression, which runs diagonally across the center of the track from the north to the south line, and is mentioned in the testimony as Spring Gulch. When the proceedings were instituted, the petitioner was granted immediate possession of the land sought to be condemned. Under this order, the canal was constructed and completed before the case was

tried. On the land there was a natural spring, the flow from which was augmented by seepage water originating on the land, all of which flowed down Spring Gulch. The right of way crosses this gulch below the spring, and the point where the seepage water originated. Over and through this tract petitioner built what is referred to in the testimony as the Croke Canal. This canal was carried across Spring Gulch by a fill, without any opening. As we understand the record, a reservoir had been constructed by respondents and their grantors, which was supplied with water from Spring Gulch. Other improvements on the land consisted of a house, barn, and outbuildings, and an orchard, all of which were located above the canal and in the near vicinity of Spring Gulch. The right of way destroyed some of these improvements.

On behalf of respondents, resulting damages—that is, damages to the land not taken for the right of way—were claimed, based upon the ground that the canal, as constructed, prevented the use of the water flowing in Spring Gulch, and cut off the water supply for the reservoir. Witnesses for respondents were asked the following question, "Assuming that the spring of water, together with the seepage water, situated in the draw in and above and upon the right of way of this company, is practically destroyed, taken, and appropriated by this company, assuming that the reservoir now located on the land is practically made useless for the purpose it was used for, and can be used, * * * what would be the actual diminution in the market value of this land?" We understand by "this land" is meant the remainder of the tract not actually taken for right of way. The answers varied from \$1,200 to \$2,500.

Counsel for petitioner contend that an objection to this question should have been sustained for three reasons: (1) That it was based upon an assumption contrary to the facts; (2) that, even if the use of the water from Spring Gulch was prevented and destroyed by the construction of the canal, it was not a proper element to consider in estimating damages, for the reason that respondents showed no right to the use of such water; and (3) that, under the petition, the cutting off of the water was not a matter for which damages could be recovered in this action.

As previously stated, the cause was tried after the canal had been constructed, and we should here note that the jury viewed the premises.

The testimony on behalf of respondents tended to prove that the water flowing down Spring Gulch from the sources named was arrested in its flow, and accumulated behind the fill and overflowed into the canal, which prevented it from passing beyond the right of way occupied by the ditch. Below the

canal was a reservoir on the land, which, previous to the construction of the canal, was supplied with water from the spring and the seepage in question; that the spring water was suitable for domestic use; that, in connection with the seepage water, it was suitable for stock and irrigation purposes, and that the water from these sources, which accumulated in the reservoir, was good for irrigation, stock, fish, and ice purposes; that it had been used for all these purposes by respondents, in connection with the quarter section involved; that the spring furnished the sole supply for domestic use; and that the fill, right of way, and accumulation of water behind the fill so covered up the waters from the spring that it was rendered inaccessible and no longer fit for domestic use.

There may be some conflict in the testimony as to the extent the use of the water from Spring Gulch is interfered with by the construction of the canal; but this conflict was a matter for the jury to determine, and as they viewed the premises, and there is testimony to prove the facts upon what may be termed the hypothetical question propounded to witnesses for respondents was based, we are of the opinion that the contention by counsel for petitioner that the question was based upon an assumption contrary to the facts is not supported by the record. In our opinion there is no merit in the contention that petitioner is not liable to respondents for the depreciation in the value of the land not taken, resulting from destroying the use of water from Spring Gulch, upon the ground that they did not establish a right to its use.

[1] The petitioner commenced these proceedings, naming the respondents as the parties in whom the title to the land was vested, thereby admitting, in the absence of a special averment to the contrary, that they were the owners of the land, and everything upon it which might be regarded appurtenant. The water involved originated on this land.

[2] It had been applied by respondents and their grantors to beneficial uses upon the land for many years prior to the construction of the canal through the reservoirs and ditches constructed by Cooper and his grantors. We think this is sufficient, in connection with the conceded ownership of the land, to make a prima facie case establishing in respondents the right to the use of water from Spring Gulch as an appurtenance to the land.

[3] In condemnation proceedings, the owner across whose land a right of way is taken is entitled to recover damages to the residue caused by such right of way, equal to the diminution in the market value of such residue for any use to which it may reasonably be put. Colo. Midland Ry. Co. v. Brown, 15 Colo. 193, 25 Pac. 87. It is true the petitioner is not attempting to condemn the spring and seepage water for its own use; but, by

constructing its ditch in the place and manner it did, it has interfered with the use of water belonging to respondents upon their land, as theretofore enjoyed by them. This necessarily depreciates its market value, and to this extent the petitioner should respond in damages, not for the value of water taken or appropriated, but because, by the construction of its canal, it has depreciated the value of respondents' land by depriving them of the use of water thereon to which they are entitled.

[4] In condemnation proceedings all damages, present and prospective, that are the natural, necessary, or reasonable incident of taking the property sought to be condemned, must be assessed; but this does not include such as may be anticipated from negligent or unlawful construction of an improvement thereon by the petitioner. *Denver City I. & W. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 585, 13 Am. St. Rep. 234. Based upon this proposition, counsel for petitioner contend that respondents are not entitled to recover damages resulting to the residue of the land occasioned by being deprived of the use of the spring and seepage water, for the reason that, if damages are thus caused, they are the result of the unskillful construction of the canal across the gulch down which these waters naturally flow. This conclusion is not tenable. Petitioner constructed its canal across the gulch by means of a fill. By so constructing it, respondents have been deprived of the use of spring and seepage water, which is the natural result of constructing the canal in the manner the petitioner did, by means of which damages have been occasioned at the very time they were assessed; hence respondents are not claiming anticipated damages for negligent or unskillful construction, but damages which directly result from the taking of the land and the construction of the canal, which had been suffered at the time the case was on trial as an incident to the taking of the right of way, and the construction of the canal thereover, and which will continue in the future. In such circumstances, depriving respondents of the water to which they are entitled is in no sense an independent tort which should be the subject of an independent action.

On the land were located a house, out-houses, and a barn, also an orchard consisting of about 50 trees, and some growing crops. Some of these improvements were on the right of way and destroyed. Others, it was claimed, by reason of the near proximity of the canal, were rendered useless. The orchard, in part, was flooded by the water collecting back of the fill. The crops growing on the right of way were injured or destroyed. Testimony regarding the value of these improvements, crops, and orchard was introduced by respondents, and the extent the

market value of the residue was injured by reason of the destruction or injury of these items. A general question was propounded to witnesses for respondents, the object of which was to elicit an answer as to what the effect on the market value of the residue of the land would be, assuming that these items were injured or destroyed. Counsel for petitioner insist that from this question, which the witnesses were permitted to answer, the jury were allowed to infer that, in estimating the damages to the land not taken, they were authorized to consider the value of such land, plus the value of crops destroyed, the value of buildings injured or destroyed, as well as the value of other items included in the question.

[5] In condemnation proceedings, double damages are not allowable, so that, in estimating damages to the land not taken for a right of way, the value of improvements injured and destroyed are not to be considered, standing alone; but, in estimating damages to the residue, a wide range of evidence is admissible. If an improvement is injured or destroyed by a right of way, necessarily the market value of the residue is depreciated, for, in estimating the value of lands, the improvements thereon cut more or less of a figure. For this reason, the value of the improvements injured or destroyed by the right of way are proper to consider, not as constituting separate elements of damage, but in estimating the depreciation of the value of the land not taken. We think this was the purpose and purport of the question, and was so understood and treated by the jury, as the court, in instructing them, stated, in effect, that, in estimating the damages, if any, to the residue of respondents' land, they were not authorized to assess damages for each specific element or item of alleged damage, which may have been shown by the evidence, but that their consideration of these elements of damage could only be considered by them in so far as they found, from the evidence and from their view of the premises, that the fair cash market value of the residue of the land was thereby depreciated by the construction of petitioner's canal, and that none of these elements of damages could be considered as independent of, and additional to, the depreciation of the value of the residue, and concluded the instruction by stating: "The question is, after considering all proper elements of damages, as limited by these instructions, and rejecting all remote and speculative elements of damages, How much is the fair, cash market value of the residue of said lands not taken, decreased, or diminished in value by reason of the construction and operation of said canal?" In this connection, it is not amiss here to note that this instruction carefully guarded the rights of the petitioner with respect to the value of the right to the use of

the water which the respondents claimed was rendered useless by reason of the construction of the canal.

[6] Counsel for petitioner also contend that, from the evidence admitted and the instructions given, the jury were authorized to assess, as damages, the expense of additional fencing. This contention is not supported by the record. To the extent the taking of the right of way impaired the value of the residue, respondents were entitled to be compensated. If the future use of the residue required additional fencing, and this fact would render it less valuable than it would otherwise have been, then this was proper to consider in estimating damages to the residue, not, however, as a separate element equal to the cost of increased fencing, but the amount of depreciation in the value of the residue caused by the increased burden upon its use. *Newgass v. Railway Co.*, 54 Ark. 140, 15 S. W. 188. This was the purport of the instructions of the court bearing on the subject.

[7] At the trial counsel for petitioner, on the cross-examination of a witness for respondents, elicited the fact that the quarter section had been rented for the years 1908 and 1909 for between \$300 and \$400 per annum. They afterwards introduced testimony tending to prove that for the year 1902 or 1903 to 1907, inclusive, the place had rented for \$150 to \$200 per annum. On motion of respondents, the testimony relating to the rent received prior to 1908 was stricken upon the ground that it was too remote. Where a tract of land is injured by taking a portion of it in the exercise of the power of eminent domain, it is proper, in determining the damages, to consider the income derived from it. Testimony on this subject, however, ought to be limited to a period reasonably proximate to the time the damages are being assessed, as such testimony tends better to establish a rental value than what such value may have been several years prior. We think the court did not err in striking the testimony under consideration.

Numerous errors are assigned upon the admission of testimony by respondents, the purpose of which was to show injury to the residue of their land, as the result of the construction of the canal. We do not believe it is necessary to consider the various questions thus raised in detail, as we think the testimony challenged was competent as tending to prove what might reasonably and naturally be anticipated would occur in the future which would affect the market value of the residue.

It is finally urged that the verdict is excessive. The jury viewed the premises. There is ample testimony to support their verdict. It does not appear that incompetent testimony was admitted. It appears that the canal enters the quarter section near the southeast corner, and, after a meandering

course of about three-quarters of a mile, leaves the premises near the northwest corner, thereby cutting into and through three of the four 40-acre tracts constituting the land involved; that the amount of land actually taken for the right of way is about 8 acres, but on account of the course of the canal, the manner of its construction, and its future method of operation, about 6 acres outside of the right of way are practically made valueless. The jury were carefully instructed what matters they should consider in estimating damages. In such circumstances, it is not within the province of this court to say, from a review of the testimony, that the jury erred in rendering the verdict they did.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

(54 Colo. 349)

FULLEN v. WUNDERLICH.

(Supreme Court of Colorado. March 3, 1913.)

1. APPEAL AND ERROR (§ 232*)—REFUSAL TO VACATE JUDGMENT—SCOPE OF REVIEW.

The review of a refusal to vacate a judgment will be limited to those questions raised in the court below on the motion to vacate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.*]

2. JUDGMENT (§ 139*)—MOTION TO VACATE—DISCRETION.

The granting of a motion to set aside a judgment and to allow an answer to the merits under Rev. Code, § 81, authorizing the court to vacate a judgment and permit the defendant to answer at any time within a year, where the summons has not been personally served, rests within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

3. JUDGMENT (§ 159*)—MOTION TO VACATE—DISCRETION.

Defendant's motion filed in February, 1912, to vacate a judgment rendered against him in July, 1911, in a suit instituted by constructive notice in January, 1911, was properly overruled where the affidavit in support thereof did not state that he was ignorant of the pendency of the action, or that he did not receive a copy of the summons and complaint which the clerk mailed to him at his post office address, and in no way attempted to excuse his delay in attempting to have the judgment set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 310, 312, 313; Dec. Dig. § 159.*]

Error to Phillips County Court; S. S. Worley, Judge.

Action by G. L. Wunderlich against Harry Fullen. The court refused to set aside a judgment for plaintiff and give defendant leave to answer, and defendant brings error. Affirmed.

Rolfson & Hendricks, of Julesburg, for plaintiff in error. W. D. Kelsey, of Holyoke, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HILL, J. Upon July 20, 1911, the plaintiff, defendant in error here, secured a judgment against the defendant, plaintiff in error here, in the sum of \$265.15 and costs taxed at \$32.54. This judgment sustained a writ of attachment theretofore levied upon real estate, and included an order that so much thereof as was necessary to satisfy the judgment be sold under special execution. This was issued upon the same date and returned August 15, 1911, showing the sale of the property, etc. Upon February 9, 1912, the defendant filed a motion to set aside the judgment and for leave to answer to the merits of the original action for the following reasons: First, that defendant had not been personally served with summons, and that judgment was entered on the 20th of July, 1911, being less than one year previous to the filing of the motion; second, that the defendant has a good and sufficient defense to the action on the merits. This, it is alleged, more fully appeared in the affidavit of the defendant filed with the motion. It states that he is a nonresident of Colorado; that he has not been personally served with summons in the above-entitled action; that the judgment was entered on the 20th day of July, 1911; that he has fully and fairly stated the case to his counsel, and, after such statement, he is advised by his counsel and believes that he has a good, full, and perfect defense to the action upon the merits. The motion to vacate the judgment, etc., was overruled. The defendant brings the case here for review.

[1] Many reasons are urged why the court was without jurisdiction in the original action, the pleadings defective, the service void, the proceedings irregular, the judgment void, voidable, etc. As none of these questions were raised in the court below upon this motion, following the well-recognized practice of this court, we will not consider them, but will limit our review to the reasons then raised and passed upon as to why the motion should be granted. *Cone v. Eldridge*, 51 Colo. 564, 119 Pac. 616; *Leary v. Jones*, 51 Colo. 185, 116 Pac. 130; *Jakway v. Rivers*, 48 Colo. 49, 108 Pac. 999; *Rice v. Cassells*, 48 Colo. 73, 108 Pac. 1001; *Nelson et al. v. Chittenden*, 123 Pac. 656; *Barr v. People*, 30 Colo. 522, 71 Pac. 392; *Auckland v. Lawrence*, 20 Colo. App. 364, 78 Pac. 1035; *Quinn v. Baldwin Star C. Co.*, 19 Colo. App. 497, 76 Pac. 552; *City of Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986; *Clayton et al. v. Clayton, Heir, etc.*, 4 Colo. 410.

[2] The defendant's contention, presented by his motion, rests upon the proper construction to be given the concluding clause of general section 81, Revised Code 1908. It reads: "When for any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representatives, at any time

within one year after the rendition of any judgment in such action, to answer to the merits of the original action." It is claimed that when a defendant brings himself within the provisions of this paragraph, and shows he has a meritorious defense that he is entitled to this relief, as a matter of right, without showing mistake, inadvertence, surprise, or excusable neglect, the court has no discretion, but must grant the relief. *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 691, 12 Ann. Cas. 990, the cases therein cited, and other California cases are cited to sustain this position. Whatever may be the rule in other jurisdictions, under their Code provisions, it has been held by this court and by our Court of Appeals that the granting or denying of a motion to set aside a judgment and to allow answer to the merits under section 81, supra, is discretionary with the trial court. *R. E. Lee S. M. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 77; *Donald v. Bradt*, 15 Colo. App. 414, 62 Pac. 580; *Morrell H. Co. v. Princess G. M. Co.*, 16 Colo. App. 54, 63 Pac. 807.

[3] Eliminating the question of the sufficiency of the affidavit pertaining to merits, under the circumstances disclosed, we do not think the court abused its discretion in overruling the defendant's motion. The suit was instituted in January, 1911. Judgment was entered July 20, 1911. The defendant's motion to set aside judgment and for leave to answer to the merits was filed February 9, 1912. The affidavit in support thereof does not state that he was theretofore ignorant of the pendency of the action; or if he was when knowledge reached him concerning it, or that he acted with any diligence thereafter, he in no manner attempts to excuse his delay of over seven months before making this attempt to have the judgment set aside. He does not state that he did not receive a copy of the summons and complaint mailed to him at his post office address in Nebraska. The burden is upon him to show everything that would entitle him to a vacation of the judgment in the exercise of sound discretion by the court. As stated by our Court of Appeals in *Donald v. Bradt et al.*, supra, at page 418 of 15 Colo. App., at page 582 of 62 Pac.: "It is true that, under this Code section, a defendant not personally served with summons has 12 months within which to apply to have a judgment vacated; but the lapse of time after he obtains knowledge of the judgment and before he applies may be, and indeed is, in many cases an important factor to be considered by the court in exercising its discretion." The affidavit upon which the order for publication of summons was based states his last known place of residence was Grand Island, Neb. The clerk of the court, as appears from his affidavit in the record, mailed a copy of the summons and complaint to the defendant at that point immediately upon the issuance of the order

for publication. The defendant does not allege that he did not receive these papers or that Grand Island was not at that time his post office address. For all that appears in the affidavit, the defendant could have known all about the suit, and might be attempting to take advantage of his being a nonresident in order to delay its ultimate termination. In our opinion the affidavit in this respect was insufficient to justify the granting of the motion.

Perceiving no prejudicial error, the judgment of the court in refusing to set aside the judgment and for leave to answer to the merits is affirmed.

Affirmed.

MUSSER, C. J., and GABBERT, J., concur.

(54 Colo. 283)

SMITH v. DENVER & R. G. R. CO.

(Supreme Court of Colorado. March 3, 1913.)

1. RAILROADS (§ 453*)—LIABILITY FOR FIRES—STATUTES.

Rev. St. 1908, § 5512, substantially following Gen. Laws 1877, § 2237, as amended by Laws 1887, p. 368, making every railroad company liable for damages by fire set or caused by operating its lines, whether negligently or otherwise, makes a railroad company unconditionally liable for damages by fire set out or caused by operating its road whether negligently or not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.*]

2. NEGLIGENCE (§ 103*)—LIABILITY—PROXIMATE CAUSE.

One who is guilty of negligence proximately causing injury to another, not chargeable with contributory negligence, is liable for the damages resulting to the injured party.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 169; Dec. Dig. § 103.*]

3. JUDGMENT (§ 587*)—BAR OF CAUSES OF ACTION—NEGLIGENCE AND STATUTORY LIABILITY.

One who recovers under the statute making railroad companies liable for damages by fires set or caused by their operation thereby loses his right of action for negligence, and vice versa.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1089; Dec. Dig. § 587.*]

4. RAILROADS (§ 475*)—STATUTORY OR COMMON LAW ACTION—RAILROAD FIRES.

Rev. St. 1908, § 5512, which provides that every railroad company shall be liable for all damages by fire set out or caused by its operation, whether negligently or otherwise, by action brought thereafter within two years next ensuing its accrual, makes the gist of the action the setting out or causing of the fire by operation of the road and eliminates negligence as an element of the action, and an action for damages for the destruction of property by fire negligently set or caused by a railroad, in which the complainant assumed the burden of proving negligence, was not an action within the statute, and hence was not barred by the two-year limitation.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 475.*]

Error to District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Henry Smith against the Denver & Rio Grande Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Carle Whitehead and Albert L. Vogl, both of Denver, for plaintiff in error. E. N. Clark, of Denver, T. L. Phillips, of St. Louis, Mo., and J. G. McMurry, of Denver, for defendant in error.

MUSSER, C. J. Henry Smith filed his complaint below to recover damages for property alleged to have been destroyed by fire negligently set out and caused (for the purposes of this case) by the defendant railroad company. It appears from the allegations of the complaint that the action was brought three years and five months after the fire occurred. To the complaint the defendant interposed, by special demurrer, a plea of the two-year statute of limitations contained in the railroad fire statute. The demurrer was sustained. The plaintiff, electing to stand by his complaint, has brought here for review the action of the court in sustaining the demurrer, dismissing the complaint and rendering judgment against him for costs. Our railroad fire statute (section 5512, Rev. Stat.) passed in 1903, so far as it is relevant to this case, is as follows: "Every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part thereof, in this state, whether negligently or otherwise; and such damages may be recovered by the party damaged, by the proper action, in any court of competent jurisdiction; Provided, the said action be brought by the party injured within two years next ensuing after it accrues." The rest of the section provides that the liability imposed shall inure solely in favor of the owner or mortgagee of the property damaged or destroyed, and forbids the passing of the right of action by assignment or subrogation in favor of any insurance company that has insured the property. It is the contention of the plaintiff that the action which he commenced is not the action contemplated in the statute, but is what he denominates a common-law action for negligence, and that, therefore, the limitation of the statute does not apply. On the other hand, the defendant contends that the statute covers the whole law with regard to damages for fire set out or caused by the operation of railroads, and that the action commenced by plaintiff is barred by the statute. In 1874 the legislative assembly of Colorado Territory passed an act substantially the same as the portion of section 5512 quoted above, except that it did not contain the words "whether negligently

or otherwise," and in which the period of limitation was three years. Sess. Laws 1874, p. 225; Gen. Laws 1877, § 2237. In 1887, section 2237, aforesaid, was amended, leaving it the same as before, except that there was added a provision for the appraisalment of damages. Sess. Laws 1887, p. 308.

[1] Under the statutes, as they existed prior to the act of 1903 (Laws 1903, p. 404, § 1), the liability of a railroad company for damages by fires set out or caused by operating a road was absolute, and the question of negligence was eliminated. Whether the fire was set out or caused by the operation of the road and the amount of damages were the questions for determination. *U. P. Ry. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221; *Garnet Co. v. Sampson*, 48 Colo. 285, 110 Pac. 79, 1136; *Denver, etc., R. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. 664; *U. P. Ry. Co. v. Arthur*, 2 Colo. App. 159, 29 Pac. 1031. The act of 1903 is the same in this regard as the previous statutes. Under it a railroad company is unconditionally liable for damages by fire set out or caused by operating the road whether negligently or otherwise. *British-Amer. Assur. Co. v. C. & S. Ry. Co.*, 52 Colo. 589, 125 Pac. 508.

[2-4] It is plain that the words "whether negligently or otherwise," in the statute, only emphasize the absolute liability imposed, and that, instead of putting negligence in the statute as an element to be considered, these words exclude it. To recover under this statute, plaintiff need not allege or prove negligence. The gist of the action is the setting out or causing of the fire by operating the road. Negligence is eliminated. It is such a liability that is fixed by the statute, and it is an action to recover on such a liability that is barred in two years. The action instituted by plaintiff is not such an action. He did not attempt to hold the railroad company under its statutory liability for the destruction of the property by fire set out or caused by operating the road. What he did was to institute an action to recover damages for the destruction of property by fire negligently set out or caused by the company. The gist of his action was negligence in setting out and causing the fire. He took upon himself the burden of proving this negligence. In the action instituted by him he would not only have to prove that the railroad company set out or caused the fire, but also that it was set out or caused through the negligence of the company. The complaint states an ordinary cause of action for damages occasioned by the negligence of a defendant. It is familiar law that he who is guilty of actionable negligence—that is, the proximate cause of injury to another—may, in an appropriate action, be made to respond for the damage resulting to the injured party who is not chargeable with contributory negligence. The liability for such damage exists independent of statute, and

certainly it can only be taken away, if at all, by statutory provisions that are express and clear. The statute in question does not create or comprehend a liability founded on negligence. The statutory liability is imposed whether negligence is present or not. Certainly a statute cannot take away or abolish something that it does not embrace either expressly or impliedly, nor can the limitation of a statute bar an action on a liability which the statute does not comprehend. The statute imposes an absolute liability for damages by fire set out or caused by operating a railroad, and limits the time within which an action may be begun for such damages. How can such a statute be said to include the liability of a railroad company based upon its negligence in setting out or causing a fire, or to limit the time within which an action may be begun to recover damages for such negligence? Any other person or company is liable in an action based on negligence for damages by fire negligently set out or caused. It cannot be said that a statute imposing an unconditional liability for fire set out or caused in a particular manner, whether negligently or otherwise, exempts a railroad company from a liability for negligence that all other persons must endure, or that such a statute will favor a railroad company with a period of limitation not enjoyed by others who may be sued upon a like liability for negligence. It may be, though the fact does not appear from the complaint, that the alleged fire was set out or caused by operating the road. The defendant seems to treat the complaint as alleging that fact. If that was so, plaintiff, within the two years, might have begun an action to recover on the absolute liability imposed by the statute. It is not probable that within that time a plaintiff would endeavor to recover damages in an action for negligence that might be recovered in an action in which negligence cuts no part. That is not saying, however, that a plaintiff cannot, if he chooses, nor can a defendant complain, if he does, take upon himself the needless burden of negligence. A plaintiff can recover such damages but once. If he recovers under the statute, his right of action for negligence is gone, and vice versa. If, however, the statutory right of action is barred by the limitation of two years, that fact certainly cannot bar his action for negligence when the statute does not include or contemplate a liability for negligence, nor an action to enforce such liability.

Our view of the statute of 1903 is expressed in *C. & F. Lumber Co. v. D. & R. G. R. R. Co.*, 17 Colo. App. 275, at page 288, 68 Pac. 670, at page 674, wherein our Court of Appeals, in speaking of the statute of 1887, said: "In *Railway Co. v. Henderson*, 10 Colo. 2 [13 Pac. 911], our Supreme Court, in construing the stock killing statute, says: 'The statute is in our judgment simply cumulative. The object of the Legislature was

not to interfere with the owner's existing rights, but, owing to the difficulty of establishing negligence, to give him additional relief.' This language is, we think, equally applicable to the fire statute. Nowhere in the statutes, either within the fire statute itself, or elsewhere, is the slightest intent manifested to substitute this for the common-law remedy of a party, and entirely abolish the latter, and to so hold would in our opinion be a judicial assumption without authority or support." The defendant concedes the correctness of that decision under the law of 1887, but contends, as we understand, that the addition of the words "whether negligently or otherwise," in the statute of 1903, abolished the liability for negligence and the remedy based thereon, or perhaps its contention is that these words show an intent to abolish the pre-existing remedy for negligence. As has been said, and as appears clear, these words have the effect and can serve no other purpose than to leave no doubt that the liability imposed by the statute exists whether the fire was caused by negligence or not, so long as it was set out or caused by operating the road, or any part of it, and they thus made no change in the statute in that respect. *British-Amer. Assur. Co. v. C. & S. Ry. Co.*, *supra*. These words exclude negligence as an element in the doing of the act for which the statutory liability is imposed and from consideration in the use of the remedy afforded, and plainly they are not to be considered as relating to another liability and another remedy in which negligence is included as an element. In other words, their use is to exclude negligence from consideration in the liability created and the remedy afforded by the statute, and not to abolish another right of action in which negligence is to be considered.

The plaintiff was, therefore, by his complaint, prosecuting a right of action to which he was entitled and which did not appear on the face of the complaint to be barred by the two years statute of limitations in question. This being so, the ruling of the court in sustaining the demurrer was wrong, and the judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer and to proceed with the action in accordance with the views herein expressed and as the law provides.

Reversed and remanded with instructions.

WHITE and GARRIGUES, JJ., concur.

(54 Colo. 236)

YOUNG v. PEOPLE

(Supreme Court of Colorado. March 3, 1913.)

1. CRIMINAL LAW (§ 184*)—CHANGE OF VENUE—REQUISITES OF APPLICATION.

Under *Mills' Ann. St.* § 4618, which requires an application for a change of venue to be by petition, verified by defendant, etc., an

unverified motion, signed by accused's attorneys, is insufficient.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* §§ 243, 251, 252; *Dec. Dig.* § 134.*]

2. CRIMINAL LAW (§ 134*)—CHANGE OF VENUE—PREJUDICE OF JUDGE—PROOF REQUIRED.

Under *Mills' Ann. St.* § 4618, which provides that, on application for a change of venue, prejudice of the trial judge must be shown by the affidavits of at least two credible persons not related to defendant, affidavits by accused's attorneys, stating a belief that accused cannot have a fair and impartial trial because of the prejudice and bias against him of the presiding judge, is insufficient.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* §§ 243, 251, 252; *Dec. Dig.* § 134.*]

3. CRIMINAL LAW (§ 193*)—FORMER "JEOPARDY"—CONSTITUTIONAL LAW.

Under *Const. art. 2, § 18*, which provides that no person shall be twice put in jeopardy for the same offense, but that, if judgment be reversed for error in law, he shall not be deemed to have been in jeopardy, on such a reversal one accused of murder stands as though there never had been a former trial; his second trial is *de novo*; and hence on reversal of conviction of murder in the second degree, and on a new trial, accused can be again tried for murder in the first degree.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* § 378; *Dec. Dig.* § 193.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3802-3811; vol. 8, p. 7694.]

4. COURTS (§ 92*)—APPELLATE COURTS—DICTA.

Expressions of the Supreme Court in an opinion are in no sense authority upon a proposition which was not properly before the court for determination.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* § 335; *Dec. Dig.* § 92.*]

5. CRIMINAL LAW (§ 759*)—INSTRUCTIONS—MALICE.

In a murder trial, an instruction that, when a killing is done with a deadly weapon, etc., malice may be inferred, in the absence of proof that the act was done in necessary self-defense, etc., and the presumption will be that the act was voluntary and committed with malice aforethought, was not erroneous as invading the jury's province for failure to state that the presumption obtains only where the killing has been shown to have been deliberate and unlawful, especially where other instructions stated that malice was not a presumption of law, but a fact for the jury to determine from the evidence under the instructions of the court, etc.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* §§ 1737, 1738, 1790-1793; *Dec. Dig.* § 759.*]

6. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

Instructions covered by those given are properly refused.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* § 2011; *Dec. Dig.* § 829.*]

7. CRIMINAL LAW (§§ 542, 543*)—TESTIMONY AT FORMER TRIAL—ADMISSIBILITY.

On it appearing that witnesses who testified at a former trial are beyond the jurisdiction of the court, or dead, their testimony, preserved and identified by bill of exception, is admissible.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* §§ 1232, 1233, 1236; *Dec. Dig.* §§ 542, 543.*]

S. CRIMINAL LAW (§ 1158*)—APPEAL AND ERROR—REVIEW—CONCLUSIVENESS OF FINDING.

A finding by a trial court that a witness who testified on a former trial was beyond the jurisdiction of the court, and that other former witnesses were dead, thus making the testimony of such witnesses admissible, will not be disturbed by the Supreme Court on writ of error, if fairly supported by evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

En Banc. Error to District Court, Montrose County; Sprigg Shackelford, Judge.

Henry Young was convicted of murder in the second degree, and he brings error. Affirmed.

T. J. Black, of Montrose, and O. N. Hilton and Caesar A. Roberts, both of Denver, for plaintiff in error. Benjamin Griffith, Atty. Gen., and Philip W. Mothersill, Asst. Atty. Gen., for the People.

BAILEY, J. This cause has been in this court once before from a judgment on a verdict of conviction of murder in the second degree, which was reversed solely on a question of law, in that it was there held that the trial court failed to properly instruct the jury upon the matter of self-defense, on which reliance was had for acquittal. Young v. People, 47 Colo. 352, 107 Pac. 274. Upon a new trial the defendant was again convicted of murder in the same degree, and brings the case here a second time for review, alleging numerous errors. On this review the defendant raises no question of the sufficiency of the testimony to support the verdict; indeed there is no room for such claim on any reasonable basis, as the testimony is ample to support it, as it would have been had the verdict been one of murder in the first degree. The errors relied upon go mainly to questions of procedure, and relate particularly to change of venue, former jeopardy, and objections to instructions given and refused.

[1, 2] On October 24th, 1910, the day before the trial was to begin, according to a previous setting, counsel for the defendant filed a motion to change the venue on the ground of bias and prejudice of the judge. This motion was supported by two affidavits, identical in subject-matter and verified, respectively, by the two record attorneys of the defendant. The motion was based specifically, as shown by the affidavits, on section 4613 of 2 Mills' Annotated Statutes, and, omitting formal parts, is as follows:

"Comes now the defendant Henry Young and presents this his motion and moves the court to change the venue of this cause to some other court of competent jurisdiction in this county or some other county, or notify and request the judge of some other court, having jurisdiction of a like offense to try the said cause, because the said presiding

judge the Hon. Sprigg Shackelford is so biased and prejudiced against this defendant that he cannot have a fair and impartial trial of his said cause before said presiding judge and in support of his said motion tenders herewith the affidavit of two credible persons not related to this defendant."

One of the affidavits was by O. N. Hilton, the other by T. J. Black, precisely alike except the name of the affiant. The Hilton affidavit follows:

"O. N. Hilton being duly sworn says on oath, that he is a citizen of the state of Colorado and has been such citizen for more than 20 years past; that the defendant above named is on trial for a felony, being a criminal cause now pending in the district court of said county, before the Hon. Sprigg Shackelford, the presiding judge thereof; that it is the belief of affiant that the said defendant, Henry Young, cannot have a fair and impartial trial before the said presiding judge, the Hon. Sprigg Shackelford, because of the prejudice and bias of the said judge against the said defendant; that this affiant is not in any manner related to the said defendant Henry Young and makes this affidavit in accordance with section 4613 of Mills' Annotated Statutes of Colorado to show the prejudice of said judge against the said defendant Henry Young." Duly sworn and subscribed.

These affidavits comprise the entire showing to support the motion, which was signed by the attorneys only. Under the statute this application is insufficient, not only in form, but likewise in substance. The statute provides, among other things, that:

"Every application for a change of venue shall be by petition, verified by the affidavit of the defendant," etc.

It is at once apparent that the application does not at all comply with the statute. It is not only not signed by the defendant, but it is unverified. Verification by the defendant is a substantial requirement. By this application no sworn complaint whatever against the trial judge was presented. In the absence of a verified charge by the defendant, in substantial conformity with the statute, the application is fatally defective. Furthermore, the section of the statute on which the application is specifically based provides:

"Third. When the judge is in any wise interested or prejudiced, or shall have been of counsel in the cause, such prejudice of the judge must be shown by the affidavit of at least two credible persons not related to the defendant."

How can it be fairly said that the prejudice of the judge has been shown when the only allegation is the bare statement of a belief that the defendant cannot have a fair and impartial trial, because of the prejudice and bias against him of the presiding judge?

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

There is no showing of fact which discloses that any such prejudice or bias actually exists. The mere expression of a belief that the judge would not give the defendant a fair and impartial trial, without the statement of a single fact upon which such belief is based, is in no sense a compliance with the requirements of the statute, that the prejudice of the judge must be shown. It would be a travesty upon justice, and in direct conflict with sound common sense to permit such a showing to effect a change of venue in a criminal cause under such a statute. It has been the policy of this state from the earliest times to require the disclosure of sworn facts showing the prejudice of the judge, and such facts must be sufficient to require the change. Under early statutes upon this subject there was a specific requirement that the facts showing the prejudice be set forth in the application, and the affidavits filed in support thereof. The requirement under the present statute, that the prejudice of the judge must be shown, is equivalent to that contained in the earlier ones.

In the case of *Solander v. People*, 2 Colo. 48, this court, passing upon an application for change of venue for prejudice of the judge, said:

"It is plain that the petitioner must now set forth in his petition the ground upon which the venue may be changed, as, that the judge or the inhabitants of the county are prejudiced against him, and also the facts which lead to the belief that such ground exists. Affidavits may be filed to show the truth of these facts, and if the ground upon which the change is asked sufficiently appears, the prayer of the petitioner will be granted; otherwise it should be denied.

"In support of the allegation that the judge was prejudiced against her, petitioner averred that she had heard that the judge had expressed the opinion that she was guilty of the crime charged, and that, at a former term of court, he had tried to prevent her from procuring bail in the cause. The mere statement that she had heard such rumors, there being no averment as to the truth of them, may be dismissed without comment."

In *Mullin v. People*, 15 Colo. 437, 24 Pac. 880, 9 L. R. A. 566, 22 Am. St. Rep. 414, speaking to this proposition, under the present statute, it was said:

"In some jurisdictions, when a change of venue is asked on account of the prejudice of the presiding judge, it is not necessary to set forth in the petition the fact or facts on which the party bases his fears that he will not receive a fair trial in the court wherein the cause is pending. But in this state such facts must be stated, although with not the same particularity as is required in cases in which the application is based upon the alleged prejudice of the inhabitants of the county."

Our own authorities seem clear upon this

point and we need not look elsewhere. The reason for such requirement is obvious, else the mere filing of an application and affidavits simply expressing a belief that, because of the bias and prejudice of the judge, a fair and impartial trial could not be had, would work a change of venue in any criminal cause. The statute is incapable of any such construction; its plain meaning is to the contrary. The hardship, delay and impossibility of bringing offenders to justice in many cases, if the venue might be thus readily and easily changed, is manifest. The motion was properly denied.

[3] The defendant was convicted upon the first trial of murder in the second degree, on an information charging first degree murder. On writ of error from this court, the judgment entered on that verdict was reversed for failure of the trial court to fully instruct upon the subject of self-defense. On a second trial the defendant was again convicted of murder in the second degree, the trial having been conducted as though no previous trial had been had. The claim is that having been once convicted of second degree murder, the defendant was by the verdict acquitted of first degree murder, and on a second trial could not be put in jeopardy of punishment for a crime higher in degree than that of which he was first convicted.

By section 18 of article 2 of the Constitution of the state, it is provided:

"That no person shall be compelled to testify against himself in a criminal case nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy."

This provision of the Constitution needs no construction; it is as plain and clear as language can make it. It means: First, if the jury disagree, that the accused may be tried again upon the charge as if no trial had been had; second, if the judgment be arrested after the verdict, for any reason, that the defendant shall be deemed not to have been in jeopardy, and may be again tried as originally; and third, if the judgment be reversed for error in law, that then the defendant shall be deemed not to have been in jeopardy, and may be again tried under the information, upon every charge contained in it. If the defendant in this case had not been in jeopardy, and such is declared to be the fact upon the record, by this provision of the Constitution, the former judgment having been reversed for error in law, then he could be lawfully tried for and convicted of the highest degree of crime contained in the charge. Upon a reversal of a conviction for error of law, under this provision, one accused of murder stands as though there never had been a former trial; his second trial is *de novo*. The same pre-

sumption of his innocence of any degree of unlawful homicide, although he has been convicted of one degree thereof, prevails as upon the first trial. The accused stands upon a second trial as though the former trial had never taken place, and the state stands in precisely the same position. This is the evident purpose and intent of the framers of our Constitution. Unless it be assumed that the criminal laws are designed to facilitate the escape from just punishment of those charged with offenses, instead of for the protection of society through punishment of those who violate its laws, the above interpretation must be accepted as correct.

The argument advanced in the cases cited in behalf of the defendant in support of his position of former jeopardy, is that a conviction of a lesser degree of homicide is an acquittal of all higher degrees of that crime. This is undoubtedly true so long as that conviction stands, for no one should be twice punished for the same offense. But where, as here, such conviction has been set aside, on review, for error in law committed by the trial court, then by the constitutional provision under consideration the implied acquittal of the higher offense charged in the information is completely overthrown.

It is to be noticed that section 18 of article 2, above quoted, upon the question of former jeopardy, differs widely from corresponding provisions found in the Constitutions of those states where the doctrine is held that one convicted of murder in the second degree, under an information charging murder, cannot, on a new trial, be tried for a greater degree of crime than that of which he was first convicted. The Constitutions of states so holding simply have the provision, in substance, that no person shall be twice put in jeopardy for the same offense. They do not have the further provision, found in our Constitution, that if the judgment be reversed for error in law the accused shall not be deemed to have been in jeopardy. For this reason the cases from the various states, holding as above indicated, are not in point in determining the question of former jeopardy under a constitutional provision such as ours.

Several of the states have either constitutional or statutory provisions in effect like the one now before us, and in those states it has been uniformly held that upon a new trial the accused cannot plead former jeopardy, though the first trial resulted in a conviction of a degree of crime less than the highest one contained in the charge. The Constitution of Georgia (article 1, § 1, par. 8) provides:

"No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial."

The case of *Waller v. State*, 104 Ga. 505, 30 S. E. 835, was determined under this provision. In that case Waller was indicted

for the offense of murder, put upon trial and convicted of that offense. He moved for a new trial, and when this motion was denied, took the case to the Supreme Court, where the judgment was reversed and a new trial granted. He was again tried in the lower court and convicted of voluntary manslaughter, and the judgment upon that verdict was also reversed and a new trial awarded. Upon a third trial, when arraigned in the lower court, he filed pleas setting up that he had been acquitted of the crime of murder by the verdict of the jury pronouncing him guilty of voluntary manslaughter, and could not therefore be again put in jeopardy on an indictment for murder, and submitted himself for reindictment for voluntary manslaughter. This plea was overruled and Waller convicted of voluntary manslaughter. He once more took the case to the Supreme Court for review of the question of former jeopardy. In the course of its opinion on this proposition, the Supreme Court of that state said:

"Prior to the Constitution of 1865 all of the constitutions of this state had read, in regard to this matter: 'No person shall be put in jeopardy of life, or liberty, more than once for the same offense.' Under the same or a similar provision many courts had held that a person who had been tried for murder, and convicted of a lower offense, was by the verdict acquitted of the higher offense and could not be again put upon trial for it. When the constitutional convention of 1865 met and organized, Charles J. Jenkins was appointed chairman of the committee to draft a new constitution. He was at that time a member of the Supreme Court of Georgia, and had served for several years. Judge Jenkins had doubtless read the various opinions of the courts and text-writers upon this question; and in order to put the question at rest in this state, he added to the provision of the older constitutions the words: 'Save on his or her own motion for a new trial after conviction, or in case of mistrial.' This addition was adopted by the convention * * * and forms part of our present Constitution. If, prior to its adoption, the accused had the absolute right to which many of the decisions above referred to held him entitled, this right has since that time existed only in a modified form. The state said to the accused: 'If you are indicted for a major offense and convicted of a minor, and a new trial is granted upon your own motion, you may be a second time tried for the major offense.' * * * The state, for the purpose of protecting society against crime and criminals, reserved the right to place more than once upon trial for the same offense persons accused of crime who had upon their own motion been granted new trials. Waller made this motion for a new trial and obtained it with a knowledge of this constitutional provision. He therefore can not complain of his having been again put upon trial for murder, although the jury may, in the

other trial, have found him guilty of manslaughter only."

The Missouri Constitution provides:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; * * * and if judgment be arrested after verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law." Const. art. 2, § 23.

In *State v. Simms*, 71 Mo. 538, considering the question of a plea of former jeopardy under that provision, the court said:

"As this cause will be remanded, it may be well to observe that section 10, of article 13 of the Constitution of 1820, which provides that 'no person having once been acquitted by a jury can, for the same offense, be again put in jeopardy of life and limb,' * * * and under which the case of the *State v. Ross* [29 Mo. 32], supra, was decided, has been materially changed by section 23, article 2 of the Constitution of 1875, by the addition to what has been copied of the following words: 'And if judgment be arrested after verdict of guilty, on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law.' The change thus made in the said section overthrows the rule laid down in the case of the *State v. Ross*, supra, that a person who is indicted for murder in the first degree, if tried and convicted of murder in the second degree, which judgment is reversed for error in law, cannot on a second trial be tried for murder in the first degree. They are equivalent to declaring that when such a judgment is reversed for error at law, the trial had is to be regarded as a mis-trial, and that the cause when remanded is to be tried anew, and when remanded, that it is put on the same footing as to a new trial as if the cause had been submitted to a jury resulting in a mis-trial by the discharge of the jury in consequence of their inability to agree on a verdict. It is difficult to conceive what other construction can be given to the words added to said section."

In *State v. Billings*, 140 Mo. 193, 41 S. W. 778, speaking to this proposition, it was said:

"It was held in *State v. Ross*, 29 Mo. 32, that one indicted for murder in the first degree, and put upon his trial, and convicted of murder in the second degree, and a new trial granted upon his application, could not legally be put upon trial again for murder in the first degree. But by article 2, section 23, Constitution of Missouri, that decision is no longer law in this state. A defendant convicted of murder in the second degree

under an indictment for murder in the first degree may now be awarded a new trial, and, when granted, he may be again put upon trial for murder in the first degree."

In some states there is a statute which has the same effect as our constitutional provision, most of which are substantially in the words of the Indiana statute, which provides as follows:

"The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument."

In *Veatch v. State*, 60 Ind. 291, in reference to a reversal of a conviction for manslaughter under indictment charging murder, on plea of former jeopardy of the higher grades of the offense charged, the Supreme Court of Indiana had this to say:

"On the trial, the defendant offered in evidence the record of the former conviction in the cause, 'as proof of his former acquittal of murder in the first and second degrees, and for no other purpose,' but the evidence was excluded.

"The theory of the appellant is, that the former verdict, which was for manslaughter only, operated as an acquittal of murder in either of its degrees; and that, upon a subsequent trial, he could not be convicted of murder in either degree. The Constitution, it is true, provides that 'no person shall be put in jeopardy twice for the same offense.'"

"But there are many cases in which this constitutional provision is deemed to have been waived. Thus, if one is convicted of an offense, and obtains a new trial, either in the court in which the case is tried, or on appeal or writ of error, he is deemed to have waived the constitutional provision, and may, of course, be put upon trial the second time for the same offense, and so on as often as he obtains a new trial. The statute regulating criminal pleading and practice provides, that 'The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument.' 2 R. S. 1876, p. 408, § 141.

"Now, it would seem, that, if a party takes a new trial in a criminal case, he takes it on the terms prescribed by the statute, and consents to be placed 'in the same position as if no trial had been had.' If this is so, where a party has been tried on an indictment for murder, and convicted of manslaughter, and has obtained a new trial, he may, upon the new trial, be convicted of murder; for, by obtaining the new trial, he consented to be placed in the same position as if no trial had been had. But, however this may be, the appellant was not injured by the rejection of the evidence, for he was not convicted of murder, but of manslaughter only."

In the case of *Ex parte Bradley*, 48 Ind. 548, the Supreme Court of that state, dis-

cussing the question of former jeopardy at considerable length, under both the common law and the statute quoted above, upholds the rule that where the accused is convicted of murder in the second degree or manslaughter under a charge of murder and secures a reversal of that judgment, he may be again tried for murder in the first degree. In *People v. Palmer*, 109 N. Y. 415, 17 N. E. 213, 4 Am. St. Rep. 477, *Commonwealth v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114, *Briggs v. Commonwealth*, 82 Va. 554, and *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469, the same rule is announced, all under statutes substantially like that of Indiana. In *Re Somers*, 81 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700, a case under a statute similar to those above referred to, the Supreme Court of that state, reviewing at considerable length the authorities relative to former jeopardy, overruled the contention of the defendant, that upon a new trial brought about by his own application he could not be tried for a higher degree of the offense than that of which he had been convicted.

It becomes unnecessary, as already indicated, to consider or comment on the many cases from various states announcing a different rule, where the sole provision for consideration is in effect that no person shall be twice put in jeopardy of life or liberty for the same offense, since such decisions can have no application to a like question, considered under the peculiar provisions of our Constitution on this subject.

In several states, however, the rule is upheld that, upon a new trial, a previous conviction having been set aside, the plea of former jeopardy of the higher grades of the offense charged than the one on which conviction was had, is unavailing, even without the aid of a constitutional provision such as ours, or statutory provisions similar to those heretofore considered, notably, in *South Carolina*, in *State v. Gillis*, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (N. S.) 571, 114 Am. St. Rep. 95, 6 Ann. Cas. 993; *Ohio*, in *State v. Behlmer*, 20 Ohio St. 572; *Utah*, in *State v. Kessler*, 15 Utah, 142, 49 Pac. 293, 62 Am. St. Rep. 911; *Nebraska*, in *Bohanan v. State*, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791; *Oklahoma*, in *Turner v. Territory of Oklahoma*, 15 Okl. 557, 82 Pac. 650; and *Vermont*, in *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

In *Trono v. United States*, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773, the United States Supreme Court definitely declared the same doctrine. In that case the rule announced in *People v. Palmer*, supra, was specifically approved, and the statutory provision in New York, there under consideration, that 'the granting of a new trial places the party in the same position as if no trial had been had, and when a new trial is ordered it shall proceed in all respects as if no trial had been held,' was de-

clared not to contravene the constitutional provision that no person shall be twice put in jeopardy for the same offense. The doctrine of the *Trono* Case was reaffirmed in *Flemister v. United States*, 207 U. S. 372, 28 Sup. Ct. 129, 52 L. Ed. 252. If, by statutory provision, a defendant may upon a new trial be lawfully held to answer to a higher degree of an offense than that of which formerly convicted, then certainly it is competent to so provide by a constitutional provision.

[4] It is urged by counsel for the defendant that by previous opinions of this court a different rule from the one here stated has been indicated. It is sufficient to say that never before has this court been called upon to directly consider or determine this question, and anything which may have been heretofore said, indicative of a view contrary to that here declared, was purely incidental, and in cases where that question was not properly before the court for determination. Such expressions are, therefore, in no sense authority upon the proposition.

Of the instructions of the court, it is complained generally that at this trial instructions were again given which had been condemned in our former opinion, and that some which had been expressly approved were not given. A careful inspection of the record fails, in any true sense, to support these contentions. Of the three instructions, which it is claimed were condemned in the former opinion, *Young v. People*, supra, this court spoke as follows:

"The first instruction is the statutory definition of justifiable homicide, and the other two are mere negative instructions, given on behalf of the people, specifically pointing out certain conditions, circumstances and situations, under which the defendant may not avail himself of that defense. They do not purport to state the law of this subject in extenso, or with any degree of fullness. They were entirely proper for the purpose intended, but under the conflicting testimony, touching the facts immediately surrounding the homicide itself, the defendant had a constitutional right to have a lucid, accurate and comprehensive statement by the court to the jury of the law on the subject of self-defense from his standpoint, upon the supposition that the jury might believe, and accept as true, his testimony, and that of his witnesses, explanatory of the encounter which resulted in the death of Wilkinson."

From the foregoing it is apparent that these instructions were not condemned. They are declared to be entirely proper for the purpose intended. It was there further held, in substance, that the defendant was entitled to have affirmative instructions covering the law of self-defense from his standpoint, which were not given, and it was solely because of the failure to so further instruct that the former judgment was reversed and the cause remanded. It is plain that

if upon the former trial the court had, in addition to those instructions, given instructions embodying the defendant's right to act upon appearances, even though such appearances may have been deceptive, and also covering generally the rights of one claiming to act in self-defense, then the charge which contains these instructions would not have been a proper subject of criticism. On page 360 of 47 Colo., on page 277 of 107 Pac., of the opinion in the former case, this court quoted two instructions, numbered 1 and 5, which were requested by the defendant on the first trial and refused by the court, stating the law as to the rights of the defendant relative to self-defense as announced in the opinion of the court, at page 355 of 47 Colo., at page 275 of 107 Pac., where it is said:

"It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one's right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that actual danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity."

In the former opinion the court did not specifically direct that these instructions, numbered 1 and 5, should have been given. What it did say, at page 361 of 47 Colo., at page 277 of 107 Pac., of that opinion, was this:

"While we do not say that these particular instructions should necessarily have been adopted, what we do say is, that under the facts it is clear that proper instructions, either like those requested or their equivalent, covering the defendant's right to act upon appearances, that actual danger is not indispensable to warrant one acting in self-defense, and that the defendant, acting as a reasonable person, had a right to judge for himself of the danger, should have been given. A single instruction covering this entire phase of the case could easily have been framed by the court for the jury."

The inquiry of the court will now be directed, not to the question as to whether these specific instructions were given, as there was no direction that they should be, but as to whether the court did in fact give instructions upon the law of self-defense, such as the defendant was entitled to have, and while it is asserted by counsel that no such instructions were given, the record discloses the fact to be precisely the contrary. Instructions numbered 19 and 25, respective-

ly, requested by the defense at the trial, were given, and fully and accurately state the law upon this subject. They were quite as favorable to the defendant as were instructions numbered 1 and 5, which this court approved. It satisfactorily appears from the whole record that all of the rights of the defendant, on his theory of the case upon the law of self-defense, under the evidence adduced, were fully protected by the instructions of the trial court in the present case, in strict compliance with the suggestions of this court in its former opinion.

[8] Instruction number 4, given by the court, reads as follows:

"The jury are instructed that when the killing is done with a deadly weapon, or weapon calculated to produce, and actually producing death, malice may be legitimately inferred in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause, and the presumption in such case will be that the act was voluntary and committed with malice aforethought."

This is vigorously attacked as invading the province of the jury, for failure of the court to say that such presumption only obtains where the killing has been shown to have been deliberate and unlawful. The words, "In the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause," characterize the killing as unlawful, and clearly, as we think, leave the question as to whether malice had been shown as one of fact for the jury, upon the whole testimony. If testimony was adduced showing or tending to show necessary self-defense, or sufficient provocation or cause for the act, then, under this instruction, the jury was free to reach a conclusion upon the question of malice from all of the facts and circumstances before it. It was only in the entire absence of testimony showing or tending to show necessary self-defense, or sufficient provocation or some cause which justified or explained the act, that the jury was permitted, if they should see fit from all of the facts before them to do so, to draw the presumption of malice from the use of the weapon, to which the instruction referred. They were not instructed that they should draw such a conclusion, but advised merely that it would be legitimate to do so under the circumstances and conditions suggested. So that the question of malice after all was left to the jury to determine from the testimony as a fact. In other words, if the instruction had said, where the killing is unlawful, and done with a deadly weapon, malice may be implied, that clearly would have been proper; and in the present case we are of opinion that the words of limitation used in the instruction given are equivalent to the use of the word "unlawful" to describe the character of the

killing referred to in the instruction. Furthermore, the jury were instructed upon the question of malice as follows:

"The court instructs the jury that malice is not a presumption of law, but a fact for the jury to determine from the evidence, under the instructions of the court."

The jury were also instructed upon the question of intent in this language:

"The court instructs the jury that the intention of the accused at the time of the killing, is to be ascertained by the jury upon the evidence, and cannot be made the subject of legal presumption or inference."

And further, the court, having theretofore instructed the jury that malice was one of the essential elements to be found from the testimony in order to convict the defendant of the crime of murder, instructed as follows:

"The court instructs the jury that to warrant a conviction, each fact necessary to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt, and the facts and circumstances proven should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion."

These instructions are sufficiently explicit upon the question, that malice was a fact to be proven and determined as a fact by the jury, to remove any implication, in the instruction of which complaint is made, that the jury should as a matter of law infer malice or intent to kill from any particular or special fact or circumstance. Furthermore, this precise instruction has been specifically approved by this court in its opinion in the case of *May v. People*, reported in 8 Colo. 210, 6 Pac. 816, where it, with other instructions quoted, is characterized as follows:

"The court gave the jury 26 instructions, 16 of which were upon the court's own motion, the other 10 upon the motion of the counsel for the prisoner; and for the reason that, in my opinion, these instructions furnish in themselves better proof of their correctness, lucidity and comprehensiveness in their application to the facts of the case, and under our statutes relating to murder and manslaughter in force at that time, than could be made by any discussion of them simply with reference to the verdict complained of, they are inserted here in full."

Repeatedly throughout the instructions the court directed that the jury should make their findings upon the testimony in the case, and particularly directed the jury to treat and consider the instructions as a series, that no one instruction stated all the law, but that the instructions were to be taken and considered together as the law in governing the jury in applying the law to the facts. The jury could not have failed to

understand, from all of the instructions, that they were to determine the character of the killing, the question of justification, and all the necessary elements to determine the guilt or innocence of the defendant from all of the facts and circumstances disclosed by the testimony, taken and considered as a whole. From a complete survey of the record, including all testimony introduced and instructions given, we have no hesitancy in reaching the conclusion that the giving of instruction number 4 was not misleading, and that no prejudicial error was occasioned thereby.

[6] The refusal of the trial court to give certain instructions asked on behalf of the defense is urged as a ground of complaint. There was no error in such refusal, since every proposition sought to be covered by those instructions was fairly covered by the instructions which were given, and this court has repeatedly declared that it is not error to refuse to give instructions which are merely cumulative.

[7, 8] It is further urged that the testimony of Gass, Taylor and Pitts, taken at the former trial, was improperly introduced in evidence at this trial. The testimony taken showed that the witness Gass was absent from the state, located in Missouri, beyond the jurisdiction of the court, and that the witnesses Taylor and Pitts were dead. The questions of whether the absence of Gass from the state, and the death of the witnesses Taylor and Pitts had been satisfactorily established, was primarily a matter for the trial court, and that court having held that these matters were sufficiently shown, such finding will not be disturbed if it is fairly supported by the testimony. Upon this subject we have carefully examined the record, and are satisfied that the findings of the court in this respect are supported by clear and convincing testimony. When these facts were established, then the testimony taken at the former trial, preserved and identified by bill of exception, was clearly competent in evidence at this trial. The contention is made that this testimony was introduced from stenographic notes. The record does not support this claim. On the contrary, it was from the bill of exception, made a part of the record at the former trial and used in this court upon review of that judgment, that the testimony of these three witnesses was read into the present record. That testimony was duly authenticated, certified and sealed by the trial judge, as being all of their testimony introduced at the former trial, both on direct and cross examination. The bill of exceptions was further identified by the official stenographer, who also testified that it contained all the testimony of these three witnesses adduced, offered and received at the first trial. It was therefore properly received. *Rico R. & M. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Emerson*

v. Burnett et al., 11 Colo. App. 86. 52 Pac. 752; 16 Cyc. 1088, 1096, and 1097, subject "Former Evidence."

Other errors are assigned, which we have carefully examined. They are without merit and need not be further considered or discussed. Upon the whole record, we are convinced that the defendant had a fair and impartial trial, that the verdict was fully warranted under the law, upon the facts shown, and that the judgment upon the verdict is a just and proper one, which should not be disturbed. Judgment affirmed.

(54 Colo. 331)

BOARD OF COM'RS OF LARIMER COUNTY v. ANNIS.

(Supreme Court of Colorado. March 3, 1913.)

1. WATERS AND WATER COURSES (§ 152*)—CLAIMANTS OF WATER—PRIORITIES—PROCEEDINGS TO DECIDE.

On an appeal from the decision of the trial court, sustaining a division between two counties of the fees of a referee in a proceeding to determine priorities among claimants of water for irrigation purposes, where it is contended that the proceeding was not an initial proceeding, and therefore that the county could not be held liable under Rev. St. 1908, § 3300, if the record does not disclose the nature and character of the proceedings, its regularity and validity cannot be determined, but the court will presume that the court below was acting within its jurisdiction.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*)—PRIORITIES OF CLAIMS—DECISION BY REFEREE—ACTIONS FOR FEES.

On an appeal to the district court from the decision of a board of county commissioners not to pay the fees and expenses of a referee who had been appointed to adjudicate the rights of priorities to the use of water in a water district, an order requiring all persons, associations, and corporations affected by the decree to pay into the court their proportionate share of the expense involved for use of the referee pending hearing, and that if the judgment rendered shall be sustained, the sum so recovered from the county is to be paid into court and repaid to the several contributors, is not in effect an order for a double payment to the referee for his services and expenses, and the county cannot complain of such order, as it is not affected by it.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

Error to District Court, Larimer County; James E. Garrigues, Judge.

In the Matter of Water District No. 3, proceeding under the statute for the adjudication of the rights of priority to the use of water for reservoir purposes in said district. From a decision of the District Court charging Larimer County with certain fees earned by Frank J. Annis as referee, the Board of County Commissioners of such county brings error. Affirmed.

T. J. Leftwich, of Ft. Collins, for plaintiff in error. Lee & Aylesworth, of Ft. Collins, for defendant in error.

SCOTT, J. This case was submitted to the trial court upon an agreed statement of fact. From this it appears that on the 4th day of October, 1902, the defendant in error was appointed by the district court of Larimer county, as referee in the Matter of Water District No. 3, proceeding under the statute in such case provided for the adjudication of the rights of priorities to the use of water for reservoir purposes in said water district; that in the discharge of his duties as such referee he rendered services for 125 days and which, at the statutory fee of \$6 per day, amounted to \$750; that he also incurred actual expenses, in addition thereto, in the sum of \$986.20, making the total sum of the bill rendered \$1,736.20. It appears, also, that this water district embraced parts of both Weld and Larimer counties; that the judge of the court acting under the direction of the statute, in that respect, approved the said account for services and expenses, and divided it into two equal parts, as provided by statute in such case, and certified to each of the said counties its proportionate share in the sum of \$868.10. It appears that this account was paid by Weld county, but was disallowed by the board of county commissioners of Larimer county, and from such action an appeal was taken to the district court of that county. Upon the trial judgment was rendered in favor of the defendant in error for the amount claimed as against the county, which judgment is now before us for review.

[1] The only serious objection to the judgment is that the statute under which this proceeding was had is intended to apply to what counsel refers to as an "initial proceeding," whatever that may be; that the services of such referee were not rendered in such a proceeding, and therefore the public, and in this case the county, could not be held liable for the expense of the reference. It would seem to be the contention of counsel for the county that, where an adjudication had been once had as to priorities in a district under the statute applicable, thereafter no other general adjudication of like character can be had, but that claims of adjustment, or for the establishment of priorities of water rights, must proceed as affecting purely private rights, and the expense incurred should be that of the individuals, corporations or associations concerned.

No authorities are cited in support of this contention. The referee was appointed in this case, presumably under authority of subdivision B, c. 72, Rev. St. 1908. The compensation for a referee is provided by section 3300 as follows: "The referee appointed in this act shall be paid the sum of six dollars per day while engaged in discharging his duties as herein provided, and also his reasonable and necessary expenses and mileage at the rate of ten cents for each mile actually and necessarily traveled by him in going and

coming in the discharge of his duties as such referee, which said per diem allowance, expenses and mileage shall be paid out of the treasury of the county in which such water district shall lie, if it be contained in one county, and if such water district shall extend into two or more counties, then in equal parts thereof, shall be paid out of the treasury of such county into which such district shall extend. He shall keep a just and true account of his services, expenses and mileage and present the same from time to time to the district court, or judge in vacation verifying the same by oath, and the judge, if he find the same correct and just, shall verify his approval thereof thereon, and the same shall thereupon be allowed by the board of county commissioners of the county in which said water district shall lie, but if said water district extend into two or more counties, he shall receive from the clerk of the district court separate certificates, under seal of the court, showing the amount due him from each county, upon which certificate the board of county commissioners of the respective counties shall allow the same on presentation thereof."

The agreed statement of fact as to a former proceeding in relation to the adjudication of water rights in said water district No. 3, is, in substance, as follows: On or about the 1st day of August, 1879, proceedings were instituted in that county entitled, "In the Matter of a Certain Petition for Adjudication of Priorities of Rights to Use of Water for Irrigation in Water District No. 3"; that a decree therein was entered on the 11th day of April, 1882, adjudicating certain water rights in said district; that subsequent to the day last named certain persons interested petitioned for a further adjudication of water rights in said district, and that these proceedings culminated in a decree of that court on the 11th day of April, 1884, and which decree determined the respective rights of all persons who had applied in said supplementary proceedings, save and except the rights of the Larimer County Ditch Company for its ditches and reservoirs, and that the said proceedings were continued open with respect to said claimants, and leave given to adduce proof of the completion of said ditches and reservoirs, and of the application of water by such means to a beneficial use; that afterward such proof was adduced and a decree entered adjudicating the rights of said claimants with respect thereto, on October 12, 1886. Further, that the proceeding leading up to the decree of November 11, 1882, and all subsequent proceedings thereto, were numbered 320 of the serial numbers of the cases filed in that court. The agreed statement then sets forth certain named priorities and awards, under the last two named supplementary decrees, but these are not identical with the priorities and claimants involved

in the proceeding under consideration. It is further stipulated that all of these several rights were numbered with respect to the decree entered April 11, 1882, which required the renumbering of all priorities decreed between the 1st day of August, 1879, and the 12th day of October, 1886. It is further agreed that the adjudication proceeding in which the defendant in error was referee concerned no rights which antedated the entry of the original decree of April 11, 1882, and concerned only such rights for storage purposes as had their inception subsequent to the last-named date, except the Windsor Lake reservoir, owned by the claimants in these proceedings, upon which reservoir work was commenced between the 1st and 15th days of February, 1882, by the construction of an outlet ditch, the said reservoir being a natural basin having been filled for the first time during the year 1882, and subsequent to April 11th, and also excepting reservoirs 2, 3, and 4 of the Larimer County Ditch Company, work whereon was commenced April 21, 1881, and not completed or in operation until after the 11th day of April, 1882. The priorities of the reservoir in the proceedings in which this plaintiff was referee were numbered and considered independently of said former proceedings; also that, in the proceedings which culminated in a decree dated December 9, 1904, 64 separate reservoir priorities were awarded, 10 of which antedated the 11th day of April, 1884, priorities No. 10 for the Richards reservoir, belonging to the Water Supply & Storage Company, being of the date of January 17, 1884, and that 15 of said priorities so awarded antedated the 12th day of October, 1886, priorities No. 15 belonging to reservoir claimants No. 8, the Dickson Cañon Ditch & Reservoir Company for the Dickson Cañon reservoir being dated October 8, 1885, which priority is the last-numbered priority prior in time to four years subsequent to the date of the entry of the decree of April 11, 1884.

This is all the information before this court for its consideration of the contention of counsel for the county, as it relates to prior proceedings in adjudication.

There seems to have been 32 water priorities involved in the proceeding in which the defendant in error acted as referee, owned by as many different persons, associations, and corporations. But the record does not disclose the nature and character of such proceeding, so as to convey even a suggestion of the issues involved or the scope of the action. There is certainly not sufficient in the showing here to enable this court to review that case so as to determine the regularity and validity of the proceeding, even were it proper to do so in this case. We must therefore presume, for the purpose of this action, that the court was acting within its jurisdiction, and that all parties were within their rights. No objection is presented here and no right asserted by any

claimant of a water right in that water district, and we can scarcely sustain the contention of the county without declaring the court to have been without jurisdiction in rendering the decree in that case.

[2] The court also entered an order requiring all of the persons, associations, and corporations affected by the decree to pay into the court their proportionate share of the expense herein involved, for use of the defendant in error, pending this hearing, and that if the judgment in this case rendered shall be sustained, the sum so recovered from the county is to be paid into court and in the manner provided in the order, and repaid to the several contributors. It is contended that such order is in effect a double payment to the defendant in error for his services and expenses. This contention is not tenable. Besides it is not for the county to complain of such order, for it is in no wise affected by it.

Complaint is further made that the item of stenographer's fees in the account so allowed by the court is excessive. The court made a finding, and made its certificate of such finding, as required by the statute. We see no reason to disturb it.

The judgment is affirmed.

MUSSER, C. J., and HILL, J., concur.

(23 Colo. App. 226)

WYOMING NAT. BANK et al. v. SHIPPEY.
(Court of Appeals of Colorado. Jan. 18, 1913.)

1. APPEARANCE (§ 25*) — GENERAL APPEARANCE—EFFECT.

One by a general appearance waived its right to complain of its being brought in as a party by an amended complaint, instead of by a supplemental complaint.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 144-153; Dec. Dig. § 25.*]

2. EXECUTION (§ 172*) — SALE — RELIEF AGAINST—COMPLAINT.

The complaint seeking relief on the ground of nonexistence of W. as a corporation, when execution issued, against sale to F. under execution, issued at the instance of F., on judgment of W. against plaintiff, should negative the assignment to F. of the judgment either by W. prior to its dissolution, or thereafter by its legal successor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.*]

3. JUDGMENT (§ 840*)—SALE—ASSIGNMENT OF JUDGMENT—RECORD.

As regards validity of a sale under execution at instance of the assignee of the judgment, or the successor of the one in whose favor the judgment was rendered, it is not necessary that evidence of the assignment or of the successor's right should have been lodged either in the court in which the judgment was rendered or elsewhere.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1536; Dec. Dig. § 840.*]

4. CORPORATIONS (§ 617*) — DISSOLUTION — PROPERTY RIGHTS—PRESUMPTION.

That a corporation had ceased to exist, as such, before issuance of execution on a judgment in its favor, under which sale was made,

does not even raise a presumption that its property rights had been forfeited, or that it had no successor in interest with authority to enforce its claims.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2448-2456; Dec. Dig. § 617.*]

5. JUDGMENT (§ 668*)—CONCLUSIVENESS—PARTIES NOT APPEARING.

One in favor of whom a judgment was rendered having been made a defendant, in a suit by the judgment debtor for relief against sale under execution issued on the judgment at instance of a third person, on the ground of such person having no interest in the judgment, and having made no appearance, cannot thereafter be in a position to collect the judgment; the decision being in favor of such third person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181-1183, 1188; Dec. Dig. § 668.*]

6. LIMITATION OF ACTIONS (§ 6*)—EXTENDING PERIOD—EFFECT ON EXISTING JUDGMENT.

A statute extending the period of limitations on judgments applies to a judgment already rendered, but not barred under the old statute at the time the new statute is passed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. § 6.*]

7. APPEAL AND ERROR (§ 1176*)—REVERSAL WITH DIRECTIONS.

Plaintiff having had ample opportunity to state a cause of action, having filed four amended complaints, and the last one failing to state a cause of action, the judgment overruling demurrer thereto will be reversed, with direction to dismiss the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.*]

Appeal from Larimer County Court; C. V. Benson, Judge.

Action by John T. Shippey against the Wyoming National Bank and another. From a judgment overruling a demurrer to an amended complaint, defendants appeal. Reversed, with direction to dismiss.

See, also, 21 Colo. App. 78, 120 Pac. 1123.

Annis & Stow, of Ft. Collins, for appellants. Rhodes, Temple & Foster, of Ft. Collins, for appellee.

CUNNINGHAM, J. This action was brought by the appellee, Shippey, in the county court for the purpose of canceling a certain judgment rendered against him in favor of the Wyoming National Bank, and to recall an execution that had been issued on said judgment at the instance of the appellant the First National Bank, and for other relief not necessary to state. Five complaints in all were filed by the plaintiff, the case being finally submitted upon his fourth amended complaint, to which the appellant the First National Bank filed a general demurrer. This demurrer was overruled, and, said appellant electing to plead no further, judgment went in favor of the plaintiff, appellee here. No appearance was ever made by the Wyoming National Bank.

Certain defenses are found in the original complaint, which, being omitted from the fourth amended complaint, need not be con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sidered. It may be said, however, that in the original complaint the Wyoming National Bank was made the sole defendant. Thereafter, and before any appearance had been made, the plaintiff filed an amended complaint, making the First National Bank a party defendant, and charging that said bank had, at a sale on execution made to satisfy said judgment in favor of the Wyoming National Bank and against appellee, purchased certain real estate belonging to appellee, and this notwithstanding the appellee had filed a lis pendens at the time of the institution of his suit, and before sale of the property had been made.

[1] The First National Bank, after entering a general appearance, contends that it could not, in the circumstances of this case, properly be brought in by an amended complaint, but could only be made a party to the action, if at all, by a supplemental pleading. It is probable that a supplemental complaint would have been the better practice, but we are disposed to think that appellant the First National Bank has, by appearing generally, waived its right to complain of the procedure followed.

[2-5] 1. The fourth amended complaint attempts to state two causes of action: the first, in substance, charging that the execution was void because of the nonexistence of the Wyoming National Bank, the original judgment creditor, as a corporation, at the time execution issued. The pleader fails, however, to allege when said bank went out of existence further than that it was some time "subsequent to the securing of said judgment," meaning the judgment against the appellee here involved. There seems to be no question about the validity of the judgment when same was originally rendered against Shippey. Therefore at one time he was liable thereon. Hence the burden is upon him to allege and prove facts which render the sale of his land to the First National Bank in satisfaction of that judgment void or voidable before he is entitled to relief. Appellee in his complaint nowhere negatives the assignment of the judgment by the Wyoming National Bank to the First National Bank prior to the dissolution of the former corporation, or by its legal successors. It is alleged that no such assignment was made a matter of record. Our attention has been called to no statute or other authority requiring the assignee or successor of the Wyoming National Bank to lodge the evidence of an assignment of the judgment or proof of his right thereto in the court in which the judgment was given or elsewhere. Even if the Wyoming National Bank had ceased to exist as a corporation, that fact does not even raise a presumption that its property rights had been forfeited, or that it had no successor in interest with sufficient authority to enforce its claims.

We discover in the fourth amended complaint no allegation which, under the most liberal construction in favor of the pleader, can be held as an allegation that the First National Bank was not at the time the execution was sued out the owner of said judgment. If the judgment was not barred by the statute of limitations plead in the second cause of action, to which we will later call attention, Shippey should pay the same to the First National Bank, rather than to the Wyoming National Bank, so far as the pleadings indicate, providing he is thereby entirely relieved from further liability on the judgment. The Wyoming National Bank, having been made a party to the suit, and having made no appearance, can never be in a position hereafter to collect the judgment, even granting that corporation or its successor still exists. Courts are not disposed to look with favor upon nice technicalities that are put forward for the purpose of relieving against a meritorious obligation.

[6] 2. The second cause of action of the fourth amended complaint consists of a plea of the statute of limitations. Assuming, but not deciding, that the act of 1891 fixed the life of judgments at ten years, as contended by appellee, rather than 20 years, the appellee cannot invoke the same for the reasons pointed out by us in the case of Harrington v. Anderson et al., 130 Pac. 616, our number 3,916, the opinion in which has just been handed down.

[7] We therefore conclude that appellants' demurrer to plaintiff's complaint was good, and that the trial court ought to have sustained the same. The judgment will be reversed, and in view of the record, which discloses that the plaintiff has been given ample opportunity to state a cause of action, having been permitted to file four amended complaints, the trial court is instructed to enter an order dismissing the action at plaintiff's costs.

Reversed, with directions.

(23 Colo. App. 512)

LITTLE v. LITTLE et al.

(Court of Appeals of Colorado. March 10, 1913.)

1. DEEDS (§ 194*)—POSSESSION OF PROPERTY—PRESUMPTION OF DELIVERY.

Possession under a recorded deed, valid on its face, is presumptive evidence of its delivery, and imposes on one denying the same the burden of showing nondelivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. § 194.*]

2. DEEDS (§ 196*)—EXECUTION AND DELIVERY—BURDEN OF PROOF—DEED BY BLOOD RELATIVE.

No presumption of invalidity attaches to a deed from one blood relative to another simply because of such relationship; but when such a deed is attacked upon grounds of fraud, undue influence, mental weakness, etc., the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

burden of proof is shifted to the grantee to show the execution and delivery of the deed to have been in good faith.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.*]

3. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE—WAIVER.

Where defendant proceeds to introduce evidence after an erroneous ruling that the burden of proof is upon him, he does not thereby waive his right to insist on the plaintiffs opening and closing the case and going forward with their evidence to sustain the issue tendered by their complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

4. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—RULING AS TO BURDEN OF PROOF.

In an action to cancel a deed, the error in a ruling that the burden was on defendant to show delivery of the deed, and to open and close the case, is prejudicial, since, if defendant had remained passive after the court's ruling, a decree would have been rendered in favor of plaintiffs, and plaintiffs introduced no evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.*]

5. DEEDS (§ 200*)—WRITTEN STATEMENT ACCOMPANYING DEED.

In an action to cancel a deed on the ground that it was not delivered during the life of the grantor, a written statement, signed by the grantor, that she delivers to a person to whom the statement is addressed as agent of the grantee a warranty deed of the property, that the deed is to take effect immediately, but not to be recorded until after her decease, and which is signed by the grantee under a statement accepting the conveyance, is admissible in evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.*]

6. DEEDS (§ 200*)—CROSS-EXAMINATION AS TO VERBAL INSTRUCTIONS.

Where, in an action to cancel a deed on the ground that it was never delivered during the lifetime of the grantor, a written statement of the grantee, addressed to an agent of the grantor, to the effect that she delivers to him a deed of the property which is to be delivered to the grantee after the grantor's death, is offered in evidence, and the agent is placed on the witness stand, cross-examination as to what his verbal instructions were, and what he would have done with the deed in case the grantee had died before the grantor, was inadmissible.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.*]

7. DEEDS (§ 208*)—DELIVERY—SUFFICIENCY OF EVIDENCE.

In an action to cancel a deed on the ground that it was not delivered during the life of the grantor, evidence held not sufficient to warrant a decree for plaintiff, but the action should have been dismissed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

Appeal from District Court, Arapahoe County; Charles McCall, Judge.

Action by Edna Pansy Little and another against John Harwood Little. Judgment for plaintiffs, and defendant appeals. Reversed, with directions to dismiss.

Caley & Ashbaugh, of Littleton, for appellant. Crump & Allen, of Denver, for appellees.

HURLBUT, J. This action was begun October 18, 1908, by plaintiffs (appellees) against defendant, and it was sought thereby to obtain a decree of the court canceling a certain warranty deed from Angelina Little to John Harwood Little, dated February 20, 1907, recorded February 28, 1907, upon the ground as alleged in the complaint, that "said deed is void and of no force and effect whatever, because it was never delivered to said John Harwood Little, the grantee named therein, nor to any one for him, during the lifetime of the said Angelina Little." Other matters are stated in the complaint which will be unnecessary to notice for the reason that a decision upon the question of delivery of the deed is decisive of this appeal. The answer of John Harwood Little formed an issue upon the allegations of the complaint concerning the delivery to him of the warranty deed aforesaid. The complaint does not allege, upon the part of grantor or grantee, any fraud, duress, deceit, want of consideration, or improper motive relative to the execution, acknowledgment, and delivery of the deed.

[1] When the case was called for trial, plaintiffs' counsel suggested to the court that the burden of proof was on defendant, and asked that he be ruled to open and close the case. The defendant at once objected, but the court adopted plaintiffs' view and held that the burden of proof was on defendant to prove lawful delivery of the deed, and that it was his duty to open and close the case. Exceptions were saved to this ruling and preserved in the bill of exceptions. This ruling of the court was error and prejudicial to defendant's rights. It is the generally recognized rule that possession under a recorded deed, valid on its face, is presumptive evidence of its delivery, and imposes on one denying the same the burden of showing nondelivery. A few of the numerous cases holding to this rule are the following: *Carnes v. Platt*, 41 N. Y. Super. Ct. (9 Jones & S.) 435; *Ward v. Ward*, 43 W. Va. 1, 26 S. E. 542; *Kerr v. Freeman*, 33 Miss. 292; *Oliver v. Oliver*, 110 Ill. 119; *Roberts v. Swearingen*, 8 Neb. 363, 1 N. W. 305; *Newlin v. Beard*, 6 W. Va. 110. The evidence is undisputed that defendant was in possession of the premises under this deed, and that the same had been lawfully signed and acknowledged by the grantor, and after her death duly recorded.

[2] The record shows that the relationship of grandmother and grandson existed between the parties to the deed, and justifies a fair inference that the consideration for the deed was a valuable one, as contradistinguished from a good consideration based solely upon love or affection. We have been cited to no authority, and know of none, which indulges a presumption of invalidity against, or casts suspicion upon, a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

deed from one blood relative to another simply because of such relationship. When such deeds, however, are attacked upon grounds of fraud, undue influence, mental weakness, etc., it seems to be the generally accepted rule that the burden of proof is shifted to the grantee to show the execution and delivery of the deed to have been in good faith. As we read this record, there is no suggestion of the transaction culminating in the deed being other than a fair, reasonable, and just act on the part of grantor, much to her credit, and showing her to be a woman of good principle and integrity.

[3] The fact that defendant proceeded to introduce evidence after the erroneous ruling of the court, we do not think was a waiver upon his part of his right to insist on the plaintiffs opening and closing the case and going forward with their evidence to sustain the issue tendered by their complaint. The following excerpt is from *Shaw v. Abbott*, 60 N. H. 564: "Nor was the burden of proof changed by the fact that the plaintiff claimed and was allowed the right to open and close. Although the right to open and close may be determined by the burden of proof (Judge of Probate v. Stone, 44 N. H. 593) and has sometimes been allowed on condition of assuming it (*Schoff v. Laithe*, 58 N. H. 503), the exercise of the right to open and close is not necessarily an assumption of the burden of proof." Also section 226, *Thompson on Trials* (2d Ed.) viz.: "This right (to open and close) in a civil case has been deemed of such importance that it has been the subject of a distinct treatise by a distinguished law writer and judge. It is the settled law in England, and in most, if not all, American jurisdictions, that a deprivation of this right is substantial error, which, if saved and properly presented by a bill of exceptions, will operate to reverse a judgment."

[4] This rule being sanctioned by many respectable authorities, equally strong reasons exist for holding the error reversible where the one not holding the burden of proof is compelled by the court to assume the same, as was done in this case. It is obvious that, if defendant had remained passive after the court's ruling, a decree would have been rendered in favor of plaintiffs. The injustice to defendant by this ruling is apparent from the record, as plaintiffs introduced no witnesses nor documentary proof or evidence of any kind, but obtained a full decree in their favor without making any attempt whatever to establish by original evidence the nondelivery of the deed as pleaded by them.

[5] Defendant offered in evidence the following instrument (Exhibit "b") viz.: "Law Offices of Samuel S. Large, Attorney and Counselor, 515, 516 and 517 Ernest and Cranmer Building, Denver, Colorado. February 28, 1906. Mr. Samuel S. Large, Den-

ver, Colorado—Dear Sir: Herewith I deliver to you as agent of my grandson, John Harwood Little, warranty deed dated December 19, 1905, signed and acknowledged by me, conveying to him the following property situated in Littleton, Arapahoe county, Colorado, viz.: Lots numbered one (1), two (2), three (3), four (4) and five (5), in block numbered twelve (12); also lots numbered one (1), two (2), and three (3), ~~four (4), five (5), six (6), and seven (7)~~, in block numbered eighteen (18), all in Littleton, as per plat recorded in the office of the county clerk and recorder; also all that portion of the southeast quarter section seventeen (17), in township five (5), south of range sixty-eight (68) west, lying south of the center of the Platte river and west of the Rough and Ready Milling Company's land, containing five (5) acres more or less; also a piece of land commencing at a point forty-two (42) feet west of the northwest corner of block eighteen (18), as per recorded plat of Littleton, from thence due north two hundred and fourteen feet (214 ft.) to county road; from thence due west one hundred and forty-seven feet (147 ft.) to millrace, from thence in southerly direction along the east side of said millrace to a point two hundred and eighty-one feet (281 ft.) due west of place of beginning; from thence due east to place of beginning. Also a piece of land described as follows: Commencing at a point forty-two (42) feet due west of the northwest corner of block eighteen (18), as per recorded plat of Littleton; from thence due east one hundred and seventy-two (172) feet to a point; from thence north one hundred and thirteen (113) feet to south side of Malinda street; from thence in a northwesterly direction to the intersection of south side of county road with Powers street, which point is two hundred and fourteen (214) feet due north of place of beginning; from thence due south two hundred and fourteen (214) feet to place of beginning; the last two mentioned pieces of land being the same as were deeded to John Harwood by Malinda A. Powers and the Colorado Mortgage and Investment Company. This deed is to take effect in present, but not to be recorded until after my decease, and I am to have the privilege of occupancy of the said property during my lifetime, as part consideration of the said conveyance. [Signed] Angelina Little. I hereby accept said conveyance and agree to the above. [Signed] John Harwood Little."

Upon objection by plaintiffs the same was excluded. This ruling was palpable error. In order to better understand the situation some matters appearing of record should be mentioned. The witness Large had been a close friend of Angelina Little and John Harwood Little for many years, during which time he had been their legal adviser, generally without charge; he had drawn a number of

deeds and documents for them; and he drew three deeds from Angelina Little to John Harwood Little, conveying the property described in the complaint, the first about July, 1903, which was delivered to her, but Large never saw it afterwards and knew of no instructions accompanying it. The next was prepared in December, 1905, and Exhibit "b" was written at the same time but not signed until February 28, 1906. This deed was never signed, because it included property not belonging to grantor. The next and last deed was prepared about February 20, 1906 (Exhibit "a") and was signed and acknowledged by the grantor February 28, 1906. At the same time she signed Exhibit "b," which was also signed by John Harwood Little. Three or four days after February 28th, the deed and letter were handed to Mr. Large, and he retained them until February 7, 1907, at which time he handed the deed to defendant John Harwood Little. This was about four days after the death of grantor. Exhibit "b" is a clear, positive, and unambiguous recital of the exact intention of Angelina Little and John Harwood Little as to the effect of the deed and the purpose to be accomplished thereby. It is not only signed by the grantor of the deed, but also bears the signature of the grantee. It is too clear for argument that the conversations and discussions between grantor and grantee, concerning the effect of said deed and its delivery, had at the time or prior to its execution and deposit with Large, are merged in the writing, and their intentions relative to the deed must be deduced therefrom. Exhibit "b" thus became the true and only guide in ascertaining such intentions. There is no evidence tending to show that, after the letter and deed were delivered as above stated, any agreement, contract, or understanding was had between the grantor and grantee, or between them or either of them and Large, changing in any manner the terms of such instrument. Appellees objected to the introduction of Exhibit "b" in evidence, on the ground that the same was not admissible because of a pencil change in its date, from December, 1905, to February 28, 1906, and because the body of the instrument refers to a warranty deed dated December 19, 1905, instead of to the date of the one in issue, viz., February 20, 1906. There is nothing in this objection, as the undisputed evidence clearly shows that the instrument was originally written in 1905 for the purpose of being signed and delivered contemporaneously with the warranty deed of 1905, which deed was never signed. It was not destroyed, but was held until the 28th day of February, 1906, on which date it was signed, together with the deed (Exhibit "a"), in the presence of the witness Large, and both deposited with him shortly after that time. The testimony of Large shows that before Exhibit "b" was signed he changed

the date of the same from December, 1905, to February 28, 1906, and intended to change a recital therein, "December 19, 1905," to February 20, 1906, but overlooked the same. We think Exhibit "b" was the best possible evidence explanatory of the true intention of the parties in regard to the deed's execution, acknowledgment, delivery, and deposit with Large. The record discloses no good reason why it should have been excluded.

[8] Much cross-examination was indulged in tending to elicit from the witness Large what his verbal instructions were, and what he would have done with the deed in case the grantee had died before the grantor, all of which was inadmissible. *Griffis v. Payne*, 22 Tex. Civ. App. 519, 55 S. W. 757. Appellees' counsel also repeatedly and persistently propounded questions to the witness Large tending to elicit from him admissions that he held the deed under different conditions from those expressed in Exhibit "b"; but the witness repeatedly and persistently testified that he held the deed exclusively under its terms, and to the best of his ability performed his duty in strict conformity with the conditions therein expressed.

The evidence shows that certain erasures were made in the deed after Large received the same, but this is satisfactorily explained by the undisputed testimony of Large. About six months after Exhibits "a" and "b" were deposited with him, some lots known as the "cottage" lots, described in the deed, were sold to one Gill, and deeds given therefor, in which Angelina Little and John Harwood Little were grantors. This information was conveyed to Large, and he obtained the consent and approval of both grantors to erase the description of that property from the deed in his possession, which he did with some kind of chemical. Large had consulted both of them as to making a new deed after the sale of the "cottage" property, and it was understood that he should do so; but, when he called on Angelina Little shortly before her death with reference to the matter, he recognized her failing condition and thereupon obtained her approval, as well as that of John Harwood Little, to make the erasure in question.

In support of the proposition that the possession of property under a properly executed and recorded deed raises the presumption of lawful delivery, and that the burden is on him who alleges to the contrary to rebut such presumption, the following authorities, in addition to those already cited, are in point, viz.: *Marvin v. Stimpson*, 23 Colo. 174, 46 Pac. 673. The court says: "What is essential in law to constitute a delivery of a deed has been considered in many of the adjudged cases, and the generally accepted rule is that when, from the acts and agreements of the parties, the intention of the grantor to invest the grantee with the immediate ownership of the property, and of

the grantee to accept the same, is manifest, such intent and purpose is sufficient to constitute a constructive delivery of the deed, even though the actual custody thereof remained in the grantor, or some third person." Also, *Kyle v. Calmes*, 2 Miss. (1 How.) 121. The following from Cyc. vol. 13, p. 569, is supported by numerous authorities, viz.: "The delivery of a deed by the grantor to a third person, to be held by him and delivered to the grantee upon the grantor's death, will operate as a valid delivery where there is no reservation on the part of the latter of any control over the instrument." See, also, *McCalla v. Bane* (C. C.) 45 Fed. 828; *Corker v. Corker*, 95 Cal. 308, 30 Pac. 541; *Stewart v. Stewart*, 5 Conn. 317; *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090; *Hinson v. Bailey*, 73 Iowa, 544, 35 N. W. 626, 5 Am. St. Rep. 700; *Crooks v. Crooks*, 34 Ohio St. 610; *Millican v. Millican*, 24 Tex. 426. From the last-cited case we extract the following: "It (the disposition of the property by warranty deeds) could not be avoided, on the ground that it was a testamentary disposition of the property. * * * The deeds in question importing an absolute transfer of the property, the burden of proving the contrary was on the plaintiffs; and we see nothing in the evidence to warrant the conclusion that they were not made and delivered with the purpose and intention which appears upon their face, or that they did not have the full effect and operation to divest the grantor of the ownership, and vest it absolutely and presently in the donees." In *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, the court says: "Section 767 of the Civil Code provides that a freehold may commence in futuro, and for that reason we are inclined to recognize the views of Dixon, C. J., in *Prutsman v. Baker*, 30 Wis. 650, 11 Am. Rep. 592, as the true rule applicable to this class of cases in this state. We know of nothing in the Codes forbidding

the doctrine announced in that case, to wit, that the grantor, upon the irrevocable delivery of the deed to the depository, thereupon constitutes such depository the trustee of the grantee, and creates in himself a tenancy for life." *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *Roberts v. Swearingen*, 8 Neb. 363, 1 N. W. 305.

[7] Exhibit "b" specifically recites that the deed shall take effect in present, but shall not be recorded until after the death of the grantor, and that the grantor shall have the privilege of occupancy of the premises during her lifetime. The record discloses that the witness Large fully and faithfully discharged the trust imposed on him by the terms of that instrument. The evidence is undisputed that both Exhibits "a" and "b" were signed and executed by the grantor, and the latter by the grantee, prior to their deposit with Large; that the erasure from the deed, after its deposit with him, was done with the full approval and under the instructions of both grantor and grantee; that the changing of the date of Exhibit "b," by pen or pencil, from December, 1905, to February 28, 1906, is shown by the evidence to have been understood and approved of by both grantor and grantee, and the failure to change the recital in that instrument, namely, "December 19, 1905," to February 28, 1906, is convincingly shown by the record to have been a mere oversight; and the evidence is equally clear that both grantor and grantee fully intended Exhibit "b," which was originally drawn in 1905, to be changed and used in the transaction of February 28, 1906.

We are of the belief, from a full consideration of the record, that appellees' case is without merit. Therefore the judgment will be reversed, with instruction to the district court to dismiss the action at the cost of plaintiffs.

Reversed, with instructions.

(28 Colo. App. 481)

WESTERN LUMBER & POLE CO. v. CITY OF GOLDEN et al.

(Court of Appeals of Colorado. March 10, 1913.)

1. MECHANICS' LIENS (§ 13*)—PUBLIC PROPERTY.

Mechanic's Lien Act (Laws 1899, p. 261) may not be invoked by one who performs labor or furnishes material upon or for public works, for the purpose of fastening a lien on public property.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 14, 15; Dec. Dig. § 13.*]

2. STATUTES (§ 181*)—CONSTRUCTION—INTENT.

In construing a statute courts should ascertain and give effect to the intent of the Legislature.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 268; Dec. Dig. § 181.*]

3. STATUTES (§ 179*)—STATUTORY RULES FOR CONSTRUCTION.

It is competent for the Legislature to enact rules for the construction of statutes.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 258; Dec. Dig. § 179.*]

4. STATUTES (§ 211*)—CONSTRUCTION—TITLE.

While the title of an act may not govern, it may be looked to in seeking the legislative intent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 288; Dec. Dig. § 211.*]

5. MUNICIPAL CORPORATIONS (§ 373*)—WITHOLDING MONEY FROM CONTRACTORS—CLAIMANTS—RIGHT AGAINST CITY.

Rev. St. 1908, § 5406 et seq., providing that a city shall withhold money from a contractor of a public improvement and allow claims to be filed against the fund so held out, though providing no penalty for its disobedience, creates the city a trustee for the benefit of persons holding claims against the contractor; and if the city pay money to a contractor, contrary to the statute, claimants of the contractor can hold the city liable in an action for that purpose.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. § 373.*]

6. CONTRACTS (§ 167*)—CONSTRUCTION—EXISTING LAW AS PART OF CONTRACT.

The law of the place where the contract is entered into at the time of the making of the same is as much a part of the contract as though expressed therein.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 750; Dec. Dig. § 167.*]

7. STATUTES (§ 47*)—VALIDITY—CERTAINTY.

Though a law is imperfect in its details, it is not void, unless it is so imperfect as to render it impossible to execute; but the imperfections of its details may be supplied by the rules of court.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 47; Dec. Dig. § 47.*]

8. EQUITY (§ 57*)—MAXIMS.

Equity regards and treats that as done which in equity and good conscience should be done.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 179; Dec. Dig. § 57.*]

Error to District Court, Jefferson County; Flor. Ashbaugh, Judge.

Action by the Western Lumber & Pole Company against the City of Golden impleaded with Ronald P. McDonald. From a

judgment, dismissing the action as to the city, plaintiff brings error. Reversed and remanded.

See, also, 22 Colo. App. 209, 124 Pac. 584.

Van Cise, Grant & Van Cise, of Denver, for plaintiff in error. J. W. Barnes and William A. Dier, both of Golden, for defendants in error.

CUNNINGHAM, P. J. In February, 1903, the city of Golden (hereinafter for convenience referred to as the city) entered into a contract with Ronald P. McDonald (to whom we shall hereafter refer as the contractor), whereby the contractor was to construct a system of waterworks for the city. By the terms of this contract McDonald was to receive in payment for his work and material \$95,000; \$50,000 of this amount to be paid in bonds issued by the city for the purposes of constructing the waterworks. The total bond issue was \$100,000; \$50,000 of said bonds being sold for cash, at par, to create a special fund for the construction of the said waterworks. The contractor's conduct or work being unsatisfactory, the city elected to and did terminate its contract with him in January, 1904, before the work called for by the contract had been completed, but after a very considerable amount of it had been done. The \$50,000 worth of city bonds which the contractor was to receive were issued and delivered to him long prior to the termination of the contract. He was also allowed and paid by the city something over \$2,500 on November 4, 1903, and on December 1st of the same year he was allowed and paid something over \$1,400. These payments were made to the contractor on estimates and favorable reports upon his work, or upon his bills, by the finance committee of the city council, and while McDonald was still prosecuting his work under the contract. The contractor became indebted to the lumber company for material which it had furnished him, and which he and another firm of contractors, who completed the waterworks after the termination of the McDonald contract, used in the construction of the plant. For this indebtedness, amounting to over \$3,000, after all proper credits were allowed, the contractor gave an order to the plaintiff in error on the city. In fact, he gave two such orders, one signed by himself, and one signed by himself and his manager. These orders appear to have been delivered to the city clerk, and probably a copy of them to the mayor, although the mayor testified that he had no recollection that he received a copy of either of the orders; while the manager of the plaintiff in error (hereinafter referred to as the lumber company) testified unequivocally that he did deliver or mail to the mayor a copy of such orders, or at least one of them, and knew that the mayor received the same, for he saw and talked with that of-

ficial concerning the matter, and that the mayor destroyed one of the orders in his presence. There was other evidence, such as correspondence, clearly indicating knowledge on the part of the city officials that the contractor was not making satisfactory settlements with the lumber company for material which the latter was furnishing the former. Failing to secure payment of the balance due it, the lumber company filed its bill in the district court on May 27, 1904, against the contractor and the city. The contractor, although properly served, made default. The trial court found generally for the city and dismissed the action as to it. No special findings were made by the trial court. The case was tried without a jury.

From the foregoing it will be seen that the liability or nonliability of the city to the lumber company is the sole question presented for our consideration.

The lumber company predicates its right of recovery on the Mechanic's Lien Act of 1899, c. 118, p. 261 (section 4025 et seq., R. S. 1908); also upon chapter 124, Laws 1899, p. 310 (section 5406 et seq., R. S. 1908), and upon other grounds, which, in the view we take of the case, may be disregarded.

[1] 1. There can be no question that the water plant which the lumber company seeks to reach by lien is owned by a municipal corporation and used for public purposes. Counsel for the lumber company concedes that the great weight of authority is against their contention that property owned by a municipal corporation and used for public purposes can be subjected to a mechanic's lien. Bolsof, in his work on Mechanics' Liens (section 208), thus announces the rule: "There can be no mechanic's lien on public property, unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement; public property not being subject to forced sale." 27 Cyc. 25. To the same effect is Dillon on Municipal Corporations, vol. 2 (4th Ed.) § 572, and Phillips on Mechanics' Liens (3d Ed.) § 179. Our Mechanic's Lien Act (section 4025, R. S. 1908) does not expressly provide for subjecting such property to a lien. On the contrary, the same session of the Legislature which passed that act passed another bill also, which we shall presently discuss, designed to protect the rights of all those having claims for labor performed upon or material furnished for public works. By thus attempting to provide a distinct remedy limited exclusively to those performing labor or furnishing material upon or for public works, the Legislature indicated clearly that the general mechanic's lien act which it had just passed was not designed to give a lien upon public property. Our respect for the conceded weight of authority and the clearly manifested purpose and intent of the legislative department of our state gov-

ernment impels us to hold that the provisions of chapter 118 of the Laws of 1899 (known as the Mechanic's Lien Act) may not be invoked by one who performs labor or furnishes material upon or for public works, for the purpose of fastening a lien upon public property.

2. Let us next examine chapter 124, Laws 1899. Our attention has not been called to any similar enactment in other states; nor does it appear that the provisions of our act have been previously before the courts of this state for consideration.

On behalf of the city it is urged that the act is defective, incomplete, and ineffectual, in that it provides no penalty for failure on the part of the public officials referred to in the act to comply with its requirements. For this reason we are asked to declare the statute a dead letter, an act without life or vitality. A proper interpretation of any legislative act imposes a grave responsibility upon the court to whose lot such duty may fall, particularly so when the very life of a statute depends upon the conclusion reached. Realizing the importance of the contentions submitted, we have spared no pains in our examination of the authorities cited, and others to which our research has led; nor shall we permit considerations of brevity to limit the expression of our views.

[2] A familiar rule of statutory construction requires that courts should strive to ascertain and give effect to the intent of the Legislature. *Dekelt v. People*, 44 Colo. 525, 99 Pac. 330; *County Commissioners v. Lunney*, 46 Colo. 403, 104 Pac. 495. In the latter case Mr. Justice Hill has collected a large number of authorities bearing upon this question, and announces that "the intention of the statute is the law."

[3, 4] It is competent for the Legislature to enact rules for the construction of statutes. 36 Cyc. 1105. And our Legislature has exercised this authority. Section 6299, R. S., reads as follows: "All general provisions, terms, phrases and expressions used in any statute shall be liberally construed, in order that the true intent and meaning of the General Assembly may be fully carried out." This statute has been in force since 1861. While the title of an act may not govern, it may be looked to by the courts when seeking the legislative intent. 36 Cyc. 1132.

In *Hanly v. Sims*, 175 Ind. 345, 93 N. E. 228, 94 N. E. 401, the Supreme Court of Indiana, speaking of the preamble of a legislative act, uses this language: "The preamble of the act in question may be said to contain the finding of facts by the Legislature which led up to the passage of the act in controversy." In *Fenner v. Luzerne County*, 167 Pa. 632, 31 Atl. 862, it is said: "A preamble is said to be the key of the statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplish-

ed by the provisions of the statute." The title of the act here under consideration reads as follows: "An act to secure the payment of claims of laborers, subcontractors, and others performing labor and furnishing materials upon public works constructed under the authority of cities, incorporated towns and school districts." It is manifest from the title of the bill that its purpose was to secure the payment of claims for which the city was not theretofore, under pre-existing laws, liable. Abridged as much as possible for our purpose, the statute in question reads as follows (we shall adopt the section numbering in the Revised Statutes and Morrison & De Soto's Annotated Statutes):

"Sec. 5406. That hereafter *it shall be the duty of councils of cities* * * * which have contracted for the construction of public works to *withhold* payment of moneys due the contractor for the construction of such public works *to satisfy the claim of laborers, subcontractors,*" etc.

"Sec. 5407. Before any payment shall be made to the contractor as may be provided for in the contract for the construction of such public works, the contractor *shall* present to the council of cities * * * a statement in writing showing the amount owing by him for labor performed or material furnished and the names of the persons to whom such sums are due. * * * It shall be the duty of the clerks of cities * * * to cause to be published * * * a notice in substance that at a designated meeting of the city council, * * * to be held not less than ten days from the time of the first publication of such notice, payment will be made to the contractor and that the claimant to whom sums are owing for labor or material may file with the clerk of cities * * * on or before the day of such meeting."

"Sec. 5408. Any person to whom a contractor * * * may be indebted may file with the clerk of such city * * * a claim. * * * If such claim tally with the statement of the contractor * * * *the amount claimed shall be paid directly to the claimant, and shall be deducted* out of the sum to be paid contractor. * * * In case claim filed shall not be admitted or tally with statement filed by contractor * * * as aforesaid, such claimant shall within thirty days bring suit in some court of competent jurisdiction to recover judgment against the contractor * * * and on filing a transcript, showing final judgment has been recovered, together with a certificate of the clerk of the court that the same has not been appealed from, *shall be entitled to be paid* the same as if claims had been admitted as aforesaid. * * *"

(The italics are ours.)

It is conceded that the city made no attempt whatever to comply with the provisions of this statute, or any thereof. It is true

that nowhere in the letter of the act is the laborer or materialman given a specific lien on the funds in the hands of the city designed to pay for the improvement created, in part at least, by the contributions of such claimant; nor is there any penalty specifically provided for failure to do the things imposed by the statute upon the public officials. Neither does the statute, in specific terms, by its letter confer a right upon any one by reason of the failure or omission of the public officials in this behalf. But where no express penalty is prescribed in a statute it does not necessarily follow that no right is conferred by it upon those who may suffer by reason of its violation. A statute must be so construed and applied as to fully carry out the true intent and meaning thereof, and, as we have already pointed out, our Supreme Court has expressly ruled, in *County Commissioners v. Lunney*, supra, that "the intention of the statute is the law." The statute, in unmistakable language, makes it the duty of the board to withhold the fund in question until its provisions shall have been complied with. For whom does it act in so withholding the fund? Not for the contractor; his interests are not thereby advanced. On the contrary, they are interfered with. There can be but one answer to the question: By the statute the city is made the agent or trustee for the unpaid claimant, and the fund in the hands of the city is impressed with a trust in his favor. By section 5406, in the most unequivocal language, the trustee created by the statute, namely, the city in this case, is enjoined to withhold the payment of money due the contractor, and the purpose for which it is to be withheld is clearly expressed: "To satisfy the claim of laborers," etc. Section 5407, in language requiring no interpretation, positively forbids payment by the city to the contractor until he shall have done the things imposed upon him by the statute; and this no matter what the terms of the contract between the city and the contractor may be.

[8] It is a familiar rule that the law of the place where the contract is entered into at the time of the making of the same is as much a part of the contract as though it were expressed therein. 9 Cyc. 592; *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 274, 275, 74 Pac. 786. But the legislative act in question, in terms, requires that any contract for public work, such as that which was to be constructed in this case, should be subordinated to the provisions of the statute, to the end that laborers and materialmen might be given an opportunity to protect themselves against dishonest or insolvent contractors to whom they had extended credit. Section 5408 of the act, in unequivocal terms, commands the city to pay the money due the claimant directly to him, when by agreement or judgment that amount

shall have been ascertained. Thus, and thus only, may the city, whom the statute has made a trustee, dispose of the trust fund and discharge its duty under the trust imposed by law. The imposition upon the city to pay by implication creates a right in the claimant to compel payment by proper legal action. *Hammond v. School Board*, 109 Mich. 676, 67 N. W. 973.

[7] Though a law is imperfect in its details, it is not void, unless it is so imperfect as to render it impossible to execute; but the imperfections of its details may be supplied by the rules of court. *Lessee of Cochran's Heirs v. Loring*, 17 Ohio, 409.

In *Bloomer v. Bloomer*, 128 Wis. 297, 107 N. W. 974, the following language is used: "The further point is made that the law is fatally defective because the Legislature omitted providing details for carrying it out. * * * The law itself, by necessary implication, provides for its execution. * * * It is absolutely free from ambiguity. The imposition of the duty necessarily carries with it the right and the duty to incur the necessary expenses, and in the only way practicable—by means of action by the executive department of the town and the village. The right and duty to incur the expense, again, carries with it by necessary implication the duty of the people of the town to make the necessary appropriation and provide by vote for levying the necessary tax to meet the expenditure. Upon their failure to do so a suit upon implied promise * * * is the proper method of vindicating the right of the matter. * * * It is a mistake to suppose that a law imposing upon a municipality the duty to do a particular thing requiring public expenditure is necessarily void because it does not provide in detail procedure to be followed. * * * If the courts were to exercise power to modify all legislation not providing expressly for all administrative features, it would not take long to create confusion of a very prejudicial character."

In *Illinois Central R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041, the Supreme Court of Tennessee had before it a lien act which had been challenged upon similar, if not the identical, grounds urged by the city in the instant case, and in the course of its opinion that court used the following language, which meets with our approval: "It is true, as suggested, that the present act does not prescribe any method for the enforcement of the lien declared; yet that omission does not render the act unconstitutional, since there is no provision in the organic law requiring that acts granting new rights shall likewise provide new remedies. The statute would undoubtedly have been more complete within itself, and more simple in its application, if that omission had been supplied. Nevertheless it was manifestly within the legislative power to declare the lien, without more, and

leave the enforcement of it to the general law in reference to liens, as was in fact done."

The Legislature in the act before us had the right to impose the trust upon the particular fund, and leave the enforcement of the trust to the general law in reference thereto, as it appears to have done. Equity recognizes and protects certain rights ignored at law. The most important of these is the right of one in whose favor a use or a trust has been created. "One who is equitably entitled to funds, the holder of which is legally obliged to pay to another, may maintain a bill against the debtor and legal creditor to establish a right and recover." 16 Cyc. 88-90. In the instant case by the statute, which, as we have seen, must be regarded as having been written into the contract between the city and McDonald, the city was legally obligated to pay the claim of the lumber company directly to it, and by implication was forbidden to pay it to McDonald, the contractor, providing, of course, the lumber company established its claim in the manner provided by the act. As was said in *Re McKennan's Estate*, 27 S. D. 136, 130 N. W. 33-43: "The statutory liability to pay is just as strong in binding force and effect as if it were contractual." In the case under consideration the record discloses that the contract between the city and the contractor contained the following provision: "The contractor shall give the engineer satisfactory evidence by the production of receipts, letters, and in other ways, that all persons who have done work or furnished material in the execution of this contract have been fully paid or satisfied. If the contractor shall fail to pay and discharge all such claims, the city of Golden shall have the right to pay the same, and charge the contractor the amount so paid, and deduct the same from any money due or which may become due to the contractor by the city." It will be observed that the contract but declares the rights which the city possessed under the statute; the principal difference being that the statute, along with the right which it conferred upon the city to require evidence that the contractor had settled with his creditors, also imposed a duty upon the city. By the terms of its contract and the provisions of the statute, the city, in effect, invited parties to deal with McDonald and extend credit to him on the faith of that contract. Equity will not, under such circumstances, allow the city to say, when it is sued, that because it has seen fit to pay McDonald, in violation of the statute, it will repudiate the duty which, under that statute, it owed to those who had, on the faith of the contract between the city and McDonald, as supplemented by the statute, extended to the latter credit. *Bispham's Principles of Equity*, § 294. Statutes like the one under consideration are designed to shield, not to ensnare, laborers and mate-

rialmen, and it is the business of courts to see that their beneficent purpose is effectuated.

[8] Even in the absence of a specific statutory lien, equity and good conscience require the city to perform the imperative duty, imposed upon it by the statute, of withholding what was due the contractor until those who had supplied him with material for the construction of the city's water system could avail themselves of the provisions of the statute; and equity regards and treats that as done which in equity and good conscience should be done. This is an ancient maxim, so universally recognized by all the authorities on equity that it is not necessary for us to do more than give citations where the subject is discussed. Bispham's Principles of Equity (7th Ed.) § 44; Pomeroy's Equity Jurisprudence (2d Ed.) vol. 1, § 364; 16 Cyc. 135. Speaking of this maxim, Professor Pomeroy (section 364) says: "It has been applied by the most eminent courts to all classes of equities; to every instance where an equitable *ought* with respect to the subject-matter rests upon one person towards another; to every kind of case where an affirmative, equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another party." And again (section 365): "In the first place, it should be observed that the principle involves the notion of an equitable *obligation* existing from some cause; of a present relation of equitable right and duty subsisting between two parties,—a right held by one party, from whatever cause arising, that the other *should* do some act [and, of course, where the obligation requires that one should refrain from doing some act, the principle is equally applicable] and the corresponding duty, the *ought*, resting upon the latter to do such act." Professor Pomeroy thus concludes (section 377) his lengthy discussion of this important maxim or rule of equity: "It is no exaggeration, therefore, to say that the principle lies at the very foundation of the department of equity jurisprudence which deals with equitable estates, property, and interests analogous to property." And he declares that "every species of purely equitable property, and of equitable interests analogous to property, except those which are intentionally created by the direct and affirmative operation of some instrument similar in its action to a conveyance at law, is a certain and necessary result of the principle that equity treats that as done which in good conscience ought to be done." This wholesome rule of equity requires us to hold that neither the city's duty nor the lumber company's right have been in any manner altered by the unauthorized payment by the city of McDonald's claim, and that the lumber company may yet look to the city for its pay for the material furnished the contract-

or, precisely as it might have done had no such payment been made by the city to him. By its answer the city admits that it took a bond from McDonald in the sum of \$25,000 for the faithful performance and fulfillment of the contract entered into between itself and him. The record further discloses that the city was protected against double payment for McDonald's work (a) by its contract with him, (b) by the statute. If it has waived its rights to look to the bond or to enforce its contract, the court may not relieve the city by transferring the results of its folly to the shoulders of those who, relying on the statute, credited McDonald for material used in the construction of the city's water plant.

Entertaining no doubt as to the validity of the statute and the right of the lumber company to invoke its provisions, the judgment of the trial court must be reversed, and the case remanded for further proceedings in harmony with the views herein expressed.

Other questions than those herein determined were ably presented in brief and on oral argument; but, in view of the rights conferred and obligations imposed by the statute upon the parties to this action, it is not necessary to further prolong this opinion by a discussion of other questions.

Reversed and remanded.

(23 Colo. App. 529)

DANIELS et al. v. STOCK.

(Court of Appeals of Colorado. March 10, 1913.)

1. EVIDENCE (§ 575*)—TESTIMONY AT FORMER TRIAL.

Even in absence of statute, the testimony of a witness at a former trial, transcribed by the court stenographer and reporter who took it down, may be proved in a subsequent trial between the same parties and involving the same issues by introducing such report, provided the witness is dead, insane, beyond the jurisdiction, or sick and unable to testify, or cannot be found after diligent search, or appears to have been kept away by the adverse party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2407-2409; Dec. Dig. § 575.*]

2. APPEAL AND ERROR (§ 970*)—EVIDENCE (§ 581*)—TESTIMONY AT FORMER TRIAL—DISCRETION OF COURT.

The sufficiency of a showing to excuse the absence of a witness so as to admit his testimony at a former trial is within the discretion of the court, and only for abuse thereof will the appellate court interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.* Evidence, Cent. Dig. §§ 2414-2418; Dec. Dig. § 581.*]

3. EVIDENCE (§ 581*)—FORMER TESTIMONY OF WITNESS—DILIGENCE.

Evidence held insufficient to show such diligence as was required to establish the absence or disability of a witness, so as to admit her testimony at a former trial, especially in view of impeaching evidence, rejected because foundation therefor was not laid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2414-2418; Dec. Dig. § 581.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. WITNESSES (§ 374*)—IMPEACHMENT—INTEREST IN RESULT.

Extrinsic evidence that a witness was given an interest in the result of the suit for her testimony is competent impeaching testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. § 374.*]

5. EVIDENCE (§ 581*)—IMPEACHMENT—TESTIMONY AT FORMER TRIAL.

Where a witness at a former trial is absent, and her testimony at the former trial is admitted, she may be impeached by evidence discovered since the former trial that she was to have an interest in the suit for her testimony, without a foundation being laid therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2414-2418; Dec. Dig. § 581.*]

6. NEGLIGENCE (§ 125*)—INJURIES FROM BATH TUB—EVIDENCE.

In an action for injuries sustained by a projection in a bathtub in a public bathhouse, evidence of the general condition of all the bathtubs was admissible as tending to show want of care and inspection.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 239-244; Dec. Dig. § 125.*]

7. PRINCIPAL AND AGENT (§ 23*)—AGENCY—PROOF.

In an action for injuries sustained by a projection in a bathtub in a public bathhouse, where the plaintiff pays the charge to a boy, who receives the money and waits upon customers, agency is sufficiently shown to establish the liability of the defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

8. EVIDENCE (§ 199*)—DEMONSTRATIVE EVIDENCE—SIMILARITY OF CONDITIONS.

Where plaintiff alleged she was scratched on the leg by a projection in a bathtub in a public bathhouse, a demonstration offered by a witness to show that she could not have been injured as alleged was properly excluded, in absence of proof of similarity of tubs and legs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 683; Dec. Dig. § 199.*]

Appeal from District Court, Jefferson County; Charles McCall, Judge.

Action by Sarah A. Stock against William P. Daniels and others. From a judgment for plaintiff, defendants appeal. Reversed.

Redd, Stidger & Benson, of Denver, for appellants. H. N. Hawkins, of Denver, for appellee.

MORGAN, J. Appellee recovered a judgment on a verdict for \$2,000 in the Jefferson county district court May 28, 1909, on account of an alleged wound on the front part of her leg between the knee and the ankle, which she claimed to have received while bathing in one of appellants' bathtubs in their public bathhouse at Idaho Springs, in this state, and caused, as she alleges, by appellants' negligence in permitting a rough-edged piece of copper, covered with dirt and verdigris, to protrude from the lining of the tub in such way as to inflict the wound which she alleges resulted in blood poisoning and the consequent injury complained of.

An examination of this appeal presents three predesignate issues of fact necessary

to a logical discussion and determination of the legal issues involved: (1) Was the appellee injured as she alleged? (2) Was appellants' negligence the cause thereof? (3) Was the alleged damage the result? These three issues were determined by the jury in favor of the appellee, but such determination was doubtless the result of errors of law that occurred at the trial, manifestly and materially affecting appellants' substantial rights, as that term is construed by the courts of other states as well as our own. Our Code provides that: "The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. * * * Any error, defect or abuse of discretion manifestly and materially affecting the substantial rights of any party to the action may be received and corrected by the Supreme Court on appeal or writ of error, whether occurring before, at, or after the final judgment." Section 78, Mills' Ann. Code. It is not so difficult to ascertain that there was error in the proceedings as to determine whether such error manifestly and materially affected the substantial rights of the appellants.

The case was tried three times, resulting in two verdicts for appellee and one disagreement. On the last trial, certain testimony was read to the jury that had been given by a witness at a former trial and transcribed by the stenographer, who took it down; and the testimony of two witnesses was rejected tending to prove that the testimony so admitted and read was obtained by offering to give the witness an interest in whatever judgment was obtained. The testimony so admitted, and that which was rejected, bore materially upon the first two, and indirectly upon the third, of the aforesaid issues of fact.

[1] The rule is quite generally established, even in the absence of a statute, that the testimony of a witness at a former trial, transcribed by the court stenographer and reporter who took it down, may be proved in a subsequent trial between the same parties and involving the same issues, by introducing such report thereof, provided that the witness is dead, insane, beyond the jurisdiction of the court, or is sick and unable to testify, or cannot be found after diligent search, or appears to have been kept away by the adverse party. 1 Greenleaf on Ev. 234. But, as stated in *Emerson v. Burnett*, 11 Colo. App. 88, 90, 52 Pac. 752, 753: "The courts all agree that conditions may exist which would authorize the introduction of the former testimony of an absent witness, but they disagree as to the character of the conditions; and, while some hold that the fact that he is out of the jurisdiction is enough, it is the doctrine of others that the party de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

siring his testimony must first use due diligence to procure his deposition." The question here is concerning the diligence used to procure the attendance of the witness, as it was admitted that the evidence transcribed was correct in all respects, and no question arose as to taking her deposition. Such testimony is the best proof obtainable as to what a witness swore to on a former trial, but not so good in all respects as a deposition, as the witness, whose deposition is taken, either reads or has the deposition read over to him before he signs the same, and an opportunity is then given to correct any errors in taking it down or transcribing it.

[2] The sufficiency of the showing to excuse the absence of the witness, and to admit the offered testimony, is largely within the discretion of the court; and it is only upon an abuse of such discretion that the appellate courts will interfere.

[3] The diligence shown by the record here is that the witness, after she gave her testimony on the former trial, went to an adjoining county, and from there to another county, in this state; that appellee wrote to her prior to a former trial, and received a letter from her while she was in the latter place, and answered it, but received no reply; that appellee asked her attorney to cause a search to be made for the witness, but the attorney merely had a subpoena issued in the name the witness bore when she testified, and delivered it to the sheriff of Jefferson county, and no return was made thereupon; that appellee had never heard of the witness' being in any other place in the state, and that she inquired of the postmaster at the place where she wrote as above stated; it appeared also that the witness had married since her testimony was given, and was thereafter known by a different name. The court, in ruling upon the objection interposed to the insufficiency of this showing, said: "The Court: It appears that this witness has testified that, after making some search, she was unable to find this party in this county; that she in all probability is not in the county. I will overrule the objection." This ruling discloses a mistaken idea of what is required. The county is not the limit of the jurisdiction of the district court. A subpoena issued in the name the witness bore at the time, and directed to the sheriff of the county in which she lived when last heard from, might have reached the witness, so far as anything definite can be determined from the record. The admission of this testimony materially affected the substantial rights of the appellants, and the showing made to excuse her absence was insufficient. 5 Enc. of Ev. 936, 964; 1 Greenleaf on Ev. 234; Sou. Ry. Co. v. Bonner, 141 Ala. 517, 37 South. 702; Wabash Ry. Co. v. Miller, 158 Ind. 174, 61 N. E. 1005; Reynolds v. Fitzpatrick, 28 Mont. 170, 72 Pac. 510. We might not disturb the conclusion of the lower court, reached, within its

discretion, that the showing was sufficient, were it not for the peculiar circumstances of this case in reference to the impeaching testimony rejected, and the consequent importance of the presence of the absent witness in order that she might be cross-examined and a foundation laid for the introduction of the impeaching testimony.

The testimony of the two witnesses that was offered and rejected tended to prove that the witness, whose former testimony was admitted, stated, prior to the date of her testimony at the former trial, that the appellee promised to give her \$300 for testifying, if she won the suit. The testimony of the absent witness was that she saw the appellee in the bathtub after the wound had been inflicted, examined the protruding piece of copper on the bathtub, and later saw the swollen and inflamed condition of the appellee's leg. This was the only testimony, aside from the testimony of the appellee, tending to prove that the wound was inflicted as alleged. But if her testimony was obtained wholly or partly by reason of an agreement between her and the appellee that she was to receive part of whatever might be recovered, her testimony would have less weight, and the testimony of appellee would be materially affected by the damaging consequences of such an agreement. The only objection made to the introduction of the impeaching testimony was that it was incompetent, irrelevant, and immaterial, and for the reason that no ground for impeachment had been laid. It appeared, furthermore, that the impeaching testimony was not ascertained until after the trial at which the absent witness testified. There is no doubt that the evidence offered, impeaching the former witness on account of bias, interest, and corruption, was competent, material, and relevant; but its admissibility, without first having laid a foundation for it, is extremely questionable under the authorities. It could hardly be considered substantive evidence, but was in relation to an extrinsic matter impeaching the former witness on account of interest, bias, or corruption.

[4] Extrinsic evidence, such as this, may always be admitted to prove the bias, interest or corruption of a former witness. Wigmore on Ev. §§ 948, 956, 966; Phenix Ins. Co. v. La Pointe, 118 Ill. 387, 8 N. E. 353.

[5] The great weight of authority, however, on the question that a foundation must first be laid for all testimony of an impeaching character, is to the effect that some question must be asked, on cross-examination of the witness to be impeached, concerning the testimony to be offered of an impeaching character, so that the witness may have an opportunity to admit, deny, or explain such impeaching testimony. 1 Greenleaf on Ev. (4th Ed.) § 462; 3 Jones on Ev. § 848; Ryan v. People, 21 Colo. 119, 40 Pac. 775; Lerum v. Geving, 97 Minn. 269, 105 N. W. 967, 969.

However, under the conditions here, and leaning toward the position taken in several authorities, founded upon very good reasoning, that a foundation is not necessary in all cases, especially where the testimony offered is wholly for the purpose of showing bias, interest, or corruption, and where the witness to be impeached is absent from the jurisdiction of the court, or has not testified at the trial, but whose deposition or former testimony is being used, and the knowledge of the impeaching testimony was obtained after the former testimony was given, we conclude that the strict rule in regard to laying a foundation for impeaching testimony ought not to be applied. Mr. Wigmore, in his work on Evidence, says, in stating the objections to the rule: "The objection in brief is that in many cases it is impossible for the impeaching party to ask the question while the witness is on the stand, because it is often not until after the testimony is delivered that the prior contradictions are brought to the opponent's notice, and thus, wherever the witness becomes unavailable by death or absence, the contradictions cannot be used." 2 Wigmore on Ev. § 1027, citing *Downer v. Dana*, 19 Vt. 345; *Hedge v. Clapp*, 22 Conn. 266, 58 Am. Dec. 424. He further says, in the same section, that: "A due consideration . . . leads to the conclusion that in general the preliminary question should indeed be put before producing the alleged contradiction, but that this requirement, instead of being rigid and invariable, should be open to exceptions, and should be dispensed with, in the court's discretion, where the putting of the question has become impossible, and the impeaching party has acted in good faith. This sensible form of the rule is, however, in vogue in a few jurisdictions only. The modern tendency has been to enforce the rule with inconsiderate and arbitrary rigidity. To-day it does, upon the whole, as much evil as good; and it is to be hoped that a reaction will some day manifest itself." Our Supreme Court and the former Court of Appeals have followed the majority of the authorities, and have enforced the rule with considerable rigidity, but usually in criminal cases, and not in any case where like circumstances have existed, such as appear in the case at bar. *Ryan v. People*, supra.

It seems to us that, if it is intended to impeach the testimony by showing the witness has made statements out of court directly in conflict with those made in court, then, and in such cases as that, a foundation should be laid on cross-examination so as to give the witness an opportunity to either deny, admit, or explain such statements made out of court; but where the object is, as the object was in this case, to show corruption and interest in the judgment to be obtained, no foundation is really necessary. It is concluded, therefore, that it was reversible error

to admit the former testimony to be read without also admitting the impeaching testimony.

[6] Appellants' contention that all evidence concerning the general condition of the bathtubs was prejudicial, and its admission reversible error, is not good, because while it was very general in its character, and in several instances beyond the issues, yet it would tend to prove a condition of things indicating negligence, on the part of appellants, in the care given by them in keeping the bathhouse and the bathtubs in a clean and sanitary condition. It tended to prove that they made no examination of the tubs sufficient to discover any defect that might exist.

[7] As to the question concerning the agency of the boy who took the appellee's money and showed her the bathtub, the proof was sufficient in this regard to establish the liability of the appellants. If the injury was caused by the defective condition of the bathtub through the owners' negligence, it is immaterial whether the person in charge was a servant of the owners or not, where the injured person pays for the bath, if it is a person in charge who receives the money and waits upon the customers, as there is nothing here to raise the presumption or give any notice that the baths were not under the owners' control. *Haugh v. Chicago, etc., R. R. Co.*, 73 Iowa, 66, 35 N. W. 116.

[8] The lower court committed no error in excluding the testimony of the witness, and a demonstration offered to be made by him in a bathtub, for the purpose of showing that it was impossible for a person to receive a scratch in the fore part of the leg, between the knee and the ankle, from a defect such as is alleged to have existed in this case. There was no proof that the tub was exactly similar, nor that the leg of the witness was sufficiently the same form as that involved in the facts of the case.

In addition to the error, hereinbefore considered, in regard to the testimony, there was error, worthy of serious consideration, concerning the proof by which the appellee sought to establish that the alleged damage was the result of the injury which she claims to have received, especially as to whether such proof followed the allegations of the complaint that blood poisoning ensued by reason of the wound.

The testimony of the appellee was that her leg was slightly scratched, and that she did not discover the place on the tub where she scratched it until she caught the towel on the jagged place which she testified was found in the tub. If it had been anything more than a slight wound, she would certainly have been aware of its infliction at the moment she received it, and would necessarily have examined the tub at that time to ascertain what it was that wounded her. It must be concluded that it gave her no pain

at all until at least a few moments after it had been inflicted. Therefore she ought to be required to prove quite distinctly that her damage was the result of the wound; and she ought to be confined to the allegations in her complaint, concerning blood poisoning, which it was distinctly alleged was the direct result of the wound. The record shows that she was the only witness who testified that the wound produced the diseased condition of her limbs. Her husband and her mother were the only witnesses who testified that blood poisoning resulted; and even their testimony, on this issue, was incidentally, rather than directly, drawn out, and neither testified as to any knowledge or experience whatsoever on the subject, notwithstanding an objection interposed to the husband's testimony for this particular reason. All the husband said was, "She injured her right limb in the bathtub, cut it on the protruding piece of lining, and blood poisoning set in." All the mother said on cross-examination was, "I told Mr. N. C. Merrill in April, 1905, that when my daughter, Mrs. Stock, came to visit me in March, 1904 (at least three months after the alleged injury), that I saw her limbs, and that both of her legs at that time were broken out with red sores, and that the right leg from the knee down was red and sore and worse than the left leg. I am the plaintiff's mother. They were not cancre [so spelled in the record] sores on her limbs; but it seemed to me that the injury which she had received on her right leg produced blood poisoning." It seems that no effort was made to prove this allegation of the complaint. The complaint alleged:

"Ninth. That the wound caused by said tear in the said bathtub was not regarded by this plaintiff as a serious matter at the time of the said occurrence, but within 24 hours thereafter this plaintiff's limb became somewhat swollen and discolored, and the said swelling and discoloration continued to increase, until this plaintiff was forced to take to her bed because of the pain and agony suffered by her on account of said swelling and discoloration; that by reason thereof blood poisoning set in which confined this plaintiff to her bed for six weeks absolutely, and for a period of about four months altogether, during which time she was attended by a physician and was obliged to and did take nauseating vile medicines to overcome the said condition of blood poisoning which had ensued by reason of the said wound received in the said bathtub.

"Tenth. That since said period of time this plaintiff has suffered great and immeasurable distress, anxiety, and pain on account of the said blood poisoning, and her health has been permanently injured and shattered. Her limb has been practically ruined, and is now, and has been since shortly after the said injury, a blackened, distorted, and diseased mass, from which, as this plaintiff is

informed and believes, she will never wholly recover.

"Eleventh. That the said defendants * * * were and are responsible to this plaintiff by reason of their negligence which resulted in said injury to this plaintiff. That said negligence consisted in each and every of the following particulars, to wit: (a) In allowing said bathtub to become and remain in a dangerous condition, while being rented to this plaintiff for the purpose of taking a bath, on account of the tear in the side of the copper composing the lining of said bathtub. (b) In permitting said tear to become contaminated and foul with dirt and veridgris at the time the said tub was rented to this plaintiff for the purpose of taking a bath. (c) In allowing said tub to become and remain in a filthy condition, whereby and by reason of which this plaintiff suffered blood poisoning. (d) In employing negligent, unskillful, and improper attendants at said time and place, whose lack of action in cleaning said bathtub resulted in the injury to this plaintiff."

The foregoing are the only allegations concerning the alleged damage that resulted from the injury.

Appellants proved, unequivocally, by three physicians of undisputed qualification and integrity, that she did not have blood poisoning at all, but all three diagnosed her malady as eczema of some kind. Appellee produced no evidence on the subject, except that which incidentally fell from the lips of her husband and mother. The appellee was not questioned as to the matter, and never testified concerning it, except, incidentally, that: "The doctor [meaning Dr. Stemen] said it was a clear case of blood poisoning at that time. He said there were no varicose veins there."

Dr. Stemen testified: "My name is George S. Stemen. I am a surgeon by profession. I know Sarah A. Stock and I made an examination of her lower limbs. The first time was on the 24th of March, 1904, in my office in the city of Denver. I remember the leg she presented to me at that time for examination, which she claimed was injured, and it was the left leg. There was no blood poisoning present at that time on that leg, and I never stated to Mrs. Stock at that or any other time that it was a clear case of blood poisoning."

She alleges in her complaint that her damage resulted from blood poisoning, but she signally fails to carry out these allegations in her testimony or the testimony of her witnesses. Appellee's malady may have arisen immediately after her bath, yet it cannot be concluded from the evidence that it was blood poisoning, as alleged in her complaint. It may be that some other disease resulted from the scratch, or that the scratch might have produced eruptions and inflammation that could not be diagnosed as any disease;

but she alleges that it was blood poisoning, and that it was by reason thereof that she was damaged, and proof of any other result would be a clear variance from the allegations of the complaint. The only testimony that appellee was affected with blood poisoning was by witnesses who did not qualify as to any knowledge or experience that would entitle them to diagnose her case and arrive at a conclusion as to what her disease was; and, while no direct objection was interposed to the mother's testimony for this reason, it was of not sufficient probative force to merit any; neither spoke as one having knowledge or experience, but rather from general impression, and in an incidental and perfunctory manner. The diagnosis of a malady of this character should be made by a physician, nurse, or other person qualified, by education, experience, or otherwise, in such matters.

In the case of *McGraw v. Kerr*, 128 Pac. 870, recently decided by this court, it is held that resort must be had to the opinion of experts to determine whether a surgeon exercises ordinary care and skill in examining a case, as well as in applying remedies thereafter, and that the jury must determine such question from the preponderance of expert testimony.

In the case of *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577, the court said: "Thereupon it becomes important, if not the controlling question in the case, which of these respective authorities was correct [referring to the diagnosis of the malady], since the propriety of defendant's treatment of the plaintiff depends upon which was the correct diagnosis, and whether the defendant exercised ordinary care and skill in examining the case, as well as in applying the remedies. To determine this, resort must be had to the opinion of experts, based upon the ultimate facts as the jury may find them established by the weight of the evidence."

It is claimed by counsel for appellee that the term "blood poisoning," as used in the complaint, was used in the commonly accepted meaning of the term, and not in its technical sense, and that, if it had been intended to allege blood poisoning in its technical sense, the term "septicæmia" would have been used. If the complaint had even alleged that the blood was poisoned, or that a diseased condition resulted, by reason of which she was damaged, such theory might receive greater consideration. But there was no effort to follow the allegations of the complaint and to prove blood poisoning of any kind. Nothing was disclosed in the testimony as to this difference, if there be any difference, between the commonly accepted

and the technical meaning, as the term "blood poisoning" was used in the evidence and discussed by the physicians as a disease; and the court instructed the jury, using the term "blood poisoning," with no explanation as to the term used. The physicians testified that blood poisoning consisted of three kinds, or stages of the disease, and that appellee was not afflicted with any of them. They examined her many times and at various intervals from a few weeks after her alleged injury down to the last trial. All of them testified positively that it was her left leg that she claimed to have injured, including her own physician, whom she called to attend her soon after her bath.

Dr. Finucane testified: "The small veins were varicose. There was no blood poisoning there. In cases of blood poisoning, after the wound takes infection, the first indication is elevation of temperature, then a chill. The blood vessels become inflamed; the vessels extending up towards the thigh will probably be enlarged. The lymphatics will enlarge. The lymphatics are susceptible of enlargement from the infection. After the germs get to work in the sore spot, if you can't retard the trouble right away, you will have the process that is termed blood poison. The first indication is elevation of temperature and a chill. That is what we call septicæmia, the first stage of blood poisoning. The next stage is pyæmia. We have three stages of blood poisoning—sapremia, septicæmia, and pyæmia. In a case of blood poisoning they either get well or die in six or eight days. There was no blood poisoning in Mrs. Stock's case that I could recognize."

No competent testimony of any kind was introduced to show that appellee had any symptoms of the disease commonly or technically known as blood poisoning; and, while there was some testimony tending to prove that the appellee's injury was immediately succeeded by a diseased condition of her limbs, it was at variance with the allegations and the theory of the complaint, and the court was not justified in so submitting the issues to the jury that the verdict might be predicated upon a finding that blood poisoning ensued, and that by reason thereof the appellee was damaged. This view concerning the proof is not in accord with the view of all of my associates.

The judgment is reversed and remanded, with privilege of amendment of the pleadings as the parties may be advised.

Judgment reversed.

KING, J., concurs. CUNNINGHAM, P. J., and HURLBUT, J., concur in the result. BELL, J., does not participate.

(23 Colo. App. 545)

BURNS v. NATIONAL MINING, TUNNEL & LAND CO. et al.

(Court of Appeals of Colorado. March 10, 1913.)

1. APPEAL AND ERROR (§ 781*)—GROUNDS FOR DISMISSAL—SETTLEMENT.

A settlement which would justify a dismissal of an appeal must include not only the matters originally involved in the action, but also the judgment itself, and must be made by and between the parties to the appeal who are interested in the determination and the result itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. CORPORATIONS (§ 316*)—LOAN OF MONEY—INTEREST OF DIRECTOR.

A board of directors of a solvent corporation may borrow from a member of the board, and mortgage the corporate property to secure the loan, where the transaction is in good faith, but, if the presence and vote of the lending director is necessary to a quorum or to a majority in voting to take such action, the act is voidable by the corporation or its stockholders, and will be set aside in equity, regardless of the good faith of the transaction, although the note and the acts of the directors in authorizing it are valid at law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1404-1406, 1408, 1409, 1412-1414; Dec. Dig. § 316.*]

3. CORPORATIONS (§ 320*)—OFFICERS—DEALINGS WITH CORPORATION—ACTION TO ANNUL PROCEEDINGS IN SUIT.

In a suit to annul all proceedings in an action on a note given by a corporation after judgment, execution, and sale of property before objection was made, there was no allegation in the bill that the money borrowed for which the note was given was not received and used by the corporation, and no offer to refund the money obtained on the note; but the bill alleged that the note was paid by the firm lending the money by a sale of collateral security, and alleged, also, that the act of the directors authorizing it was illegal. The replication denied on information and belief a plea that the corporation received and used the money obtained by the sale of the collateral. *Held*, that the denial in the replication to be good should be direct, and that it appears from the pleadings that the corporation owed the money for which the note was given, and that there is no bad faith directly charged against the directors in authorizing the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

4. CORPORATIONS (§ 316*)—INDEBTEDNESS—INTEREST OF DIRECTOR.

Where money was received by a corporation and used for its benefit, the person furnishing the money, even though he was a director of the corporation, and his vote was necessary to the majority vote of the directors in authorizing the loan, could sue the corporation for the money loaned, even if no note or other evidence of the indebtedness had been executed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1404-1406, 1408, 1409, 1412-1414; Dec. Dig. § 316.*]

5. CORPORATIONS (§ 320*)—LOAN OF MONEY—INTEREST OF DIRECTOR—RELIEF.

A stockholder of a corporation cannot have judgment on a note of the corporation set aside on the ground that the money which was loaned the corporation was loaned by a director, without an offer to return the money

obtained on the note, for in a suit for equitable relief plaintiff must do equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

6. PAYMENT (§ 26*)—ACTS CONSTITUTING PAYMENT—SALE OF COLLATERAL.

Where a note is given by a corporation and collateral is pledged for its payment, and the holder of the note allows the collateral to be sold, and permits the corporation to use the money derived from the sale to pay other outstanding indebtedness, the sale of the collateral does not constitute payment of the note, although sold for an amount sufficient to pay it.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 32; Dec. Dig. § 26.*]

7. JUDGMENT (§ 460*)—EQUITABLE RELIEF—PLEADING—PAYMENT OF NOTE.

In an action to set aside judgment on a note given by a corporation on the ground that the note had been paid by the sale of collateral, the bill stated that sufficient funds were realized by such sale to pay off the note and through fraud such funds were not applied to such purpose. Defendant answered, admitting that it had sold or permitted the sale of the collateral, and pleaded that the money was used by the corporation for its benefit. The replication alleged that plaintiff did not have sufficient knowledge or information upon which to base a belief as to defendant's plea. *Held*, that the replication was a practical withdrawal of the charge of fraud in the bill.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882-891; Dec. Dig. § 460.*]

8. JUDGMENT (§ 460*)—EQUITABLE RELIEF—PLEADING—ALLEGING CONSPIRACY.

Pleadings in an action to set aside a judgment on a note given by a corporation *held* not sufficient to charge a conspiracy between the directors and the members of the partnership holding the note, where the only charge indicating conspiracy was in the allegation that after the partnership wrote the corporation that its note must be paid, or suit would be brought, the corporation answered that it had no funds, that it was obliged to refuse payment, and that the writers of the letters were each members of the partnership.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882-891; Dec. Dig. § 460.*]

Appeal from District Court, El Paso County; R. E. Lewis, Judge.

Action by James F. Burns against the National Mining, Tunnel & Land Company and others. From a judgment on the pleadings against plaintiff for costs, he appeals. *Affirmed*.

Gunnell & Chinn, of Colorado Springs (C. S. Thomas, of Denver, of counsel), for appellant. K. R. Babbitt, of New York City, and F. L. Sherwin, of Colorado Springs, for individual appellees.

MORGAN, J. This appeal is from a judgment on the pleadings against the appellant for costs in the El Paso district court, by which appellant's bill was dismissed for want of equity.

[1] The motion to dismiss the appeal, filed in the Supreme Court after the appeal had been perfected, is denied. The settlement of the matters involved on the appeal and up-

on which the motion is based was not a complete settlement of all the matters involved, especially as to the judgment itself for costs. A settlement such as would justify a dismissal of an appeal must not only settle the matters involved in the original action, but must include the judgment itself, and must be made by and between the parties to the appeal who are interested in the determination and the result thereof. The case of *Geraghty v. Randall*, 18 Colo. App. 194, 70 Pac. 767, approaches the condition here. The cases of *Floyd v. Cochran*, 24 Colo. 489, 52 Pac. 676, *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, and *Hunter v. Dickinson*, 3 Colo. App. 373, 33 Pac. 982, cited by appellees, contemplate a more complete disposition of the matters involved than the settlement in the pending case. Two recently decided cases—*Woodmen Ass'n v. Grand Junction*, 51 Colo. 353, 117 Pac. 997, and *Bull v. Doss Bros. Co.*, 51 Colo. 459, 119 Pac. 156—are somewhat analogous to the pending case, but in each of these cases the reasons for dismissal involved the entire issue, and all the parties in the case that was appealed. In the pending case the settlement seems not to have included either all of the parties or all the issues.

It may be determined from the pleadings that the only purpose appellant had in bringing the suit was to annul all proceedings in a certain suit by the firm of Otis & Co., a partnership, against the National Mining, Tunnel & Land Company, a corporation, upon a certain promissory note for \$1,000 given by the corporation to the partnership. The bill of complaint in the pending suit charges that the note was invalid, and also that it had been paid, and a determination of these two questions will be sufficient upon which to reach a conclusion concerning the appeal. There are other charges in the bill upon which a prayer for an accounting, the appointment of a receiver, and other relief is based, but the right to such relief seems to rest upon the invalidity of the note and its payment, and these two questions alone will be considered.

It is claimed by the appellant that because two of the four directors present and voting when the note was authorized by the board of directors of the corporation were also members of the partnership to whom the note was made payable, and whose votes were required to adopt the resolution, and whose presence was necessary to constitute a quorum at such board meeting, such act on the part of the board was void, and the note was therefore void. The contention is that these two directors were disqualified by reason of their personal interest in the act done. It is further contended that because the partnership permitted certain shares of the capital stock of the corporation that had been turned over to the partnership as collateral security for the note to be sold for a sufficient amount to pay off the note, the

act of the partnership, in permitting the money, so derived, to be used by the corporation for other purposes, amounted to a payment of the note. It is further contended that all the circumstances, connected with obtaining the judgment on the note, showed a conspiracy to obtain all the property of the corporation, and were tainted with fraud to such an extent that the judgment on the note is void. These are the only questions raised by the appellant in his brief. They will be disposed of in the order above indicated.

[2] 1. A board of directors of a solvent corporation may borrow money from one or more individual members of the board, and give the corporation's note for it, and even mortgage the corporate property to secure it, where the transaction is in good faith. *Cook on Stock & Stockholders*, § 661, citing many authorities; *Mining Co. v. Bank*, 10 Colo. App. 339, 50 Pac. 1055. If the presence and vote of the director loaning the money is necessary to constitute a quorum, and to make a majority upon such vote, however, the act is voidable at the instance of the corporation or its stockholders. The trust relation existing between the directors and the stockholders of a corporation ought not to permit such an act, and a court of equity will scrutinize all contracts made in this way and set them aside, regardless of the good faith of the transaction. 2 *Cook on Stock & Stockholders*, § 653; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742; *Sims v. Petaluma Gas Co.*, 131 Cal. 656, 63 Pac. 1011; 10 Cyc. 790, 791. The note given by the corporation to the partnership, and the acts of the directors in authorizing the same, are, however, valid in law, although they might be attacked in equity by the corporation, or any other party having a standing for such purpose, but this would not prevent an action at law to recover the amount due upon the note, so long as no objection was made and no action was taken attacking its validity. 10 Cyc. 791.

[3] The pleadings in the case at bar disclose that judgment had been taken upon the note, execution had been levied upon the property of the corporation, which was sold, and a certificate of purchase issued on the sale, before any objection was made, or any action was taken, in that proceeding, or otherwise, attacking its validity. There is no allegation in the bill that the money borrowed and for which the note was given was not received and used by the corporation for the best interests thereof, and no offer to refund the money obtained on the note; but the bill contains only an allegation that it was paid, actually or constructively, by the partnership, upon a sale of the collateral security, together with the prior allegation that the act of the directors authorizing it was illegal and void. It is true the replication denies on information and belief a plea by

the partnership that the corporation did receive and use the money so borrowed to pay off other valid, outstanding indebtedness of the corporation, but such a plea should be met by direct and positive denials. Therefore it appears from the pleadings that the corporation owed the partnership the money for which the note was given, and there is no bad faith, construing the bill and the replication together, directly charged against the directors in authorizing the execution and delivery of the note.

[4] If no note or other evidence of the indebtedness had been executed at all, yet if the money was received by, and used for the benefit of, the corporation, the person furnishing the money, even though his vote as a director of the corporation was necessary to a majority vote of the directors in authorizing the loan, could sue the corporation for the money loaned and recover the amount. *Sims v. Petaluma Gas Co.*, supra.

There are many authorities on the validity of an act of a board of directors of a corporation, such as that involved in this appeal, but the following extracts from 10 Cyc. seem to state the law as it now exists, and in conformity with the decisions of the courts of this state: "While it is clear that a member of a corporation is not incapacitated by the circumstance of being a member from entering into valid contracts with the corporate body, yet, where a bare quorum is assembled, no contract can be made with a member of that quorum, because such a contract requires his concurrence, and he cannot be on both sides of the same contract. As to that contract he is not a director, but is a stranger; and when he steps out of the bare quorum, and assumes the attitude of a stranger, the quorum is broken. Where, on the other hand, a majority of the directors vote in favor of a resolution in which one member of the board has a personal interest, the resolution is not invalid by reason of that personal interest." 10 Cyc. p. 781. "A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case; and any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted will be voidable at the instance of the corporation or the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result." 10 Cyc. p. 790. See, also, *Morgan v. King* and *Mosher v. Sinnott*, supra, where the individual directors bought property of the corporation.

Concluding that the action of the board, authorizing the execution and delivery of the note, was voidable at the instance of the appellant, yet, in his suit for equitable relief, he should "do equity," and offer to return the money so obtained on the note.

[5] Even a stockholder of a corporation

should not be permitted to benefit by a void transaction of his corporation, and come into a court of equity and appeal to the conscience of the chancellor without first offering, or procuring his corporation to offer, to return to the party complained of, the fruits of the unlawful act. In the case of *Mosher v. Sinnott*, supra, the court, through Gunter, J., said: "We think the sale of the stock by the directors to appellants Mosher and Whipple constructively fraudulent and voidable at the instance of the corporation. This action, although brought by a stockholder, is really an action by the corporation to redress a corporate wrong; that is, to set aside the constructively fraudulent sale of this stock. In order to obtain this equitable relief, the corporation must do equity. The complaint makes no offer to do equity with reference to Mosher and Whipple, nor does the decree make any provision for doing them equity. The decree simply provides for a cancellation of the certificates of stock held by them under this purchase. The claims of Mosher and Whipple against the corporation are not disputed; they are open accounts; they accrued more than six years ago, and are therefore barred by the statute of limitations." Were we to affirm the judgment of the lower court as to these certificates of stock, we would thereby cancel the certificates of stock, and yet not put Mosher and Whipple in the same position in which they were before they received the certificates of stock, the corporation would have back the stock, and at the same time have annulled perforce the statute of limitations the claims of Mosher and Whipple against it. This result would be manifestly unjust. The complaint failed to state facts sufficient to constitute a cause of action, in that it failed to offer to do equity with reference to Whipple and Mosher. The decree was bad, in that it canceled the certificates issued to Whipple and Mosher without requiring the corporation to do equity with reference to their claims."

It may be contended that appellant was relieved of the necessity of alleging this offer to "do equity" by the allegation that the note had been actually or constructively paid. Such supposed contention requires the consideration of the next question, as to whether the note was so paid or at all.

[6] 2. The contention of appellant that the note was paid when the collateral security was sold for an amount sufficient to pay it is untenable. The pleadings show quite conclusively that the partnership sold the collateral and permitted the corporation to use the money derived from the sale for the purpose of paying other outstanding and valid indebtedness. This amounted to nothing more than a release by the partnership of its claim on the collateral, and left the note with no security.

[7] The bill does not state any facts to put this in issue—the good faith of the part-

nership in releasing the collateral—but simply states that sufficient funds were realized on the sale of the collateral to pay off the note, and, through fraud, was not applied to such purpose. This naked charge, however, when the partnership answered, admitting that it had sold, or permitted the sale of, the collateral, and pleaded that the money was used by the corporation for its benefit, was modified in the replication to the averment that the appellant did not have sufficient knowledge or information upon which to base a belief as to this plea. This was a practical withdrawal of the charge of fraud, if any had been sufficiently made, in the bill. There is no reason why the partnership could not relinquish its hold upon the collateral if it so desired. It would not in any way prejudice the corporation or its stockholders if the money derived from the sale of the collateral was used for the benefit of the corporation. The entire pleadings show appellant to have been without equity in this regard as well as in regard to the validity of the note. His bill should have, at least, stated that he, or his corporation, stood ready to pay the indebtedness in case the court should find that it had not been paid.

[8] 3. The contention of the appellant that a conspiracy existed between the corporate directors and the members of the partnership, and that all the circumstances connected with obtaining the judgment on the note were tainted with fraud, does not sufficiently appear from the pleadings. It does appear that the partnership at Colorado Springs wrote the corporation at Denver that its note of \$1,000 must be paid or suit would be brought, and the corporation answered that it had no funds, and that it was obliged to refuse payment, and that the writers of the letters were each members of the partnership; yet this alone, without further charges, would not constitute fraud, nor establish a conspiracy, as it is not denied in the replication, except on information and belief, that a few days before this suit was brought the directors of the corporation sent out notice to all of the stockholders, notifying them that all the property of the company was sold at sheriff's sale to satisfy the judgment that had been obtained upon the note, and that the property ought to be redeemed from the sheriff's sale (although plaintiff denies that any such notice was sent to him), that about a month later a new board of directors was elected for the corporation, not including any member of the partnership, and that these directors recognized the validity of the note, and sent out notices to all the stockholders, requesting contributions sufficient to pay off the judgment upon the note. It also appears that the new board of directors, acting for the corporation, filed a separate answer and cross-complaint, in which they do not deny the valid-

ity of the note, but charge, as was charged in the bill, that sufficient funds were realized from the sale of the collateral to pay off the note, and charge that it was the duty of the partnership, under the terms of the collateral agreement, to have applied this money to the payment of the note. As the act of the corporate directors in authorizing the execution of the note was voidable only, this action on the part of the new board of directors in filing its separate answer admitting the validity of the note would seem to be a sufficient ratification of a voidable act to make it valid. These acts on the part of the old and the new boards of directors, disclosed by the pleadings, tended to destroy the claim on the part of the appellant that a conspiracy existed in regard to the note, and that the circumstances were tainted with fraud. And, as there are no direct charges to be found in the pleadings sufficient upon which to base the suit of the appellant concerning the charge that the note was invalid and had been paid, it seems that nothing remained in the bill or in the pleadings which would justify a decree in equity in favor of the appellant.

While it is true that the acts of shrewd conspirators are frequently clothed in the deceptive garb of apparent legality and good faith, and their tracks artfully made to appear the most distinct in places where no suspicion would be aroused, yet all deceptions of such character are absent from the allegations of the bill, or retracted by the replication. The direct charges of fraud and conspiracy attempted to be made in the bill are reduced to charges upon information and belief in the replication. To use the language of the replication, replying to pleas of good faith in the answer, the appellant repeats that, "This plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief." The charges were, as a consequence, insufficient. *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911, where the court said: "Whether a transaction is fraudulent or not is a question of law, to be determined upon the facts, and in pleading fraud the facts from which it is a conclusion must be set forth, and those facts must warrant the conclusion. * * * No person ought to be held to answer a charge of fraud which is made, not as a fact, but as a conclusion drawn from irresponsible hearsay."

All questions raised in the briefs, or discussed in oral argument, have been thoroughly considered, and, if any have not been referred to in the opinion, it is not because they have been overlooked. The judgment is affirmed.

Judgment affirmed.

CUNNINGHAM, P. J., and KING and HURLBUT, JJ., concur. BELL, J., does not participate.

(155 Cal. 84)

COUNTY OF SACRAMENTO v. PFUND,
County Clerk. (Sac. 2,043.)(Supreme Court of California. March 6, 1918.
Rehearing Denied April 4, 1913.)**1. OFFICERS (§ 100*)—CLERKS—COMPENSATION**
—STATUTORY PROVISIONS.

St. 1909, p. 863, § 2, allows county clerks 10 per cent. of amounts received for hunting licenses as compensation for services under the act. Pol. Code, § 4235, fixes county clerks' salaries, and section 4290 makes the salaries and fees full compensation for all services rendered by them, both of which provisions antedate the 1909 act. Const. art. 11, § 9, prohibits the increase of an officer's salary, etc., during the term for which he was elected. *Held* that, as applied to terms commencing after the 1909 act was adopted, it constitutes a valid provision for compensation for additional services required under the act.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. § 100.*]

2. STATUTES (§ 164*)—AMENDMENT—EFFECT.

Under Pol. Code, § 325, providing that a section partly amended is not to be deemed wholly re-enacted, the amendment of a statute in a given particular does not constitute such re-enactment of other provisions not changed by the amendment as to make it a later expression of the legislative intention on a given point than another statute enacted before the amendment, but after the amended section was originally adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 239; Dec. Dig. § 164.*]

In Bank. Application by the County of Sacramento for writ of mandate against E. F. Pfund, County Clerk. Application denied.

Eugene S. Wachhorst, Dist. Atty., of Sacramento, for appellant. White, Miller & McLaughlin, of Sacramento, for respondent.

HENSHAW, J. This is a proceeding in mandate to compel the respondent, the county clerk of Sacramento county, to pay into the county treasury certain fees asserted to have been collected by him as such county clerk for services performed in the issuance of hunting licenses under the act to regulate and license the hunting of wild birds and animals. Stats. 1909, p. 863. Section 2 of that act provides as follows: "Licenses granting the privilege to hunt, pursue or kill wild birds or animals shall be issued and delivered upon application, by the county clerk of any of the counties of this state, or by the state board of fish commissioners." The licenses shall be prepared by the fish and game commission and furnished to the county clerk, and, for the licenses furnished to and disposed of by the county clerk, "the county clerk shall be responsible and shall account for the same to the controller of the state every three months, beginning with July 1st of each year. For each license sold, registered, and accounted for by any person, excepting a fish commissioner, he shall be allowed as compensation out of the game preservation fund 10 per cent. of the amount ac-

counted for." The facts, over which there is no serious controversy, are that respondent received for the issuance of these licenses the sum of \$4,721. The whole of this sum he paid into the state treasury at different times, in accordance with the law, and after such payments he received from the fish and game commission the 10 per centum contemplated by the statute, which moneys, aggregating \$472.10, he insists upon his right to retain as his personal property. The legal question, therefore, is whether, under the law, the county clerk is so entitled to retain it, and, subordinate to that inquiry—one not necessary here to determine—whether, if the county clerk is not entitled to retain it, the money belongs in the treasury of the county or of the state. Preliminarily it may be said that no question is here involved of an increase of salary during the term of office of an incumbent, for the term which respondent is now serving commenced nearly two years after the act of 1909 was passed.

[1] A reading of the license act of 1909 establishes certain facts beyond peradventure: First, that the state of California has imposed an additional duty upon the county clerks, for the act not only authorizes them to issue the licenses, but makes it their duty so to do upon application; second, that this duty is one to be performed, not for and on behalf of the county, but for and on behalf of the state, since it is a state license which the county clerks are authorized and directed to issue, and since by section 6 of the act all moneys collected from these licenses shall be paid into the state treasury; third, the authority to issue licenses is limited absolutely to the state board of fish commissioners and their deputies, and county clerks and their deputies; fourth, that the state Legislature set forth a succinct and clearly devised plan whereby, for the issuance of such licenses, "any person" other than a fish commissioner, who should so issue them, was allowed "as compensation" 10 per cent. of the amount of the license; fifth, since the authority to issue was by the act limited to officials only, namely, state fish commissioners and county clerks, the phrase "any person" seems to have been used designedly, for otherwise "any official" would have been the more appropriate language; sixth, that the use of the words "any person" in this connection seems clearly to indicate that the Legislature designed to differentiate in the matter of the issuance of these licenses between the county clerks in their official capacity and county clerks in their private capacity; seventh, that the clear purpose of this differentiation was to give expression to the legislative intent that the county clerks, as individuals, should be entitled to retain this 10 per centum "as compensation"; eighth, this is made the more manifest by reason of the fact that, if the county clerks

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexed 130 P.—06

are not so allowed to retain this 10 per centum (since the fish commissioners are in express terms forbidden to retain it), it results in convicting the Legislature of a very manifest absurdity in declaring that a particular class of officers shall be allowed to retain a commission, which very class, under other laws of the Legislature's own creation, are forbidden to do this very thing.

These facts, we say, are irresistible from a reading of the statute itself, but nevertheless they are, of course, not conclusive upon the question. For it still may be that the Legislature has passed a law whose intent may be plainly seen, but which intent may not be given effect because of the prohibition of the Constitution or of other controlling statutes. Such, it is contended, is the case here. This inhibition upon the county clerk's right to retain these fees, it is said, is found in the language of sections 4235 and 4290 of the Political Code. The first of these sections fixes the salary of the county clerk of Sacramento county. The second declares that "the salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title, either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided." But these two sections, in so far as they have any bearing upon the present consideration, are precisely the same now as they were when the game license act was adopted; and, as the only constitutional limitation upon the Legislature in fixing the compensation of officers is a prohibition against increasing their salary or emoluments during the term for which the officers are elected (Const. art. 11, § 9), it follows that it was permissible for the Legislature to make any such increase to apply to future terms. As has been said, such is the situation here presented. Thus, for the additional duties imposed upon county clerks, no one would question the right of the Legislature to say that their salaries should be increased in a fixed sum, and no objection attaches to the method of compensation by fees based upon a per centum of the amounts received for the issued licenses.

[2] Were this all of the question, there could be but one conclusion drawn, and that in favor of the respondent's right to the retention of the money. But it is said that sections 4235 and 4290, being amended in certain particulars, were entirely re-enacted by the Legislature of 1911 (St. 1911, pp. 134, 251), and that such re-enactment should be held to be the latest expression of the legislative view, and thus to forbid the retention of the moneys. But it is conceded that the amendments, touching the matter under consideration, made absolutely no change in the sections of the Code as they previously stood. In other words, the provisions of the law, so

far as section 4290 is concerned, are identical, and, so far as section 4235, they were not changed in any material respect by the amendment of 1911. But it is said that section 4235 was amended two days after the approval of the game license act by increasing the compensation and number of deputies of the county clerks in the class of counties to which Sacramento belonged, and that it must be concluded from this that this increase was designed to cover the added service required in the issuance of hunting licenses. We cannot, however, concur with this reasoning. Section 4235 merely fixes the compensation and leaves section 4290 to declare what additional compensation may be received and what is forbidden. Moreover, so to find an inhibition by implication, and so to construe a statute amended in certain particulars as having been wholly re-enacted as of the date of the amendment, is to do violence to the Code and all canons of construction. The Code itself (Pol. Code, § 325) declares: "Where a section or part of a statute is amended, the statute as a whole is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted." For the interpretation of this section, as well as for the general rules of construction, it is sufficient to cite *C. P. R. v. Shackelford*, 63 Cal. 265; *Swamp Land, etc., v. Glide*, 112 Cal. 90, 44 Pac. 451; *People v. Sutter St. Ry.*, 117 Cal. 604, 49 Pac. 736.

The application for mandate is therefore denied.

We concur: MELVIN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.

(165 Cal. 55)

PEOPLE v. O'BRYAN. (Cr. 1,725.)

(Supreme Court of California. March 5, 1913.)

1. HOMICIDE (§ 166*)—EVIDENCE—RELATIONSHIP OF PARTIES.

In a murder trial, the prosecution was properly permitted to show the existence of a strike by a labor organization of which accused was a member, and that decedent was a non-union workman, employed by a company against whom the strike was directed, though such testimony should be limited to a general showing of the relations of the parties.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

2. CRIMINAL LAW (§ 371*)—EVIDENCE OF RELATED OFFENSES—ADMISSIBILITY.

Generally evidence of offenses other than the one for which accused is on trial is not admissible; but, where two offenses are part of a single transaction, every element of accused's conduct in that transaction can be shown to illustrate his motive and intent in committing the particular act, and hence, in a prosecution of a union employé for killing a nonunion workman, the prosecution was properly permitted to show an assault at the same time upon a non-union companion of decedent, where the evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence sustained a theory that the killing and the assault were parts of one attack upon decedent and his companion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

3. WITNESSES (§ 277*) — CROSS-EXAMINATION OF ACCUSED—SCOPE.

Under Pen. Code, § 1823, which permits cross-examination of accused as to all matters about which he was examined in chief, it was proper in a trial of a union employé for killing a nonunion workman, wherein accused testified that he did not intend to shoot decedent, to ask him, on cross-examination, as to his relation to a strike which involved the parties, as to his movements on the night of the homicide, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.*]

4. WITNESSES (§ 380*)—IMPEACHMENT—INCONSISTENT STATEMENTS BY ACCUSED.

If one accused of murder gave such testimony on cross-examination as supported his direct testimony that he did not intend to shoot decedent, the prosecution was not bound by his answers on a cross-examination, but could impeach him by proof of contradictory statements made at other times.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.*]

5. CRIMINAL LAW (§ 393*)—EVIDENCE—COMPULSORY SELF-INCRIMINATION.

Under Const. art. 1, § 13, which provides that no one shall be compelled in any criminal case to testify against himself, it was error to permit the people in a murder trial to show accused's testimony before the grand jury before which he was taken after being arrested on suspicion, without being informed of his constitutional right to decline to be a witness against himself or that his statements might be used against him, though the grand jury did not return an indictment, and the prosecution was upon information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393.*]

6. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of such evidence was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. B. Unangst, Judge.

W. J. O'Bryan was convicted of murder in the first degree, and he appeals. Affirmed.

A. B. Campbell, of San Luis Obispo, and George Appell, of San Francisco, for appellant. U. S. Webb, of San Francisco, for the People.

SLOSS, J. The defendant, convicted of murder of the first degree and sentenced to life imprisonment, appeals from the judgment and from an order denying his motion for a new trial.

The appellant does not question the sufficiency of the evidence to support the verdict, nor does he attack the instructions given to the jury. The only errors assigned consist of certain rulings admitting evidence over the objection of the defendant. A brief statement of the case presented by the people will

suffice for the understanding of the points so raised.

Defendant was a member of a labor organization which had declared a strike against certain employers, including the Llewellyn Iron Works. John D. Avila, the deceased, and one Molina, were nonunion workmen, and were working for the Llewellyn Iron Works in the construction of oil tanks near the city of San Luis Obispo. Early in the morning of December 17, 1910, Avila and Molina, after spending the preceding evening in the city, started to walk back to their lodgings, which were at the place where the tanks were being erected. After they had gone some distance, they were overtaken by the defendant, who, with two companions, was following them. The defendant was armed with a revolver. Avila drew a pistol, but the defendant came up to him, and seized him by the wrist of his pistol hand. One of the men with O'Bryan then took Avila's pistol from him. A similar weapon was also taken from Molina. Avila broke away from O'Bryan, and started to run toward the city. O'Bryan ordered him to stop, and, on Avila disregarding the command, fired. Avila continued to run, and made his way to the city. It appears, however, that the bullet from defendant's revolver had passed through his body, and in consequence of the wound so received he died during the following night. O'Bryan did not pursue him, but turned to Molina, and, after asking him questions regarding his and Avila's employment, struck him. Molina then ran away and made his escape.

While it was not expressly admitted that the shot fired by O'Bryan had caused Avila's death, there was no real controversy over this point. The defendant's contention was that he had fired for the purpose merely of frightening Avila, and without any intention of hitting him. It is apparent, therefore, that the intent of the defendant became the paramount issue, and that any competent testimony tending to show a motive on his part for the killing or injuring of Avila, or to throw light on the purpose leading him to fire the fatal shot, was relevant and proper.

[1] It cannot be doubted that the prosecution was entirely within its rights in proving the existence of the strike, the connection of the defendant with the organization conducting the strike, and the employment of Avila as a nonunion workman by the Llewellyn Iron Works, one of the employers against whom the strike was directed. This was evidence tending very directly to show a motive on O'Bryan's part for attacking Avila. *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369; *People v. Donnelly*, 143 Cal. 394, 77 Pac. 177; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016. It may be observed, however, that testimony of this character should be limited to a general showing of the relations of the

parties. *People v. Thomson*, 92 Cal. 506, 512, 28 Pac. 589; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539. Perhaps the district attorney was permitted, in this case, to show with too great detail the activities of the defendant on behalf of the union. At the same time we cannot see that anything substantially prejudicial to the defendant was elicited in consequence of the widening of the range of inquiry.

[2] There was no error in permitting the people to prove the assault upon Molina, following the firing of the shot that killed Avila. The general rule is, of course, that evidence of offenses other than the one for which the defendant is on trial is not admissible. But, where the two offenses are part of a single transaction, "every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him." *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. Walters*, 98 Cal. 141, 32 Pac. 864; *People v. Craig*, 111 Cal. 468, 44 Pac. 186; *People v. Teixeira*, 123 Cal. 298, 55 Pac. 988; *People v. Suesser*, 142 Cal. 363, 75 Pac. 1093. It was the theory of the prosecution—and the theory was entirely reasonable under the evidence—that the shooting of Avila and the assault on Molina were parts of one attack upon the two, perpetrated in pursuance of a single scheme to terrorize or injure them because they were working for the Llewellyn Iron Works. Whatever was done in the course of that attack was proper as throwing light on the motive and intent of O'Bryan and his companions.

The defendant took the stand as a witness in his own behalf. His testimony, on direct examination, was, in effect, that he saw Molina and Avila on the night of the shooting; that he had never seen them before; that he shot his gun; that he did not shoot at or aim at Avila, and did not intend to kill him. His purpose, he testified, was to scare Avila, and to make him stop.

[3, 4] The cross-examination of the defendant was extended, but, with an exception to which we shall recur, we cannot see that it exceeded the proper limits of cross-examination. By asserting that he had not intended to shoot Avila, the defendant opened the door to any questions so framed as to elicit answers which might tend to show that he had in fact entertained and acted upon the purpose of killing or injuring Avila. In seeking to obtain answers which would support the claim that the defendant was actuated by a motive of hostility to Avila, the prosecution did not go beyond the bounds defined in section 1323 of the Penal Code, which permits a defendant offering himself as a witness to be cross-examined "as to all matters about which he was examined in chief." In so far as the cross-examination touched upon O'Bryan's relation to the strike as an "organizer"

for the union, it is apparent, from what we have already said, that the questions had a proper bearing upon his motive and intent. It was entirely permissible, too, for the prosecution to go into the defendant's movements on the night of the homicide, and to draw out his statement of the occurrences leading up to the shooting. If, in any of his answers, he testified in such manner as to lend support to his declaration made on direct examination, that he had not intended to shoot the deceased, the prosecution was not bound by such answers, but had the right to impeach him by proof of contradictory statements made at other times. Evidence directed to this end did not violate the rule prohibiting impeachment on matters "collateral and irrelevant to the issue." Without discussing in detail the various questions asked of defendant in the course of a somewhat protracted cross-examination, we may say that the rulings of the court in this regard were, in the main, correct, and that any errors that may have been committed were of trivial import.

[5] On the day of the shooting, December 18th, the defendant was arrested on suspicion of being concerned in the killing of Avila, and was held in custody in the county jail. No formal charge had been made against him when on the 28th of December he was, by the sheriff, taken before the grand jury which was investigating the homicide, and was sworn and questioned concerning his actions before and at the time of the shooting. He was not informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him. In response to the examination of the district attorney, he made to the grand jury a number of statements. These statements did not amount to a confession, but were admissible in evidence against the defendant as declarations against interest, unless proof of them was rendered incompetent by the manner in which they had been obtained.

Over the objection of the defendant, the people were allowed to show the questions thus asked of O'Bryan before the grand jury and his answers thereto. This testimony should not have been admitted. The course pursued was in violation of the constitutional right of every person not to "be compelled, in any criminal case, to be a witness against himself." Const. Cal. art. 1, § 13. The defendant could not, of course, have been called and required to testify against himself at the trial. The guaranty against being so compelled would be of little value if the same result could be attained by the indirect method of compelling him to testify at some antecedent step of the proceedings against him, and then offering in evidence his statements so extracted. We do not mean to suggest that under no circumstances can testimony given by a person before a

grand jury be given in evidence in a subsequent trial of a criminal charge against him. The Constitution protects a person from being compelled to be a witness against himself. If, at the time he appears, no accusation, formal or informal, has been made against him, he does not in testifying become a witness against himself. Or if, even though charged with crime, he voluntarily gives evidence against himself, his rights are not infringed by the use of such evidence thereafter. These distinctions are well illustrated by a series of New York cases (*Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *People v. McMahon*, 15 N. Y. 384; *Teachout v. People*, 41 N. Y. 7; *People v. Singer*, 18 Abb. N. C. (N. Y.) 96; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *People v. Chapleau*, 121 N. Y. 287, 24 N. E. 469), the result of which is summed up in *People v. Molineux*, 168 N. Y. 331, 61 N. E. 308, 62 L. R. A. 193, in these words: "When a person testified at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given after he has been fully advised of his rights and has been given an opportunity to avail himself of them." Here the defendant when brought before the grand jury was in custody under an accusation of guilt of the crime under investigation. Taken into the presence of that body by the sheriff, sworn and examined without the aid of counsel, and without any instruction as to his rights, it cannot be said that his submission to the interrogation was in any fair sense voluntary. The great preponderance of authority is that testimony so given by a defendant is not to be used against him. *U. S. v. Kimball* (C. C.) 117 Fed. 156, 163; *Boone v. People*, 148 Ill. 440, 36 N. E. 99; *State v. Clifford*, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518; *State v. Frolseth*, 16 Minn. 296 (Gil. 260).

Of the cases cited to support the admission of this testimony, the only one which need be noticed is *People v. Sexton*, 132 Cal. 37, 64 Pac. 107, in which this court used the following language: "Defendant's statements, whether made in the grand jury room, at the trial, or extrajudicially, may be used against him, and we see no error in their admission here." The report of the decision does not disclose the conditions under which the defendant in the *Sexton* Case testified before the grand jury. It may well be assumed that no accusation had been made against *Sexton*, or that he gave his testimony voluntarily, with full knowledge of his right to remain silent. In either of these events his declarations were properly admitted in evidence at the trial. At any rate, we cannot regard the case as an authority requiring us to hold that the state may give in evidence against a defendant charged with a criminal offense testimony

which he, while accused of the same offense, was compelled to give before a grand jury investigating such offense.

We attach no importance whatever to the circumstance that the grand jury did not return an indictment, and that the defendant was in fact tried upon an information. Granting that the testimony given by him before the grand jury could not be used against him on the trial of an indictment found by that body, it would be manifestly unfair to hold that the constitutional right was lost because the district attorney elected to proceed by information rather than indictment. To so hold would give sanction to a device which might readily be used for the purpose of accomplishing by evasion what could not be done directly. For like reasons, it was improper to permit the district attorney, on cross-examination of the defendant, to question him concerning other statements similarly made by him before the grand jury.

[6] But, conceding that error was committed in the admission of this testimony, there still remains the question whether the character and effect of the error were such as to require a reversal. This question must be answered with due regard to the terms of section 4½ of article 6, added to the Constitution by amendment adopted in 1911. Section 4½ reads as follows: "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error in any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The general purpose of the amendment is plain. Inasmuch as under the pre-existing provisions of the Constitution the jurisdiction of the Supreme Court and of the District Courts of Appeal was limited in criminal cases "to questions of law alone" (Const. art. 6, § 4), it was incumbent upon these courts to reverse any judgment of conviction based upon proceedings which were affected in any degree by substantial error of law. Where, however, the error complained of was trivial, or the record showed that no prejudice to a substantial right could have resulted therefrom to the defendant, it has always, even before the amendment, been the practice to disregard the error. Pen. Code, § 1258. But where neither of these conditions existed, and the error was one which might or might not have turned the scale against the defendant, the limitation of the appellate jurisdiction to questions of law precluded the reviewing courts from weighing the evidence for the purpose of forming an opinion whether the error had or had not in fact worked injury. Having no jurisdiction in matters of fact, the court in which the appeal was pending was bound to apply

the doctrine that prejudice was presumed to follow from substantial error.

In not a few instances this limitation upon the power of courts produced results which were unsatisfactory and which seemed to hamper the state in its efforts for a prompt and effective enforcement of the prohibitions and penalties of its penal laws. It sometimes became necessary for the Courts of Appeal and for this court to grant new trials to defendants on account of technical errors or omissions, even though a review of the evidence, if such review could legally have been undertaken, would have shown that the guilt of the accused had been established beyond question and by means of a procedure which was substantially fair and just. It was to avoid the necessity for such results that the amendment in question was proposed and adopted. By the new constitutional provision the appellate courts are empowered to examine "the entire case, including the evidence," and are required to affirm the judgment, notwithstanding error, if error has not resulted "in a miscarriage of justice." What, then, is a miscarriage of justice? The phrase is a general one, and has not as yet acquired a precise meaning. We find it in the English Criminal Appeal Act of 1907 (St. 7 Edw. VII, c. 23), section 4 of which contains this language: "Provided that the court may, notwithstanding they are of opinion that the point raised on the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." The Court of Criminal Appeal created by this act has had frequent occasion to consider whether a given error has resulted in a miscarriage of justice. In the case of *Peter Meyer*, 1 Criminal Appeal Cases, 10, 12, the Lord Chief Justice said that the provision "enables the court to go behind technical slips and do substantial justice." We have no doubt that in a general way this fairly states the purpose of our own constitutional provision. It does not, however, afford an all-embracing test or definition for determining just what will constitute a miscarriage of justice. In the case of *Cohen and Bateman*, 2 Crim. App. Cas. 197-207, *Channell, J.*, referring to section 4 of the Criminal Appeal Act, used this language: "This section has been considered in almost all the cases which have come before this court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case." The same may be said of our constitutional provision. It is as difficult to frame a definition of "miscarriage of justice" which shall be "at once perspicuous, comprehensive and satisfactory" as it has been to thus define the term "due process of law" of which Mr. Justice Miller said, in *Davidson v. New Orleans*,

S. 97, 104 (24 L. Ed. 616): "There is no in the ascertaining of the intent and

application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." This much, however, we think may be safely said. Section 4½ of article 6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted.

On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected. For example, if a court should undertake to deny to a defendant charged with a felony the right of trial by jury, and after a hearing of the evidence render a judgment of conviction, it cannot be doubted that such judgment should be set aside even though there had been the clearest proof of guilt. Or, if a defendant, after having been once acquitted, should be again brought to trial and thereupon convicted, in disregard of his plea that he had been once in jeopardy, it would hardly be suggested that, because he was in fact guilty, no "miscarriage of justice" had occurred.

But it does not follow that every invasion of even a constitutional right necessarily requires a reversal. It may well be that the court, after examining the "entire cause including the evidence," is of the opinion that the error complained of, whatever its character, has not resulted in a miscarriage of justice. The mere fact that the assignment of error is based upon a provision of the Constitution is not conclusive. The final test is the opinion of the appellate court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not sub-

stituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered.

The application of these views requires an affirmance of the judgment and order under review, notwithstanding our conclusion, as already stated, that the statements of the appellant to the grand jury should not have been allowed to go to the jury. These statements were to the effect that the defendant had joined the union at Coalinga in August; that he had quit work on account of the strike, and thereafter had drawn strike benefits of \$7 a week; that, after coming to San Luis Obispo, he had acted as captain of the organizers; that he went out to see that the organizers were doing their duty, which was to get the men working at the Tank Farm to join the union, if possible. These declarations were introduced as a part of the people's case in chief. Every material matter covered by them was shown to the jury by other evidence, which was concededly admissible, and the truth of which was not contradicted. Among other things, it was proven that substantially the same statements had been made by the defendant in interviews with the district attorney. In his testimony at the trial, in response to proper cross-examination, he again reiterated the substance of these declarations. In this state of the record we should certainly not be justified in forming or expressing the opinion that the admission of this testimony had resulted in a miscarriage of justice.

As we have already stated, O'Bryan was cross-examined regarding other statements made to the grand jury, and such statements were introduced in evidence on rebuttal. Nothing of any consequence was developed in this way, with the exception of testimony of the defendant's statement that he had, before going down the road on the night of the shooting, obtained a loaded pistol from the union headquarters. The only importance of this declaration was that it differed from his testimony at the trial, in which he stated that he did not know, when he got the pistol or when he came up to Avila and Molina, whether or not the pistol was loaded. In view of the testimony regarding defendant's conduct, including his own admissions before and at the trial, this statement was so improbable that we cannot, without reflecting upon the common sense of the jury, assume that credence could have been given to it. Any fair-minded man must have believed that O'Bryan knew that his pistol was

loaded, and the admission of his own declaration to that effect was not, therefore, an error for which, under the constitutional provision above quoted, a new trial should be granted.

The offense with which the appellant was charged was committed prior to the adoption of section 4½ of article 6. But the amendment, under the construction which we have given to it is not obnoxious to the provision of the federal Constitution against *ex post facto* laws. It does not affect the crime with which the defendant was charged, "the punishment prescribed therefor, or the quantity or degree of proof necessary to establish his guilt." *Mallett v. North Carolina*, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015. It merely alters the rules for the disposition of an appeal after trial. There can be no constitutional objection to an enactment which, while it preserves to a defendant all the substantial safeguards in force at the time of the commission of the act charged, merely provides that formal or technical errors, which have not brought about an unjust result, shall not be ground for a reversal. *Jacquins v. Commonwealth*, 9 Cush. (Mass.) 279. There is no vested right to have a judgment set aside for errors which have not affected the real merits of the cause. Such changes as the one under consideration are permissible on the ground that they go merely to matters of remedy or procedure. In the case last cited the court applied to past judgments a statute providing that, where a criminal judgment is reversed upon writ of error on account of error in the sentence, the court may render such judgment as should have been rendered, or may remand the case for that purpose. *Shaw, C. J.*, delivering the opinion of the court, used the following language, which is very appropriate here: "It was competent for the Legislature to take away writs of error altogether in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause." Similarly, in *Mallett v. North Carolina*, *supra*, the Supreme Court of the United States upheld, as applied to past offenses, a statute which gave to the prosecution an appeal where none had before been allowed.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

LORIGAN, J. (concurring). I concur in the judgment and order of affirmance in this case and in the views expressed by Mr. Justice SLOSS in the foregoing opinion, except as to the construction of section 4½ of article 6 of the Constitution and its application under the evidence. I am of the opinion that neither the construction nor application of this section is necessarily involved in the disposition of this appeal, and therefore the dis-

cussion upon it is obiter and the scope of this section may be better left until the question is squarely presented. It was, as pointed out in the opinion, error for the court to have admitted in evidence on behalf of the state the statements made by the defendant before the grand jury. This was in violation of the constitutional right of the defendant not to "be compelled in any criminal case to be a witness against himself." If the defendant had not subsequently become a witness on the trial in his own behalf but had stood squarely upon the error of the court in permitting evidence of those statements, I am not prepared just now to say that against this violation of a constitutional right the section of the Constitution could be interposed. But here the defendant did not stand upon the error. He became subsequent to its admission a witness in his own behalf, and gave testimony in chief upon such matters as warranted the district attorney upon cross-examination in covering all the matters concerning which he had made statements before the grand jury. This district attorney was justified in cross-examining him as to all these matters, and the testimony of the defendant respecting them was substantially a reiteration of the statements he had made before the grand jury. This being true, whatever error was committed by the court in the first instance was cured by this subsequently properly elicited testimony covering the same matters. The original prejudicial character as error was obviated by this subsequent confirmatory evidence of the defendant, and under the general rule which has always obtained here the error became harmless, and could not be successfully invoked by defendant to obtain a reversal. This being the general rule applied before the constitutional amendment referred to was made, it is as directly applicable now since the amendment, and the assignment of the ruling as error was without merit by virtue of the general rule, and in my opinion, therefore, it is unnecessary obiter to construe or apply the amendment in disposing of this alleged error. The general rule to which we have thus referred is one to which this court long since has given succinct utterance. Thus in *People v. Brotherton*, 47 Cal. 388, 404, where the question before this court was the ruling of the trial court upon a matter of evidence it is said: "That a technical error has intervened at the trial is therefore not of itself enough to warrant our interference. The prisoners must go further, and affirmatively show in some way that their substantial rights have been injuriously affected by the error complained of." That the principle here laid down has since been consistently adhered to and never once departed from will appear from the following cases in each one of which it was argued on behalf of the defendant that error prejudicial to

him arose under the court's rulings receiving or rejecting evidence and in each one of which this court refused to support the contention: *People v. Barnhart*, 59 Cal. 381; *People v. Chuck*, 78 Cal. 317, 20 Pac. 719; *People v. Nelson*, 85 Cal. 425, 24 Pac. 1006; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Clark*, 106 Cal. 33, 39 Pac. 53; *People v. Maroney*, 109 Cal. 278, 41 Pac. 1097; *People v. Barthleman*, 120 Cal. 15, 52 Pac. 112; *People v. Wynn*, 133 Cal. 72, 65 Pac. 126; *People v. Glaze*, 139 Cal. 162, 72 Pac. 965.

We concur: MELVIN, J.; HENSHAW, J.

(166 Cal. 31)

COOPER v. MILLER. (L. A. 2,992.)

(Supreme Court of California. Feb. 27, 1913.
Rehearing Denied March 29, 1913.)

1. DIVORCE (§ 249*)—DISPOSITION OF PROPERTY.

In a decree of divorce in an action brought by the wife, it is competent for the court to set aside to the wife all of the real estate belonging to the community.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. § 249.*]

2. HOMESTEAD (§ 158*)—DECREE OF DIVORCE—DESTRUCTION OF HOMESTEAD.

The decree in a divorce suit, which declares that plaintiff is entitled to have set apart to her the real property belonging to the community, and declaring that the homestead thereon "is hereby vacated and dissolved," and which sets the real property over to the plaintiff, vests the title in the plaintiff and destroys the homestead declared under the state homestead law.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158.*]

3. PUBLIC LANDS (§ 140*)—HOMESTEAD EXEMPTION.

Rev. St. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398), exempting the homestead from liability for debts incurred before the issuance of a patent, does not protect one who has parted with title to the land and subsequently acquired the title.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 377-382; Dec. Dig. § 140.*]

4. PUBLIC LANDS (§ 140*)—DECREE OF DIVORCE—HOMESTEAD EXEMPTION.

Where, in a divorce suit, the decree sets over the community real property to the plaintiff, and vacates her declaration of homestead thereon, she does not take that part of the community realty which she derived from the federal government under the homestead law under a new title, nor did she part with title so as to waive or destroy the federal homestead exemption.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 377-382; Dec. Dig. § 140.*]

5. PUBLIC LANDS (§ 140*)—HOMESTEAD EXEMPTION—DEBTS PRIOR TO ISSUANCE OF PATENT.

Where a patent is issued on March 26, 1892, and notes given by the person to whom the patent is issued were executed May 24, 1892, the land was not exempt from liability for this indebtedness by the exemption in the federal laws; Rev. St. U. S. § 2296 (U. S.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Comp. St. 1901, p. 1398), exempting the land from liability only for debts incurred prior to the issuance of the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377-382; Dec. Dig. § 140.*]

6. JUDGMENT (§ 736*)—JUDGMENT ON MOTION—RES ADJUDICATA.

Where the owner of land applies to the superior court to have an order enforcing a judgment by sale of land vacated, and the order is denied, this determination is not *res adjudicata* in a subsequent action brought by the owner against the purchaser at the sheriff's sale to quiet title, as such a judgment is *res adjudicata* only upon matters adjudicated under the motion, and the sole ground of motion was that the owner had not been served with summons in the original action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

Department 2. Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action by Florence I. Cooper against H. G. Miller. Judgment for plaintiff, and defendant appeals. Judgment ordered modified.

Louis Luckel and Murphey & Poplin, both of Los Angeles, for appellant. Watkins & Blodget, of Los Angeles, for respondent.

HENSHAW, J. This action was brought to quiet plaintiff's title to 120 acres of land in Ventura county. The defendant, Miller, bases his title upon a sheriff's sale pursuant to an execution issued out of the superior court of Los Angeles county upon a judgment in his favor against the plaintiff, Florence I. Cooper, and J. F. Cooper, formerly her husband. The setting forth of plaintiff's title requires a longer narration of facts.

Plaintiff acquired title by patent from the United States under its homestead laws to the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 35. This was in 1901. The adjoining 40 acres to the west, being the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 34, was patented to her husband, J. F. Cooper, in 1892. In 1897 the husband made his deed of grant to his wife, plaintiff herein, for this 40 acres. Thereafter, in June, 1901, the wife recorded her declaration of homestead covering the whole 120 acres. An action for divorce was instituted by plaintiff herein against her husband in 1904 and the interlocutory decree was duly entered on January 27, 1906. That decree provided as follows: "That the plaintiff is entitled to a divorce from the defendant; that, when one year shall have expired after the entry of this interlocutory judgment, a final judgment and decree shall be entered granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved, and that the plaintiff is entitled to have awarded and set apart to her all of the real property described in the complaint, * * * all of which is community property, and the declaration of homestead thereon

vacated and dissolved; and a final judgment and decree shall be entered when one year shall have expired from the date hereof, awarding all of the said real property to plaintiff and dissolving the said homestead." The final decree was entered upon January, 1907. It was silent concerning and made no final disposition of the property. Thereafter, upon April 21, 1907, upon motion of Mrs. Cooper, plaintiff in the divorce action and plaintiff here, the decree was amended; the court declaring that, through its oversight, inadvertence, and mistake, it had failed to embody in the final decree all the matters and things therein intended to be embodied. Wherefore on motion of Donald Barker, Esq., attorney of plaintiff, the final decree heretofore entered is hereby amended, and plaintiff is awarded relief as follows: "It is hereby declared that said plaintiff, Florence I. Cooper, is entitled to have set apart to her the real property hereinafter described, which said real property was, at the time of filing of the complaint, community property of the plaintiff and defendant, and the declaration of homestead thereon is hereby vacated and dissolved, and the said real property is hereby set apart and awarded to the plaintiff without any restriction whatever, and plaintiff is hereby declared to be the owner thereof, freed from any claim or demand whatsoever of the defendant or any person claiming by, through, or under him. Said real property is described as follows." Here follows a description of the two parcels of land in controversy.

The debt upon which judgment was secured against the Coopers was contracted in 1892. A homestead patent to Mrs. Cooper had issued in 1901. Appellant's contention upon these facts is that Mrs. Cooper, by virtue of her declaration of homestead, and by her own affirmative act in causing the dissolution of that homestead and the setting over to her of the 120 acres, acquired thereby a new title, which title was subject to all of her debts and liabilities. By respondent it is argued that it is beyond the power of the court to dissolve or vacate a homestead in the divorce proceedings when all of the community property is awarded to either spouse, as was done in this case, and properly done because of the adulterous conduct of the husband. And, further, respondent argues that if this position be not well taken, still, unquestionably, the 80 acres patented to Mrs. Cooper under the homestead laws of the United States is forever freed from the claim of any debt contracted prior to the issuing of her patent.

It is important to bear in mind the titles by which the respondent held the two parcels of property at the time she made her declaration of homestead thereon. Both parcels, under the decree of divorce, were declared to be community property; but title

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the 80 acres was acquired by patent from the United States under its homestead laws, while title to the second vested in her by virtue of the deed of grant from her husband.

[1] The decree of divorce not only set aside to her this property absolutely, as it was competent for the court to do, but, at the invitation of the respondent herself, the decree "vacated and dissolved the homestead."

[2] This decree was not beyond the power of the court to make, and its effect was to vest the title in the respondent and to destroy the homestead declared under the California homestead law. *Shoemaker v. Chalfant*, 47 Cal. 432; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582; *Bahn v. Starcke*, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40. But the homestead, and consequently the homestead exemption, having thus been dissolved and destroyed, appellant further contends that because respondent included in her homestead declaration the 80 acres of land acquired by her from the United States under its homestead laws, when the decree of divorce awarded her the property, it came back to her, divested of the exemption and protection of the federal statute. Revised Stats. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398).

[3] It is, of course, well settled that this federal exemption does not protect one who has parted with title to the land and subsequently acquired that title. *De Lany v. Knapp*, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160. Appellant contends that *Taylor v. Hargous*, 4 Cal. 273, 60 Am. Dec. 606, announces the doctrine that, upon a declaration of homestead, a new title, in the nature of a joint tenancy, is created. But this construction was subsequently overruled by *Gee v. Moore*, 14 Cal. 472, and the operation and effect of a homestead declaration, as declared in *Gee v. Moore*, has been consistently adhered to since.

[4] Therefore it follows that, upon the restoration to respondent by the divorce court of this property, she took it in the present instance under no new title; nor had she parted with title so as to waive or destroy the federal homestead exemption.

[5] As to the 40 acres, however, the case presents a different aspect. The patent to the 40 acres was issued on March 26, 1892. The notes upon which appellant recovered judgment against respondent and her former husband were executed May 24, 1892, after the date of the patent. This 40 acres was, therefore, never at any time, by virtue of the federal laws, exempt from this debt. *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 31 Pac. 495, 36 Am. St. Rep. 266; *Leonard v. Ross*, 23 Kan. 292; *Flanagan v.*

Forsythe, 6 Okl. 225, 50 Pac. 182. It follows herefrom that the 80 acres were exempt from execution, levy, and sale under the Miller judgment, and the 40 acres were not so exempt.

[6] After an order had been made by the superior court enforcing the Miller judgment, and before the sheriff's sale, the respondent applied to the superior court to have the order enforcing the judgment vacated. The hearing came on and was on December 17, 1910, denied. It is argued that this determination upon the order to show cause was *res adjudicata* and worked an estoppel by judgment against the present action brought by plaintiff. That a decision of a court upon an order such as this may, in proper cases, be pleaded as *res adjudicata* is unquestioned. *Lake v. Bonyng*, 161 Cal. 120, 118 Pac. 535. But it is *res adjudicata* only upon the matters adjudicated under the motion, and here it is established, upon the face of the record, that the sole ground was that respondent had not been served with summons in the Miller action; and it is at least doubtful whether the respondent in his motion could have sought an adjudication of the questions considered and determined in the present action. *Both v. Insley*, 86 Cal. 134, 24 Pac. 853.

Wherefore the judgment is ordered modified, and the court directed to decree that the 40 acres of land were subject to the execution, sale, and levy and to the legal rights of appellant which may have arisen by virtue of such execution and sale. Appellant will recover his costs.

We concur: MELVIN, J.; LORIGAN, J.

(165 Cal. 45)

BARROWS v. HARTER. (L. A. 2,978.)

(Supreme Court of California. March 1, 1913.)

1. VENDOR AND PURCHASER (§ 98*)—RESCISSION BY VENDOR—RESTORATION OF CONSIDERATION.

While under Civ. Code, § 1691, requiring a party rescinding a contract to restore everything of value received thereunder or to offer to restore it upon condition that the other party shall do likewise, and section 3408, providing that the court, on adjudging the rescission of a contract, may require the party to whom such relief is granted to make any compensation to the other which justice requires, a vendee upon a rescission by a vendor is ordinarily entitled to a restoration of the moneys paid by him, as well as to an allowance for permanent improvements, taxes paid, etc., he was not entitled to the return of his payments where the value of the use of the premises by him exceeded such payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163-165; Dec. Dig. § 98.*]

2. VENDOR AND PURCHASER (§ 101*) — RESCISSION BY VENDOR—NOTICE.

A vendee could not complain because a vendor gave notice of rescission on January 27th, and commenced action therefor on Feb-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ruary 4th, where he failed to show at the trial his ability to make the payments required under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.*]

3. VENDOR AND PURCHASER (§ 93*)—RESCISSION BY VENDOR—DEFAULT BY VENDEE.

Where a vendee had possession under the contract for six years, and for more than two years failed to make any payments of principal or interest as required by the contract, a rescission by the vendor could not be denied on the ground that he had not been injured by the vendee's default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.*]

4. VENDOR AND PURCHASER (§ 186*)—PAYMENT OF PURCHASE PRICE—EXCUSES.

That a vendor did not have a merchantable title did not excuse the purchaser from making the payments required by the contract of sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 341, 673; Dec. Dig. § 186.*]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by L. H. S. Barrows against Stephen A. Harter. Judgment for plaintiff, and defendant appeals. Affirmed.

M. B. Butler, of Pasadena, for appellant.
J. H. Merriam, of Pasadena, for respondent.

HENSHAW, J. Under a contract of sale of a certain piece of property, entered into between plaintiff and defendant herein, the vendee entered into possession, and thereafter continuously remained in possession of the property contracted to be sold. Under this contract, and an extension thereof agreed to by the parties, defendant paid a small portion of the purchase price and certain sums by way of interest, altogether, as the court finds, aggregating \$570. He ceased paying interest in May, 1909, and continued in possession of the land thereafter without paying any part of the principal or interest as provided in the contract. On January 27, 1911, plaintiff gave notice to defendant of his rescission of the contract, offering to restore to defendant everything of value which he had received under the contract upon condition that defendant do likewise. Subsequently, on February 4, 1911, plaintiff commenced this action. Defendant by answer and by cross-complaint expressed his willingness and ability to comply with the terms of the contract and make the payments therein contemplated, and further demanded from plaintiff the return of the moneys which he had paid upon account of the purchase price. The court, in addition to the findings indicated by the above statement of facts, further found that plaintiff had rescinded in accordance with law; that defendant was not able to comply with the terms of his contract; found that the value of the use and occupation of the premises

which had been enjoyed by defendant since the date of the contract, for a period exceeding six years, was \$700, and decreed a rescission of the contract and the restoration to plaintiff of his land and premises.

[1] Upon this appeal the questions principally urged are that the court erred in not decreeing a repayment to the vendee of the amount which he had paid, principal and interest, upon account of the purchase price, and this, without diminution on account of the value of the rents, issues, profits, use, and occupation of the premises in possession of the vendee. In support of this, certain detached utterances are taken from cases, these utterances declaring very properly that in rescission the vendee is entitled to a restoration of the moneys paid by him. Ordinarily he is so entitled. He is entitled, as well, to an allowance for permanent improvements, taxes paid and the like. The cases to which we have adverted, however, are cases where there was no question of set-off against these amounts on account of the use and occupation of the premises. In cases of rescission, under general principles of equity as well as under our Code provision, each party, when it is practicable, must restore to the other whatever of value he has received. Such is the rule of section 1691 of the Civil Code, and it is still further emphasized by section 3408, which declares: "On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." The principle under which the court in the case at bar acted is that clearly enunciated in *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489, and uniformly followed throughout all our later decisions. In that case, speaking of a vendee's right under rescission against a defaulting vendor, it is said that it is his duty to "offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth." That the rule in this state is not peculiar to the state may be seen from 2 Warvelle on Vendors, § 869, and cases. Here the sum actually paid by defendant was \$570. The value of the use of the premises is found to be \$700. The court did not even give judgment against the defendant for the difference, \$130, but allowed him to retain it. He has no cause of complaint.

[2, 3] Appellant further urges that, notwithstanding his own default, the court should not have decreed a rescission, since notice of rescission was given on the 27th day of January, 1911, and the action was commenced on the 4th day of February, 1911. To this it is sufficient to answer that, while in his answer the defendant expressed his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

willingness and ability to make the payments required of him by his contract, even so late as the time of the trial he failed absolutely to show his ability. If his expressed willingness had then been accompanied by a present ability to pay, the decree might have been different. Under the circumstances he has nothing to complain of. He urges further in this connection that plaintiff was not injured in any respect by his defaults and delays, but, in contemplation of the fact that plaintiff had been deprived for six years of the possession of his land, and for more than two years received no return by way of principal or interest upon the purchase price, it cannot be said that this position is well taken.

[4] Complaint is made of the refusal of the court to permit the entry in evidence of a certain judgment roll which confirmed the title to the property in the plaintiff. It is said that this judgment roll would have shown that up to the time that the judgment became final the plaintiff did not have a merchantable title. But this fact, if it be a fact, affords no justification for defendant's defaults. *Joyce v. Shafer*, 97 Cal. 336, 32 Pac. 320; *Backman v. Park*, 157 Cal. 607, 106 Pac. 686, 137 Am. St. Rep. 153.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(165 Cal. 48)

WURZBURGER et al. v. NELLIS et al.
(L. A. 2,965.)

(Supreme Court of California. March 3, 1913.)

1. APPEAL AND ERROR (§ 854*) — REVIEW — GROUNDS OF DECISION.

An order granting a new trial in general terms would be sustained if properly granted upon any of the grounds of the motion therefor, even though it appeared that the trial court granted it on another ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

2. NEW TRIAL (§ 70*) — GROUNDS — VERDICT CONTRARY TO EVIDENCE.

Where, in an action against a road commissioner for injuries caused by falling into a gully or wash in the portion of a highway next to the property line at a point where there was no sidewalk, it appeared that the condition of the highway had existed for six months, but the commissioner testified that he had no knowledge thereof, and that that road district was very large, including about 75 miles of worked roads, the granting of a new trial after a verdict for plaintiff for insufficiency of the evidence to show notice would not have been an abuse of discretion, and hence an order granting a new trial in general terms would not be reversed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. HIGHWAYS (§ 188*)—DEFECTS—CARE REQUIRED.

A street commissioner or road overseer can be held to the exercise of only a reasona-

ble degree of care with respect to defects in highways.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 480; Dec. Dig. § 188.*]

4. HIGHWAYS (§ 213*)—NEW TRIAL (§ 157*)—DEFECTS—QUESTIONS FOR JURY.

What constitutes a reasonable degree of care on the part of a street commissioner or road overseer is primarily a question for the jury, but is also one which the trial court may consider in passing upon a motion for a new trial.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 535; Dec. Dig. § 213.* New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. § 157.*]

5. HIGHWAYS (§ 188*)—DEFECTS—CARE REQUIRED.

The degree of care required from a road commissioner in a rural district is quite different from that imposed upon a street superintendent in a city, and the requirement respecting notice is different from that governing a city street superintendent.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 480; Dec. Dig. § 188.*]

6. HIGHWAYS (§ 198*)—DEFECTS—PERSONS LIABLE.

While under Pol. Code, § 2641, requiring road commissioners to see that all orders of the board of supervisors pertaining to roads in his district are properly executed, section 2643 giving boards of supervisors general supervision over roads in the county, and section 2645 requiring the road commissioner, under the direction and supervision, and pursuant to the orders of the board of supervisors, to keep the highways in good repair, the functions of the road commissioner are to be performed under the direction of the board, it is his positive duty of his own motion to keep the roads clear from obstructions and in good repair, or at least to report to the board cases requiring attention, and hence he was not relieved of liability for injuries caused by a defect in a highway merely because the board had not ordered its repair.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 504-507; Dec. Dig. § 198.*]

7. HIGHWAYS (§ 214*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries sustained on a highway outside an incorporated city or town, it appeared that plaintiff came to the end of a sidewalk and proceeded three or four steps when she fell into a gully. The highway, with sidewalks constructed along a portion of it, had been accepted by the county. The court charged that plaintiff had a right to assume that the sidewalk was in a reasonably safe condition for her to pass over with ordinary care; that the highway included both the roadway and the sidewalks; that those in charge of highways outside of cities and towns were not bound to provide sidewalks, and had no power to do so, except under special circumstances not shown in that case; and that one walking along such a highway had no right to assume that there was a sidewalk at any particular point. *Held*, that the instructions were not inconsistent; their purport being that, where sidewalks existed, a traveler was entitled to depend upon their safety, but was not entitled to assume that they continued throughout the entire length of the road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 538-540; Dec. Dig. § 214.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Bessie Currier Wurzbarger and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

husband against C. J. Nellis and others. From an order granting a new trial after a verdict and judgment in her favor, plaintiffs appeal. Affirmed.

Moore & Finkenstein, of Los Angeles, for appellants. Hartley Shaw, J. D. Fredericks, Dist. Atty., D. M. Hunsaker, and Hunsaker & Britt, all of Los Angeles, for respondents.

MELVIN, J. Plaintiff Bessie Currier Wurzburger was injured by a fall into a gully or wash which traversed a portion of a public road in Los Angeles county. The accident occurred in the evening after 8 o'clock, while Mrs. Wurzburger was proceeding along the road. Mrs. Wurzburger testified that she walked along the sidewalk to a point where it ended abruptly. She stepped down a few inches to the ground, and, thinking that she was traversing a cross street, proceeded three or four steps, when her foot struck the edge of one of the boards by which, as she expressed it, "the wash was banked up," and thereupon she plunged headlong into the gully. As a result there were fractures of the femur and the coccyx, lacerations of the shoulder, and scars and bruises upon her face. She suffered great pain, was confined to her bed for several months, and, because of the fracture to the femur, one leg is shorter than the other by more than half an inch. The court instructed the jury to render a verdict in favor of all of the defendants, except R. W. Pridham, who was the member of the board of supervisors having charge of the roads in the district in which the accident occurred. A verdict against him for \$11,500 was returned by the jury, and judgment was entered accordingly; but upon motion a new trial was granted. This appeal is by the plaintiffs prosecuted from the order granting said motion.

[1] The grounds of the motion were: (1) Insufficiency of the evidence to justify the verdict; (2) that the verdict was against law; (3) that material errors of law, to which respondent excepted, occurred at the trial; and (4) that the damages were excessive, appearing to have been given under the influence of passion and prejudice. There were many specifications of alleged insufficiency of evidence to support the verdict. The order granting the motion was in general terms. Counsel for the plaintiffs concede that, if the order is capable of rational support upon any of the grounds mentioned in the motion, it should stand, but they contend that all of the alleged reasons for granting the motion were without merit. In their brief, counsel say the court informed them that the motion for a new trial was granted because of errors of law in admitting and rejecting testimony. This, however, does not appear from the record; and, even if the court had by a written opinion given reasons for the action taken in making the order for a new trial, we would be compelled to

sustain the order, if it could have been granted with propriety upon any of the grounds assigned. *Morgan v. Robinson Co.*, 157 Cal. 351, 107 Pac. 695.

There was a conflict of testimony upon the matter of notice to defendant Pridham. The duties of a road commissioner are defined by section 2645 of the Political Code, which is in part as follows: "Road commissioners, under the direction and supervision and pursuant to orders of the board of supervisors, must: (1) Take charge of the highways within their respective districts. (2) Keep them clear from obstructions, and in good repair. (3) Cause banks to be graded, bridges and causeways to be made when necessary, keep the same in good repair, and renew them when destroyed."

[2-5] Appellants insist that there was no substantial conflict because of the length of time in which the yawning waterway had existed. Brand boulevard, which is the road involved here, was accepted by the board of supervisors on November 22, 1900. Mrs. Wurzburger was injured about half a year later, on May 27, 1910. Mr. Pridham testified that at no time prior to the accident had he any knowledge or information regarding the unsafe condition of the sidewalk in question. He also testified that the Tropico road district, in which Brand boulevard lay, was territorially very large, and that there were about 75 miles of worked roads in said district. On his behalf counsel here maintain that he is not in the same position as a street superintendent in an incorporated city, and that therefore proof of the notice to him, either actual or imputed, of the condition of the street ought to be very clear. *Doeg v. Cook*, 126 Cal. 215, 58 Pac. 707, 77 Am. St. Rep. 171, is cited by appellants in support of the doctrine that, the existence of the imperfection in the road and the duty of the public officer to keep the highway in repair being shown, his responsibility for any injury caused by a fall of a pedestrian into the cavity in question follows as matter of course. It is to be remembered, however, that *Doeg v. Cook*, and also *Merritt v. McFarland*, 4 Cal. App. 391, 88 Pac. 369, were both cases in which the injuries that were the subject of litigation occurred within the limits of municipalities, and in both of those cases the negligence charged against the public officer was of a gross character. Mr. Justice McFarland, in his concurring opinion in the former of these cases, said that "a street commissioner or road overseer could be held to the exercise of only a reasonable degree of care." This is the true rule, and the question what constitutes "a reasonable degree of care" is primarily one for the jury, but it is also a question which the trial court may consider in passing upon a motion for a new trial. *Morgan v. Robinson Co.*, supra. The degree of care exacted from a road commissioner in a rural district is quite different

from that imposed upon a street superintendent in a city, and consequently the requirements respecting notice to persons charged with the repairing of rural roads are different from those governing the same subject-matter in relation to urban officers.

In *Elliott on Roads* (3d Ed.) § 497, the rule is thus expressed: "The difference in the extent of the servitude, in the authority of the local officers and in the nature and situation of rural roads, supplies strong reasons for discriminating actions against cities and towns from actions against counties and townships to recover damages for special injuries caused by negligence in constructing and maintaining roads and streets. In the case of a city, the territory is comparatively small, the streets are in almost constant use, the officers more numerous, the means of improving and repairing are at ready command, the necessity for vigilance and care is great, and the means of knowledge easily attainable, whereas in the case of a sparsely inhabited rural district it is essentially different. Negligence is seldom absolute, for whether an act is or is not negligent generally depends upon attendant facts and circumstances. What would be ordinary care in a country district, and in maintaining a secluded highway, may not be care of any reasonable degree in a populous city or in maintaining a much traveled street. In respect to the question of notice, which is often a conspicuous element in actions against public corporations to recover damages resulting from a special injury, the fact that the way is in a rural district and not in a city must often exert an important influence. Care is proportioned to the danger that may be reasonably apprehended, and duty is measured by the means, opportunities, and obligations supplied and imposed by the law upon the officers to whom is committed the care and control of the public ways of the state. It would be plainly unjust to measure the obligations and duties of officers in charge of rural highways by the rules which govern officers placed in charge of the streets of a town or city. What would be care and diligence on the part of the one class of officers may often be culpable negligence on the part of officers of the other class."

It is also to be remembered that as a rule the attention of the supervisor is not called to that part of the roads in his district near the property line. This fact is recognized by the Legislature because it is provided that the supervisors may, in their discretion, establish a "side path" on a public highway for pedestrians and bicyclists. *Pol. Code*, § 2643, subd. 12. We do not wish to be understood in the present case as holding that, as matter of law, the defendant Pridham was not charged with notice of the defect in the road. We are merely pointing out the conflict between his positive statement

that he knew nothing of the defect in Brand boulevard and the presumption which might arise from the long-continued existence of the gully crossing the line of the sidewalk that he should be charged with constructive notice of the danger to travelers on that highway. If the trial court, without abuse of discretion, might have resolved that conflict in favor of the defendant Pridham, on his motion for a new trial, then we are not at liberty to reverse its action. We do not find an abuse of discretion, and therefore we must affirm the order granting a new trial.

We might dispose of this appeal with the foregoing discussion; but, as the case will probably be tried again, it may be well to discuss some of the other questions presented in the briefs.

[6] Respondent Pridham contends that the evidence was insufficient to justify the verdict because it does not appear that he had been directed by the board of supervisors to repair the sidewalk. He insists that since, by section 2641 of the Political Code, each road commissioner shall see to it that all orders of the board of supervisors pertaining to roads in his district are properly executed, that because, by section 2643 of the same Code the board of supervisors is given general supervision over the roads in the county, and that as by section 2645 the road commissioner, under the direction and supervision and pursuant to the orders of the board of supervisors, must keep the highways in good repair, therefore he is under no duty to act upon a needful repair, unless ordered so to do by the board. While it is true that the functions of a road commissioner are to be performed under the direction of the board of supervisors, yet he has certain positive duties to be executed of his own motion, and one of these is to keep the roads clear from obstructions and in good repair. He has at least the duty of reporting to the board cases requiring attention, and is culpable if he fails to do all that he may reasonably be expected to do toward providing for the repair of the dangerous places in the roads of his district. There is nothing in *Edwards v. Brockway*, 16 Cal. App. 627, 117 Pac. 787, in conflict with this view. That was a case arising under a freeholders' charter, by which the superintendent of streets was limited in his powers and could not even make repairs in a street without an order from the city council.

[7] There was no conflict in the instructions designated by appellants. By instruction No. 5 the jury was informed that plaintiffs had a right to assume that the sidewalk was not a dangerous place, but in a reasonably safe condition for her to pass over with the exercise of ordinary care. By instruction No. 17 the court told the jurors that the highway included both the roadway and the sidewalks. By instruction No. 12 they were

informed that: "The authorities having charge of highways outside of incorporated cities and towns are not bound to provide sidewalks on such highways, and have no power to do so, except under special circumstances not shown to exist in this case; and any one walking along such a highway has no legal right to assume, without investigation, that there is a sidewalk on any particular part thereof." It appears, without contradiction, that the county had accepted the boulevard with the sidewalks constructed along a portion of it. Where those sidewalks existed the traveler was as much entitled to depend upon their safety as if the board had by formal action set apart a strip of the road as a "side path." Instruction No. 12 merely informed the jurors that, because sidewalks existed along a portion of the road, that gave no basis for the belief on the part of the pedestrian that they continued throughout its entire length. No other alleged errors require notice.

The order from which this appeal is taken is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(105 Cal. 70)

DAVIS v. PARSONS et al. (L. A. 2,998.)
(Supreme Court of California. March 6, 1913.)

1. GIFTS (§ 49*)—UNDUE INFLUENCE—EVIDENCE.

In an action by a father for possession of policies of insurance assigned to him by his daughter as a gift, evidence held to warrant a finding that the assignment of the policies was not freely and voluntarily made.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

2. GIFTS (§ 38*)—UNDUE INFLUENCE—MENTAL DEBILITY.

In having a gift set aside for undue influence, it matters not that the donor's life was not endangered, if, by reason of mental debility and nervousness following a protracted period of alcoholism, the donor believed it to be in danger, nor that hallucinations were not produced by the conduct of the donee, if the donor did entertain them; and if through fear, however groundless, the donor executed a deed of gift, it was not the voluntary act of a disposing mind.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 74; Dec. Dig. § 38.*]

3. GIFTS (§ 49*)—RATIFICATION—EVIDENCE.

In an action to enforce an assignment of insurance policies, evidence held to warrant a finding that defendant had not ratified the assignment.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

4. TRIAL (§ 89*)—STRIKING VOLUNTARY EVIDENCE.

It was not error to refuse to strike a voluntary statement of a witness from the evidence, where such evidence would have been proper if in answer to a question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

5. GIFTS (§ 48*)—UNDUE INFLUENCE—EVIDENCE.

In an action to enforce an assignment of insurance policies, where defendant claimed that the assignments were not freely made, evidence of quarrels between plaintiff's wife and defendant, wherein the wife threatened her harm if she did not do as plaintiff told her, although not having anything to do with the direct question of the assignment, were admissible to show threats and to show defendant's state of mind.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 87-94; Dec. Dig. § 48.*]

6. APPEAL AND ERROR (§ 882*)—INVITED ERROR—EVIDENCE.

Where the attorney for plaintiff told the court that plaintiff was perfectly willing if the court wished, to go into the question of the relation of plaintiff with his present wife before divorce of a former wife, he cannot complain of the admission of evidence on such point.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8591-8610; Dec. Dig. § 882.*]

7. WITNESSES (§ 302*)—PRIVILEGE OF WITNESS.

A ruling of the court that, if answers to questions to a witness as to her mode of life and occupation in certain cities tended unnecessarily to humiliate her, she need not give them was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1047, 1048; Dec. Dig. § 302.*]

8. TRIAL (§ 48*)—EVIDENCE INADMISSIBLE IN PART.

In an action to enforce an assignment of insurance policies, where it was asserted by defendant that she did not make it voluntarily, evidence of a servant of defendant as to defendant's distressed state of mind after going to plaintiff's house was not rendered inadmissible because she stated what defendant told her plaintiff has said to her.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

9. EVIDENCE (§ 265*)—ADMISSIONS—UNDUE INFLUENCE—LETTERS.

In an action to enforce an assignment of insurance policies, where defendant attacks the assignments and all letters written by her upon the ground that they were the result of coercion and undue influence, she is not bound by declarations in a letter, and may testify to the contrary, although she admits that the writing and signature are hers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

10. EVIDENCE (§ 256*)—EXCLUSION OF IMPROPER EVIDENCE.

Where a typewritten letter, purporting to be from defendant to others, was not signed nor sent to its addressee, and defendant testifies that it was not her voluntary act, the letter itself bearing internal evidence of that fact, some of the expressions being in plaintiff's language, the court properly refused to allow its admission in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1003, 1005; Dec. Dig. § 256.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hut-ton, Judge.

Action by Carlyle C. Davis against Charles C. Parsons and others. Judgment for defendants, and plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

John W. Kemp, John S. Mitchell, W. A. Alderson, and Kemp, Mitchell & Silberberg, all of Los Angeles, for appellant. Joseph Scott and James L. Irwin, both of Los Angeles, for respondents.

HENSHAW, J. This action was brought by Carlyle C. Davis, plaintiff, against his daughter, Nellie Madelein Davis, and against the trustees under the will of Martha Ellen Davis, mother of Nellie Madelein Davis, by which will certain property of the deceased was devised and bequeathed to the trustees for a period of years in trust for the use and benefit of defendant Nellie Madelein Davis. Summarized, the pleadings amount to this: Of the property and funds of the trust in the hands of the trustees were certain life insurance policies upon the life of plaintiff, which policies plaintiff had made over to his wife, Martha Ellen Davis, when, some years before, differences had arisen between them, culminating in a divorce. These policies were four in number, and were for the aggregate sum of \$17,500. Their surrender value was between \$8,000 and \$9,000. The plaintiff pleads that his daughter voluntarily and for a good and valuable consideration assigned and transferred these policies to him on the 3d day of November, 1906; that the policies were in the hands of the trustees; and that, before the delivery of the policies to him by the trustees, the defendant, Nellie Madelein Davis, attempted to revoke and repudiate her assignment and demanded of the trustees that they do not deliver the policies to the father. The trustees answered, in substance, asking the court to define their duties in the premises. The daughter pleads by answer and cross-complaint that her signatures to the purported written assignments were secured from her by the plaintiff through duress, violence, fraud, and undue influence. The court found, in accordance with the allegations of the cross-complaint, that Nellie Madelein Davis never freely or voluntarily executed the assignments; that they were not executed for a good and valuable consideration; that their execution was not of the free act and will of Nellie Madelein Davis; but that the execution was procured from her by plaintiff through the exercise of undue influence, coercion, and menace. Upon the judgment which followed, ordering the cancellation of the asserted assignments, and from the order denying his motion for a new trial, plaintiff appeals.

A review of the evidence is made necessary by reason of the fact that the principal contention upon appeal is that it does not support the findings of the court. The necessity of the review in this case is the more unfortunate, not only because of the relationship existing between the plaintiff and the principal defendant, but because as it appears, from the more or less veiled intimations of counsel, certain findings of the court

were drawn as inferences from the evidence, rather than from the positive statement of witnesses. This will be made the more apparent as the discussion proceeds.

[1] Plaintiff, his former wife, Martha Ellen Davis, and their one child, the defendant Nellie Madelein Davis, lived for many years in Colorado. The plaintiff was the proprietor of two daily newspapers in Leadville. At the time of the trial, the plaintiff was over 60 years of age and his daughter 36 years of age. The plaintiff had been in ill health for a number of years. Differences had arisen between himself and the mother of defendant, which led to their separation, and ultimately to their divorce. As an outgrowth of these differences and in the settlement of the property rights, plaintiff made over to his wife these insurance policies fully paid up. After the divorce the husband married again, and with his second wife came to California. In 1906 the divorced wife died, leaving, as has been said, her property to trustees in trust for her daughter. That the plaintiff had been a most kind and indulgent father to his daughter is abundantly established even from the lips of the daughter herself. She had been educated at home and abroad, studied for three years in an art school in Paris, spoke French and German, and upon her return from abroad entered a dramatic school in New York and went on the stage. In 1895, when her father was ill, she took charge of his two daily newspapers at Leadville, remaining there in charge until 1896, for a period of nearly a year. Then, upon \$5,000 being given her by her father, she returned to New York and engaged in the business of furnishing musical, literary, and other entertainment for social functions. But (this, however, appearing by inference and intimation rather than by direct proof) the daughter fell into evil ways and into dissolute habits. She led, or was willing to lead, an immoral life. She smoked and drank alcoholic liquors to excess. Thus, in a letter, one of the trustees, Mr. Parsons, wrote to her upon October 8, 1906, as follows: "You must realize that your life during the past eight years with its history of hospitals, sanitariums, etc., is anything but safe, secure, or dignified. It caused your mother unutterable woe. I have seen upon her face expressions of intense agony, of unutterable grief, when speaking of you. I have no doubt her death was hastened by the overwhelming sorrow that your career brought upon her. She was at times inclined to dispose of her property otherwise than by leaving it to you. Her mother's affection, however, prevailed, but it was her expressed desire that the estate should be preserved for a period of five years in the hope and expectation that during that time a greater sense of responsibility would develop in you. * * * If you leave your father's house and pursue the life you have been leading during the past eight years, we will not respond to your

letters and telegrams asking for money beyond the amount we have fixed, no matter what occurs."

In 1906 plaintiff, with his present wife, Mrs. Mollie Davis, was living upon a tract of land which he had purchased near San Gabriel in Los Angeles county. While there they learned from her letter that defendant was in a sanitarium in San Diego. The wife of plaintiff went to San Diego and, upon the promise of the daughter to reform, to cease smoking, and the use of alcoholic stimulants, Mrs. Davis took her to her father's home. Thus, on the last of October or the 1st of November, 1906, the daughter was received into her father's household. Two or three days afterwards—that is to say, upon November 3d—the daughter executed, in consideration of love and affection, the assignments to her father of the insurance policies. Of the circumstances connected with and attending these assignments, the plaintiff declares that, though sick and enfeebled, he was by stress of poverty compelled to do manual labor on his home place; that he was so engaged in painting his barn when his daughter came to him, saying that it was too bad that he was forced to do such work at his age, and that she was going to transfer to him the insurance policies which he had given her mother, voicing the hope that he could realize enough money from these policies to make his old age more easy and comfortable. Plaintiff expressed his gratitude to his daughter, and told her that he was not physically able to do the work he was compelled to perform; that her proposition was most generous; and that, if she carried it out, it would enable him to pay his debts and employ some one to do the hard work on his little ranch. At no time did he or did his wife ever suggest to the daughter the assignment of the policies. On November 3d plaintiff had further conversation with his daughter. He was then preparing to go to Los Angeles to meet Mr. Parsons, one of the trustees of the defendant's estate. The daughter drove with him to the station about a mile away, and on the drive told him that she wished him to have the necessary papers prepared, while he was in Los Angeles, so that she could execute the assignment. Plaintiff told her that he would have this done and would probably bring a notary public with him on his return to take her acknowledgment. Plaintiff then, while in Los Angeles, did employ Mr. Carl A. Johnson, a practicing attorney, and a notary public, who prepared the assignments; he returned to his home accompanied by Mr. Johnson and also by Mr. Parsons, one of the trustees, whom plaintiff had known for many years. Upon arrival at his home, plaintiff testifies further that his daughter followed him into the bathroom and asked him if, after executing these assignments, she would be expected to pay for her board, to which

the father laughingly replied that he thought she "would be entitled to her keep at least." He gave the papers to his daughter, saying, "Here are the papers, Nellie, which you authorized me to have made out." She took them and asked if it was necessary to read them all, to which her father replied that it was not necessary as they were duplicates save in the name and description of the policies. The daughter sat down at a desk, read the papers, and then and there signed them, but, before signing them, he said to her that she must sign them of her free will and for no other reason than that she wanted him to have the money which the policies represented, otherwise that she must not sign them at all. She signed them, acknowledged them, and gave them to him with a kiss. The notary's recollection is that, before taking Miss Davis' acknowledgment, he asked her if she understood what the instruments meant, and that she replied that she did and that it was all right; that it was not true that Miss Davis was crying at the time, nor that, in answer to his question, "Do you do this of your own free will?" she replied that she did it because she had to and had no will of her own. After the execution of the papers, they all sat down to dinner and "had a general social conversation and pleasant evening." Mr. Parsons, the trustee, testifies that, upon arrival at the house, Miss Davis spoke to him relative to the making of the assignments, and asked him if it was all right, and he replied: "Nellie, I don't care to advise you in this matter. This is a matter entirely between you and your father, and besides I am the trustee of this estate, and I would rather you managed those things. I would rather you settled the matter between you and your father. I will say this to you, that, if you do sign the papers transferring these policies, you must do it knowing what you are doing, and it must be done voluntarily and free from any pressure or influence of your father or any one else. It must be your voluntary act, I said, otherwise the assignments would not be effective." She made no dissent. The witness never made any suggestion to Miss Davis that she transfer the policies, and never in the slightest attempted to influence her to do so. Fixing the surrender value of the policies at about \$8,000, there was \$10,000 more remaining in the trust estate, so that the gift was of a little less than half of the total trust estate. The trust estate, under prudent and economical management, yielded a net income of about \$50 a month.

The daughter's story is that she never saw her father painting a barn; that she never suggested giving him the policies; but that he said to her that he had paid all the money on the policies and that they really belonged to him. She never volunteered to make an assignment of them to her father, but, to the contrary, her father represented that "he

had so much property in Los Angeles and he had that beautiful ranch—I have forgotten how much it was worth—now many thousand dollars;” that upon the 3d of November, when her father was in Los Angeles, she had a serious quarrel with her stepmother, who threatened to have her confined as an insane person; that she tried to telephone to get an express wagon to remove her things out of the house, and her stepmother struck her and took the telephone from her. Then, in the afternoon when her father, Mr. Parsons, and Mr. Johnson arrived, her father took her in the bathroom and told her he was terribly in debt; that the place was mortgaged; that the insurance policies were of no value to her, and that, if she would make them over to him, he would leave her out of his estate as much money, or more, as their value to him; that, while he was much harassed by debts at present, in a few years his property would increase enormously in value. “Then we went out into the other room, or we went through the living room and out through the porch where the desk and table and everything was, and the papers were all ready for me to sign, and I signed them. I didn’t know what they were. I didn’t read them. They are very long papers. If I had read them they never would have got out. So I suppose I didn’t ask for proof he would give me something. He is my father, and he always was truthful to me, and so I believed he would give me the value of those things, and still I wanted Mr. Parsons to take me to town, and when I signed these I went to Mr. Parsons. He was in the living room. I said, ‘Mr. Parsons, are you going to witness this? Are you going to witness my giving up everything I own?’ He said, ‘No, Nellie, that would not do at all. I am trustee of the estate’—so there was nobody to stand up for me, and, you know, my room opened off the porch. Mrs. Davis slept right by my door, and I am afraid of Mrs. Davis. What more is there?” When Mr. Johnson, the notary, asked her if she signed the papers of her own will, she said, “I don’t know if you can say I have a free will or right,” and she was crying. Mrs. Davis also told her that she could never collect a cent on the policies, and, in case of her father’s death they were of no value; that the policies were only good during her father’s lifetime to borrow money on; that she begged Mr. Parsons, when he arrived at the house, to take her away as she was in fear of her life.

Mr. Parsons’ testimony upon this is that it did not occur on November 3d, but upon the day preceding, when he was a visitor at the father’s home; that Miss Davis then came out of the house crying and said, “Won’t you take me away from here?” or something of that kind; and then said something about some trouble with her stepmother. “I said, ‘Nellie, I have nothing to do with you per-

sonally,’ and I said, ‘You must not expect me to take you away from here,’ and then I said, ‘There is no use of any excitement about this or worry. I will inquire into it. We will adjust this matter in some way, perhaps, before I leave.’ Soon after that we sat down and talked, and she got over her weeping, and everything was apparently very pleasant and cheerful the balance of the evening. On November 3d Miss Davis herself drove us to the house. She was not weeping that evening. I think she has confounded that with what occurred the night before.”

The explanation given by Mrs. Davis of the difficulty between herself and her stepdaughter is that the stepdaughter in her craving for liquor sought in every way to indulge her appetite, and at times to escape from the parental roof, and that it was necessary for her to interfere when the daughter would phone to the grocery store for liquors, or when she was contemplating flight from her father’s house. Thus her father and his wife both testified that upon at least one occasion the daughter, demanding money to return to New York, threatened to go to Los Angeles and earn it by an immoral life if it was not given to her. When Miss Davis testified to her fear that her stepmother would poison her, the stepmother insisted upon her taking certain pills, the explanation of the stepmother, herself formerly a trained nurse, is that the pills contained strychnine, were prescribed by a physician to be given to Miss Davis as a stimulant while recovering from her debauch, and to furnish aid in resisting her alcoholic craving.

[2] The appellant insists that the evidence of defendant is not inconsistent with the proofs offered by plaintiff, and that in many particulars it is so incoherent and inconsistent with itself that it is not entitled to such credit that a reviewing court will say that it raises a conflict. But here again, drawing the inferences from that evidence which the trial court must have drawn, and with the advantage which the trial court possessed of having the witnesses before it, it seems reasonable to say that these very inconsistencies and incoherencies give evidence of a mind, or of a state of mind, on the part of the defendant justifying the trial court in withholding its approval of the validity of the assignments. Thus it matters not if Miss Davis’ life was not endangered, if, by reason of her mental debility and the nervousness following her protracted period of alcoholism, she believed it to be in danger; it matters not if she entertained hallucinations not produced by the conduct of her father or stepmother. If, in fact, she did entertain them, and through fear of them, however groundless, executed the assignments, it was not the free and voluntary act of a disposing mind. Such, we conclude, must have

been the view which the trial court took of this evidence, and in this view the question of the confidential relation between parent and child enters very little, if at all. By this is meant that such confidential relation need not be established as the foundation from which to attack the transaction. The case rests upon the salient facts that the dissolute daughter returning to the Davis roof after a protracted alcoholic debauch which ended in a sanitarium, endeavoring by the father's own testimony to escape from that roof, threatening to lead an immoral life to get money to escape, apparently desirous of returning to her former life, necessarily debilitated in health and with ragged nerves, gives to her father nearly one-half of her trust property, declaring that she did so under pressure from her father, in fear of her life, and to buy her peace. Again we repeat that, however improbable the narration is in fact, it may well to the mind of the court have seemed that Miss Davis believed the situation to be as she represented, a belief not supported by the conduct of her father, but a distorted belief springing from her own troubled brain. It is concluded, therefore, that a substantial conflict in the evidence is presented, and upon familiar principles this court will not disturb the conclusions found by the trial court.

[3] A subsequent ratification of the assignments is asserted by plaintiff. This ratification springs from the fact that the daughter resided with her father for some months after the execution, and repeatedly wrote to the trustees in terms confirming the assignments, in some instances the confirmation being outright, in others conditional; the conditions in one letter, for example, being that the trustees should continue to pay her \$50 a month and should turn over to her her mother's jewels. In another the confirmation was based upon the condition that her father and his wife should execute to her some sort of an agreement whereby she should receive the amount of the policies from their estates upon the death of the last survivor. But, as to these letters, it is shown that they were inspired by the father and in some instances wholly typewritten by him; the daughter doing nothing more than signing her name. True, the father says that the letters were the free act of the daughter, and were merely typewritten by him after consultation with her and confirmation by her of their substance. But the daughter's answer is still the same, that she was under her father's roof, under his absolute domination and control, that the trustees did not even pay her monthly \$50 to her, but paid it to her father so that she was penniless, and she simply signed whatever she was asked to sign until later in the year she wrote to the trustees herself repudiating the assignments, and consulted a lawyer in Los Angeles about the matter.

[4] Numerous exceptions were taken to the rulings of the court admitting and rejecting evidence. The first of these groups is the refusal of the court to strike out voluntary statements of the witness Nellie Davis. It has been said before that the testimony of Nellie Davis was rambling, in some respects contradictory, in others absolutely incoherent. Appellant asserts that the most glaring of these errors, and it will serve for a type of all, is the following: Shown a typewritten letter signed by herself, the court asks, "What is the date of this letter?" Mr. Kemp, of counsel for appellant, replies, "June 21, 1907," when the witness interjects, "Your honor, I never composed that, and I doubt if I ever wrote it, and yet the signature is mine." The court refused to strike this out. True, it was voluntary. True, it was not in response to any question, but it was perfectly permissible evidence, if questions soliciting it had been asked; and the refusal of the court to strike out the volunteered matter was but a time-saving device, since unquestionably the same evidence would have been adduced under direct question and answer if it had been stricken out.

[5] The second group of exceptions is predicated upon the court's admission of the testimony of Nellie Davis concerning quarrels between herself and her stepmother, Mollie Davis. It may be well to quote this. Miss Davis is constantly asking the court if she may tell her story. Asked if Mrs. Davis ever said anything to her about the policies, she says, "May I tell what she said?" Q. No, not unless it is in reference to the assignment of the policies. A. May I say it? The Court: Yes, go on. A. She says, 'If you don't do what you are told to-night, Mr. Parsons will fix you, and if he don't I will.' And I said, 'You cannot do a thing to me, because I have never done anything that you could do anything for.' I was mad and I didn't need to talk like that— This was previous to the telephone incident. She said she had doctors that would swear things, and she said, 'If you land in an insane asylum in California, you will not get out of it,' and she said that Dr. Horn said there was nothing the matter with me physically, and I was not affected, and that I had not nervous prostration, but that I was mentally wrong. She told me that on the afternoon of the 3d, and she further said, 'If you get locked up in an insane asylum in California there was no chance.' I said, 'That is rubbish, because they cannot hold you. They have got to prove in court you are insane;' and she said "The testimony of two doctors is sufficient;" and I says, 'No, the testimony of two doctors is not sufficient, they cannot go into court and say you are insane;' and she says, 'They can in this state;' and I says, 'You cannot in New York;' and she says, 'They can in this state, and that is what they can do to you.' I believed it. But the first time

the policies were mentioned was when my father took me into the bathroom, and this was after the quarrel with my stepmother." Manifestly this evidence had nothing to do with the direct question of the assignments of the policies; but it is equally manifest that it gave evidence, first, of asserted threats upon the part of Mrs. Davis; and, second, of the condition of Miss Davis' mind. It was therefore admissible.

[6] The third alleged error is in admitting evidence offered by Miss Davis of occurrences in Leadville. The occurrences seemed to be the beginning of the marital differences between the plaintiff and his first wife and involved the stepmother, the present Mrs. Davis, who was at that time Mr. Davis' nurse. This evidence of itself amounted to nothing. It was simply a declaration by the daughter that the present wife exercised great control over the husband, and the conclusion of the witness that "Father would not have treated me that way if it had not been for her." That there had been differences was not in question, and the representation of Mr. Kemp, of counsel for appellant, was an invitation to the court to rule precisely as it did; he saying: "If the court wants to go into that proposition, we would be very glad to go into it. We have not a thing to conceal, as far as the relations of Mr. Davis' present wife are concerned." Here to insist that the admission of the evidence thus invited is prejudicial error is somewhat inconsistent.

[7] The next alleged errors were where the court permitted the witness Nellie Davis to refuse to answer certain questions. These questions were addressed to her mode of life and her occupation in the cities of Chicago and Boston. The ruling of the court was simply that, if the answers tended unnecessarily to humiliate the witness, she need not give them; and, resting upon this perfectly proper declaration of the court, she refused to answer. Code Civ. Proc. 2065.

[8] The next group of exceptions is addressed to the admission of the testimony of Maria McNally, given by deposition. Maria McNally had been a household servant of the Davises and came to California to live with Nellie Davis after the latter had left her father's roof. An example of these objections is the following: Nellie Davis was living in her own bungalow built for her by the trustees near to her father's place. The trustees were still paying the money for the support of Nellie Davis to her father, and not directly to her. She was obliged to visit her father's house upon her business affairs in the matter of her bills. The witness testifies to her frequent nervous and crying spells after returning from her father's house, and that the troubles of Nellie Davis seemed to have followed these visits. She is then asked: "Q. You never heard Nellie and her

father talking about the insurance policy? A. No, sir. I did not. Q. Had you never heard him make any complaint about the size of her bills? A. The grocery bills? Q. Yes. A. I certainly did. I did not hear him, because I was not there. I heard it from Nellie after she would come back. Q. All you know is what Nellie told you? A. All I know is what Nellie told me. Q. How frequently did she go over to her father's house? A. I do not think she ever went there except on business, and when she got her allowance she did not go over there at all. She went there when she had to go. Q. Did he give her the money, or pay her bills? A. No, he paid the bills. Q. He paid the tradesmen direct? A. Yes." The witness seems to have been a candid one. It was competent for her to testify concerning the condition of Nellie Davis upon her return from her father's home, that she was perturbed and in tears, and the fact that she frankly answers that she was not at Mr. Davis' house, did not hear the conversation, and so could not know the cause of Miss Davis' distress other than what Miss Davis herself told her, does not render her evidence inadmissible.

[9] A letter was introduced in the handwriting of Nellie Davis and signed by her. This letter is dated in June, 1907, is addressed to Mr. Walling, attorney for her trustees at Denver, and "begs leave to state" that the assignment of the insurance policies to her father was executed by the writer freely, and that her father never sought to influence or coerce her in the matter, "and, further, whatever promises he has made to me were made subsequent to the two acts mentioned, and not made as an inducement or condition;" the promises here referred to being promises to secure the defendant out of the estate of her father and his wife. The defendant is allowed to testify, over objection, touching the letter and its contents as follows: "That is not my English. My father composed that letter. I don't remember of ever seeing it, but it is my writing. I suppose it is one of those I signed when my father was in a hurry, when he went to town I had to sign often, because he was going—the postman was going. It was not necessary to read them over because he would tell me what was in the letter. I could not have been familiar with the contents of that letter when I signed it because I don't recognize it now. It is not my composition at all. The contents are new to me." It is asserted by appellant that, as respondent admits having written the letter and having signed it, she must have known the contents and is bound by the declarations therein contained. But in this appellant loses sight of the fact that the attack upon the assignments and upon all of this correspondence is that they were the result of coercion and

undue influence. As bearing upon these issues, the testimony of the witness was in point and admissible.

[10] The court refused admission in evidence of a long typewritten document purporting to be from Nellie Davis to her trustee, Mr. Parsons, the last page of which, however, was in her father's handwriting. This letter was neither signed by Nellie Davis nor sent. But appellant contends that it contains statements negating much of her testimony, and therefore should have been admitted. It was refused admission in evidence, first, for the reasons indicated, that the letter was not signed by Nellie Davis nor sent to its addressee, and, further, because she testifies—and the letter itself bears internal evidence of the fact—that it was not her free voluntary act, that only some of its expressions were hers, and others were those of her father. It was not error, therefore, for the court to refuse to receive this writing.

To sum up, therefore, it is sufficient to say that, while the direct evidence in the case strongly preponderates in favor of the fairness of the gift by the daughter to the father, yet, when consideration is paid to the character of the daughter, her habits of life, the restraint put upon her under her father's roof, her nervous condition, her apparent inability because of her habits to maintain herself, and the final fact that by this gift she is irrevocably parting with nearly half of her small property, it may not be said that the trial court was not justified in declaring that gift to have been one not freely and voluntarily made.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(154 Cal. 741)

CLAPP et al. v. CHURCHILL et al.
(L. A. 2,994.)

(Supreme Court of California. Feb. 20, 1913.
Rehearing Denied March 21, 1913.)

1. BOUNDARIES (§ 46*) — ESTABLISHMENT — AGREEMENT OF PARTIES—GROUNDS AND VALIDITY OF AGREEMENT.

The rule as to an agreed boundary line and its binding effect upon coterminous owners rests upon the fact that there is an actual or believed uncertainty as to the true line, acquiescence being merely evidence of the agreement, and then only when a formal agreement will be binding; but a formal agreement to fix a boundary line is void if either party knows that the agreed line is not the true line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

2. FRAUDS, STATUTE OF (§ 70*)—CONVEYANCE OF LAND—ESTABLISHMENT OF BOUNDARIES—"TRANSFER OF TITLE."

A valid formal agreement upon a boundary line is not a transfer of title within the statute of frauds; the theory of the law being that

there has been no conveyance of any land, but simply an agreement as to the land which the parties respectively own under circumstances estopping either from thereafter denying it.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7064-7070.]

3. BOUNDARIES (§ 37*) — ESTABLISHMENT — EVIDENCE OF UNCERTAINTY.

In an action to determine the boundary line between adjoining owners, plaintiff showed that he did not know where the true boundary line was until he caused his land to be surveyed, when it was ascertained according to the calls in his deed, and also defendant's acquiescence in his exercise of dominion over the strip in controversy. *Held*, that his own uncertainty was not defendant's uncertainty, and that there was no evidence that defendant regarded the boundary line as uncertain.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

4. EVIDENCE (§ 274*) — DECLARATIONS — BOUNDARIES.

In an action to determine a boundary line, plaintiff's testimony that he did not have a very distinct conversation as to the boundary line at the time he went into possession, and that it was indicated as the south side of adjoining property, and his testimony as to what he claimed as the boundary line during possession, was inadmissible, where it was not shown that such conversation was with defendant or that defendant knew of his claim.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

5. EVIDENCE (§ 471*) — ESTABLISHMENT OF BOUNDARY — ADMISSIBILITY OF EVIDENCE—REPLICATION.

In an action to establish a boundary line as marked by a hedge, testimony of a witness, who had sowed seeds for plaintiff on the disputed strip, that he supposed the hedge belonged to plaintiff, was inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Mary B. N. Clapp and husband against F. S. Churchill and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. I. Morrison, of Los Angeles, and F. G. Cruickshank, of Pasadena, for appellants. G. A. Gibbs, of Pasadena, and Richards & Carrier, of Santa Barbara, for respondents.

HENSHAW, J. This action was brought to determine the common boundary line between plaintiffs' land upon the north and defendants' land upon the south, and to restrain defendants from cutting down and destroying a row of pomegranate trees which plaintiffs assert are upon and define the boundary line. A nonsuit was granted, and from the judgment which followed plaintiffs appeal.

The land in controversy is a strip 4 or 5 feet wide and 590 feet long. There is no contention that there are any false calls in the deed to the plaintiffs, nor that there is any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

discrepancy between the calls and visible and declared monuments. The deed of the plaintiffs, it is stipulated, is certain in its terms, and, running the courses and distances of this deed, the boundary line is fixed 4 or 5 feet north of the row of pomegranate trees. Nor is this a case where the litigants hold from a common grantor, or where one, the owner of the whole tract, is the grantor of the other who thus becomes the owner of a portion of the tract. The case is one where plaintiffs to prevail must establish an uncertain boundary line, an agreement between the coterminous owners to fix that boundary line, and the fixing of that line by agreement, or must establish their title by adverse possession. The motion for a nonsuit was addressed to the insufficiency of the evidence to show plaintiffs' ownership of the property by either method. Thus, as one of the grounds of the motion, it was urged that no adverse possession for the statutory period with payment of taxes had been proven, and upon the other it was urged "that the plaintiff has not been in possession with improvements of a substantial order for five years; and that there was no dispute shown or uncertainty to make an agreement as to what the boundary line should have been with anybody; and there is no estoppel; and no improvements have been made such as would make it equitable that the plaintiffs should recover."

Upon the matter of adverse possession there is no contention that it was proved by plaintiffs that any title was thus acquired. Whatever may have been plaintiffs' acts of dominion, ownership, and control over the disputed strip, it is unquestioned that they did not pay the taxes thereon. The whole case, therefore, rests upon the proposition first set forth.

The action was brought in February, 1911. Plaintiffs acquired title to their property in 1905, more than five years prior to the commencement of the action. Title to plaintiffs' property stood in the name of Mary B. N. Clapp. Dr. Clapp, her husband, joined with her as plaintiff, testifies, in substance, that in purchasing and entering into possession of the land he took it for granted that the southern boundary line was the row of pomegranate trees with a fence, or the remnants of a fence running through it. The fence was a wire fence supported partly by the pomegranate trees and partly by some two or three old posts. Only parts of the fence were there. He had a new fence put up to keep the boys out. There was a building, "a kind of barn and chicken corral, and a house at the southeast corner of lot 7; the south end was tight up against this hedge." He had it torn down. He always supposed that the pomegranate trees marked his southern line. He had openly occupied all the property up to the hedge. He trimmed the hedge on his side and planted nasturtiums

and other flowers upon the strip, but they did not grow well because of the hedge. He had built a garage at the southwest corner of the property. No part of the garage proper was upon the disputed strip. Its southern side corresponded exactly with the line of plaintiffs' property as called for in the deed. However, the original steps of the garage were built upon the disputed strip, and these original steps were afterwards torn down and replaced by new ones upon the same spot. No objection was made by any one to these acts of dominion and control. The witness did not know that the pomegranate hedge was not the true southern line until he had a survey made in accordance with the calls of his deed and found that his line was thus established four or five feet north of the line of pomegranate trees. He did not know that the boundary stakes were there along the true line until shortly before his testimony when he saw them uncovered. This is substantially the testimony to support plaintiffs' case. It is silent upon several important matters. There is no word of testimony that the defendants, or any one of them, believed or declared their northern boundary line to be uncertain. There is no testimony about any agreement fixing the pomegranate hedge as the accepted boundary line because of such uncertainty, and the whole case of the plaintiffs resolves itself down to this: That plaintiffs did not know where the boundary line called for by their deed was, but supposed it to be the pomegranate hedge. There was no uncertainty even upon the face of their deed. The pomegranate hedge as the boundary line was a mere assumption upon their part. Plaintiffs exercised certain acts of dominion and control over the disputed strip. From the acquiescence by their silence of the coterminous owners to the south it is argued that this acquiescence, having continued for a period equal to that required by the statute of limitations, gives rise to the conclusive presumption of previous agreement, or, if not, to the conclusive presumption, at least to a presumption which has not been rebutted by any evidence.

[1] But the doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words,

if there be not an actual or believed uncertainty as to the true line.

[2] This is so because under our law title to real property can be transferred only by descent, devise, conveyance *inter vivos*, or by adverse holding, and to allow parties where their common boundary line was not uncertain or in dispute by a mere agreement to give one title which belongs in another would be the recognition of a mode of transferring title not countenanced by law. *Lewis v. Ogram*, 149 Cal. 506, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; *Mann v. Mann*, 152 Cal. 23, 91 Pac. 994; *Young v. Blakeman*, 153 Cal. 477, 95 Pac. 888; *Loustalet v. McKeel*, 157 Cal. 634, 108 Pac. 707. When such an agreement has been deliberately entered into, it is not the theory of the law that there has been a conveyance of any land from the one coterminous owner to the other, but it is simply that they have agreed between themselves as to the land which they respectively own under circumstances which estop either of them thereafter from denying it. This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line. But what is meant is that this inference of a doubtful boundary will not prevail against the proved fact to the contrary, namely, that there was no question or doubt or dispute between both parties over the boundary.

[3] In the case under consideration plaintiff's evidence completely breaks down in its failure to show an uncertainty touching the boundary line which would support such an agreement for, as is said in *Lewis v. Ogram*, *supra*, "such an agreement necessarily is not valid for any other purpose than that of settling an uncertainty in regard to common boundary." Plaintiff shows that he did not know where the true boundary line was until he caused his land to be surveyed, when it was easily determined. But his uncertainty was not the defendants' uncertainty, and there is not the slightest evidence that they considered that their northern boundary line was uncertain in its location. Therefore the acquiescence of the defendants in the acts of the plaintiffs in their exercise of dominion over the strip might make against them for their failure to assert their right, if title were claimed by adverse possession, a claim which has heretofore been said could not, in this instance, be sustained. But it is without meaning or potency under the contention of an agreed boundary line because, as has been said and shown, an agreement fixing a common boundary line can only have efficacy where the true boundary is either

uncertain in fact or is believed by the contracting parties to be uncertain.

[4] The witness Dr. Clapp was asked the question, "Will you state what conversation you had with reference to the south boundary line of your property at the time you went into possession there?" He answered, "I did not have a very distinct conversation in the matter, but the boundary line was indicated to me as the south side of that property, and I had no survey made of it." A motion to strike out the answer touching the conversation was made unless it was shown to have been a conversation with the defendants, and the motion was granted. The ruling was proper. The witness does not declare that this conversation was had with the defendants or any of them; he does not declare that the row of pomegranate trees was indicated to him as his boundary line. He had sufficiently indicated his own ignorance of his true boundary line, and this evidence would not in the slightest tend to show that the defendants or any of them were in like ignorance.

Again the witness was asked, "State what you claimed as the south boundary line of your property during the time you were in possession." While an objection to the question was made upon the ground that the evidence was inadmissible unless these claims were shown to have been brought to the knowledge of the defendants, and while the objection was sustained, nevertheless the witness was permitted to answer, and did answer freely: "We occupied all of the property up to the hedge openly. * * * Since we came into possession we have occupied it."

[5] A witness testified that he had sowed seeds for Dr. Clapp along the disputed strip, concluding his answer by saying, "and I have supposed that the hedge belonged to Dr. Clapp." The quoted portion of his answer was stricken out on motion. It is asserted that this was error. Clearly the supposition of the witness, even if it be dignified as do appellants by calling it his "opinion" touching the title to the property, was not admissible in evidence.

No other points upon the reception and rejection of evidence are made, and, for the reasons given, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(21 Cal. App. 56)

PEOPLE v. BERNARD. (Cr. 420.)

(District Court of Appeal, First District, California. Jan. 31, 1913.)

1. FORGERY (§ 44*) — SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for forging a check held to sustain a finding that the alleged drawer was a fictitious person.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 117-121; Dec. Dig. § 44.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 808½*)—INSTRUCTIONS.

An instruction in a forgery prosecution, which merely repeated the provisions of Pen. Code, § 470, defining forgery, upon which the information was based, was not erroneous, though parts of the section read did not apply to the case made by the information or proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1811; Dec. Dig. § 808½.*]

3. FORGERY (§ 37*)—ADMISSION OF EVIDENCE.

In a prosecution for forging the name of "Manuel Babbist" to a check, in which it appeared that no one by that identical name existed, evidence was admissible by one named "Manuel J. Baptist," a depositor, that the signature to the check was not his, and specimens of his handwriting were also admissible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 105-107, 111; Dec. Dig. § 37.*]

4. CRIMINAL LAW (§ 982*)—SENTENCE—SUSPENSION—HEARING MOTION FOR NEW TRIAL.

The fact that a motion for new trial was made and filed before accused was formally arraigned for sentence did not affect its status as a motion for new trial, so as to prevent the court from continuing the hearing thereof, as is authorized by Pen. Code, § 1191, especially where the continuance was requested by accused, so that jurisdiction to impose sentence was not lost by the delay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

J. E. Bernard was convicted of forgery, and appeals. From judgment of conviction and order denying a motion for a new trial, defendant appeals. Affirmed.

T. L. Christianson, of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of the crime of forgery, and upon judgment being pronounced appealed to this court from the judgment and order denying his motion for a new trial.

In apt and sufficient language defendant was charged both with falsely making, and knowing the same to be false and forged, uttering, and passing as genuine and true a certain check, which is set out in the information. Both the making and uttering are charged in the information as having been done with intent to defraud one John Ratti, to whom it is alleged the check was passed as true and genuine by defendant. The check, as set out in the information and as proved, was drawn upon the First National Bank of Oakland, Cal., for the sum of \$18, payable to "Frank H. Silva or bearer," and purported to be signed "Manuel Babbist" as drawer thereof. It also purported to be indorsed on the back thereof "Frank H. Silva."

The evidence showed that defendant passed the check to John Ratti as true and genuine, and obtained thereon from John Ratti the sum of \$18. Upon presentation at the bank upon which it was drawn, it was not paid, for the reason that no Manuel Babbist had or ever had had an account at such bank. A brother of defendant, however, learning of

the matter, subsequently paid the amount of the check to Ratti. Evidence was given by an expert in handwriting that the written portion of the check, including the name "Manuel Babbist" and the indorsement, "Frank H. Silva," were written by the same person who wrote certain exemplars used for comparison. The writer of these exemplars was proven to be the defendant. Evidence was given by a police officer that after diligent inquiry, including an examination of the directory of all the cities and towns of Alameda county, he could find no such person as Manuel Babbist. In addition there was the testimony of the cashier and the bookkeeper of the bank that no such person had or ever had had an account with the bank.

[1] This testimony was ample to support the theory that Manuel Babbist was a fictitious person. *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. On the other hand, it was shown that one Manuel J. Baptist had an account with the bank upon which the check was drawn, but he testified that he did not draw the check, nor authorize any one to draw it or sign his name thereto.

Under these circumstances the court gave an instruction which permitted a conviction notwithstanding either or both Manuel Babbist or Frank H. Silva were fictitious persons. In so doing appellant claims that the court erred, for the reason, as he claims, that a prosecution for making a fictitious check should be under section 476 of the Penal Code, and not under section 470, under which this case was prosecuted, citing in support thereof *People v. Elliott*, 90 Cal. 596, 27 Pac. 433, and *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. Since those cases were decided, however, section 470 has been amended to avoid the rule laid down in those cases, and so as to cover the case made by the proof in this action, and covered by the instruction given by the court and now challenged by appellant. *Stats. 1905, p. 673*. The instruction complained of is a correct statement of the law as it has existed since the amendment to section 470 of the Penal Code of 1905.

[2] Appellant also complains of an instruction in which the court simply read from the section (section 470, Pen. Code) defining forgery under which the information was framed. In this the court did not err, although some portions of the section as read do not apply to the case made by the information or the proof. It was simply read as a definition of forgery.

[3] The court did not err in allowing Manuel J. Baptist to testify that the signature to the check in question was not his, nor in submitting to the jury specimens of the handwriting of Manuel J. Baptist. Although the name "Manuel J. Baptist" differs somewhat from the name "Manuel Babbist," the circumstances of the case were such as to jus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tify the introduction of the evidence to preclude any inference or presumption that the signature "Manuel Baptist" was either made or authorized by Baptist, who did have an account with the bank upon which the check was drawn.

Appellant attacks the reliability of the testimony given by the expert upon handwriting; but the jury likewise had before them the disputed check and proven exemplars of the handwriting of defendant, and from the entire evidence found the defendant guilty. After an examination of the entire record including the evidence, we see no reason to disturb the finding of the jury.

Lastly it is contended that the court lost jurisdiction to pronounce judgment, because sentence was not pronounced within five days after verdict. The verdict was rendered September 24, 1912. The cause was then continued to September 28, 1912, upon which day the record discloses that "defendant now makes and files a motion for a new trial, and the cause is by the court ordered and hereby is continued to October 3, 1912, at 9:30 a. m. for hearing upon the motion for a new trial and sentence at the request of the defendant," upon which day judgment was pronounced after hearing and denying the motion for a new trial.

[4] The continuance for the purpose of hearing the motion for a new trial was authorized by the law. Section 1191, Pen. Code. The fact that the motion was made and filed before defendant was formally arraigned for sentence does not rob it of the force and effect of a motion for a new trial so as to preclude the court from continuing the hearing thereof as allowed by section 1191 of the Penal Code. Especially must this be so where the continuance is at the request of defendant.

The judgment and order are affirmed.

We concur: LENNON, P. J.; MURPHEY, J., pro tem.

(21 Cal. App. 59)

WHINNERY v. WHINNERY. (Civ. 1,061.)

(District Court of Appeal, Third District, California. Jan. 31, 1913. Rehearing Denied by Supreme Court March 24, 1913.)

1. DIVORCE (§ 130*)—ACTION—SUFFICIENCY OF EVIDENCE—CRUELTY.

Evidence in divorce *held* to support a finding that the husband treated the wife in a cruel manner so as to authorize a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445; Dec. Dig. § 130.*]

2. DIVORCE (§ 49*)—CONDONATION.

Under Civ. Code, § 118, providing that where a cause for divorce consists of cruelty, where the offense is made up of a series of acts, conjugal kindness, etc., shall not be evidence of condonation, unless accompanied by an express agreement to condone, an express agreement to condone cruelty is essential.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. § 49.*]

Appeal from the Superior Court, Alameda County; A. J. Buckles, Judge.

Action by Kate Whinnery against James E. Whinnery. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

J. K. Johnson, of San Francisco, for appellant. Edward R. Eliassen, of Oakland, for respondent.

BURNETT, J. The action was for divorce on the grounds of intemperance and cruelty. The judgment was in favor of plaintiff, awarding her a divorce on the ground of cruel treatment. Findings were waived. The court recited in its judgment that the "interlocutory decree is hereby made on account of defendant's extreme cruelty towards the said plaintiff." Certain property was also adjudged to be the separate property of plaintiff, and a portion of the community property was awarded to her and the balance to defendant.

The points made on the appeal are that the evidence is insufficient to support the judgment; that there was condonation on the part of plaintiff; and that the court erred in determining that said property was the separate property of plaintiff.

[1] As to the evidence, there can be no doubt as to its sufficiency to support the conclusion of the trial court. The plaintiff testified: "I am not living with defendant at this time. We have been separated a year. The reason of the separation was his intemperance and his cruelty. He was intemperate, drinking to excess. He started to drink almost immediately after we were married, and continued to drink while we were living together. He was drunk frequently. The last year that he lived at home he was drunk almost continuously. He first commenced to be cruel to me about four or five years ago. He tried to choke me on one occasion. He repeatedly told me that I was not better than a prostitute; also told me that I had not a dollar when he married me; every cent he had, everything he was possessed of, was his; I had nothing. On one occasion he said that I occupied a different bed because I had all the men there that I wanted, the butcher boys and grocer boys. He would stand over me in a threatening attitude and say those things about the butcher boys and grocer boys. That was a year ago, in February or March, a month or two preceding before I insisted on his leaving home. He would make those statements almost daily. During the last six months that he was home, we quarreled almost weekly over money matters."

The daughter, Rose Whinnery, testified that her father "was very quarrelsome and abusive, to my mother especially. When he had been drinking, when he was at home during the last year, he was quarreling with mother almost every day. I remember when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

my father tried to choke my mother. I must have come into the room while they were quarreling. My father had his hands around my mother's neck. I don't remember that he said anything. My mother was screaming. My father had been drinking; his face was flushed; he looked angry."

Marjory Whinnery, another daughter, testified that her father drank to excess, and that he quarreled with her mother several times each week; that he accused her of stripping him of everything he had, and she corroborated her mother and her sister as to her father choking her mother.

Comment is unnecessary as to the foregoing testimony, as it is obviously sufficient to support the conclusion that the defendant treated the plaintiff in a cruel manner, and that sufficient corroboration appears. That it inflicted grievous mental suffering and great bodily injury upon the plaintiff appears also from the testimony in the case, which we deem unnecessary to cite further upon this point.

As to the claimed condonation, it may be said, in the first place, that it was not pleaded by defendant; and, in the second place, that there is no evidence to show condonation, as defined by the provisions of the Civil Code in cases of this character. Section 117 of said Code is as follows: "Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness." And section 118: "Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from excessive acts of ill treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause unless accompanied by an express agreement to condone."

[2] It is apparent from the record that the cause of divorce grew out of the excessive acts of ill treatment of plaintiff on the part of defendant, and there is no evidence disclosed that there was any express agreement on the part of plaintiff to condone the offense of defendant; hence condonation was not made out, within the contemplation of the statute. *Morton v. Morton*, 117 Cal. 443, 49 Pac. 557; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Hunter v. Hunter*, 132 Cal. 473, 64 Pac. 772.

Concerning the property referred to, there is evidence in the record that defendant had transferred it to plaintiff, and the court was entirely justified in the conclusion, from the testimony, that he intended to invest, and thereby did invest, said property in plaintiff as her separate estate. The conclusion of the court was therefore justified by the evidence. But even if it were not her separate, but community property, the court was warranted in setting it aside to her, since the divorce was granted on the ground of cruelty.

Section 146 of the Civil Code provides: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead shall be assigned as follows: 1. If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just."

In the present instance there was no decree for alimony or costs or counsel fees in favor of plaintiff, and quite a portion of the community property was awarded to defendant. Under the circumstances, the plaintiff being a woman of some years and having two daughters to educate and maintain, and without any other source of income, so far as appears from the record, the disposition made of the property by the court appears fair and just. At least, there does not appear to have been any abuse of discretion on the part of the court in that respect.

After an examination of the record, we feel constrained to say that there appears to be no ground for interfering with the judgment of the lower court and the order denying a new trial, and each is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(21 Cal. App. 39)

DEALEY v. EAST SAN MATEO LAND CO.
(Civ. 1,054.)

(District Court of Appeal, First District, California. Jan. 23, 1913. Rehearing Denied by Supreme Court March 24, 1913.)

1. CONTRACTS (§ 130*)—ILLEGALITY—BY-BIDDERS—PUBLIC POLICY—"FRAUD."

In view of Civ. Code, § 1797, providing that the employment by a seller of any person to bid at an auction sale without any intention on the part of the bidder to buy or on the part of the seller to enforce the bid is a fraud entitling a buyer to rescind, a contract for compensation for securing by-bidders at auction is against public policy, as working a "fraud" on the public, though the section is intended only to protect bona fide buyers.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 654-658; Dec. Dig. § 130.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

2. CONTRACTS (§ 137*)—PARTIAL INVALIDITY—EFFECT.

Where a contract for the employment of plaintiff as an auctioneer also provided for compensation for procuring by-bidders, the entire contract is tainted by the illegality of the last provision and cannot be enforced even though the compensation for procuring by-bidders has been paid.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 701-712; Dec. Dig. § 137.*]

3. CONTRACTS (§ 138*)—ILLEGALITY—NECESSITY OF PLEADING.

A contract for procuring by-bidders at an auction being against public policy, no recovery can be had thereon, though the answer did not set up the illegality.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, City and County of San Francisco; George H. Canbiss, Judge.

Action by George L. Dealey against the East San Mateo Land Company. From a judgment for plaintiff, defendant appeals. Reversed.

Archibald Barnard, of San Francisco (H. W. Philbrook, of San Francisco, of counsel), for appellant. Vogelsang & Brown, of San Francisco, for respondent.

LENNON, P. J. This is an appeal by defendant from a judgment in favor of plaintiff. Plaintiff sued upon a written contract for commissions alleged to be due him from defendant upon the amount of the selling price of lands belonging to defendant and sold at public auction, plaintiff acting for defendant as the auctioneer at such sales. The written contract provided that the sum of \$30 on each sale was to be allowed the auctioneer, the plaintiff herein, to be used by him "as for assistance." The plaintiff testified that the purpose of the assistance was to "swell the crowd and speak well of the property"; that they occasionally "bid at the sale"; that these assistants, variously called by respondent "puffers" and "by-bidders," were "employed through him by the defendant"; that "plaintiff hired them"; "that quite a number of them were at each of the sales." The testimony of other witnesses was to the effect that, with the knowledge and consent of and through a prior arrangement between the parties, these so-called "assistants" were present at each sale for the purpose of boosting the bids, it being understood between the parties that in the event of the property being knocked down to any one of these "puffers" or "by-bidders" no attempt would be made to enforce the bid.

[1] Defendant claims that the contract was one to defraud the public, is against public policy, and by reason thereof the court cannot accord relief to either party. We think this contention must be sustained. The practice of by-bidding is referred to in section 1797 of the Civil Code. It is therein provided as follows: "The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer, which entitles him to rescind his purchase." This Code section is a definite statement of the public policy toward such practices. At common law a similar rule prevailed, and our Code section is but an enactment in statutory form of the rule laid down by a long line of authorities positively declaring the practice of by-bidding against public policy. *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 281, 1 Am. Dec. 407; *Curtis v. Aspinwall*, 114 Mass. 187, 191, 19 Am. Rep. 332; *National Bank Metropolis v. Sprague*, 20 N.

J. Eq. (5 C. E. Green) 159, 165; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398. Plaintiff contends, however, that the contract of sale with the purchaser was voidable only at the election of the purchaser, and, inasmuch as no purchaser has undertaken to rescind his purchase because of the use of by-bidders at the sale, the fraud has been condoned. Plaintiff's right to recover depends primarily, however, not upon the contract of sale to purchasers, but upon his contract of employment with the defendant. The section above quoted is intended for the benefit of the innocent purchaser and him alone. The use of by-bidders at the sale without the knowledge of the buyer and under the circumstances mentioned in the Code section is a "fraud"—true a fraud upon the buyer, but nevertheless a fraud—and the fraudulent character of such a practice is not in any manner or to any extent changed by the failure of the buyer to exercise his right of rescission. The contract between these parties, and upon which this action rests, is entirely separate and distinct from the contract of sale given to the purchasers. It must be judged by itself, standing alone, and not in the light of what may or may not be done by purchasers at the sale. The use of by-bidders is declared in so many words by the Code section to be a fraud, and, inasmuch as the contract between the parties to this action contemplates resorting to such a practice, we must hold that the contract from its inception was to perpetrate a fraud upon the public and can form the basis of a recovery to neither of the parties thereto. It makes no difference how or when the fact was brought to the attention of the court that the contract sued upon is against public policy. Neither does it matter whether or not one of the parties raises the question of its illegality upon that account, but courts of law and of equity, as the true character of such a contract is disclosed, refuse to permit themselves to be used in settling a controversy arising out of such a contract.

In *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 Pac. 708, 710 (9 L. R. A. [N. S.] 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609), the Supreme Court said: "There is no better settled rule of law than the one to the effect that the courts will not entertain any action in affirmance of an illegal contract."

In *Ball v. Putnam*, 123 Cal. 134, 140, 55 Pac. 773, 775, the same court, in reversing the judgment, called to the attention of the trial court the fact that there was "evidence in the record tending to show that the contract which lay at the bottom of all the transactions between these parties was a contract void as against public policy," and suggested a rigid inquiry by the trial judge, adding, "If, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this ac-

tion, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor the consent of the parties to it justifies the court in retaining jurisdiction of such an action." *Wight v. Rindskopf*, 43 Wis. 344, 348. We take it that this doctrine is so well established that the citation of other authorities to sustain it is unnecessary.

[2] There is no merit in plaintiff's contention that the portion of the contract providing for an allowance for the hiring of assistants to act as puffers or by-bidders may be severed from, and thus effect given to remaining provisions of the contract, otherwise unobjectionable, and in this connection plaintiff directs the court's attention to the fact that the money due plaintiff on account of the employment of these so-called assistants had actually been paid over to him and therefore claims discussion of its allowance is no longer an element in the case. We cannot agree with this contention. We are not concerned with the right of defendant to receive moneys so paid, even were such a claim made. The fact remains that these "assistants" were intended to be and were actually employed as by-bidders, which was a fraud upon the public, and the entire contract between the parties became thereby tainted.

[3] Plaintiff further sets up the claim that defendant's answer did not properly raise any issue of the illegality of the contract. There might be some merit in the contention if the defendant was seeking to avoid payment on the ground of plaintiff's alleged fraud against it, i. e., that the defendant was the victim of plaintiff's alleged fraud. Here the fraud is not against the defendant, but against the public. Pleading such a fraud is not a condition precedent to the court's taking cognizance of it. As soon as it is disclosed to the court, whether alleged in the pleadings or not, that the contract between the parties contemplates a fraud upon the public, it must sua sponte refuse to grant any relief to either party based on such contract. *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 165, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; *Camp v. Bruce*, 96 Va. 521, 524, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873 (1898); *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Prost v. More*, 40 Cal. 347; *Drexler v. Tyrrell*, 15 Nev. 115, 134; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Coppell v. Hall*, 7 Wall. (74 U. S.) 542, 558, 19 L. Ed. 244; *Dunham v. Presby*, 120 Mass. 285, 289.

It is the duty of courts to protect the public at all times against fraud, and one way of doing so is by closing the doors to would-be or actual perpetrators of such fraud who

would fain make use of the court to divide the spoils between them.

Alleged errors of the court in its rulings on matters of evidence and for failure to make a finding on certain alleged material issues are discussed by defendant; but inasmuch as in our opinion the illegality of the contract, because against public policy, prevents any recovery upon the contract by either of the parties thereto, it will be unnecessary here to discuss these alleged errors.

For the reasons given the judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

(21 Cal. App. 72)

BALDWIN v. TRAHERN. (Civ. 1,077.)
(District Court of Appeal, Third District, California. Jan. 31, 1913.)

DEEDS (§ 211*)—MENTAL CAPACITY—EVIDENCE.

In an action to set aside a deed, evidence held to warrant a finding that the grantor had mental capacity.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 637-647, 649; Dec. Dig. § 211; *Cancellation of Instruments, Cent. Dig. § 102.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Zuleika J. Baldwin against Henriette B. Trahern. Judgment for defendant, and plaintiff appeals. Affirmed.

Albert Jacoby and Louis Ferrari, both of San Francisco, for appellant. A. H. Ashley, of Stockton, for respondent.

BURNETT, J. This is an action brought to set aside a deed on the ground of undue influence and the incompetency of the grantor. The deed was made by George W. Trahern to his wife, Henriette B. Trahern, on August 17, 1909, 28 days before the death of the grantor on September 14, 1909. The deed recites a consideration of love and affection, and was duly acknowledged, delivered, and recorded on the day of its execution. Plaintiff claimed to be the daughter of the grantor, and, in her alleged capacity as heir, brought the action to set aside said deed. The answer denied that appellant was his daughter, and also denied his unsoundness of mind and the exercise of any undue influence.

The court found that plaintiff was the illegitimate daughter of the grantor, but that she was never legitimized by any act or acknowledgment of said grantor. The court also found that no undue influence was exercised on the said grantor by any person, and that "on the 15th day of August, 1909, and up to the time of his death, said George W. Trahern was continuously of sound mind, and during all of said time was mentally able to and did understand, realize, and comprehend the nature, result, and effect of his

act or acts in the signing and affixing his signature to and acknowledging and delivering a document, bill of sale, or other instrument, and to and did understand and realize and comprehend the nature, result, and effect of his act or acts in making and entering into a contract."

No evidence whatever was offered by plaintiff to sustain the allegation of undue influence; and, since it is entirely clear from the record that the finding of the court, in reference to the mental condition of said grantor and his execution and delivery of said deed, is abundantly supported by the evidence, it is perfectly clear that the other finding that plaintiff was never recognized by said grantor as his daughter need not be considered, as it is not necessary to support the judgment.

In reference to the mental condition of said grantor at the time of the execution of said deed, it may be said that there is really no conflict in the evidence, as the testimony of all the witnesses upon that point substantially agrees that he was entirely competent to transact business, understood thoroughly the nature of the transaction, and that it was his purpose and desire to vest the title of said property entirely in his said wife, the grantee, and that the deed was properly signed, acknowledged, and delivered by him to said grantee at the time alleged. To show how fully the finding of the court is supported, it will be necessary to quote only from the testimony of two witnesses.

George F. McNoble, who prepared the deed and who took the acknowledgment of the grantor, testified, among other things: "I was an intimate acquaintance, confidential friend, and legal adviser of Mr. Trahern. In the summer of 1900 I spent my vacation near Lake Tahoe; I got home on August 14th, Saturday morning, at half past 9, and called at the Trahern house that evening, between half past 7 and 9 o'clock. I then saw Mr. Trahern upstairs, sitting on a settee. I had conversation with him. There were three or four persons present, Mrs. Trahern, Rachael, Dr. Hammond, the son's daughter, and possibly Mrs. Williams. Mr. Trahern called me by name and said he had been anxious for me to come home; that he wanted to fix up those papers. He had previously spoken to me about expenses about probating, making deeds, etc., in June or May, some time earlier. I asked him what disposition he wanted to make of his property and he said he wanted to deed all of his property to his wife, Ret, he called her. He asked me if I could draw up the papers, and I told him I could. He asked when, and I said, 'Your place is one of those old Mexican grants, I suppose; I will have to go to Wilhoit for a description before I can make a conveyance.' Mr. Trahern said he would like to have the matter fixed up, and consulted me about his bank book and account, personal property, live stock, and all that. I assured

him that I could make a present conveyance of all of his property by combined deed and bill of sale in the one deed. He asked me if it would be good; I told him it would. I explained to him that there must be a present delivery and so that he could exercise no control; that, if there was a present delivery to the grantee, title must then pass and the grantee have absolute control. I went over the matter very carefully with him, explaining to him that if he should recover from his illness, and go on the ranch again, he would not have control of his property. I asked him if he desired to deliver the deed in escrow, accompanied by a memorandum showing irrevocable delivery. He said he had delayed the transfer of his property to his wife somewhat longer than what he really should have done, and that he wanted the deed executed and delivered to his wife at once, and recorded at once." The witness, after stating that no one else participated in the conversation, declared that, after the deed was written, he went out with it by appointment, on August 17th between 12 and 1 o'clock, and continuing: "Mrs. Trahern, their son and their two daughters, and, I think, the granddaughter were there. I told Mr. Trahern I brought the papers out, and that they were now ready for his execution. I said to him that the first thing I would like to have him do was to read the instrument over and see if he was satisfied with its contents. He took the instrument and read it over and read about the personal property. He said, 'This includes the bank account, does it?' I said, 'Yes, it includes your bank account, any paper, everything you have got in the way of personal property.' He said, 'Very well.' I then read the deed aloud, including all the land description, and then asked him if it represented his intention. He said it did. A table and writing materials were brought in. The table was not well adjusted, and he wrote his name as it is signed to the deed. I then asked him if it was his act and deed, and he said it was. I asked him if he acknowledged the execution of the deed as his act and deed, and he said he did. I said to his son, 'Now, you and I will sign our names to this instrument as witnesses and to this act of your father;' and we did so. I then handed him back the deed, which was yet unfolded. He took it up in his hands, one of which from an old injury was not flexible, and folded the instrument rather clumsily and loosely, and handed it to his wife, saying, 'Here, Ret, this is for you.' His wife was pretty much nonplussed and confused, and she said, 'What shall I do with it?' He said, 'You take it and have it recorded.'" The witness afterward stated, "I know the man was of sound mind," and furthermore: "I never urged Mr. Trahern to do anything about his property. I had no interest in it in any way. I did not do anything in the way of corruptly or at all con-

trolling or intending to influence him or to prevail upon him or persuade him or importune him or overpower him in the execution of this deed, and I never heard his son or his wife, Henriette B. Trahern, say anything at all of that nature."

David D. Trahern, the son of the grantor, 37 years of age, detailed also the transaction, and, among other things, testified: "He was of as sound a mind as any man that I ever knew in my life, up to the time the deed was executed and after. This was so up to the morning of the day he died. Based upon my intimate acquaintance, my father was just as sound when the deed was signed, acknowledged, and delivered by him as he ever was in his life, as sound as any of us in the courtroom to-day; he was never incompetent at any time in his life. My reasons are that he was able to carry on and did carry on his business. Nothing was done or said by me to him at the time of the execution of this deed, or prior thereto, with reference to obtaining the execution of such deed; nor was anything done or said in that regard by either my mother or Mr. McNoble. My father was not mentally feeble on August 17, 1909; his mind was perfectly normal, always has been."

There is other evidence to the same effect, but it seems unnecessary to call particular attention to it. In fact, the reading of the transcript creates the impression that, as stated by the trial judge, "the preponderance in favor of the defendant is so overwhelming as to practically preclude all doubt in the matter."

There seems absolutely no merit in the appeal and the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(21 Cal. App. 76)

**ZUMBUSCH v. SUPERIOR COURT IN
AND FOR COUNTY OF LOS AN-
GELES et al. (Civ. 1,804.)**

(District Court of Appeal, Second District, California. Jan. 31, 1913.)

1. PROCESS (§ 99*)—SERVICE OF PUBLICATION.

Code Civ. Proc. § 412, provides that where the person on whom service is to be made resides out of the state and the fact appears by affidavit to the court's satisfaction it may order service by publication. Section 670 provides what shall constitute the judgment roll and directs the clerk, immediately after entering judgment, to attach together and file certain papers, including the affidavit for publication of summons. *Held*, that the court could order publication of summons, though the affidavit was not filed until the action was called for trial, and could not refuse to hear the action or docket the case for failure to sooner file the affidavit, though it might refuse to proceed with the trial until the affidavit was filed.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 125; Dec. Dig. § 99.*]

2. PROCESS (§ 98*)—SERVICE—PUBLICATION.

The court has power upon its own motion to vacate a void order for service of summons by publication, previously made in the case.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. § 98.*]

3. PROCESS (§ 98*) — SERVICE — ORDER FOR PUBLICATION—VACATION.

If an order for publication of summons was not void, the court could only set it aside on motion within a reasonable time, or by action where all of the interested parties had an opportunity to be heard.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. § 98.*]

4. PROCESS (§ 98*)—PUBLICATION—VOID ORDER.

Even though an original order for publication of summons was void, the court could not, on a motion to proceed with trial, compel the issuance of a new order; it only having the power to determine the validity of the original order.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. § 98.*]

5. CONTEMPT (§ 80*)—JURISDICTION—DIVESTMENT—MISCONDUCT OF COUNSEL.

The court could not divest itself of jurisdiction previously acquired, on the ground of disrespectful conduct of counsel; Code Civ. Proc. § 1209, defining contempts of court and providing a manner for punishing them, furnishing the only remedy.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 261-266; Dec. Dig. § 80.*]

Application for writ of mandate by Helen Zumbusch against the Superior Court of the State of California in and for the County of Los Angeles and others. Writ issued.

A. W. Sorenson, of Los Angeles, for petitioner. H. W. Hanson, of Los Angeles, for respondents.

ALLEN, P. J. In mandamus. The affidavit and return disclose the commencement of an action by petitioner in the superior court, and the presentation to a judge thereof of an affidavit sufficient in form and substance to warrant an order for publication of summons. Such order was made and followed by the publication and mailing as by said order directed. Defendant's default was regularly entered by the clerk and the cause set down for trial. Upon the day set for the trial it was discovered by the judge that the affidavit upon which the order for publication was made was not among the files, and thereupon the trial court, upon its own motion, struck the case from the calendar, ordered a new affidavit for publication, and directed a new order to be obtained. Counsel for plaintiff, being present, presented to the clerk the original affidavit, and the same was filed; and thereupon counsel moved the court to proceed with the trial, or to designate a day for the trial thereof. The trial judge refused to reinstate the case upon the trial calendar, and refused to hear the cause or to exercise jurisdiction in the premises, for the reason that the judge making the order for publication had no jurisdiction to

make such order until the affidavit presented in support thereof was filed.

[1] Petitioner in this proceeding seeks a writ of mandate requiring the trial judge to reinstate or place said cause upon the trial calendar and to proceed at its earliest convenience to hear and determine said cause. It is conceded that the sole question presented relates to the proper construction which should be given to sections 412 and 670 of the Code of Civil Procedure. The first-named section provides: "Where the person on whom service is to be made resides out of the state; * * * and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; * * * such court or judge may make an order that the service be made by the publication of the summons." Section 670 determines what shall constitute the judgment roll and directs the clerk, immediately after entering the judgment, to attach together and file certain papers, among which is the affidavit for publication of summons. The evident theory of the learned trial judge was that section 670, when construed in connection with section 412, indicated a legislative intent to require the filing of the affidavit before presentation, without which filing the clerk could not attach the same to the judgment roll. We think this construction is answered by our Supreme Court in the case of *Parsons v. Wels*, 144 Cal. 415, 77 Pac. 1010, where it is said: "Where the person upon whom service is to be made resides out of the state, the jurisdiction of the court to order the service of the summons by publication is brought into exercise by the presentation of an affidavit stating this fact." This decision was rendered after the amendment of section 670 requiring the attaching of the affidavit to the judgment roll. It may be, and probably it is, true that such affidavit should be on file, or be before the court when the case is called for trial, that the court may determine the question of jurisdiction arising from service of process; for we take it that, even though a previous order was made directing service by publication, it could only be made upon a sufficient affidavit, and the trial court, if upon re-examining the affidavit it finds that statements of fact required to be incorporated therein were omitted, possesses the power upon its own motion to vacate the order previously made, or to decline to try the case, because jurisdiction of the person had not been properly and regularly acquired.

[2] The power of the court upon its own motion to vacate a void order previously made cannot be questioned. *People v. Davis*, 143 Cal. 675, 77 Pac. 651.

[3] Upon the other hand, if the order for publication was not void, the court has no power to set it aside, except upon motion made within a reasonable time, or by action where all interested parties have an opportunity to be heard. *People v. Temple*, 103 Cal. 453,

37 Pac. 414. We are of opinion then that, the affidavit presented before the issuance of the order being admittedly sufficient, the court possessed the right to make the order for publication, and that proof of compliance therewith conferred jurisdiction over the person of defendant, even though such affidavit was not placed on file until the day when the action was called for trial; that the court, having jurisdiction of the person and subject-matter, could not arbitrarily refuse to hear the action and deny a motion to place the cause upon the trial calendar, even though it might properly refuse to proceed with the trial until the affidavit was on file.

[4] We think it unnecessary to consider that portion of the order made by the trial court in refusing to hear the cause, through which it directed a new affidavit and the obtaining of a new order. Even if the original order was void, the court could not compel a new one, its function being confined purely to a determination of the character of the original order.

[5] The court having acquired complete jurisdiction, it could not divest itself of such jurisdiction, even though the conduct of counsel in presenting their cause was disrespectful. The statute provides a manner through which courts may punish for violations of section 1209 of the Code of Civil Procedure.

Let the writ issue, then, commanding respondent to place said cause upon the trial calendar at its earliest convenience, and to hear and determine said cause upon its merits.

We concur: JAMES, J.; SHAW, J.

(33 Idaho 555)

SMITH v. DAVIDSON.

(Supreme Court of Idaho. Dec. 12, 1912.)

1. TAXATION (§ 534*)—OFFER TO PAY TAXES—VALIDITY OF SALE—TAX DEED.

Where a person offers to pay the taxes on his land, and is informed by the proper officer that there is no tax to be paid on such land, and he relies on such statement in good faith, a subsequent tax deed based on such tax will not pass title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 990; Dec. Dig. § 534.*]

2. TAXATION (§ 810*)—TAX DEEDS—QUIETING TITLE—SUFFICIENCY OF EVIDENCE.

Under the facts of this case, held, that the evidence is sufficient to sustain the findings of the trial court.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Belle S. Smith against Frances M. Davidson to quiet title on certain real estate based on a tax deed. From judgment for respondent, plaintiff appeals. Affirmed.

B. F. Griffith, of Boise, for appellant. Davidson & Davison, of Boise, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SULLIVAN, J. This action was commenced by the plaintiff on October 23, 1911, to quit title to 10 acres of land situated in Ada county. The respondent filed her answer and cross-complaint, setting forth, in substance, that her true name was Frances M. Nelson, and that she was formerly Frances M. Davidson; denied the ownership and possession of said land in plaintiff, and set up in her cross-complaint that she was a resident widow of this state from November, 1904, until April, 1906; that she purchased said land on May 8, 1905, and entered into the possession thereof, and has been in the possession ever since said date; that between the 8th day of May, 1905, and the 5th day of July, 1905, the assessor of Ada county assessed said land in the name of "Mrs. Davidson"; that at the time of said assessment said premises were uncultivated and unimproved, with the exception of a barn situated thereon in which defendant resided with her minor children; that said property was assessed on the assessment roll for the year 1905 at \$250, and was subsequently raised 10 per cent. by order of the board of equalization; that respondent did not have any other property during the year 1905 than said land, and that the assessed valuation of said property did not exceed the sum of \$5,000, and that neither the defendant nor her minor children were allowed any exemption; that the claims of plaintiff are based on a certain pretended tax sale of said land for delinquent taxes for the year 1905, made to one Hoseley on the 18th day of July, 1906; that between the fourth Monday of May, 1906, and the 1st day of July, 1906, respondent was informed that said property had been advertised for sale for delinquent taxes for the year 1905; that respondent thereupon called at the office of the assessor and tax collector, and informed him that she was a resident widow of the state at the time said property was assessed to her; that the assessor thereupon informed her that said property was not liable for taxes, and that the same would be stricken from the delinquent list; that at said time the respondent was ready and able to pay said taxes and penalty thereon; that she relied upon the assessor to cancel the taxes against the property as agreed by him, and thereafter did not pay said delinquent taxes; that thereafter, and before the commencement of this action, defendant constructed buildings and improvements on said land to the value of \$2,500. Issues were thus joined, and the trial was had before the court without a jury, and findings of fact were made and judgment entered in favor of the respondent, quieting her title to said land. The appeal is from the judgment.

[2] There is very little dispute, if any, as to the facts established by the evidence, which are substantially as follows: That the respondent was at all times during the

years 1905 and 1906 a resident widow of the state of Idaho, and owned no property excepting the land in controversy, and that the assessed valuation of said land involved in this case did not equal the exemption allowed by statute to resident widows; that on the 8th day of May, 1905, the defendant purchased said land, and took possession thereof, and was in possession at the time said assessment for the year 1905 was made; that the deputy assessor listed said land informing respondent at the time of said assessment that she was entitled to an exemption of more than the assessed valuation of said land, and that she would not have to pay any taxes upon the property for the year 1905; that the defendant relied upon said statement of the deputy assessor, and made no attempt to pay the taxes before they became delinquent; that some time after May 28th, and prior to the 18th of July of the same year, the respondent was informed that said property had been advertised for sale for delinquent taxes, and she thereupon called at the office of the assessor and ex officio tax collector of said county for the purpose of paying said delinquent taxes, if any were due, and, after a statement to the assessor of the facts and conditions concerning said assessment, she was informed by said assessor that said land was not liable for taxes, and that he would secure a rebate from the county commissioners to the tax collector for said taxes, and that respondent was by said statement prevented from paying the taxes upon said land; that the assessor, through oversight or otherwise, did not cause said land to be stricken from the delinquent list, and that thereafter said land was attempted to be sold for delinquent taxes for the year 1905; that since the time said taxes were levied for the year 1905 the respondent has been at all times, and now is, in possession of the land in controversy, and has paid all taxes levied thereon, excepting those for which said sale was made, and has improved said land by expending between \$2,500 and \$3,000 thereon; that the delinquent assessment roll for the year 1905 was published on the fourth Monday of May, being the 28th day of May, 1906, and that said notice fixed the time for the sale of the property as the 16th day of July, 1906; that the property was sold, or attempted to be sold, on the 18th day of July, 1906, and that the tax deed and tax certificate are silent as to any adjournment made on the 16th day of July, 1906, to any other date for the purpose of making sale for delinquent taxes for that year; that the appellant purchased the tax sale certificate on the 13th of September, 1911, and a tax deed dated September 14, 1911, was issued to her under said certificate. The appellant relies solely on said tax deed.

The insufficiency of the evidence to support the findings is the main assignment of error.

we concede that the tax deed made a prima facie case in favor of the appellant. We are satisfied that such case was overcome by the evidence contained in the record. The evidence shows that the deputy assessor at the time the assessment was made informed the defendant that she would not have to pay taxes on said land. The evidence also shows that a short time after the publication of the delinquent tax list, and before the sale, respondent and her son-in-law called at the office of the tax collector for the purpose of paying said taxes in case the tax collector concluded she must pay them, and there informed the deputy that she was ready and willing to pay them, but the deputy informed her that the property was exempt, and that it would not be sold at said tax sale. Her son-in-law testified to the same state of facts, and the tax collector testified as follows: "Q. You may state as nearly as you can remember what was said at that time. A. Why, it seems that Mrs. Davidson's name had gotten onto the delinquent assessment roll; they had discovered it and come to the office to see about paying the taxes; asked to pay them and I looked it up pretty carefully, inquired into her ownership; made list for application for rebate, and told her she would have to pay no taxes. Q. Told her she would not have to pay taxes? A. Yes. Q. She informed you at that time she would pay the taxes if any were due on the property? A. Yes; she said she would pay them if we wanted her to."

[1] The law is well settled that where a party is ready and willing to pay taxes upon any property, and is informed by the person authorized by law to collect the tax that no taxes are due on the particular property, a valid sale cannot be made. The case of *Tracey v. Irwin*, 18 U. S. 549, 21 L. Ed. 786, involved the sale of property attempted to be made by a tax commissioner of the United States. It appears that the commissioner under the act in question had laid down a ruling that no payment of taxes could be made before sale by any person except the owner and could not be made by an agent. The agent of the absent owner called upon the tax collector to pay the taxes, and was informed that the owner must pay them himself. The court held that the tax commissioner had no authority to make that ruling. After the premises were advertised for sale, the agent of the owner called about the payment of taxes, but made no formal offer to pay them because it was in effect waived by the commissioner's order. The court held that it was difficult to see how under that state of facts the case could be sustained as the law does not recognize the doing of a futile act, as would have been the tender of payment after the commissioner had declined to receive the tax.

In the case of *Hoffman v. Auditor General*, 136 Mich. 689, 100 N. W. 180, the court quotes with approval from *Kneeland v. Wood*, 117 Mich. 176, 75 N. W. 462, as follows: "It is held in numerous cases that if a landowner in good faith applies to the proper officer for the purpose of paying his taxes, and is prevented by the mistake, wrong, or fault of the officer, such attempt to pay is equivalent to payment." In *Hayward v. O'Connor*, 145 Mich. 52, 108 N. W. 366, the court held that it was equivalent to a payment of other taxes, if any, where a county treasurer at the time an owner paid his state and county taxes against his land assured the owner that there was no other tax against the land. In *Nelson v. Churchill*, 117 Wis. 10, 93 N. W. 799, it is held that where a person makes an offer to the proper person to pay the taxes on his land for a particular year, and is informed that there is no tax to be paid, and relies thereon in good faith, a subsequent tax deed based on such tax will not pass title. In *Breisch v. Cox*, 81 Pa. 336, it is said: "A bona fide attempt to pay all the taxes, frustrated by the fault of the treasurer, stands as the equivalent of actual payment." In *Pottsville Lumber Co. v. Wells*, 157 Pa. 5, 27 Atl. 408, it is held that a landowner who goes to the treasurer's office to pay all overdue taxes and thus prevent a sale of his land, and he explains his business to the treasurer, and pays all taxes demanded of him, has the right to rely on the treasurer's statement, and need not search the tax books for further taxes charged against his land. In the case at bar the respondent had a right to rely upon the tax collector's statement. The law and equities under the facts of this case are all with the respondent.

The judgment must be affirmed, and it is so ordered, with costs in favor of respondent.

AILSHIE, C. J., and STEWART, J., concur.

(23 Idaho, 537)

BROWN et al. v. GRUBB et al.

(Supreme Court of Idaho. March 11, 1913.)

1. SUFFICIENCY OF EVIDENCE.

Held; in this case, that the evidence supports the finding of the court and the judgment.

2. EVIDENCE (§ 317*) — QUIETING TITLE TO WATER RIGHT.

A witness will not be permitted to testify to ante mortem statements made by a deceased person to said witness about a transaction that transpired between the deceased and a second party, where the second party is claiming an appropriation of water from a stream as against a third party, who is also claiming an appropriation from the same stream, which was made prior to the time the second party claims to have made his appropriation, for two reasons: First, that it is hearsay; second, for the reason that the statement relates to a matter which is not involved in the controversy submitted to

this court under the finding made by the trial court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174–1192; Dec. Dig. § 317.*]

3. APPEAL AND ERROR (§ 1010*)—FINDING—EVIDENCE.

A finding supported by evidence cannot be disturbed on appeal because of insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. § 1010.*]

Appeal from District Court, Lemhi County. Action by J. D. Brown and others against George Grubb and others. From the judgment, plaintiffs appeal. Affirmed.

E. W. Whitcomb and A. C. Cherry, both of Salmon, for appellants. F. J. Cowen, of Salmon, for respondents.

STEWART, J. This is an action to quiet title to 80 inches or $1\frac{3}{4}$ cubic inches per second of time of the waters of Morse creek, diverted and appropriated and used by the plaintiff Horn, and also certain waters appropriated by John D. Brown and M. A. Brown, and to have the rights of the plaintiff Horn declared prior in time and superior to the rights and claims of the defendants and each of them. The defendants answered and pleaded their respective rights to water appropriated from Morse creek. When the cause was called for trial, the parties all agreed as to the decree that should be entered, except as to the date of the appropriation of the plaintiff S. F. Horn, and a decree was prepared and entered accordingly, fixing and determining the rights of the respective parties, including the plaintiffs John D. Brown and M. A. Brown, and likewise S. F. Horn and all the defendants, describing the amount of water allowed to each of the parties and the priorities of each of the parties, and all questions except as to the date of the water appropriated by the plaintiff Horn. The appeal is from the judgment.

Counsel for appellants and respondents have entered into a stipulation and filed the same in this court that two questions are to be relied upon and discussed and decided upon this appeal; and this court, in considering this appeal, will limit such consideration to the questions specified in the stipulation: First, that the trial court erred in making the following finding: "That on or about the 1st day of June, 1891, the predecessors in interest of said plaintiff S. F. Horn, for the purpose of irrigating the said lands of S. F. Horn, appropriated of the waters of the said Morse creek 45 inches of water, * * * and, by means of dams and ditches of sufficient size to convey the same, diverted a sufficient amount of water from said stream to flow the said amount to and upon the said lands, and, since their said appropriation and diversion, said plain-

tiff and his said predecessors in interest have continued to use the said water thereon;" second, that the court erred in refusing to allow the defendants upon the trial of said cause to prove the ante mortem statements of J. B. Morrow, and also in refusing to allow the defendants to prove their ownership in the Morrow ditch by showing the general and current understanding in the neighborhood before the death of Morrow. As a part of this stipulation, the appellants contend that the right of Horn, as stated in the finding, should date from the time he first used water through the Campbell ditch in 1904, and not from 1891.

[1, 3] We have carefully gone over the evidence and find that there is evidence which tends to support both sides upon this contention. To recite the evidence and draw distinctions as to the weight in favor of or against either contention would unnecessarily incumber the reports. The trial judge heard the evidence in this case; he saw the witnesses, and was in a better position than this court to judge the credibility of the witnesses; and, there being evidence to support the finding of the lower court, this court will not reverse the case on the ground that the same is not supported by the evidence.

[2] Upon the second question as to the refusal of the court to allow the defendants to prove the ante mortem statements of Morrow and show the title to the Morrow ditch by general and current understanding, this was properly refused by the trial court for two reasons: First, that the evidence is hearsay; second, for the reason that the title to the Morrow ditch is not involved in the question of fact submitted to this court under the stipulation, inasmuch as the finding made by the trial court, which is recited above, makes no finding whatever with reference to the Morrow ditch or the title thereto, neither is there any provision in the judgment which determines the ownership or the right to use the Morrow ditch.

The judgment, therefore, is affirmed. Costs awarded to respondents.

AILSHIE, C. J., and SULLIVAN, J., concur.

(47 Mont. 127)

RAICHE v. MORRISON.

(Supreme Court of Montana. March 19, 1913.)

1. CORPORATIONS (§ 116*)—STOCK—SALE—OPTION.

The option given plaintiff by defendant to sell stock to him at a certain price, on a certain day, became binding on defendant, when on said day plaintiff accepted it and tendered the stock, though it was without consideration, defendant not having in the meantime withdrawn it, as he might if there was no consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. § 116.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CORPORATIONS (§ 121*)—STOCK—SALE—OPTION—CONSIDERATION—EVIDENCE.

A finding that the option given plaintiff by defendant to sell him stock at a certain time was given as an inducement for plaintiff to buy the stock, and so had consideration, is warranted, though defendant testified to the contrary, his testimony being in several respects self-contradictory and confusing, and plaintiff's attorney testifying to an admission of defendant to the contrary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

3. APPEAL AND ERROR (§ 215*)—REVIEW—OBJECTIONS WAIVED.

Defendant may not complain of an erroneous instruction as to the measure of damages, having made no objection thereto below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by J. A. Raiche against J. R. Morrison. Judgment for plaintiff. Defendant appeals. Affirmed.

W. S. Towner, of Great Falls, for appellant. W. B. Sands, of Chinook, for respondent.

BRANTLY, C. J. The plaintiff heretofore brought an action in the district court of Chouteau county to recover upon the same cause of action alleged in the complaint herein. The court sustained a general demurrer to the complaint, and rendered judgment for the defendant for his costs. On appeal to this court this judgment was reversed. *Raiche v. Morrison*, 37 Mont. 244, 95 Pac. 1061. When the cause was remanded to the district court, the plaintiff dismissed it and brought a second action in the district court of Cascade county, where the defendant now resides. The defendant having filed his answer, a trial was had which resulted in a verdict and judgment for the plaintiff. The defendant has appealed from the judgment and an order denying his motion for a new trial. The complaint is substantially a copy of that considered on the former appeal. A statement of the allegations constituting plaintiff's cause of action will be found in the opinion thereon delivered. They need not be restated here.

[1] In his answer the defendant denied that the contract to repurchase the stock was executed and delivered to plaintiff in consideration of the sale to him of the stock and as an inducement to the purchase as alleged in the complaint, or upon any consideration, or that plaintiff had suffered any damage by reason of defendant's failure to comply with the terms thereof. He admitted all the other allegations in the complaint. The contention is now made that the evidence is insufficient to justify the verdict. On the former appeal the contract here in question was classed as an option contract, or an option, and we think this characterized it correctly. Under

the rule applicable to such contracts, when the option to buy or sell is based upon a consideration moving to the promisor, the promisee has the exclusive right to sell or buy during the time specified in the contract. He may or may not exercise his option, yet the contract is binding upon the promisor. If not based upon a consideration, it may be withdrawn at the will of the promisor; nevertheless it is a standing offer which may be accepted by the promisee at any time during its life, and thus become a contract binding upon both parties. *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17, and cases cited. If we regard defendant's promise either as based upon a consideration—that is, made as an inducement to the plaintiff to purchase the stock—or as a continuing offer to repurchase if made without any consideration, it became binding upon him when the plaintiff, at the date at which the option was to expire, accepted it and tendered the stock. The rule thus stated was distinctly recognized in the decision upon the former appeal holding the complaint sufficient, as is made clear by the authorities cited, though, perhaps, more importance was attached to the question of consideration than the allegations in the pleading required.

[2] This brief statement, by way of preliminary, of our view of the rule of law applicable, clears the way for the determination of the contentions made by counsel for defendant. He insists that the evidence is insufficient to sustain the verdict, (1) in that it does not show that there was any consideration for the option; and (2) in that it fails to show that plaintiff suffered any damage. At the commencement of the trial, after a colloquy between the court and counsel, it was determined that, in view of the admissions in the answer, the burden of proof was upon the defendant to show want of consideration. Thereupon counsel for defendant introduced his evidence, which consisted of the testimony of the defendant himself, in connection with the option contract and a receipt for the purchase price of the stock, introduced as exhibits. While he testified that the option was not given until two or three days after the sale and was the result of subsequent negotiations wholly disconnected with the sale, it appears that the receipt and option both bear the same date, viz., September 18, 1903, the day upon which the sale was made. This fact he did not undertake to explain. His testimony was in several respects self-contradictory and confused. The plaintiff, who resides in the state of Wisconsin, was not present, and his testimony was not introduced. His counsel, called in rebuttal, testified that he notified the defendant of the plaintiff's acceptance of the option, and that in an interview had with him a short time afterward the defendant admitted that, in order to induce

the plaintiff to buy the stock and as a part of the consideration for the purchase, he had agreed to repurchase it at the end of three years at the price named in the option, and that at that time he intended to make his promise good, but had not done so because he had not been retained as manager of the corporation, the capacity in which he was acting at that time, as he then expected. Under these circumstances, we do not think that we ought to say that the jury arbitrarily disregarded the defendant's testimony as unworthy of credit, or that the court erred in accepting their conclusion in overruling the motion for a new trial. *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; *State v. Willette*, 46 Mont. 326, 127 Pac. 1013.

In considering this feature of the case, we have proceeded upon the assumption that the question of consideration was a material issue, requiring the introduction of evidence and a finding by the jury thereon. Under the allegations made in the complaint which were admitted in the answer, this was not necessary. It is admitted that the option was given by the defendant, and that it was accepted at the expiration of the time limit named, with a tender of the stock by the plaintiff which was refused by the defendant. It is apparent, therefore, that plaintiff would have been entitled to a judgment on the pleadings for nominal damages; for proof of the breach of a contract is proof of a wrong for which the injured party is entitled to recover nominal damages. 13 Cyc. 17.

[3] No evidence was introduced by either party as to the value of the stock at the time the plaintiff accepted the option, or at any time before or after that time, other than a statement made by the defendant when counsel for plaintiff tendered him the stock and demanded payment of the purchase price. The latter testified that the defendant, upon refusing to accept it, said: "You can just as well keep it because it is worthless. It makes no difference who keeps it, whether I have to pay for it or not." Viewing this as an admission against interest, it was some evidence tending to show that the stock was valueless. We shall not stop to consider whether it would have sustained a finding of the jury that the stock had no value. The court and counsel both proceeded upon the theory that, if the question of consideration should be resolved in favor of the plaintiff, he would be entitled to recover the full amount of the price fixed in the option, viz., \$1,720. In other words, court and counsel proceeded upon the assumption that the stock was valueless, and that plaintiff, if entitled to recover at all, should recover the option price. Accordingly, the court instructed the jury, in substance, without objection by counsel for defendant, that if at the time of the purchase of the stock by plaintiff, and as a part of the transaction and as an inducement

to lead the plaintiff to make the purchase, the defendant made the agreement contained in the option to repurchase within three years at the price of \$1,720, they should return a verdict for this amount in favor of the plaintiff. Let it be conceded that this theory of the case was wholly erroneous; nevertheless, counsel having accepted and acted upon it and permitted the court to do so without objection, he cannot now complain that his client has suffered prejudice. A party cannot be permitted to assume in this court a position different from that assumed in the trial court in order to predicate error upon any action of that court during the course of a trial to which he did not make timely objection in that court. *Childs v. Pto-mey*, 17 Mont. 502, 43 Pac. 714; *Newell v. Nicholson*, 17 Mont. 389, 43 Pac. 180; *Maul v. Schultz*, 19 Mont. 335, 48 Pac. 626; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582; *Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355; *Dempster v. Oregon S. L. Ry. Co.*, 37 Mont. 341, 96 Pac. 717.

Counsel has devoted much space in his brief to a discussion of the measure of damages which he insists the court should have given to the jury. We agree with him that the rule prescribed by section 6081 of the Revised Codes, applied in *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89, should have been followed in this case; but for the reason already stated we do not think counsel is now in position to allege prejudice because the court failed to do so.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(54 Colo. 272)

EVERHART v. PEOPLE.

(Supreme Court of Colorado. March 3, 1913.)

1. GAMING (§ 67*)—STATUTES—CONSTRUCTION.

Rev. St. 1908, § 1791, makes it an offense to unlawfully keep and exhibit a gaming table, establishment, device, and apparatus to win and gain money by gambling, and section 1792 declares that it shall be unlawful to play at a game for a sum of money or other property of value, or to make a wager for a sum of money or other property of value upon the result of such game. *Held*, that neither the keeping nor exhibiting of a gaming table, establishment, device, or apparatus, nor the playing at a game, is prohibited, except where such tables, etc., are kept or exhibited to win or gain money or property, or when the play is for money or property, or a bet is made on the result of the game.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 135-139; Dec. Dig. § 67.*]

2. GAMING (§ 73*)—"GAME"—HORSE RACING.

A game is any sport or amusement, public or private, including physical contests, whether of man or beast, when practiced to decide wagers or for diversion, and games of hazard or chance by means of instruments or devices. As so defined, it includes a horse race, so that book making at a horse race, constituted the playing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of a game and the establishment of a gaming table, device, or apparatus to win money in violation of Rev. St. 1908, §§ 1791, 1792.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 187, 188; Dec. Dig. § 73.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3036-3038; vol. 8, p. 7688.]

8. GAMING (§ 74*)—“GAMING TABLE,” “ESTABLISHMENT,” “DEVICE,” OR “APPARATUS.”

The words, “gaming table, establishment, device, or apparatus,” as used in Rev. St. 1908, § 1791, making it unlawful to keep and exhibit a gaming table, establishment, device, or apparatus to win money by gambling, do not mean literally instrumentalities with appliances adapted and essential to particular games, but include any species of table, establishment, device, or apparatus kept and used for gambling, winning, betting, or gaining money or other property, since there may be a gaming table, provided all the essentials for the game exist, though the table in its literal sense may not be set up or used.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 190-198; Dec. Dig. § 74.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 439, 440; vol. 3, pp. 2045, 2046; vol. 8, p. 2475; vol. 8, p. 7686.]

4. GAMING (§ 63*)—STATUTES—HORSE RACING.

Sess. Laws 1866-67, p. 114, creating the Ford's Park Association, and providing for the holding of public races by such association at a particular place once a year, at which betting on horse races was authorized, did not constitute a legislative construction of the gaming statutes (Rev. St. 1908, §§ 1791, 1792), so as to exclude horse racing at other times and places from the provisions thereof.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 120; Dec. Dig. § 63.*]

5. CRIMINAL LAW (§ 34*)—STATUTES—PARTICULAR ACTS.

Acts clearly within the letter and spirit of a criminal statute cannot be excluded from the operation thereof because no attempt had been previously made to enforce the statute with reference to such acts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 89, 766; Dec. Dig. § 34.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

W. E. Everhart was convicted of gaming and unlawfully maintaining a gaming table, in violation of Rev. St. 1908, §§ 1791, 1792, and he brings error. Affirmed.

T. J. O'Donnell, Edwin H. Park, John W. Graham, John A. Rush, Caldwell Yeaman, and J. D. Benedict, all of Denver, for plaintiff in error. Benjamin Griffith, Atty. Gen., and Charles O'Connor, First Asst. Atty. Gen., for the People.

WHITE, J. An information in two counts was filed against plaintiff in error, upon which he was tried and convicted. The first count was under section 1791, R. S. 1908, and charged that he “unlawfully did keep and exhibit a certain gaming table, establishment, device and apparatus, * * * to win and gain money by gambling,” etc. The second count was under section 1792, R. S. 1908, and charged that he “unlawfully did play at a game for a sum of money or other property

of value, and did make a bet and wager for a sum of money or other property of value, upon the result of such game,” etc. The proven or admitted facts are that plaintiff in error made books and sold pools upon certain horse races held under the auspices of the Overland Jockey Club at Overland Park race tracks, in the city and county of Denver, on a certain day. Preceding the running of each race, the plaintiff in error entered the names of the horses competing in the race upon a blackboard, placed upright upon a table or platform prepared for that purpose, adjoining the grand stand at the race tracks; and, in conjunction with others employed for the purpose, received the money bet upon the races, giving in exchange therefor cards upon which was recorded the bet, and after the result of each race paid the sums won to the winners upon presentation and surrender of the cards, keeping the balance.

[1] Much of the argument of counsel is predicated upon the assumption that, in order to sustain the judgment of conviction, it is essential to hold that horse racing is unlawful within the intent of these statutes. The assumption is erroneous, and cannot be upheld. Neither the keeping or exhibiting of a gaming table, establishment, device, or apparatus, nor the playing at a game, is prohibited. On the contrary, such things, as far as these sections of the statute are concerned, may be done with impunity. It is only when such tables, etc., are kept or exhibited to win or gain money or property, or when the play at a game is for a sum of money or other property, or a bet is made upon the result of such game, that the acts become unlawful, and the doers thereof subject to punishment. Moreover, there can be a game without the element of either chance or hazard.

[2] A game is any sport or amusement, public or private. It includes physical contests whether of man or beast, when practiced for the purpose of deciding wagers or for the purpose of diversion, as well as games of hazard or skill by means of instruments or devices. *Boughner v. Meyer*, 5 Colo. 71, 74, 40 Am. Rep. 139; *Corson v. Neatheny*, 9 Colo. 212, 11 Pac. 82. As defined in the *Century Dictionary*, it is “a contest for success or superiority in a trial of chance, skill or endurance, or of any two or all three of these combined; as, a game at cards, dice, or roulette; the games of billiards, draughts, and dominoes; athletic games; the Floral games. The games of classical antiquity were chiefly public trials of athletic skill and endurance, as in throwing the discus, wrestling, boxing, leaping, running, horse and chariot racing,” etc. *Desgain v. Wessner*, 161 Ind. 205, 67 N. E. 901; *People v. Weithoff*, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557. A horse race, according to the weight of authority, though there are decisions to the contrary, is a game within the meaning of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

statutes against gaming. 20 Cyc. p. 884; *Thrower v. State*, 117 Ga. 753, 45 S. E. 126; *Swigart v. People*, 154 Ill. 284, 40 N. E. 432. Whether it is such within the meaning of the sections under consideration we must now determine. In *Corson v. Neatheny*, supra, we held that a horse race was a game within the intent of section 1796, R. S. 1903, citing *Boughner v. Meyer*, supra; *Tatman v. Strader*, 23 Ill. 493; *Shropshire v. Glascock et al.*, 4 Mo. 536, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 599. *Boughner v. Meyer*, supra, involved the validity of a check, the consideration of which was a wager as to whether a certain execution issued upon a judgment would or would not be collected. Section 1796, supra, was quoted, and the question propounded: "Was the consideration of the check won by any gaming within the meaning of the section above quoted?" We then said: "If the wager was upon any game, the check is absolutely void in the hands of every holder. Horse racing has been decided to be gaming within the intent of the language here used. * * * But a wager as to whether an execution can be collected we are constrained to conclude cannot be considered as a wager upon any game." It was unnecessary to, and we did not, determine therein whether horse racing is a game within the meaning of that word as used in the section. We nevertheless declared that it had been so decided, citing *Tatman v. Strader*, supra; *Shropshire v. Glascock*, supra; *Boynton v. Curle*, supra. But in *Corson v. Neatheny*, supra, we referred to the *Boughner-Meyer* Case, and the authorities therein cited, and expressly held that horse racing is gaming within the intent of the section. That the case might have been decided exactly as it was, as claimed by plaintiff in error, does not render the holding obiter. The decision was based upon the applicability of the statute, and therefore determined that horse racing is a game, and betting thereon is gaming, within the meaning of the section.

As the section of the statute involved and construed in the *Corson-Neatheny* Case affects only contracts, etc., entered into as a result of gaming, or in which the consideration was for money, property, or other valuable thing won by gaming, declaring them void and of no effect, and the decisions cited therein are in civil cases, it is claimed that the rule announced and applied therein is not applicable in the construction of the criminal sections. A sufficient answer thereto is that the alleged civil section involved and construed in that case, and the criminal sections upon which this prosecution is based, are embodied in, and form a part of, the same legislative act. Session Laws 1866, p. 56; R. S. 1868, pp. 224, 225, § 135; G. L. 1877, pp. 297-299, §§ 730-736; G. S. 1883, pp. 332-334, §§ 844-851; R. S. 1908, §§ 1791, 1792, 1796. We must ascribe the same meaning to the same words occurring in different parts of

the same statute, unless it clearly appears therefrom that a different meaning was intended. *Dixon v. People*, 127 Pac. 930. This does not appear from the statute in question. On the contrary, it is clearly evident that the same words in the several sections of the act were used in the same sense, and the purpose of the lawmaking power was to suppress gambling, which, as used in the act, includes betting and winning money or property upon any game whatsoever. The title of the act of 1866 is, "An act to suppress gambling and gambling houses," and that law has been in no substantial respect changed or modified by subsequent legislation. We cannot assume that the lawmaking power used the words "game" and "gaming" in a different sense in one section of the statute from that in which it employed them in other sections of the same act. In the passage of each of these sections the Legislature must have had in mind the immorality of the acts and the evils resulting. Under section 1791 the party violating the provisions thereof is to be punished by fine and imprisonment. Under section 1792 the offender is subjected to a pecuniary penalty, while under section 1796 certain contracts, etc., the consideration of which has arisen from the practice of the immoral and inhibited acts, are rendered nugatory and of no effect. So, in order to effectually suppress gambling, the act subjects the violator thereof to punishment and makes it impossible, upon the instruments designated, for any person to reap the fruits growing out of the acts prohibited.

But *Corson v. Neatheny*, supra, as an authority, is questioned. It is claimed that this court in basing that opinion upon *Tatman-Strader*, supra, did not take into consideration the difference between the Illinois statute and the Colorado statute upon the subject, and that the former statute, after the word "game" uses the words "or sport," and contains other words not found in the latter statute upon which that decision could properly be based. The words "game" and "sport" are synonymous. Webster's Dictionary. Moreover, the statute under consideration in the *Tatman-Strader* Case was section 1 of chapter 46 of the Illinois Revised Statutes of 1845. We observe no substantial difference in respect to the question now under consideration between that section and section 1796, supra, of our own statute. If anything, the language of the latter is broader and more comprehensive than that of the former. It was not until long after the decision in *Tatman v. Strader*, supra, that the words said to be excluded from our statute, and included in the Illinois statute, appeared in either the criminal or civil sections of the statutes of that state. Sections 129, 130, p. 174, and section 1, p. 263, R. S. Ill. 1845; section 1, Public Laws of Illinois 1871-72, p. 462; paragraph 179, § 131, p. 792, vol. 1, Starr & C. Ann. St. Ill. 1885. Counsel for plaintiff

in error maintain that the history of the several legislative acts on the subject of gambling in this state shows conclusively that horse racing is not a game within the meaning thereof, and that the holding in *Corson v. Neatheny*, supra, in that regard is illogical and incorrect. We cannot concur in this view. On the contrary, when we bear in mind the provisions of the several acts, their titles, nature, the history of their enactment, and the state of the law when passed, the conclusion is inevitable that the legislative intent, as the law now is, was to prevent public gambling, and includes the risking of money or anything of value between two or more persons on a contest of either chance, skill, or hazard, where one must be the loser and the other the gainer.

Our first legislation on the subject is found in the Session Laws of 1861, p. 813, under the heading, "Offenses Against the Public Morality, Health and Police," embodied in "An act concerning criminal jurisprudence." It consisted of but two sections. The first section on the subject, being section 112 of the act, made it a crime for any person to "deal or play at or make any bet or wager for money or other thing of value, at any of the games commonly known or called Three Card Monte, the Strap Game, Thimble, the Patent Safe Game, or any other game of similar character, or shall induce, or attempt to induce, any person whatever to make any bet or wager at any such game," etc. The other section, being section 113 of the act, prohibited the keeper of a house, etc., to knowingly permit a person within such house, etc., "to deal or play at any of the games mentioned in the preceding section, or any game of similar character, or any game or games of cards, roulette, dice, or any other games where fraud or cheating is practiced, or where loaded dice or marked cards or waxed cards are used," etc. These sections are aimed exclusively at games and bets and wagers thereon in which an element of cheating, trickery, or fraud enters, and in no sense at fair and honestly conducted games or betting thereon.

The second act upon the subject was in 1864 (Session Laws, p. 98), entitled, "An act to suppress gambling and gambling houses." Section 1 thereof makes it a criminal offense for any person to keep a house, etc., "or place resorted to for the purpose of gambling, or permit or suffer any person" therein "to play at monte, three card monte, or any other game at cards, dice, faro, roulette, or any other game whatever for money or other things of value." The second section subjected any person to fine and imprisonment who should in such gambling house or place "play at any game for any sum of money or other property of value," or make therein a bet or wager for money or other property of value. Section 3 made all contracts, when any part of the consideration thereof

was for money or other valuable things won or lost, laid, or staked upon any game or bet or wager, absolutely void and of no effect. In argument it is pointed out that in this act we find for the first time the words "any other game" associated with "monte, three card monte," etc., and it is impossible to conceive that horse racing or betting or wagering thereon was included within the meaning of the statute; and, further, that the act does not penalize gambling generally, but only gambling and betting at a place resorted to for the purpose of gambling and the keeping of such place. Such is unquestionably the purpose of the act, and it may be that, under the rule of ejusdem generis, the gambling and games prohibited thereby are such only as belong to the class enumerated therein. Be that as it may, subsequent legislation broadened the law materially. In 1866 Session Laws, p. 56, "An act to suppress gambling and gambling houses," was adopted. The act consists of sections 1 to 12, inclusive, and as to the offenses created and the acts and things prohibited seems to be identical with sections 1790 to 1796, inclusive, of the Revised Statutes of 1908. This act differs materially from those preceding it. The things prescribed therein are as follows: Section 1, places used or occupied for gambling, the keeping of gaming tables, apparatus, or establishment therein to be used for gambling and winning, betting, or gaining money or other property; section 2, which is section 1791, R. S. 1908, the keeping or exhibiting "any gaming table, establishment, device, or apparatus to win or gain money or other property," and the practice of gambling; and section 3, which is section 1792, R. S. 1908, the playing "at any game whatsoever" for a sum of money or other property of value, and betting and wagering upon the result thereof. These changes in the law are significant and pregnant with meaning. Previous legislation was directed against games and bets thereon in which an element of cheating, trickery, or fraud entered, and to places wherein such games and bets continuously occurred; whereas this act, being the law as it now is, is directed against all places used or occupied for gambling, the keeping or exhibiting of gaming tables, establishments, devices, etc., to win or gain money or other property, the practice of gambling and the playing "at any game whatsoever" for a sum of money or other thing of value, and betting and wagering upon the result thereof. There being no enumeration of specific games, subjects, or things, the general words used must be ascribed their ordinary meaning. The language is plain and unambiguous. The statute does not prohibit the playing of games. It is only when they are made instruments of winning or losing money or property that a criminal character attaches to them. When we bear in mind the purpose of the act as expressed in its title, the enumerated things

prescribed, it is clear that the law intends to, and does, prohibit every place commonly used or occupied for gambling of any character whatsoever, and the keeping and exhibiting of any instrumentality to be used for gambling and winning, betting, or gaining money or other property upon the result of any game, and likewise the practice of gambling.

[3] The words "gaming table, establishment, device or apparatus," as used in the statute, do not mean literally instrumentalities with appliances adapted and essential to particular games, but include any species of table, establishment, device, or apparatus kept and used for gambling, winning, betting, or gaining money or other property. It is the use to which the article or thing is appropriated which renders the keeping or exhibition thereof unlawful within the meaning of the sections here involved. *Toney v. State*, 61 Ala. 1; *Estes v. State*, 10 Tex. 300, 306; *Chappell v. State*, 27 Tex. App. 310, 312, 11 S. W. 411; *Jones v. Okla. Ty.*, 5 Okl. 536, 49 Pac. 934. "Gaming table" is said to be synonymous with "gaming house." 20 Cyc. p. 967. It means a place kept for gambling, and supplied with materials for that purpose. It may include any kind of contrivance used in betting. Cyc. supra., *Garvin v. State*, 81 Tenn. (13 Lea) 162. This is made more certain by the word "establishment" used in connection therewith. One meaning of this word is the place of business, including grounds, furniture, equipage, etc., with which one is fitted out; also that which serves for the carrying on of a business. So a device is that which is devised, or formed by design; a contrivance; an invention; a project; a scheme; often, a scheme to deceive; a stratagem; an artifice. And "apparatus" means things provided as means to some end. A full collection or set of implements, or utensils, for a given duty, experimental or operative; any complex instrument or appliance, mechanical or chemical, for a specific action or operation; machinery; mechanism.

A gaming table, therefore, consists in the essentials of the game. A table in the literal sense need not exist. A game played and something of value bet are the essential elements of a gaming table, establishment, device, or apparatus as used in this act. In *Garvin v. State*, supra, *Desty's Amer. Crim. Law*, § 102b, is quoted as follows: "Setting up a gaming table consists in providing the essentials of the game, and a table in the literal sense need not exist, nor money or property be staked, but credit may be substituted, yet a game must be played and something bet." It is then said (13 Lea [Tenn.] p. 173): "If this law is sound, and the proof shows it is, a gaming table is any place convenient for and in which the game may be played. If 'setting up a gaming table consists in providing the essentials,' and a real table is not necessary, then the room, the hall, the house

or other place used for gaming purposes is one of the indispensable 'essentials' of a gaming table. * * * A house, etc., could not be kept for the conduct of the prohibited games, unless the tools of the game were also kept. A house, hall or room kept for a purpose must be supplied with the materials for that purpose. As already intimated, all these combined constitute a gaming table, or gaming house. The terms are synonymous in gaming vernacular."

Applying these rules to the facts of this case, we think it is clear that plaintiff in error kept and exhibited a gaming table, establishment, device, and apparatus to win or gain money or other property, and played at a game and made a bet on the result thereof for a sum of money. He had a place, to wit, the space adjoining the grand stand, kept for gambling, and supplied with materials for that purpose; that is, the table, the blackboard, the slips, and the horse races then run, which latter he adopted and made a part of his establishment, project, or scheme. These constituted a gambling table, establishment, device, or apparatus. They were the essentials of the game as devised or projected as a means to a certain end. That plaintiff in error had nothing to do with the running of the races is of no consequence. The acts and instrumentalities of others in that respect he adopted, and thereby they became, in legal effect, his. It might well be said that his establishment, device, and apparatus—that is, his gaming table—included the race tracks and the horses thereon to the same extent and effect as though they were confined to the limits of the platform upon which he stood and operated. He brought them there by adoption and made them and their acts his for the purposes of his plan of operation. He and those participating in the pools were, in the understanding of all, "playing the races." As said in *Joseph v. Miller*, 1 N. M. 621, 626: "We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term 'gambling device,' and does not exclude any scheme, plan, or contrivance for determining by chance which of the parties has won, and which has lost a valuable stake. That a horse race, when adopted for such purpose, is a 'gambling device,' there can be no doubt." To the same effect and quoting the above language is *James v. State*, 4 Okl. Cr. R. 587, 112 Pac. 944, 34 L. R. A. (N. S.) 515, 140 Am. St. Rep. 693. A horse race is a game, and selling pools or making books upon the result of a horse race is gaming, because it is betting on a game, and is unlawful, though the game itself be not unlawful. *Swigart*

v. People, supra, affirming the same case in 50 Ill. App. 181. *Edwards v. State*, 8 Lea (Tenn.) 411, *Thrower v. State*, supra, *People v. Welthoff*, supra, *Miller v. U. S.*, 6 App. D. C. 6.

[4] In 1867 Session Laws (Laws 1866-67) p. 114, the territorial Legislature created a private corporation under the title, "The Ford's Park Association," which, it is claimed, constitutes a legislative construction of the anti-gambling statutes that will not permit the meaning we have ascribed to them. The objects of the association were the encouragement of stock raising and the improvement of the breed of horses within the territory. It was authorized to acquire and own a certain described tract of land; to hold thereon a horse fair once in each year; to offer such premiums and purses for horses to be exhibited and competed for; and to charge an admission to any race not to exceed \$1 for each person. The association was required to enter and record in a book all wagers made upon any trial of speed held upon the grounds, and the act made such wagers so entered a valid and legal contract enforceable in any court of competent jurisdiction. Two and one-half per centum of the winnings of all wagers so recorded, and of the purses and premiums competed for, were required to be paid to the treasurer of the territory of Colorado by the association for the use and benefit of the Colorado Territorial Agricultural Society.

We do not think the act is in any sense a legislative construction of the gambling statutes. On the contrary, its legal effect simply suspended the operation of the gambling statutes as to certain of the inhibited acts therein, but only upon one day in each year, in a designated and limited space. In other words, it was like unto a license authorizing the doing of certain acts at a particular time and place, which, without the license and at any other time or place, would be unlawful. Because the lawmaking power authorized pool selling and bookmaking upon horse races occurring, at the time, upon the limited territory described in the act of incorporation, and under the control of the incorporated association, does not establish or manifest a legislative intent to authorize such acts upon like events occurring elsewhere, at other times, nor does it in any sense indicate that such acts are not within the meaning of, and made unlawful by, the statutes aforesaid, but rather that they are thereby inhibited. Otherwise, why grant the power to the association and place limits upon its exercise?

[5] But it is said that prior to this prosecution neither lawyer nor layman considered acts like those of plaintiff in error as being within the inhibition of the statutes. However that may be, it does not subtract from

the legal meaning of the words used in the legislation which corresponds precisely with the historical and popular meaning. It is a matter of common knowledge that many laws are enacted which lie dormant, in whole or in part, for years. We know of no court, however, that has held that things clearly within the letter and spirit of an act are excluded from the operation thereof because of such desuetude. The judgment of conviction is affirmed.

Judgment affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

(23 Colo. App. 511)

ROUTT COUNTY DEVELOPMENT CO. v. JOHNSON et al.

(Court of Appeals of Colorado. March 10, 1913.)

1. EMINENT DOMAIN (§ 238*)—REVIEW—ASSIGNING CROSS-ERRORS.

Defendants in condemnation, not having assigned any cross-errors based on any ruling on the question of sufficiency of the petition to support the decree, may not have such question considered on plaintiff's appeal.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 614, 619, 658, 659, 660, 661, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.*]

2. EMINENT DOMAIN (§ 233*)—DETERMINING VALUES AND DAMAGES—EVIDENCE.

Under Rev. St. 1908, § 2416 et seq., as to condemnation, providing that the issues of values and damages, submitted to the commissioners for determination, shall be found from the "proofs and allegations" of the parties, and after a view of the premises, they may not, in fixing such values and damages, use information obtained from personal interviews with persons not called as witnesses and from inspection of documents not produced at the trial.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 233.*]

Appeal from District Court, Routt County; John T. Shumate, Judge.

Condemnation proceedings by the Routt County Development Company against Fred Johnson, executor of J. E. Insley, deceased, and Horace V. Rowell. From the decrees, plaintiff appeals. Reversed and remanded.

C. J. Morley, of Denver, for appellant. A. M. Gooding, of Steamboat Springs, for appellees.

HURLBUT, J. Petition in condemnation proceedings, filed July 17, 1907, by petitioner (appellant) against appellees. Among other things, the petition alleges that appellant is a domestic corporation, and was organized for certain purposes as defined in its articles of incorporation, to wit, "to engage in and conduct the business of irrigation and the acquisition, construction, ownership, operation and maintenance of irrigating ditches, canals, laterals, reservoirs, and other property incident and appurtenant thereto, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all rights of way and all location therefor, with view to storing, preserving, and applying water for domestic, agricultural, manufacturing and other purposes, and the reclamation of arid lands and other beneficial uses and purposes, within the state of Colorado."

[1] It is claimed by appellees that the petition did not state facts sufficient to support the decree rendered by the lower court in this: That it failed to allege that the land sought to be condemned was necessary to further the objects and purposes of the corporation. Appellees have not assigned any cross-errors based upon any ruling of the district court upon the question suggested. This relieves us of the necessity of giving it consideration.

After a careful perusal of the record, our attention is first directed to certain paragraphs in the commissioners' report in the Insley case, which may properly be considered under assignments of error numbered 1 and 10. These paragraphs read as follows:

"In order to establish a basis for a just valuation of the property of said defendant Insley, taken or affected by the location of said reservoir, we have not only heard the testimony of witnesses introduced by the parties at the hearing hereinbefore mentioned, but have carefully investigated the prices at which lands are sold in the Snake river district, Routt county, Colorado, and find a wide range of values, according to the character of the soil, location, production, water supply, accessibility to the public range, improvements, and anxiety of the owners to sell. * * *

"A prospectus of this company, issued in 1907, stated that the irrigated lands of the Snake river valley are now held at from \$50 to \$60 per acre. We find that experienced ranchmen universally consider that on an average \$10 is a conservative estimate for the expense of clearing, fencing and seeding to meadow one acre of Snake river land. * * *

"We found several Snake river ranches which produced more hay to the acre on the cultivated portions than the Insley ranch, but we found none on which the hay produced will winter so many cattle. * * *

"The 300 to 360 tons of hay produced on this ranch would, on the average ranch, winter from 300 to 400 head of cattle, but on account of the location of this ranch it is a well-known fact that not only the patented land, but a large portion of the public range in the immediate vicinity, is practically clear of snow nearly the whole year, the range and lands in the immediate vicinity being so situated that the sun and wind clear off the snow more quickly than in other localities. So advantageous are these conditions to stock raising that 300 tons of hay on this ranch, instead of wintering from 300 to 400 head of stock, as on the ordinary ranch, can be safely relied upon to supply the winter's

feed of from 800 to 1,000 head of cattle, because so much of the time, in the midst of winter, stock find sufficient feed on the patented hill land and the open range."

The record fails to disclose any evidence elicited at the hearing or trial which tends to establish any of the facts above stated, and it necessarily follows that such facts, if they are facts, must have been found by the commissioners, not from sworn testimony or proofs, but from their personal interviews with those not called as witnesses, and from inspection of maps, documents, and printed matter not produced at the trial. The only evidence which we have been able to discover in the abstract, which bears upon the recitals, is found in the testimony of J. E. Insley, to wit: "Q. A good deal has been said about your using the Pot Hook valley of your ranch as a winter range. About how much time in the winter are you in the habit of using your ranch and bottom land? A. About 90 to 100 days, more or less, all winter. I might have told you when you were here about two months ago, when we sat on a bench at the store, that I range the cattle on the bottom land about a month or 6 weeks during the year, but I run my cattle there all winter. According to the book on range reserves, I would be entitled to range a thousand nearly the year round on the reserve. The rules are the same now as they used to be, but I have to pay more, and in the business generally I have the use of the hills and ranges outside of the Pot Hook valley."

[2] Did the commissioners possess the power or authority, under the statute, in fixing values of and damages to the land, to take into consideration information or knowledge concerning the same which was acquired entirely aside from a view of the premises and from sworn testimony and evidence adduced at the trial, and were they authorized to hold personal interviews with those not called as witnesses, inspect plats, documents, and written matter not produced at the trial, and use the information so obtained in fixing such values and damages? We think clearly not. No authority has been cited, and we think none can be found, supporting the affirmative, under a statute like the one under which the commissioners were appointed. There is some conflict of authority as to whether the knowledge acquired by commissioners in viewing the property must be applied by them only to a better understanding and explanation of the sworn testimony and proofs disclosed at the trial, or whether the same should be considered as additional evidence to that there adduced. It is not necessary, however, for us to decide that question, as the record conclusively shows that the facts, above quoted, were neither acquired at the view, nor by any evidence or proofs adduced at the trial.

This is a statutory proceeding, and it is well settled that commissioners, bodies or individuals, appointed and acting thereunder

are limited in their duties and powers to those therein prescribed, and must substantially conform to the statute when assuming to act thereunder. The law under which this proceeding is brought may be found in section 2416 and accompanying sections, Revised Statutes 1908. It prescribes a complete procedure, from beginning to end. By its provisions one desiring to condemn land for reservoir or other purposes must apply to the judge of the district or county court, in term time or vacation, by filing a petition stating certain matters. Upon presentation of the petition the judge notes a day on which he will hear the same, and orders the issuance of summons to each resident defendant, as well as publication thereof when proper showing is made. Liberal amendment to the petition is provided for, and for the bringing in of new parties when necessary. The court is authorized to hear proofs and allegations of all parties necessary touching the legality of the proceedings, and is commanded to appoint a board of commissioners of not less than three freeholders to ascertain and determine the necessity for taking such lands, and to appraise and determine damages and compensation to be allowed to the owners. The commissioners are required to subscribe an oath, and are empowered to administer oaths to witnesses, to issue subpoenas, compel the attendance of witnesses, and adjourn meetings for that purpose. They are commanded to hear the proofs and allegations of the parties, and, after viewing the premises, without fear, favor, or partiality, ascertain and certify the compensation proper to be made to the owners for the lands taken or affected, as well as all damages accruing to owners of property injuriously affected by the taking. The statute also provides that any party to such a proceeding may have the issues tried by a jury by complying with the statute in that behalf, and that the jury may, in the discretion of the court, be sent to view the premises. Forms of verdict or findings of the jury or commissioners are also provided for, as well as other matters of detail touching the proceedings.

It will be noticed that the commissioners are invested with considerable power; but it is specifically provided that the issues of values and damages, submitted to them for determination, shall be found from the "proofs and allegations" of the parties, and after a view of the premises.

Under the most liberal construction of the statute it does not confer upon the commissioners a roving commission to go into the highways and byways in quest of plats, documents, and printed matter, or to interview private individuals upon the subject of values and damages, and from knowledge thus acquired make up their findings. The commissioners in this case were clearly under a misapprehension as to their powers

and duties under their appointment. Their findings of values and damages should have been based solely upon the evidence produced at the trial, and such facts as were impressed upon their minds from a view of the premises only. They were not authorized to discuss with any one the situation which a view disclosed, as affecting value or damage, or resort to plats or other documents not already in evidence to arrive at their conclusions. Should we uphold the commissioners as to their method of arriving at the value of and damage to the land in issue as disclosed by their report, we would be upholding a method which is in direct opposition to that prescribed by the statute, namely, that such values are to be found from the proofs and allegations of the parties and a view of the premises. At the trial both parties are entitled to be present, and each is entitled to cross-examine witnesses and object to the admission or exclusion of any and all documents offered in evidence. If the information acquired by the commissioners from documents and persons not produced at the trial should be used by them, then the party injuriously affected thereby would be deprived of the right of inspecting such documents and cross-examining such witnesses.

The following cited authorities are to some extent in point, and show careful consideration of the subject, viz.: Washburn et al. v. M. & L. W. R. Co., 59 Wis. 364, 18 N. W. 328; Close et al. v. Samm et al., 27 Iowa, 503; Zanesville, M. & P. R. Co. v. Bolen et al., 76 Ohio St. 376, 81 N. E. 681, 11 L. R. A. (N. S.) 1107, 10 Ann. Cas. 658; Denver, N. W. & P. R. Co. v. Howe et al., 49 Colo. 256, 112 Pac. 779; Flower v. Baltimore, etc., Co., 132 Pa. 524, 19 Atl. 274. In the last-cited case the court says: "You have seen the land, but you are not to take it for granted that you can, because you have seen it, be witnesses, or render a verdict upon your own judgment from that view. The law does not permit that. You are only permitted to view the land, that you may the better understand the testimony. The value of the land you are to ascertain from the witnesses."

The Insley case and that concerning the lands of Horace V. Rowell appear to be consolidated for the purpose of appeal. In the commissioners' report in the latter case we find the following statement, viz.: "In January, 1908, we wrote the attorney representing the plaintiffs and defendant in above case that if they would set a day for a final hearing of the case of defendant Rowell we would be pleased to meet their convenience. Receiving no reply, we proceeded to appraise the property on basis of the information elicited in the hearing of Nov. 2, 1907, and our own investigations." (*Italics ours.*) It is obvious from this excerpt that the same method of arriving at the values and

damages was adopted by the commissioners in both cases. Therefore both decrees will be reversed, and the causes remanded.

Reversed and remanded.

(23 Colo. App. 564)

**CRANDALL REALTY & SECURITIES CO.
v. TANQUARY et al.**

(Court of Appeals of Colorado. March 10, 1913.)

1. COMPROMISE AND SETTLEMENT (§ 22*)—ANSWER—PLEADING COMPROMISE.

It is better practice to require defendant to plead a compromise agreement relied upon to defeat the action, leaving plaintiff to reply by way of confession and avoidance if desired, than to have it alleged in the complaint.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 90; Dec. Dig. § 22.*]

2. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

Allegations of the complaint must be assumed to be true for the purpose of a demurrer thereto.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

3. FRAUD (§ 43*)—ACTIONS—SUFFICIENCY OF COMPLAINT.

The complaint alleged that decedent, who was 80 years of age and enfeebled in body and mind, permitted defendant to organize an investment corporation to which he conveyed real estate aggregating \$300,000 in value, and that defendant dominated the affairs of the corporation for a long period, decedent and the other officers having no knowledge of the work and the business, and being but nominal officers, and that during the time defendant was in control of the affairs of the company he "maliciously, fraudulently, and with willful deceit converted to his own use large sums of money belonging to the corporation and said" decedent, "and unlawfully paid himself large sums of money for services purported to have been, but which were not, performed by him, and in diverse other ways wasted the assets of the corporation and of said" decedent, "and misappropriated its and her property and effects." Held, that the complaint sufficiently stated a cause of action as against a general demurrer.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 37; Dec. Dig. § 43.*]

4. PLEADING (§ 48*)—COMPLAINT—SUFFICIENCY.

It is immaterial that the cause of action is different from that intended to be set up by the pleader if the complaint states facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*]

5. PLEADING (§ 406*)—COMPLAINT—WAIVER OF OBJECTIONS—TWO CAUSES OF ACTION.

If defendant does not raise the question that the complaint commingles two causes of action by motion to elect, he must be prepared to meet both at trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by the Crandall Realty & Securities Company against Nathan Q. Tanquary and Horace Phelps, as administrator with the

will annexed de bonis non of Lucy Ann Crandall. Judgment dismissing the bill, and plaintiff brings error. Reversed and remanded.

C. W. Franklin, of Denver, and Harry B. Tedrow, of Boulder, for plaintiff in error. N. Walter Dixon and Charles Roach, both of Denver, for defendants in error.

CUNNINGHAM, P. J. The trial court sustained a general demurrer to the amended complaint of the plaintiff, and thereafter, plaintiff electing to stand on its amended complaint, entered judgment against it, dismissing its bill, and for costs. From this judgment plaintiff, who is plaintiff in error here, brings the case to this court for review. It is only necessary for us, in order to properly dispose of this case, to determine whether the amended complaint states a cause of action or not. We shall therefore, as succinctly as possible, set forth its salient allegations.

From the amended complaint we learn that one Lucy Ann Crandall, who was upwards of 80 years of age, enfeebled in mind and body, and wholly dependent upon others in her business affairs, in May, 1902, permitted Nathan Q. Tanquary, an attorney at law residing in the city of Denver, to organize a corporation known as the Crandall Investment Company, to which corporation she conveyed real property of the aggregate value of \$300,000; that at and long prior to the time of the organization of this company the said Tanquary occupied a fiduciary relation to Mrs. Crandall, was her attorney in all of her business affairs, and she relied exclusively upon his advice in such matters; that Tanquary became one of the directors of this corporation, and received stock in it of the value of \$5,000, the other directors being Dan G. Kirshbaum, a nephew of Mrs. Crandall, and the third director and president of the company was Mrs. Crandall herself. But it is charged that she because of her physical and mental infirmities, which took her frequently for long periods from the state, was at all times but a nominal director. Kirshbaum held all of the offices not held by Tanquary, except that of president. It is further charged in the complaint that the corporation was organized for the sole and only purpose of putting the defendant Tanquary in complete control of Mrs. Crandall's property for his own aggrandizement; that he absolutely dominated and controlled the company, without her knowledge or consent. It further appears from the complaint that Kirshbaum died, and that after his death, for a time, Tanquary controlled absolutely the corporation, holding all the offices except that of president, and receiving a salary of \$5,000 per annum; that after a time a nonresident brother of Mrs. Crandall was made director, to take the place made vacant by the death of the nephew; this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

brother was also made secretary and vice president of the company; he was in Colorado only a few times during the time he held these offices, and then but for a few days at a time; later this nonresident brother resigned, and was succeeded by a sister of Mrs. Crandall, who, because of her lack of all knowledge pertaining to the affairs of the company, became and was but a nominal officer, the whole power and control of the company being exercised either directly or indirectly by Tanquary; that in January, 1905, Mrs. Crandall was adjudged insane, and her death occurred during the same month; that for more than two years immediately prior to her death Mrs. Crandall was absent from the state much of the time, and for more than two years immediately preceding January, 1905, Tanquary had unrestrained control of the corporation, and all the other property belonging to Mrs. Crandall; four months after Mrs. Crandall's death, Tanquary resigned all offices held by him in the corporation and ceased all connection with the same; that no account or report of his doings in connection with said corporation was ever made by Tanquary. Following his resignation, new officers were elected to take charge of the company, but received no aid from Tanquary in their investigation of its affairs. Not until December, 1906, so the bill charges, did the officers of the Investment Company learn of the irregularities of the defendant, which, according to the allegations, consisted in his malicious and fraudulent conversion to his own use of large sums of money belonging to the company and to Mrs. Crandall, and the paying of large sums of money to himself for services never performed, and the misappropriation of property and effects; the exact language of the bill being: "That during the period of time between April 29, 1902, and January 30, 1905, being the time during which he (Tanquary) was in control of the affairs of the said the Crandall Investment Company, as aforesaid, defendant Tanquary maliciously, fraudulently, and with willful deceit converted to his own use large sums of money belonging to said corporation and said Crandall, and unlawfully and fraudulently paid himself large sums of money for services purported to have been, but which were not, performed by him, and in divers other ways wasted the assets of the said last-named corporation, and of said Crandall, and misappropriated its and her property and effects." It is elsewhere charged in the bill that Tanquary misappropriated money to the aggregate amount of \$35,000, in addition to the value of the stock of the company which was issued to him at the time of the organization of the company, and which it is alleged is worth \$5,000. There are other allegations in the complaint, which was voluminous, that we need not summarize. The prayer of the complaint, which was filed December 7, 1908, asks that Tanquary be compelled to account for the

moneys in his hands belonging to the company, and for judgment against him for any balance remaining in his hands, with interest thereon, and that he be required to transfer and convey to the plaintiff any and all property found to have been acquired by him, either in his own name, or in the name of others, by, through, or with the assets of the said the Crandall Investment Company, for costs, and other proper relief.

[1] It appears from an instrument set forth in the amended complaint that Mrs. Crandall left two wills, which occasioned much controversy between her numerous heirs and the beneficiaries named therein. This controversy resulted in the compromise agreement set up in the amended complaint. Plaintiff was forced by the court to plead this agreement *hæc verba*; the defendant Tanquary having by motion asked for such an order. It would have been more in keeping with the rules of good pleading to have required Tanquary to plead this agreement, if he desired to rely upon it, and thus leave the plaintiff free to have replied by way of confession and avoidance, if it so desired. It is contended on behalf of the defendant in error that his rights, and the claims of the estate against him, were adjusted, and all claims of every kind and nature against him were embraced within and settled by this compromise agreement, one result of which was the organization of the Crandall Realty & Securities Company, the plaintiff in error here. We are unable to say as a matter of law, after reading the agreement in connection with the allegations of the bill, that the rights of the plaintiff against Tanquary are concluded by said agreement. It appears that Mrs. Crandall died in January, 1905. The compromise agreement was entered into during the same year, but the exact date of it is not given in the abstract. The complaint avers that the alleged fraudulent and wrongful acts of Tanquary complained of were not discovered until in 1906.

[2] If this be true (and for the purposes of the demurrer it must be assumed to be true), it can hardly be said that the compromise agreement was intended to settle the rights and claims of the estate, or its successor, the existence of which were not at that time known. If it was the intention of all the parties, at the time this agreement was entered into, to compromise the claims of the estate, or of the old Investment Company which was first organized, or of the plaintiff in error, that was created by this agreement and that succeeded to the rights of the old Investment Company, if any existed, against Tanquary, it will work no great hardship upon him to set up that fact by way of answer and establish it by competent proof, thus entirely, or at least to a large extent, exculpating himself from the grave charges contained in the bill.

[3] Perhaps it should be said that the bill

alleges the transfer of all the rights and claims of the first Investment Company, and of all the heirs at law and beneficiaries named in the will, against Tanquary, to the plaintiff in error. The complaint is subject to many of the criticisms urged against it by counsel for defendant in error, but we are disposed to think that it states a cause of action, and that the defendant should be required to answer. Counsel for defendant in error insists that it is impossible to determine the nature of plaintiff's cause of action from the complaint, whether it is for money had and received, or in conversion, or for an accounting.

[4] We need not trouble ourselves greatly about the precise title that should be used to designate the cause of action set up. *Mitchell v. Purley*, 48 Colo. 26, 108 Pac. 995; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608. We have quoted sufficiently from the bill to make it clear that Tanquary, by it, is fairly advised of the charges against him, and we have no doubt that he will be able from the allegations of the bill to intelligently prepare his defense. "If facts are stated constituting a good cause of action, though not the one the pleader intended, the pleading is good as against a general demurrer." *Bruhlm v. Stratton*, 145 Wis. 271, 129 N. W. 1092; *Frechette v. Ravn*, 145 Wis. 589, 130 N. W. 453; *Simpson v. Bantley*, 142 Mo. App. 490, 126 S. W. 909; *Gray v. Linton*, 38 Colo. 178, 88 Pac. 749; *Gutshall v. Kornaley*, 38 Colo. 199, 88 Pac. 158; *McDonald v. State of Nebraska*, 101 Fed. 182, 41 C. C. A. 278; *Orman v. Potter*, 46 Colo. 54, 102 Pac. 893.

[5] "If two causes of action are mingled, and the defendant does not raise the question by motion, he must be prepared to meet both at the trial." *Beers v. Kuehn*, 84 Wis. 33, 54 N. W. 109; *Little Nell Co. v. Hemby*, 45 Colo. 584, 101 Pac. 981. In *Herfort v. Cramer*, 7 Colo. 483, 4 Pac. 896, our Supreme Court quotes with approval the following from *Bliss on Code Pleading*, § 425: "It is said of a demurrer for the objection here made that the pleading, to be subject to demurrer, 'must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say—taking all the facts to be admitted—that they furnish no cause of action whatever.'" Applying this rule to the instant case must, we think, result in the conclusion that the trial court committed reversible error in sustaining the general demurrer of the defendant in error Tanquary to the complaint.

The judgment is therefore reversed, and the case remanded, with instructions to the trial court to enter an order requiring the defendant in error Tanquary to answer the complaint within a reasonable time to be fixed by that court.

Reversed and remanded.

(23 Colo. App. 53)

AULTMAN & TAYLOR MACHINERY CO. v. FOREST.

(Court of Appeals of Colorado. March 10, 1913.)

1. CHATTEL MORTGAGES (§ 260*)—SALE—NOTICE.

A public sale of mortgaged chattels not made upon 15 days' notice, as required by the mortgage, was not good either as a public sale or a private sale.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 535, 536; Dec. Dig. § 260.*]

2. CHATTEL MORTGAGES (§ 262*)—SALE—INVALID SALE.

Where a sale under a chattel mortgage was not good as a public sale because of failure to give the notice required by the mortgage, the market value of the property at the time and place of sale, and not the amount of the bid thereat, should be credited upon the purchase-money note.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 534, 538-541, 544; Dec. Dig. § 262.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.

Where the issues made by the pleadings in an action on promissory notes given for an engine covered by a chattel mortgage, were whether the property was seized and sold under the terms of the mortgage, and a sum realized in excess of the debt, it was error to submit the case upon the theory that plaintiff had wrongfully converted the mortgaged property.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. PLEADING (§ 177*)—ADMISSIONS.

In an action on notes given for an engine, and secured by chattel mortgage, the reply admitted that the notes were given in part payment of the purchase price of an engine, and that defendant, to secure them, executed a chattel mortgage "upon property described in said second defense." The second defense in the answer alleged that, to secure payment of the notes, defendant executed a chattel mortgage, wherein he mortgaged to plaintiff the engine, together with horses, a wagon, threshing machine, etc., of a value stated, and that thereafter plaintiff seized the mortgaged property and disposed of it "under the terms of the chattel mortgage," and realized therefrom more than sufficient to pay the notes. *Held*, that the reply, construed most strongly against plaintiff, was an admission of the taking by plaintiff of the property mortgaged other than the engine.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 354-355; Dec. Dig. § 177.*]

5. PLEADING (§ 36*)—ADMISSIONS.

The answer construed most strongly against defendant admitted that whatever property was taken was lawfully disposed of under the terms of the chattel mortgage, so as to estop defendant from claiming credit for any greater amount than was received, in absence of fraud.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

Error to District Court, La Plata County; Charles A. Pike, Judge.

Action by the Aultman & Taylor Machinery Company against Reese Forest. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Perkins & Main, of Durango, for plaintiff in error. Russell & Reese, of Durango, for defendant in error.

KING, J. Plaintiff in error, as plaintiff below, brought its action against the defendant on five promissory notes for the principal sum of \$650 set forth in *hæc verba*. To this complaint defendant filed his answer consisting of five separate defenses. The first was a denial of immaterial averments, and did not state facts sufficient to constitute a defense. The fourth alleged a rescission of the sale of an engine, in payment of which the promissory notes were given, but this allegation was not supported by the proof, and this defense will not be further noticed. The second, third, and fifth defenses alleged, in different forms, payment of the notes. The second alleged that the notes were given in payment of the purchase price of a certain engine sold by the plaintiff to the defendant July 20, 1901; that to secure payment of said notes defendant, at the time of making them, executed a certain chattel mortgage, whereby he mortgaged to plaintiff the said engine, together with horses, wagon, threshing machine, and other personal property, of the reasonable value of \$2,500; that some time in 1902 the plaintiff seized said property so mortgaged, and disposed of the same under the terms of the chattel mortgage, and realized therefrom more than sufficient to pay the notes, with interest and charges. The third defense alleged the execution and delivery of the notes and chattel mortgage in part payment of the purchase price of said engine, substantially as in the second defense, and alleged that at some date unknown to the defendant plaintiff seized the property covered by said mortgage, and sold the same, and out of the proceeds of such sale realized more than \$1,000, by reason of which, defendant alleged, the notes had been fully paid and satisfied. The fifth defense alleged that the notes had been wholly paid and satisfied, but there was no evidence to support this allegation, otherwise than as alleged in the second and third defenses.

By its reply plaintiff admitted that the notes were given in part payment of the purchase price of an engine sold by plaintiff to the defendant on the date of the said notes, and that, to secure the same, the defendant executed his chattel mortgage "upon property described in said second defense"; that plaintiff took possession of said property under the mortgage, and sold the same in accordance with the laws of Kansas where the contracts were made and the property situated, and denied each and every other allegation of all the defenses.

The due execution and delivery of the notes for a good consideration having been admitted, defendant assumed the burden of proof, and opened and closed the case. The only evidence upon the part of the defendant was that given by himself wherein he stated that he had executed the notes at Barnard, Kan., in payment for a compound en-

gine purchased from the plaintiff herein; that the purchase price was \$1,200 or \$1,250; that he traded in a small engine at an agreed price of \$400, and had assigned certain promissory notes for \$200; that he used the new engine a short time, after which he left it behind a shed on his father's place, and departed from the state; and that it was not damaged with the exception of being greasy. He also stated that he left in Kansas some other property consisting of team and wagons, harness, tank, and some farm implements, the value of which he did not know, but estimated at about \$300. There was no evidence to show that any of this property, aside from the new engine, was covered by the mortgage, or taken by the plaintiff. Plaintiff's testimony showed that the chattel mortgage included nothing but the engine; that about 15 months after the notes were given and several of them were past due plaintiff foreclosed the mortgage; that the sheriff acted as its agent, went to the farm, found the engine exposed to the weather, took it to Barnard, posted four notices of sale to take place ten days thereafter, and at such public sale struck off said property to the plaintiff for the sum of \$50, that being the highest bid made, and that this amount, less the expense, was credited upon one of the promissory notes. There was no evidence offered upon the part of either the plaintiff or the defendant as to the reasonable value, or market value, of the engine at the time when and place where it was sold or elsewhere. The chattel mortgage provided that, upon default, plaintiff might take the property and sell it at the best price to be obtained at public sale, giving 15 days' notice thereof by posting in one or more public places in the town where the sale was to be made, or at private sale, with or without notice. The evidence showed that four notices were posted in the township, one of which was in the town of Barnard, where the sale was to be made. The statute of Kansas provides that, upon foreclosure of a chattel mortgage, public notice of the sale shall be posted for ten days in four public places.

[1] The contention of the plaintiff is that notice in conformity with the statute is sufficient, and made the sale valid, notwithstanding the terms of the mortgage; while appellee contends that the notice must have been given in conformity with the mortgage, and, further, that the evidence does not show that the notices were posted either for the full ten days or in four public places. In that respect the evidence of plaintiff was unsatisfactory. Inasmuch as the statute does not forbid a sale under conditions provided in a chattel mortgage, the public sale should have been made upon the notice provided in the chattel mortgage, to wit, 15 days. *Denny v. Van Dusen*, 27 Kan. 437; *Reynolds v. Thomas*, 28 Kan. 810. For failure to give

due notice the sale was not good as a public sale, under the conditions of the mortgage; and while the mortgage also provides that the property may be disposed of at private sale, with or without notice, and that at any sale the mortgagee may become the purchaser of the property, the attempted sale was not private.

[2] And both upon reason and authority we think the bid at such sale without due notice should not be held to measure the amount for which the defendant should have credit upon the notes; but that he would be entitled to credit for the reasonable value of the said engine, which would be the market value thereof at the time and place of sale. *Jones on Chattel Mortgages*, § 793; *Waite v. Dennison*, 51 Ill. 319; *Kelly v. McCarty*, 75 Kan. 818, 88 Pac. 882; *McConnell v. People*, 84 Ill. 583.

[3] The court, by its instruction, submitted the cause to the jury upon the theory that the issues made were that plaintiff had wrongfully converted the engine which was really mortgaged, together with a large quantity of other personal property which was not mortgaged nor taken at all, and that, therefore, defendant must be allowed credit as against the notes for the value of all such property, which credit had not been given. But no such issue was made by the pleadings. The issue as in fact made by the answer and the replication is, not that the property was unlawfully converted to the use of the plaintiff, but that, having been seized and sold under the terms of the chattel mortgage, the plaintiff realized thereby a sum in excess of the indebtedness represented by the notes. The case was so submitted, in part at least, upon the holding of the court that plaintiff's replication admitted the mortgaging and the taking under the mortgage of this additional personality.

[4, 5] The reply construed most strongly against the plaintiff may be said to constitute an admission by it of the taking of such additional property. On the other hand, the answer construed most strictly against the defendant is an admission that whatever property was taken was lawfully disposed of under the terms of the chattel mortgage, and thereby the defendant would be estopped from claiming credit for any greater sum than was received, in the absence of charges of fraud, actual or constructive.

It is obvious that the cause was submitted to the jury upon instructions which neither covered the issues as made by the pleadings, nor the facts as disclosed by the evidence, even if the pleadings are to be considered as amended to conform to the evidence. Defendant had no right in justice or equity to have the value of his personal property, which was neither mortgaged to nor taken by the plaintiff, considered as against his

debt evidenced by the notes. While, on the other hand, under the evidence, the engine was not disposed of as provided by the chattel mortgage, and therefore the defendant is not limited to the amount for which the same was bid in by the plaintiff, and which, presumptively at least, was not a fair value of the engine; but he is entitled to its fair and reasonable market value at the time when and the place where disposed of, or to the amount derived therefrom by the plaintiff at private sale, if so sold, at a fair price after reasonable diligence. But as to such value there is no evidence. The judgment is reversed, and the cause remanded for a new trial, with permission to both plaintiff and defendant to amend their pleadings as they may be advised.

Reversed and remanded.

(23 Colo. App. 555)

NORRIS v. KELSEY.

(Court of Appeals of Colorado. March 10, 1913.)

1. JUDGMENT (§ 17*)—PROCESS TO SUPPORT—SERVICE BY PUBLICATION—SUFFICIENCY OF AFFIDAVIT—STATEMENT OF POST OFFICE ADDRESS.

Where the affidavit upon which an order of publication of summons was made stated that defendants' "residence" was unknown, instead of stating that his post office address was unknown, the judgment was invalid.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 25-33, 422; Dec. Dig. § 17.*]

2. TAXATION (§ 761*)—TAX SALES—NONCONTIGUOUS TRACTS.

Where noncontiguous tracts of land were sold en masse at a tax sale for a gross sum, the sale was invalid, and the tax deed showing such facts was void on its face.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.*]

3. TAXATION (§ 662*)—TAX SALES—POSTING OF TAX LIST—SUFFICIENCY OF AFFIDAVIT.

An affidavit by the treasurer that for four weeks prior to a tax sale he kept posted continuously near the front door of his office, and in plain public view, a complete printed list of all property offered for sale, with the exception of the amended list, which was posted for one week as provided by law, was not a substantial compliance with *Mills' Ann. St.* §§ 3882, 3883, and 3885, which requires proof that the notice stated where and when the sale would take place, that so much of the described property would be offered on which taxes for the specified years had not been paid, as should be necessary to pay such taxes, and that the notice was posted in a conspicuous place on or near the outer door of the office or building commonly used as the office of the treasurer.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1342; Dec. Dig. § 662.*]

Appeal from District Court, Phillips County; H. P. Burke, Judge.

Action by W. D. Kelsey against Harrison Norris. From a decree for plaintiff, defendant appeals. Affirmed.

Munson & Munson, of Sterling, for appellant. John F. Mail, of Denver, for appellee. Bennett & Walrod, of Holyoke, amicus curiae.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

MORGAN, J. On rehearing granted by the Supreme Court. Appeal from a judgment and decree for possession of land sold for taxes and setting aside certain tax deeds in the Phillips district court, in favor of appellee, whose complaint was met by an answer relying on the tax deeds and on a judgment quieting title to the property involved, and to which answer the appellee replied that the deeds and the judgment were void, and asked that they be set aside.

[1] The appellant asks a reversal, presenting the validity of these instruments for the consideration of this court. The judgment was invalid, because the affidavit upon which the order of publication of summons was made states that the residence of the defendants is unknown, instead of stating that their post office address is unknown. To state that the residence is unknown is not in strict compliance with a statute that requires an affidavit for publication of summons to state that the post office address is unknown. In the case of *Empire Ranch & Cattle Co. v. Gibson*, 129 Pac. 520, in which the affidavit stated that the residence of the defendant was unknown, but did not state that the post office address was unknown, this court held that the judgment was void. See, also, *Empire Co. v. Howell*, 22 Colo. App. 389, 125 Pac. 592; *Empire Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005, in which collateral attack is sufficiently discussed; *Lougee v. Beeney*, 22 Colo. App. 603, 126 Pac. 1102; *Empire Co. v. Saul*, 22 Colo. App. 605, 127 Pac. 123.

[2] One of the two tax deeds is void on its face, because it shows that noncontiguous tracts of land were sold en masse for a gross sum. This deed describes two tracts of land that could not be contiguous under the government survey, and then states that they were offered and sold to the county for a gross sum of money. Such a tax deed has been held to be void on its face in the cases of *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232; *Webber v. Wannemaker*, 39 Colo. 425, 89 Pac. 780; *Whitehead v. Callahan*, 44 Colo. 396, 99 Pac. 57; *Page v. Gillett*, 47 Colo. 289, 107 Pac. 290; *Clark v. Huff*, 49 Colo. 197, 200, 112 Pac. 542; *Hughes v. Webster*, 52 Colo. 475, 122 Pac. 789; *Carnahan v. Hughes* (Sup.) 125 Pac. 116; *Inman v. White*, 21 Colo. App. 429, 122 Pac. 65; *Kit Carson Land Co. v. Rosenberry*, 21 Colo. App. 439, 122 Pac. 72; *Foster v. Clark*, 21 Colo. App. 192, 121 Pac. 130; *Fleming v. Howell*, 22 Colo. App. 382, 125 Pac. 551; *Vanderpan v. Pelton*, 22 Colo. App. 357, 123 Pac. 960.

[3] The other tax deed is void, because the affidavit of the treasurer concerning the posting of the tax list and notice was wholly insufficient. This affidavit by the treasurer states that for four weeks prior to the tax sale, which occurred on the 9th day of December, 1895, "I kept posted continuously

near the front door of my office, and in plain view of the public, a complete printed list of all property offered for sale on that aforesaid day, with the exception of the amended list, which was posted for one week, as provided by law." This affidavit was defective and insufficient, and was not in substantial compliance with sections 3882, 3883, and 3885, Mills' Ann. Stat., in force at that time. An affidavit of the treasurer, in substantial compliance with the statute, is a prerequisite to a valid tax deed. The insufficiency of the affidavit herein consists in the absence of a statement as to what his posted notice contained, concerning where and when the sale would take place, that so much of the property described would be offered at public sale on which taxes for the specified year, or years, had not been paid, as should be necessary to pay said taxes, interest, and penalties. Keeping "posted continuously near the front door of his office and in plain view of the public" is not in compliance with a statute requiring the posting to be "in a conspicuous place on or near the outer door of the office or building commonly used as the office of the treasurer." From this defective affidavit it appears the treasurer posted nothing more than "a complete printed list of all the property offered for sale on that aforesaid day." This would not mean that he posted the notice of the time, place, manner, and purpose of the sale, but only the printed list of the property. This was not sufficient. Our courts have considered some features of this affidavit in the following cases: *Bertha Gould M. & M. Co. v. Burr*, 31 Colo. 264, 73 Pac. 36; *American Bond Co. v. Hopkins*, 46 Colo. 460, 104 Pac. 1040.

Judgment affirmed.

CUNNINGHAM, P. J., and KING and HURLBUT, JJ., concur. BELL, J., does not participate.

(35 Okl. 539)

ST. LOUIS & S. F. R. CO. v. BILBY.
(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§§ 62, 158*)—COMMERCE (§ 8*)—TRANSPORTATION OF LIVE STOCK—INTERSTATE SHIPMENTS—LIMITED LIABILITY—STATE REGULATIONS.

On account of the passage of the Act of Congress of June 29, 1906, c. 3591, § 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1284), the state, under its police power, has ceased to have the authority to pass acts relative to contracts made by carriers pertaining to interstate shipments, and section 9 of article 23 (section 358, Williams' Anno. Const.) of the Constitution of this state applies only to intrastate shipments (following *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, decided by the Supreme Court of the United States on January 6, 1913).

(a) As to interstate shipments, the common-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 180 P.—69

law liability of the carrier for the safe carriage of property may be limited by a special contract with the shipper, where such contract, being supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier (following *Adams Express Co. v. Croninger*, supra).

(b) As to intrastate shipments, only such contracts as are made between the carrier and the shipper pursuant to rules and regulations adopted by the Corporation Commission of this state are valid.

(c) All contracts or bills of lading made or issued by carriers as to intrastate shipments, which are inconsistent with the rates, charges, classifications, rules, and regulations adopted by the Corporation Commission of this state, are void.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 195-206½, 663-667, 690-703½, 708-710, 718, 718½; Dec. Dig. §§ 62, 158;* Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

2. APPEAL AND ERROR (§ 692*)—CARRIERS (§ 227*)—EVIDENCE (§§ 474, 568*)—TRIAL (§ 260*)—TRANSPORTATION OF LIVE STOCK—DAMAGES—ISSUES—INSTRUCTIONS.

The petition claimed, as one of the grounds for damages, "rough and indifferent handling," by which the "cattle were badly bruised." Over the objection of the defendant (plaintiff in error), the plaintiff (defendant in error) was permitted to prove that the cattle were badly bruised, which was caused by being lugged about in the cars and jammed against the sides of the cars and ends of the same. *Held*, not to be reversible error under the issues as framed.

(a) To lay a foundation for the admission of evidence as to the value or damage to cattle, it is sufficient to show that the witness' knowledge was that of a cattle raiser or dealer, and by pricing the same at the time the cattle alleged to have been damaged were placed on the market; the witness stating that he knew the market price. The weight of the opinion or statement as to such price then given is for the jury.

(b) The Live Stock Reporter, which was sought to be introduced in evidence in order to show the market quotations of cattle, neither having been made a part of the record nor the part thereof specially sought to be introduced, this court, on review, is unable to determine whether any error prejudicial to the right of the plaintiff in error was committed, and, under such circumstances, the alleged error cannot be considered on review here.

(c) Although the instruction which was asked on the part of the plaintiff in error, but refused by the trial court, may correctly define the law applicable to the issue or issues in the case, yet, if the subject upon which the instruction was requested is fully covered in the general charge, no reversible error will operate on account of the refusal of the trial court to give same.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692;* *Carriers*, Cent. Dig. §§ 232, 953-956; Dec. Dig. § 227;* *Evidence*, Cent. Dig. §§ 2196-2219, 2392-2394; Dec. Dig. §§ 474, 568;* *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Error from Hughes County Court; P. W. Gardner, Judge.

Action by N. V. Bilby against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error. Lewis C. Lawson, of Holdenville, for defendant in error.

WILLIAMS, J. This proceeding in error was commenced to review the judgment of the trial court, wherein the defendant in error, as plaintiff, had sued the plaintiff in error, as defendant, to recover damages on a certain shipment of cattle delivered to the railroad company at Holdenville, Okla., on April 6, 1909, to be delivered by said carrier at the National Stock Yards, Ill.

For convenience in this opinion, the plaintiff will be referred to as shipper, and the defendant as carrier.

The carrier answered by general denial and further as follows:

"Defendant admits that on April 6, 1909, it received a shipment of cattle from the plaintiff for transportation from Holdenville, Okla., to National Stock Yards, Ill., but avers that at said time this defendant had two rates for the transportation of live stock, to wit, a rate at carrier's risk and a reduced rate under a contract limiting the liability of the carrier, and that plaintiff had the option of shipping said stock at either of said rates; that plaintiff elected to ship said cattle at the reduced rate, and requested, in writing, the transportation of said cattle at such reduced rate under the terms of a contract limiting the liability of the carrier; that said contract, among other things, provided: 'The shipper acknowledges that he has had the option of shipping the live stock at carrier's risk at a higher rate, or under this contract at a lower rate, and that he has elected to make this contract and accept the lower rate. The evidence that the shipper, after a full understanding hereof, agrees to this contract and all the limitations and provisions herein contained is his signature hereto.'

"The defendant agreed to transport said cattle under the terms of said contract limiting the liability of the carrier; said written contract providing for the transportation of said cattle was duly executed by plaintiff and defendant, and a copy of the same is hereto attached and for certainty marked Exhibit A and made a part of this answer.

"Defendant avers that it is provided in said contract as follows: '(a) Live stock is not to be transported or delivered within any specified time, nor in season for any particular market. The company shall not be liable for delay caused by storms, rains, failure of engines, cars, or machinery, obstructions to the track, or from any cause whatever.'

"Defendant further avers that it is provided in said contract as follows: '(b) The company shall not be responsible for any death, loss, or injuries sustained by the live

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stock from any defect in the cars, overloading of cars, escaping of live stock, or because the live stock are wild, unruly, or weak, or maiming each other or themselves, or from fright, crowding, heat, or suffocation. (c) No agent of this company has authority to waive, modify, or amend any limitation or provision of this contract, or to furnish any special kind of cars, or to furnish cars at any fixed time, or to agree to transport the live stock by any certain train, or within any fixed time, or to reach any particular market, which the company hereby expressly declines to do.'

"And this defendant avers that said cattle were transported to National Stock Yards, Ill., in the ordinary and usual course of transportation, and defendant further avers that, under the terms of said contract, it is only required to transport said cattle by its regular freight trains, and by its first trains moving toward the point of destination, which defendant avers it did.

"Defendant avers that it was provided in said contract executed for the consideration above mentioned as follows: '(d) As a condition precedent to recovery of damages for any death, loss, injury, or delay of the live stock, the shipper shall give notice in writing of his claim to some general officer of the company or the nearest station agent or the agent at destination, and before the live stock is mingled with other live stock, and within one day after its delivery at destination, so that the claim may be promptly and fully investigated, and a failure to comply with this condition shall be a bar to the recovery of any damages for such death, loss, injury, or delay.'

"And defendant avers that said plaintiff wholly failed to give any notice of any claim for injury to such stock to any of the persons mentioned in said contract within one day after the delivery of said stock at its destination, and before said stock was mingled with other live stock, and defendant believes such failure on the part of the plaintiff is a bar to any recovery in this action."

Afterwards an amendment was filed by the shipper to his original petition, by which he claimed the additional sum of \$214.60 by reason of the depreciation in the price of the cattle on account of the delay in shipment.

The shipper demurred to the portion of the answer hereinbefore set out, which is referred to as paragraph 2. The order of the court thereon is as follows:

"The court sustains the demurrer of the plaintiff to so much of the second paragraph of the defendant's answer as seeks to make the company not liable for failure of engines, class of machinery, obstructions to the track, or for any cause whatever; the court sustains the demurrer of plaintiff to so much of the second paragraph of defendant's answer as seeks to make it a condition precedent to the recovery of damages for any

death, loss, or injury or delay of live stock, that notice in writing of such claim should be given within one day after its delivery at destination; the limitation being regarded by the court as not reasonable, to which the defendant excepts."

In due time the shipper filed a reply denying: " * * * That, at the time of the shipment mentioned in plaintiff's petition, the plaintiff was offered his option by defendant of shipping said cattle at a rate at carrier's risk, or a reduced rate under a contract limiting the liability of the carrier. Plaintiff admits signing a bill of lading, but says that he did not have time or opportunity to read same, and that he was not acquainted with the contents of same, and that he was not told by the agent of the defendant that there were provisions in said bill of lading, seeking to limit defendant's liability. Plaintiff further says that, when he signed said bill of lading, he did not know, nor was he advised, that there was a provision requiring him to give notice of damage or injury within one day, and that said provision is unreasonable; but plaintiff avers that he did give notice to defendant of the said injury at the earliest possible moment; that said notice was given, as plaintiff believes, within one day from the arrival of said stock at its destination."

This was an interstate shipment, and the question arises as to the validity of the provision requiring notice within one day after the delivery of said cattle as a condition precedent to recovery.

[1] Section 9, art. 23 (section 858, Williams' Anno. Const.), of the Constitution of this state, is as follows:

"Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void."

Unless the state, by action of Congress, has ceased to have jurisdiction of such matters as to interstate shipments, this provision applies and renders the provision of the bill of lading for such notice void. *Western Union Telegraph Co. v. Crawford*, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930; *Gray v. Reliable Ins. Co.*, 26 Okl. 592, 110 Pac. 728.

In *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, decided by the Supreme Court of the United States on January 6, 1913, in an opinion by Mr. Justice Lurton, it is said:

"The answer relies upon the act of Congress of June 29, 1906 [34 Stat. 584, c. 3591 (U. S. Comp. St. Supp. 1911, p. 1284)], being an act to amend the Interstate Commerce Act of 1887 [Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 8154)], as the only regulation applicable to an interstate shipment, and avers that the limita-

tion of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the federal question and gives this court jurisdiction. * * *

"The question upon which the case must turn is whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the state, or by the acts of Congress regulating interstate commerce.

"That the constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment, by defining the liability of the carrier for loss, delay, injury, or damage to such property, needs neither argument nor citation of authority.

"But it is equally well settled that, until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers, and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected. *Smith v. Alabama*, 124 U. S. 465 [8 Sup. Ct. 564, 31 L. Ed. 508]; *New York, etc., Railroad v. New York*, 165 U. S. 628 [17 Sup. Ct. 418, 41 L. Ed. 853]; *Chicago, Milwaukee Ry. Co. v. Solan*, 169 U. S. 133, 137 [18 Sup. Ct. 289, 42 L. Ed. 688]; *Richmond, etc., Ry. v. Patterson Co.*, 169 U. S. 311 [18 Sup. Ct. 335, 42 L. Ed. 759]; *Cleveland, etc., Ry. v. Illinois*, 177 U. S. 514 [20 Sup. Ct. 722, 44 L. Ed. 868]; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477 [24 Sup. Ct. 132, 48 L. Ed. 268]. In the *Solan* Case, cited above, it was said of such state legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

"In that case the court upheld the validity of an Iowa statute which made void every 'contract, receipt, rule or regulation, which shall exempt any railway from liability as a common carrier, which would exist had

no contract, receipt, rule or regulation been made or entered into.'

"The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to \$500 for injury to the person of the drover. Proof was offered that this limitation was the consideration for a reduced rate of transportation.

"In *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 487, 491 [24 Sup. Ct. 132, 48 L. Ed. 268], there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that, in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter state; and the Supreme Court of the state upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that state. That case came to this court upon the contention that the Pennsylvania court, in refusing to limit the recovery to the valuation agreed upon, had denied to the railroad company a right or privilege secured to it by the Interstate Commerce Law. But this court as to that said:

"It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But, upon examination of the terms of the law relied upon, we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error [Act Feb. 4, 1887, c. 104] 24 Stat. at L. 379, 382 [U. S. Comp. St. 1901, p. 3154], [Act March 2, 1889, c. 382] 25 U. S. Stat. at L. 855 [U. S. Comp. St. Supp. 1911, p. 1289], provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates, except after ten days' notice to the Commission; against reduction of joint tariff rates, except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of prop-

erty between points, as to which a joint tariff is made different than is specified in the schedule filed with the Commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, unless made in good faith for some necessary purpose without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations; and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

"In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states.

"The original Interstate Commerce Act of February 4, 1887, was extensively amended by the Act of June 29, 1906, 34 Statutes at Large, 584. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in the twentieth section, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack Amendment. * * *

"This amendment came under consideration in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7]; but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

"The significant and dominating features of that amendment are these:

"First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one state to a point in another.'

"Second. Such initial carrier is made 'liable to the lawful holder thereof for any loss,

damage, or injury to such property caused by it.'

"Third. It is also made liable for any loss, damage, or injury to such property caused by 'any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass.'

"Fourth. It affirmatively declares that 'no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'

"Prior to that amendment, the rule of carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States (*Hart v. Railroad*, 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717]), or that determined by the supposed public policy of a particular state (*Pennsylvania Railroad v. Hughes*, 191 U. S. 477 [24 Sup. Ct. 132, 48 L. Ed. 268]), or that prescribed by statute law of a particular state (*Chicago, etc., Railroad v. Solan*, 169 U. S. 133 [18 Sup. Ct. 289, 42 L. Ed. 688]).

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in *Southern Pacific Railway Co. v. Crenshaw* [5 Ga. App. 675] 63 S. E. 865, where that court said:

"Some states allowed carriers to exempt themselves from all or a part of the common-law liability by rule, regulation, or contract; other did not. The federal courts sitting in the various states were following the local rule; a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper, engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the state courts' obeying and enforcing the provisions of the federal statute, where applicable to the fact in such cases as shall come before them.'

"That the legislation supersedes all the regulations and policies of a particular

state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But, when Congress acted in such a way to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S. 370 [32 Sup. Ct. 160, 56 L. Ed. 237]; *Southern Railway v. Reid*, 222 U. S. 424 [32 Sup. Ct. 140, 56 L. Ed. 257]; *Mondou v. Railroad*, 223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]; *Michigan Central Railroad v. Vreeland* [227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —], just decided.

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading, and the liability thereby assumed are covered in full; and, though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule, and relieve such contracts from the diverse regulation to which they had been theretofore subject.

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage, or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage' would be to ignore the qualifying words 'caused by it.' The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier.

"But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject

is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

"What this court said of the twenty-second section of this act of 1906 in the case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U. S. 426 [27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075], is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or of her statutes. But this court said of that contention, what must be said of the proviso in the twentieth section, that it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act.' Again it was said of the same clause, in the same case, that it could 'not in reason be construed as continuing in a shipper a common-law right, the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.'

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

"We come, now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of \$50, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding \$50, unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50, if no value is stated herein.'

"The answer states that the schedules

which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations, and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of \$50, was 25 cents, while for the same package, if its value had been declared to be \$125, the amount for which the plaintiff sues as the actual value, the lawful charge, according to the rate filed and published, would have been 55 cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of \$50, unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that, across the top of this bill of lading, there was this statement in bold type: 'This company's charge is based upon the value of the property, which must be declared by the shipper.'

"That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Co. v. Central Railroad*, 3 Wall. 107 [18 L. Ed. 170]; *Railroad Co. v. Lockwood*, 17 Wall. 357 [21 L. Ed. 627]; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174 [23 L. Ed. 872]; *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 338 [5 Sup. Ct. 151, 28 L. Ed. 717]. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

"It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the

risk. *York Co. v. Railroad*, 3 Wall. 107 [18 L. Ed. 170]; *Railroad v. Lockwood*, 17 Wall. 357 [21 L. Ed. 627]; *Hart v. Pennsylvania Railroad*, cited above; *Phoenix Ins. Co. v. Erie Trans. Co.*, 117 U. S. 312, 322 [6 Sup. Ct. 1176, 29 L. Ed. 873]; *Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 442 [9 Sup. Ct. 469, 32 L. Ed. 788]; *New York, etc., Ry. v. Estill*, 147 U. S. 591, 619 [13 Sup. Ct. 444, 37 L. Ed. 292]; *Primrose v. W. U. Telegraph Co.*, 154 U. S. 1, 15 [14 Sup. Ct. 1098, 38 L. Ed. 883]; *Chicago, etc., Ry. v. Solan*, 169 U. S. 133, 135 [18 Sup. Ct. 289, 42 L. Ed. 688]; *Calderon v. Steamship Co.*, 170 U. S. 272, 278 [18 Sup. Ct. 588, 42 L. Ed. 1033]; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 485 [24 Sup. Ct. 132, 48 L. Ed. 268].

"That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried.

"Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a large value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in *Hart v. Pennsylvania Railroad*, cited above, where it is said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.'

"The statutory liability, aside from responsibility, for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law, as that body of law applicable to carriers has been

interpreted by this court as well as many courts of the states. *Greenwald v. Barrett*, 199 N. Y. 170, 175 [92 N. E. 218, 35 L. R. A. (N. S.) 971]; *Bernard v. Adams Express Co.*, 205 Mass. 254, 259 [91 N. E. 325, 327, 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351]. The exemption forbidden is, as stated in the case last cited, 'a statutory declaration that a contract of exemption from liability for negligence is against public policy and void.' This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld; the court saying:

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service, and for the risk of loss which the carrier assumes."

"In *Greenwald v. Barrett*, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden; the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried; and the propriety of this practice and the legality of contracts signed by the shipper, agreeing upon a valuation of the property, were distinctly upheld by the Supreme Court of the United States in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 341 [5 Sup. Ct. 151, 156 (28 L. Ed. 717)]. * * *

"That a carrier rate may be graduated by value, and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Com-

merce Commission, see [In re Released Rates] 13 Interst. Com. R. 550.

"We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the acts is not violated by the contract here in question."

In *Chicago, Burlington & Quincy Railway Company v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. —, and *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. —, decided by the Supreme Court on the same date, the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —, is followed and the same rule announced.

It follows from the foregoing authorities that on account of the passage of the Hepburn Act by Congress on June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1284]), the state under its police power has ceased to have the authority to pass acts relative to contracts made by carriers relating to interstate commerce, and that section 9, art. 23 (section 358, Williams' Anno. Const.), of the Constitution of this state, applies only to intrastate shipments.

This court, in many instances, has held that the common-law liability of the carrier for the safe carriage of property may be limited by a special contract with the shipper, where such contract is supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier. *St. Louis & S. F. R. Co. v. Copeland*, 23 Okl. 837, 102 Pac. 104; *Patterson v. M., K. & T. Ry. Co.*, 24 Okl. 747, 104 Pac. 31; *M., K. & T. Ry. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866; *St. Louis & S. F. R. Co. v. Cake*, 25 Okl. 227, 105 Pac. 322; *Chicago, R. I. & P. Ry. Co. v. Wehrman*, 25 Okl. 147, 105 Pac. 328; *M., K. & T. Ry. Co. v. Hancock*, 26 Okl. 254, 109 Pac. 220; *M., K. T. Ry. Co. v. Hancock & Goodbar*, 26 Okl. 265, 109 Pac. 223; *Midland Valley R. Co. v. Ezell*, 29 Okl. 40, 116 Pac. 163; *St. L. & S. F. R. Co. v. Young*, 30 Okl. 588, 120 Pac. 999; *C., R. I. & P. Ry. Co. et al. v. Spears*, 31 Okl. 469, 122 Pac. 228; *St. Louis & S. F. R. Co. v. Ladd*, 124 Pac. 461; *C., R. I. & P. Ry. Co. v. Conway*, 125 Pac. 1110. In all these cases the contract of shipment was entered into prior to the erection of the state. The decisions of the Supreme Court of the United States were controlling in the construction of said contracts, and were followed by this court in deciding said cases. As to the cases arising since the erection of the state, where the contracts relate to interstate shipment, the same authority governs. As to intrastate shipments a different rule applies.

Section 18, art. 9 (section 234, Williams' Anno. Const. par. 1), of the Constitution of

this state, provides: "All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void."

It is not contended that the Commission has prescribed any such rules for the entering into of such contracts relative to intrastate shipments; and therefore contracts entered into between a shipper and a carrier in this state, relating to an intrastate shipment limiting the common-law liability of the carrier for the safe carriage of property, even though such contract be supported by a consideration, and fairly entered into between the shipper and the carrier, the same would be void; and any provision in any such contract between the shipper and the carrier relating to intrastate shipments, stipulating for the notice or demand as a condition precedent to establish any claim, demand, or liability of such shipper for breach of contract, is also void. The court sustained the demurrer of the plaintiff to certain parts of the second paragraph of the defendant's answer. No assignment or specification of error as to this action, relative to the demurrer, is made in the brief as required by rule 25 of this court, and the same is therefore waived.

The following specifications of error are presented for our consideration: (1) In overruling plaintiff in error's demurrer to the evidence. (2) In denying plaintiff in error's request for a peremptory instruction. (3) In admitting certain evidence on the part of defendant in error. (4) In excluding certain evidence offered by plaintiff in error. (5) In refusing to give the following instruction: "If you find that the cattle arrived at the National Stock Yards, Ill., in a damaged condition, that alone will not warrant a recovery by the plaintiff. Before you can find for the plaintiff, you must be able to find, from a fair preponderance of the evidence, the further fact that the damaged condition was caused by and was the direct and proximate result of some act of negligence on the part of the defendant; and, unless you so find, you will find for the defendant."

The first and second specifications of error will be considered together.

[2] 1. In the brief of the plaintiff in error, it is said: "This petition proceeds upon the theory that the defendant is liable in damages on account of failure to deliver the live stock, shipped by plaintiff, at destination within time for the market of a certain day. If in fact the shipping contract is to be considered of any binding efficacy, section 5 thereof is a sufficient answer to plaintiff's demand." Section 5 of said contract is set out as paragraph 2 in the answer.

If the failure to deliver within a reasonable time, so as to reach a particular market, is occasioned by the negligence or acts

of omission on the part of the carrier, it is liable regardless of any contract to the contrary. The carrier is liable for delay occasioned by failure of engines, cars, machinery, obstructions of the track, or for any cause whatever, where such intervening cause results from the negligence or act of omission on the part of the carrier. The evidence, as disclosed by the record, presented a question for the determination of the jury.

2. Under the third specification of error, the question as to the admission of the following evidence is presented for review: "Q. State to the jury what condition those cattle were in. A. They were badly bruised, gaunted up, and gored, where they had hooked and horned one another, and made long scars and marks on them, and several showed where they had been badly handled in the cars. (Defendant objects to the evidence, or any evidence going to show that the damage is caused by the cattle goring one another. They cannot expect damages for the cattle goring one another. Objection sustained. Defendant reads live stock contract to the court. Objection sustained so far as the witness has testified about the cattle goring one another.) Q. State the condition of the cattle as to bruises, if there were any. A. They were badly bruised. Q. What caused this? (Defendant objects, as being incompetent and irrelevant. Objection overruled, to which ruling of the court the defendant excepts.) A. Being lugged about in the cars. Being jammed against the sides and ends of the cars." This was not error under issues as framed in the trial court.

It is also insisted that the carrier is not liable for damages to the live stock shipped because of the inherent nature of the animals inflicting injury upon one another; that, if such liability may be incurred in any instance, by the terms of the contract the carrier in this case is not liable.

Section 4 of the contract, which is set out in paragraph "b" of the answer, does not relieve the carrier from the duty of furnishing proper cars; and if it furnishes defective cars on account of which the cattle are injured, or the injury is caused by such negligence, it cannot contract with the shipper so as to relieve itself from the consequence of such acts. As to overloading of cars, if the loading is done by the shipper, where such is permitted by law, then that is his negligence and not of the carrier. But if the cattle are placed in the stock pens, and the loading is done by the employees of the carrier, and by its negligence the cars are overloaded, it cannot relieve itself from such negligence by contract. Likewise, if the live stock escape from cars as a result of the negligence of the carrier, the same rule applies. If the live stock are injured on account of being wild, unruly, or weak, or maim each other or themselves, or from fright, crowding, heat, or suffocation, such

injuries resulting therefrom being proximate to no act or omission of the carrier, then under said contract the carrier would not be liable. *St. Louis & S. F. R. Co. v. Copeland*, supra.

As to certain evidence on the part of the shipper relating to the value of the cattle, the witness stated that he knew the value of the cattle on the market, and then stated what the value was. He afterwards stated that he based this opinion upon statements made to him by a live stock purchaser at the stock yards, the point of destination; and the record shows that the witness was a cattleman with knowledge as to cattle.

In *St. Louis & San Francisco Ry. Co. v. Crowell*, 127 Pac. 1063, paragraph 1 of the syllabus is as follows: "To lay a foundation for the admission of evidence as to the value of millinery goods kept for sale in stores, it is sufficient to show that the witness' knowledge was that of a dealer in such goods, and by pricing same at the time she made the purchase of the lot in controversy. The weight of the opinion then given is for the jury." This was sufficient predicate for the admission of the evidence; the question as to its weight being for the jury.

3. As to the fourth assignment of error relative to the Live Stock Reporter, the record recites that it is made a part thereof, and identified as Exhibit B; but it appears not to have, in fact, been made a part of the record. The record recites: "Q. I read from this paper the following sentence, and ask you to state— (Plaintiff objects to defendant reading from this paper, as it has not been proven to be an authoritative paper. Objection sustained as to so much of the reading as states the price sold for and the number of cattle.)" No exception seems to have been reserved. "Q. I will ask you to state whether, as a matter of fact, they were common ordinary Oklahoma Tale End steers. (Objected to as leading. Objection sustained, to which ruling of the court the defendant excepts.)" The witness was introduced on the part of the defendant (plaintiff in error); and, the question clearly being leading, it was within the discretion of the trial court to sustain the objection on that ground. At another part of the record we find the following: "Q. Mr. Bilby, I hand you the Daily Live Stock Reporter, which the reporter has marked defendant's Exhibit B, and call your attention to the date of April 10, 1909, and call your attention to the left-hand column on the front page, which has been marked with an indelible pencil, and ask you to state if that does not show the sale of your cattle?" (To which the plaintiff objects because it is incompetent and immaterial. Objection sustained, to which the defendant excepts.) We fail to find in the record this exhibit or it identified in such a way as we can determine what the defendant was seeking to offer, and for that reason

we are unable to determine whether the trial court committed error. The burden is on the plaintiff in error to show error. *Tate v. Stone*, 130 Pac. 266, recently decided by this court, but not yet officially reported; section 5680, Comp. Laws of Oklahoma 1909.

4. As to the fifth specification of error, the instruction complained of seems to correctly define the law; but this subject appears to have been fully covered in the general charge, and, that being the case, the action of the trial court in that respect was free from error. *Coalgate Co. v. Hurst*, 25 Okl. 588, 107 Pac. 657; *Kingfisher Nat. Bank et al. v. Johnson*, 22 Okl. 228, 98 Pac. 343; *Citizens' Bank v. Garnett et al.*, 21 Okl. 200, 95 Pac. 755.

The judgment of the lower court is affirmed. All the Justices concur.

(25 Okl. 554)

SEMINOLE TOWNSITE CO. v. TOWN OF
SEMINOLE et al.

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 323*)—ORDINANCES—PRESUMED VALIDITY.

When a municipality, acting within the scope of its authority, has passed an ordinance, it is presumptively valid; and before a court will be justified in holding it invalid it should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred in an arbitrary manner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 842-846; Dec. Dig. § 323.*]

2. APPEAL AND ERROR (§ 757*)—ASSIGNMENTS OF ERROR—REVIEW.

An assignment of error will not be reviewed, unless that part of rule 25 (95 Pac. viii) of this court is complied with which requires, in effect, that the brief of plaintiff in error shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Dunn, J., dissents.

Error from District Court, Seminole County; Robt. M. Rainey, Judge.

Action by the Seminole Townsite Company against the Town of Seminole and the members of its Board of Trustees and Clerk to enjoin the enforcement of an ordinance providing for the construction of sidewalks in front of various lots owned by plaintiff in a certain town. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 130 Pac. 1100.

Lydick & Eggerman, of Shawnee, for plaintiff in error. Willmott & Dean, of Wewoka, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, for the purpose of enjoining the enforcement of a certain town ordinance, which provides for the construction of sidewalks in front of various lots owned by the plaintiff in the town of Seminole. The court below granted a temporary injunction, which, upon full hearing, it declined to make permanent, and it is to reverse this action of the court that this proceeding in error was commenced.

Counsel for plaintiff in error contend that the ordinance attacked is void, for the reason that it is unreasonable, oppressive, extortionate, confiscatory, and discriminative, and so indefinite and uncertain as to be incapable of being understood. In answer to this counsel for the defendants in error say: "We do not dispute that ordinances of such a town, to be valid, must not be unreasonable, oppressive, extortionate, or discriminatory, and must be so definite and certain as to be capable of being understood. The main question here is a question of fact, which was properly before the trial judge on the affidavits introduced. That question was: Are the facts and circumstances such at Seminole that a court of equity would be warranted in sweeping aside the act of the board of trustees of the town of Seminole and substituting its judgment in its stead, saying that, under the circumstances, the trustees had acted unreasonably, and that the ordinance was open to the objections urged in the bill?" Counsel state the salient features of the case with substantial accuracy.

[1] We think there is evidence reasonably tending to support the action of the court below. That being so, this court would not be justified in setting it aside. This well-established general rule is specially applicable to the class of cases now under consideration. In the case of *Le Feber v. Village of West Allis*, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917, the ordinance was attacked on the ground of unreasonableness. The court said: "It is perfectly well settled in this state, as in most others, that municipal corporations are not completely beyond judicial review and control, even in the exercise of the jurisdiction and discretion delegated to them by the Legislature. True that discretion must and will be accorded broad scope and great deference. The honest judgment of municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of the courts. Nevertheless the delegation of legislative power to subordinate political subdivisions of the state is solely for public purposes, and must be exercised with reference to them. If an act be so remote from every such purpose that no re-

lation thereto can within human reason be discovered, such act must be deemed excluded from the delegation. To that extent, then, courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized and invalid acts which are wholly unreasonable."

All the authorities called to our attention are to the effect that it requires a clear and distinct case to justify a court in holding an ordinance invalid, when the municipality is acting within the scope of its power. As was said by Duffie, C., in the case of *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651: "It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed, in the first instance, to the municipal authorities thereof by the Legislature. When they have acted and passed an ordinance, it is presumptively valid; and before a court will be justified in holding their action invalid the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred by acting in an arbitrary manner."

In the case at bar there is the direct evidence of several disinterested witnesses to the effect that the improvements provided for by the ordinance in question are reasonably necessary to a town the size and importance of Seminole. This evidence is clear and convincing; but, even if we were in doubt on the question, we would be inclined to defer to the discretion and judgment of the municipal authorities.

[2] There is an assignment of error to the effect that the ordinance involved is so indefinite and uncertain as to be incapable of being understood, but, as a copy thereof is not set out in the abstract by counsel for either party, as required by rule 25, the court cannot pass upon that assignment without an examination of the record itself; and therefore we decline to review it. Rule 25 is to the effect that the brief of plaintiff in error shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court.

Finding no error in the record, the judgment of the court below is affirmed. All the Justices concur, except DUNN, J., who dissents.

(35 Okl. 553)

SEMINOLE TOWNSITE CO. v. TOWN OF SEMINOLE et al.

(Supreme Court of Oklahoma. March 11, 1913.)

*(Syllabus by the Court.)***FORMER DECISION CONTROLLING.**

Affirmed on the authority of *Seminole Townsite Co. v. Town of Seminole et al.* (No. 2,204) 130 Pac. 1098, handed down this term.

Dunn, J., dissenting.

Error from District Court, Seminole County; Robt. M. Rainey, Judge.

Action by the Seminole Townsite Company against the Town of Seminole and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Lydick & Eggerman, of Shawnee, for plaintiff in error. Willmott & Dean, of Wewoka, for defendants in error.

KANE, J. The questions involved in this case seem to be the same as in No. 2,204, *Seminole Townsite Co. v. Town of Seminole et al.*, 130 Pac. 1098, the opinion in which has just been handed down. Upon the authority of that case the judgment of the court below is affirmed. All the Justices concur, except DUNN, J., who dissents.

(35 Okl. 639)

EBEY v. KRAUSE†

(Supreme Court of Oklahoma. March 11, 1913.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 757*) — BRIEF — ABSTRACT OF TRANSCRIPT.**

Affirmed on account of failure of plaintiff in error to comply with rule 25 of this court (95 Pac. viii).

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by W. H. Ebey as receiver, etc., against M. W. Krause. Judgment for defendant, and plaintiff brings error. Affirmed.

Clinton A. Galbraith, of Ada, for plaintiff in error.

KANE, J. This was an action by the plaintiff below as receiver of an insolvent bank against the defendant, an incorporator and stockholder thereof, to enforce against him his statutory liability to the creditors and depositors of the bank growing out of that relation. As stated in the brief of counsel for plaintiff in error (there is no brief on behalf of defendant in error), the court below found that the defendant in error, while he had been an incorporator and original subscriber to the capital stock of the insolvent corporation, had sold out his stock, and therefore relieved himself of liability, and decreed in his favor accordingly. As stated by counsel, the assignments of error relied upon "present but one question, and

that is really the only question in this case, namely, Did the defendant in error relieve himself of the obligations he assumed by subscribing for the capital stock and becoming one of the incorporators, officers, and directors of the insolvent corporation by the action he claims to have taken?" It is obvious that, in order to review that question, it would be necessary to examine the record and the evidence upon which the court below based its conclusion.

Rule 25 of this court (95 Pac. viii) requires that the brief of the plaintiff in error "shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court." And it further provides that: "A party need not include in his abstract all the evidence in support of a claim on his part that it does not show or tend to show a certain fact, but when such a question is presented, the adverse party shall print so much of the evidence as he claims to have that effect." The brief in the instant case is entirely wanting in all of the foregoing particulars. For failure to comply with the rule quoted, the court declines to review the assignments of error set out in the brief.

The judgment of the court below is therefore affirmed. All the Justices concur, except WILLIAMS and DUNN, JJ., absent.

(9 Okl. Cr. 121)

VAUGHN v. STATE.

(Criminal Court of Appeals of Oklahoma. April 5, 1913.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 778*) — TRIAL — INSTRUCTIONS — RULES OF EVIDENCE.**

An instruction in the following language: "If, after considering all the evidence, you are morally certain of the innocence of the defendant, then it is your duty to acquit him. Otherwise, convict him." *Held* error, because it places the burden of proof on the defendant to establish his innocence, and deprives him of the benefit of the presumption of innocence, which prevails until he is proven guilty beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.*]

Error from Pawnee County Court; Fred S. Liscum, Judge.

A. J. Vaughn was convicted of violation of the prohibition law, and brings error. Reversed and remanded.

Orton & McNeill, of Pawnee, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the state.

DOYLE, J. Plaintiff in error was convicted of having in his possession whisky with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 1, 1913.

the unlawful intent to violate provisions of the prohibition law, and was on July 8, 1912, in accordance with the verdict of the jury, sentenced to be confined in the county jail for 30 days, and pay a fine of \$350. To reverse this judgment an appeal on case-made was perfected.

Defendant's counsel contend that the court misdirected the jury, to the prejudice of the substantial rights of the defendant, by giving the following instruction: "If, after considering all the evidence, you are morally certain of the innocence of the defendant, then it is your duty to acquit him. Otherwise, convict him." The record shows that an exception was taken to the giving of this instruction, and that the error was also presented to the trial court in a motion for new trial. The Attorney General has filed a confession of error as follows: "This instruction is fundamentally erroneous, in that it deprives the defendant of the presumption of innocence guaranteed to him by the law of this state, and also places the burden upon him of establishing his innocence to a moral certainty, instead of requiring the state to prove his guilt beyond a reasonable doubt. We think the error here complained of so palpable and of such a nature as to deprive this defendant of a substantial right to his prejudice." Unquestionably the judgment should be reversed. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted. Under the rule announced by this court in the case of *Weber v. State*, 2 Okl. Cr. 329, 101 Pac. 355, and the authorities cited there, the confession of error must be sustained.

The judgment of the county court of Pawnee county is therefore reversed, and the cause remanded.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 104)

HOPKINS v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 29, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 598*)—CONTINUANCE—ABSENT WITNESS—DILIGENCE.

It is no abuse of discretion to overrule an application for continuance, where no diligence is shown to procure the attendance or to take the deposition of a nonresident witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

2. HOMICIDE (§ 282½*)—VERDICT—PENALTY.

Section 2275 of Comp. Laws 1909 authorizes the penalty of death at the discretion of the jury; and, if they find the defendant guilty of murder, they must designate in their verdict whether he shall be punished by death or imprisonment for life, and, when a plea of not guilty is entered to an indictment or informa-

tion charging murder, the extreme penalty can be adjudged only upon the verdict of a jury fixing the punishment by death, only "upon a plea of guilty, the court shall determine the same." In such cases section 2028 and section 2029 of Comp. Laws 1909 have no application.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 575; Dec. Dig. § 282½.*]

3. JURY (§ 108*)—COMPETENCY—HOMICIDE.

Under section 6812, subd. 8, Comp. Laws 1909, providing, "If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror," held, where on a trial for murder a juror, who on his voir dire answers that his conscientious scruples against the infliction of the death penalty are such as would preclude him from agreeing to a verdict of guilty, is incompetent to sit as a juror, and a challenge for cause by the state, was properly allowed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 489-491, 496; Dec. Dig. § 108.*]

4. WITNESSES (§§ 268, 330*)—CROSS-EXAMINATION.

On cross-examination of a witness, as a general rule, the party cross-examining should be confined to the matters concerning which the witness has been examined in chief, but this rule should be liberally construed so as to permit any question to be asked on cross-examination which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility. This must necessarily include impeaching questions, although they may relate to matters independent of the questions testified to in chief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 981-948, 959, 1106-1108; Dec. Dig. §§ 268, 330.*]

5. WITNESSES (§ 269*)—CROSS-EXAMINATION.

When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and, unless it affirmatively appears that this discretion was abused, the rulings of the court will not be reviewed on appeal.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

6. CRIMINAL LAW (§ 364*)—RES GESTÆ—SELF-SERVING DECLARATIONS.

Mere self-serving declarations, made to third parties by the defendant at a place distant from the scene of the homicide, are not admissible as a part of the res gestæ; and, while the defendant may prove that he conversed with persons who were at the place he claimed to be, he cannot introduce telephone conversations there had which on his part appear to be self-serving declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

7. CRIMINAL LAW (§ 858*)—DELIBERATIONS OF JURY—INSPECTION.

Where the jury in open court request permission to take with them to the jury room, to inspect during their deliberations, articles introduced in evidence, the granting or refusal of the request is within the discretion of the trial court, the exercise of which will not be reviewed on appeal without an affirmative showing that the discretion was abused. In so far as the case of *Hansing v. Territory*, 4 Okl. 443, 46 Pac. 506, conflicts herewith, it is overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2058-2059, 2062; Dec. Dig. § 858.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

8. CRIMINAL LAW (§ 925*)—NEW TRIAL—GROUNDS.

Where, on a trial for murder, the court permitted the jury to take, on retirement, and to have the same in their possession in the jury room, while deliberating, the defendant's shotgun and the shells and shot which had been introduced in evidence, and it not being made to appear that they were used by the jury in a manner not consistent with the evidence, it cannot be said that the jury thereby received evidence out of court and the statutory grounds as to new trial. Section 6896, Comp. Laws 1909: "Second. When the jury has received any evidence out of court. Third. Or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented"—does not apply.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2238-2247, 2250; Dec. Dig. § 925.*]

(Additional Syllabus by Editorial Staff.)

9. CRIMINAL LAW (§ 858*)—DELIBERATIONS OF JURY—INSPECTION—"PAPERS."

While a shotgun, shells, and shot were not "papers" within Comp. Laws 1909, § 8584, authorizing the jury to take to the jury room papers received in evidence, the taking of such articles to the jury room did not constitute error, where they were not used or handled by the jury in a manner inconsistent with the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059, 2062; Dec. Dig. § 858.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5161, 5162.]

Appeal from District Court, Okmulgee County; Wade S. Stanfield, Judge.

V. R. Hopkins was convicted of murder, and he appeals. Affirmed.

M. M. Alexander and Stanford & Cochran, all of Okmulgee, for plaintiff in error. Chas. West, Atty. Gen., R. E. Gish, of Oklahoma City, and J. W. Childers, Co. Atty., of Okmulgee, for the State.

DOYLE, J. Plaintiff in error, V. R. Hopkins, hereinafter referred to as the defendant, was convicted of murder in the district court of Okmulgee county on an information filed in said court February 4, 1911, charging him with the murder of Walter Huff, in said county, on or about January 13, 1911, and in accordance with the verdict of the jury was sentenced to imprisonment at hard labor in the state penitentiary for life. The judgment and sentence were entered May 27, 1911.

To reverse the judgment, the defendant prosecuted an appeal by filing in this court, on November 27th, a petition in error with case-made.

The testimony in this case is so voluminous that a full review of the same would require a volume in itself, and would serve no useful purpose. The salient facts, briefly stated, are as follows: The defendant and the deceased, both negroes, had lived in the vicinity of Okmulgee for several years, coming from the same neighborhood in Arkansas, and had been friends before coming to Oklahoma. They were both farmers; the defend-

ant living on a rented place about one-half mile west of Okmulgee. Some few months prior to the tragedy, they had a difficulty, and the defendant had sworn out a warrant for the deceased. The latter was arrested and had been in jail for some time prior to the 13th day of January, 1911. He was released upon bond on the afternoon of that fatal day, and had started to walk from Okmulgee to the home of Jeff Hopkins, who lived some six miles northwest of Okmulgee. The defendant was in Okmulgee that same day and talked to several witnesses about the prospect of the deceased being released from jail, and said to several persons who were witnesses, that "they had better keep him in jail; that there would be something doing if he got out." One witness suggested to the defendant that he had better not start any trouble, to which the latter replied, "You wait and see," or words to that effect. Shortly after the defendant was informed of the release of the deceased, he went to a hardware store and there asked for buckshot shells and purchased two, which were all they had in stock of that kind. He also purchased five BB shot shells for a 12 gauge shotgun, which were taken out of a fresh box. Later that afternoon the defendant was seen with a Winchester shotgun walking west from Okmulgee in the general direction of where the homicide occurred. On his way to their home, the deceased was overtaken by Jeff Hopkins and his wife. This party of three were seen by several witnesses going slowly along the road about sundown; the deceased walking by the side of the buggy. They went by the place of one witness D. Williams just before entering the road which runs through the woods along by what is called Checotah Lake. Soon after they entered this road by the lake and became lost to sight among the trees, this witness heard several gunshots in rapid succession, then after a considerable pause two more, another pause, and one last shot. Hastening to the scene, he found in order a woman's glove, a buggy whip, an overcoat, and further up the road the dead body of Walter Huff.

Jeff and Lela Hopkins testified that the defendant opened fire on them from behind a large tree a short distance to the right of the road. At the first shot the deceased said, "Hold up there," evidently thinking it was accidental. The defendant stepped from behind the tree, ejected a shell, and continued to shoot. The second shot struck Lela Hopkins in the head and she fell out of the buggy. The third or fourth shot struck Jeff Hopkins, and he tumbled out and crawled into the brush. The deceased ran up the road, pursued by the defendant, who passed the buggy, shooting as he went. The defendant was recognized and positively identified by Jeff and Lela Hopkins; they having known him for a long time. The body of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

deceased was riddled with BB shot and buck-shot. Several empty shells were picked up at the foot of the tree near the road, and shot were found in trees across the road from this tree. This shot, the empty shells, the defendant's gun, and the box of shells from which he bought the five were all in evidence, and the jury had full opportunity to compare all these things with one another, and with the account of the wounds made and the kind of shot found in the wounds.

The defense was an alibi. Living with the defendant at the time was a boy by the name of M. C. Porter. The defendant admits that early in the day he and this boy went west from their home down to a small lake to shoot fish, but that they returned before 5 o'clock in the afternoon. The defendant lived at the time on land owned by one James Thomas. The defendant had been in Okmulgee on the day of the killing, and had learned that the deceased was about to be released from jail; he asked James Thomas to find out for sure for him whether Walter Huff got out of jail, and said that he would come to his house and inquire. On the evening of January 13th, and about the hour of 6 or 6:30 p. m., the defendant and the boy M. C. Porter appeared at the James Thomas home, and the defendant made inquiry in regard to the deceased getting out of jail. Being informed by Thomas that he was out of jail, the defendant called up a grocery store in Okmulgee, run by a negro, and tried to find out who it was that went on the bond of the deceased. There is some conflict in the testimony as to the time the defendant and the boy reached the Thomas place, which is about four miles from the scene of the crime.

Several witnesses for the defense swore that the defendant and the boy were at their home and feeding hogs at practically the same time that Walter Huff was killed. These witnesses are all negroes. Just a little to the southwest of where the defendant lived at the time, a white man by the name of C. R. Long lived. A person standing at the home of this man Long could plainly see the house and the barn where the defendant lived.

The petition in this case covers 27 pages and contains 30 assignments of error, only a few of which we deem necessary to specifically consider.

[1] The first alleged error is that the trial court abused its discretion in denying the application for a continuance. In the affidavit for continuance the defendant stated that C. R. Long, who resided at Rolfe, Mo., is a material witness, and, if present, would testify that on the day of the killing the defendant was at his own home at the time the killing is alleged to have taken place; that he has only been recently released from jail; that he has used every possible effort to locate said witness and he has only been able to locate said witness in the past few

days; that immediately he caused his attorney to see said witness and he (the said C. R. Long) has promised to be present at the next term of this court and testify; and that he believes that the testimony so to be given to be true. Evidently the trial court was satisfied that due diligence was not shown, and the absent witness' promise to be present at the next term of court was simply a subterfuge to secure a continuance. If the defendant had exercised due diligence, he could have procured the deposition of this nonresident witness under the provisions of article 17, Procedure Criminal. The application lacks the evidence of good faith, as well as that of due diligence.

[2, 3] Second. That the court erred in sustaining a challenge for cause by the state to a juror, who on his voir dire stated that he had conscientious scruples against the infliction of the death penalty, and that he could not conscientiously agree to a verdict which should fix that punishment.

It is insisted that section 2275 of Comp. Laws 1909, providing: "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the state penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same"—has been repealed by implication by the enactment of section 2028 providing: "In all cases of a verdict of conviction for any offense against any of the laws of the state of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict and the court shall render a judgment according to such verdict, except as hereinafter provided"—and that, unless there is a special request by the defendant in a murder case that the jury do fix the punishment it is permissible for the jury, if they find the defendant guilty of murder, to leave the punishment to be fixed by the court. And therefore the defendant was denied the right of having a jury selected in conformity with the law. The jury selected imposed the lighter punishment, and for this reason the ruling of the court is not open to review. However, as there seems to be some misapprehension of the respective sections prevalent, we will briefly state our views on the question.

Section 2275 authorizes the penalty of death at the discretion of the jury, and, if they find the defendant guilty of murder, they must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor; and, when a plea of not guilty is entered to an indictment or information charging murder, the ex-

treble penalty can be adjudged only upon the verdict of a jury fixing the punishment by death. In such cases the general provisions of section 2028 and section 2029 of the Penal Code have no application, only "upon a plea of guilty the court shall determine the same." Opinion of the Judges, 6 Okl. Cr. 18, 115 Pac. 1028.

Subdivision 8 of section 6812, Comp. Laws 1909, provides that: "(8) If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror." Under the law the challenge to the juror was properly sustained.

Numerous exceptions were taken to the rulings of the court on the rejection and admission of testimony. Among these may be noticed the following: On the cross-examination of the state's witness Jeff Hopkins the court sustained objections to various questions as to whether he (the said Hopkins) had in fact held himself out to be a hoodoo doctor, and, in excluding the testimony of Mrs. Lou Allen and Ed Love, offered by the defendant to prove that the witness Jeff Hopkins had been holding himself out as a hoodoo doctor. We think this evidence was properly excluded. The witness Hopkins' identification of the defendant was only remotely affected one way or another, if at all, by evidence that he held himself out to be a hoodoo doctor, whatever that is. But we suppose they had in mind the practice of the art of voodooism. There was therefore no logical relevancy in the evidence offered; and, had it been admitted, the court would have been led into the trial of other issues not germane to the principal one, such as what the beliefs of a witness are, and whether or not they are so unreasonable in themselves as to show general lack of mental balance, and a host of collateral matters that would not tend to show whether or not witness saw and recognized the defendant at the time of the tragedy.

[4] It also appears from the examination of this witness that he said he was not a hoodoo doctor and did not pretend to be at any time. As to what is the proper practice on cross-examination of witnesses the general rule is that the party cross-examining should be confined to the matters concerning which the witness has been examined in chief; but this rule should be liberally construed so as to permit any question to be asked on cross-examination which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility. This must necessarily include impeaching questions, although they may relate to matters independent of the questions testified to in chief.

[5] When the cross-examination is directed

to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and, unless it affirmatively appears that this discretion was abused, the rulings of the trial court will not be reviewed on appeal. Harrold v. Territory, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818; Rogers v. State, 8 Okl. Cr. 228, 127 Pac. 365.

[6] The record discloses that, to establish an alibi, the defendant and several witnesses testified that on the evening of the tragedy the defendant came to the house of James Thomas, a distance of three or four miles from the scene of the crime, and while there engaged in telephone conversations with Isaac Lewis and Berry House, who were at a grocery store in Okmulgee, and the defendant offered to prove by himself and various other witnesses the telephone conversations which he then had were inquiries with reference to whether or not the deceased, Walter Huff, who had been confined in the county jail upon a charge of assault with intent to kill upon the person of the defendant, had been released from custody that day. Exceptions were taken to the refusal of the court to permit these conversations to be received in evidence. It is insisted that whatever is said during the period of the alibi is a part of the *res gestæ*.

As we view the record, this was an attempt to introduce mere self-serving declarations made to third parties by the defendant at a place distant from where the killing occurred, and not shown to be under the stress of emotion or uncontrollable impulse. None of the essentials of matter constituting a part of the *res gestæ* are shown. While the defendant may prove he conversed with persons who were at the place he claims to have been, he cannot introduce telephone conversations then had, which on his part appear to be nothing more than mere self-serving declarations. The objections were therefore properly sustained.

After a careful examination of the exceptions taken to the rulings of the court, on the rejection and admission of testimony, and of the various questions raised thereby, we are satisfied that, within well-settled rules sustained and upheld by the decisions of this court, no error was committed by the court in any of its rulings.

Several assignments are to the effect that the court erred in permitting the county attorney to make misstatements of the evidence, and statements not warranted by the evidence, prejudicial to the defendant in his closing argument of the case to the jury. And the record contains several excerpts from the argument; the two most severely criticised are as follows: "There is no question in the world but that the man who bought those shells over there at Parkinson

& Trent's store, wrapped up in the paper as they were which was found out there, was the man who shot and killed Walter Huff." And: "I say that I have a right to say that on that day as this man and wife, while riding along the road, this defendant, an assassin, stepped from behind a tree and began shooting at them and that he shot Walter Huff." To which language the defendant duly excepted and requested the court to instruct the jury to disregard such statements, which request the court refused.

The record shows that counsel for the defendant also gave his own version of what the testimony was, and in each instance the difference was simply what the testimony was. The court specifically instructed the jury as follows: "The jury are the judges of the testimony in this case. They remember the testimony. They will disregard everything but the testimony given." And the county attorney said to the jury: "Each of you men have heard the evidence. You remember whether or not any such evidence was given. You are to be governed by it; and not by what I say." In the face of these statements to the jury, both by the court and the county attorney, taken in connection with the interruptive denials and interjections of counsel for the defendant, we do not think the jury could have been misled as to the facts in evidence. In fact, we doubt that the county attorney went beyond the limits of legitimate argument in the statements criticised.

In one of its instructions the court told the jury that they might disregard the whole of the evidence of a witness who they believed has willfully sworn falsely to any material fact in the case. It is insisted that the giving of this instruction constituted reversible error. In *Manning v. State*, 7 Okl. Cr. 367, 123 Pac. 1029, this court has limited to proper cases the doctrine stated in the early case of *Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278. The inability of the defendant's learned counsel to point out specifically any state of facts in this case that tend to show that the defendant was prejudiced thereby is sufficient to confirm our conclusion that the giving of this instruction does not necessarily constitute reversible error. This was the only instruction given that is criticised in the brief. Error is assigned upon the refusal of the court to give certain instructions requested, but this assignment is not supported by citation of authority; and, under the rulings of this court that where the instructions given, considered as a whole, fully and fairly state the law of the case, such alleged errors, unsupported by citation of authority, will not be considered.

[7, 8] On page 634 the record recites that, over the objection of the defendant, the court permitted the jury to take with them to the jury room the shotgun, the shells, and the shot which had been offered in evidence.

This action of the court, the final matter of alleged error, presents the most serious question in the case. The defendant's counsel contends that this error alone entitles the defendant to a reversal of the case, and in support of his contention confidently cites the case of *Hansing v. Territory*, 4 Okl. 443, 46 Pac. 509. The statute (section 6864, Pro. Crim.) provides: "On retiring for deliberation the jury may take with them the written instructions given by the court; the forms of verdict approved by the court, and all papers which have been received as evidence in the case, or copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession." In the *Hansing Case* this section is construed; and it is held that, this being the only statutory provision upon this subject, it was error to permit the jury to take with them to their room the firearms used by the two defendants and the hat worn by the deceased at the time of the affray. Mr. Justice Scott, delivering the opinion of the court, said: "It appears that in this case the evidence is very conflicting. * * * It appears by the testimony of two of the jurors that the jury, after retiring, in the defendant's absence, made a number of experiments with the gun and hat, for the purpose of testing the accuracy of the testimony of the different witnesses on that point, showing that the jury received light to enable them to reach a conclusion from a foreign and forbidden source." In the case of *State v. Crea*, 10 Idaho, 88, 76 Pac. 1013, the *Hansing Case* is quoted with approval. In the case of *Kenyon v. Territory*, 5 Okl. 685, 50 Pac. 172, the doctrine of the *Hansing Case* is somewhat modified. In *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965, Ann. Cas. 1912B, 768, it was held proper for the jury to take, on retirement, the coat worn by deceased when he was shot, which was introduced in evidence; counsel for the defendant stating that he had no objection thereto.

We think that articles which have been received in evidence are not "papers" in the sense of the statute; and the practice of permitting the jury to take to the jury room such articles or exhibits, unless the defendant consents, is of doubtful propriety. However, where it does not appear that they were used or handled by the jurors in a manner not consistent with the evidence, it does not constitute error.

The Supreme Court of Washington, in passing upon this point under a statute similar to ours in the case of *State v. Webster*, 21 Wash. 63, 57 Pac. 361, says: "The objection of counsel is met by the very well-considered case of *Doctor Jack v. Territory*, 2 Wash. T. 101, 3 Pac. 832, in which the above section, which has been the existing law of the state and territory for many years, is construed. There it was held that exhibits properly introduced in evidence, and

explanatory of the evidence of witness, might be taken to the jury room (in that case, which was a conviction for murder in the first degree, a hat and coat, which were exhibits in the case, were taken to the jury room); and such has been the practice and the accepted construction of this section since then."

In *Spencer v. State*, 34 Tex. Cr. R. 238, 30 S. W. 46, 32 S. W. 690, where on a trial for murder, after the jury had retired to consider of their verdict, the clothing of deceased, which had been put in evidence, was, on application of the jury, authorized by the court to be sent to them in the absence of and without the knowledge of defendant and his counsel. The Court of Criminal Appeals held that this was not error. In *Chalk v. State*, 35 Tex. Cr. R. 116, 32 S. W. 534, the same court held that: "It is not error to authorize the carrying of deceased's coat, which had been used in evidence, into the jury room." In *Ferguson v. State*, 61 Tex. Cr. R. 152, 136 S. W. 465, the same court reaffirmed this doctrine.

The Supreme Court of Arkansas has held that it was within the discretion of the court to permit the jury to take a forged time check to their jury room for further inspection during their deliberations. *Harshaw v. State*, 94 Ark. 343, 127 S. W. 745.

The Supreme Court of Iowa, in a homicide case, held that, where decedent's skull was admitted in evidence, the jury were properly permitted to take it to the jury room. *State v. Teala*, 135 N. W. 408.

The Supreme Court of Illinois, in *McCoy v. People*, 175 Ill. 224, 51 N. E. 777, held it was proper for the jury to take on retirement the bullet removed from the body of the deceased, and the revolver belonging to the accused, where both had been admitted in evidence. And in the case of *People v. Morris*, 254 Ill. 559, 98 N. E. 975, the same court held that it is proper, in a prosecution for homicide, to send to the jury room objects which have been introduced in evidence, which are or may be of assistance to the jury in illustrating or elucidating some controverted question involved in the evidence, and that this is a matter wholly within the sound discretion of the court, the exercise of which will not be interfered with without an affirmative showing that the discretion was abused. See, also, *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State v. McCafferty*, 63 Me. 223; *Powell v. State*, 61 Miss. 319; *Taylor v. Commonwealth*, 90 Va. 109, 17 S. E. 812.

[8] Section 6896, Comp. Laws 1909, provides: "A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a defendant by which his sub-

stantial rights have been prejudiced, upon his application in the following cases only: * * * Second. When the jury has received any evidence out of court, other than that resulting from a view of the premises. Third. When the jury * * * has been guilty of any misconduct by which a fair and due consideration of the case has been prevented."

In the case at bar it cannot be said that the jury received evidence out of court. These articles had been properly identified and received as evidence in the case. Nor can it be said that the jury was guilty of misconduct, such as prevented a fair and due consideration of the case, for them to take with them these articles. No injury is pointed out, and no prejudice to the substantial rights of the defendant appears; and we are of opinion that in the case at bar there was no error in that regard. In so far as the case of *Hansing v. Territory*, supra, conflicts with this opinion, it is overruled.

The importance of the question in our practice must justify the attention here given to it; and we feel constrained to enunciate, as a general rule, that, where the jury in open court request permission to take with them to the jury room, to inspect during their deliberations, articles introduced in evidence, the granting or refusal of the request is within the discretion of the trial court, but, if the defendant consents, the request should be granted. The practice at best is not a safe one, as cases might arise where the jury during its deliberations might use, or attempt experiments in a manner not consistent with the evidence; and it is strongly urged upon trial courts to avoid possible prejudicial error by refusing such requests, except in cases where the trial court is convinced that an inspection of such articles may be of assistance to the jury in considering some controverted question involved in the evidence.

While we agree that some irregularities intervened during the progress of the trial of this case, as herein indicated, we regard these irregularities as not having probably had any perceptible effect upon the result of the trial, and our conclusion is that no error has been committed to the prejudice of the defendant. In our opinion, the evidence in the case shows, beyond any character of doubt, that this defendant committed a cold-blooded assassination by lying in wait by the wayside and shooting a defenseless neighbor.

The judgment of conviction is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 128)

STATE v. ZANGER.

(Criminal Court of Appeals of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 215*) — INFORMATION—ILLEGAL SALE.

An information, although awkwardly drawn, and containing several allegations which are objectionable, and the intent of which apparently indicates that it was the purpose of the pleader to charge two distinct offenses, but which, because of the language used, only charges one offense, to wit, the unlawful sale of beer, states facts sufficient to constitute an offense against the laws of this state, and is not demurrable.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 258-260; Dec. Dig. § 215.*]

Appeal from Coal County Court; R. H. Wells, Judge.

Information against Adam Zanger for violating the prohibitory law. From a judgment sustaining a demurrer thereto, the State appeals. Reversed.

Jas. R. Wood, County Atty., of Coalgate, for the State. Fooshee & Brunson, of Coalgate, for defendant in error.

ARMSTRONG, P. J. This appeal is by the state of Oklahoma upon a question reserved by the county attorney.

It appears that an information was filed in the county court of Coal county purporting to charge the defendant in error with violating the prohibitory law, the charging part of said information being as follows: "Said Adam Zanger did then and there willfully and unlawfully sell and furnish to one Jesse Combs certain malt liquors, to wit, beer, and a certain imitation of, and a substitute for, malt liquors, to wit, an imitation of, and a substitute for, beer." A demurrer was filed to this information on behalf of the defendant in error, and was sustained by the trial court on the following grounds: "That said information does not state facts sufficient to constitute a crime against the laws of the state of Oklahoma," and "that the information is duplicitous charging more than one offense against the defendant." The court erred in sustaining the demurrer to the information, because it does state facts sufficient to allege the offense of selling beer. Under a former holding of this court, it does not state facts sufficient to constitute a "furnishing" within the meaning of the prohibitory law. *Scott v. State*, 6 Okl. Cr. 492, 119 Pac. 1023. The allegation relative to furnishing is surplusage.

The latter clause in the charging part of the information does not state facts sufficient to constitute the sale of an imitation or substitute for beer under the holding of this court in the case of *Ex parte Hunnicutt*, 7 Okl. Cr. 213, 123 Pac. 179, and for that reason it is not duplicitous; that portion of the information being also surplusage. We

do not want to be understood as approving this information as a model form of pleading, but it is sufficient to charge and does charge the illegal sale of intoxicating liquor, to wit, beer.

It follows that the judgment of the trial court should be reversed, and the cause remanded for a trial. And it is so ordered.

DOYLE and FURMAN, JJ., concur.

(9 Okl. Cr. 124)

UPDIKE v. STATE.

(Criminal Court of Appeals of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 209*)—DYING DECLARATIONS—ADMISSIBILITY.

(a) Where a dying declaration has been reduced to writing, and has been read over to and approved and signed by the deceased, the fact that it may not be in the exact language used by the deceased will not render it inadmissible; provided, the language used is substantially the same as that used by the deceased.

(b) For a written statement which was properly admitted in evidence as a dying declaration, see opinion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 441; Dec. Dig. § 209.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—DEGREE OF OFFENSE.

Where an appellant has been convicted of murder, the judgment should not be reversed because of the failure of the trial court to instruct on manslaughter in the second degree, when it appears from the testimony that the issue of manslaughter in the second degree was not raised by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

3. CRIMINAL LAW (§ 822*)—HOMICIDE (§§ 39, 81, 309*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—MANSLAUGHTER—ANGER OR VOLUNTARY INTOXICATION.

(a) Instructions must be considered as a whole and all of their several parts must be construed together and in connection with each other.

(b) For correct instructions upon the subject of manslaughter in the first degree given in a case where the appellant was convicted of murder, see opinion.

(c) Anger or voluntary intoxication when not of such a character as to render the mind incapable of forming a premeditated design to effect the death of the deceased or of some other person will not reduce an unlawful homicide from murder to manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1996, 3158; Dec. Dig. § 822.* Homicide, Cent. Dig. §§ 59-61, 107, 649, 650, 652-655; Dec. Dig. §§ 39, 81, 309.*]

Appeal from District Court, Oklahoma County; George W. Clark, Judge.

B. H. Updike was convicted of murder, and his punishment assessed at imprisonment in the penitentiary for life, and he appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Moman Prulett and Kistler, McAdams & Haskell, all of Oklahoma City, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. Three questions are presented in the brief of counsel for appellant: First, that the court erred in receiving as dying declarations a written statement purporting to have been made by the deceased; second, that the court erred in instructing the jury that they could not convict the appellant of manslaughter in the second degree; third, that the court erred in the instructions given to the jury with reference to manslaughter in the first degree.

[1] First. When the purported dying statement was offered in evidence, counsel for appellant objected to the same as being incompetent, irrelevant, and immaterial, and not being a statement made by the deceased. This objection was overruled by the court, to which appellant excepted. The record then proceeds as follows:

"Whereupon, the statement was read to the jury, which is in words and figures as follows, to wit: 'I, P. D. Anderson, of Oklahoma City, Oklahoma, being mortally wounded, and realizing and believing that I will not live, and having given up all hope of life and recovery, make the following statement as my dying declaration: I live at 111½—'

"By Mr. Prulett: I now object, and ask that that portion of the statement 'make this my dying declaration' be stricken, for the reason that it is not the language of the deceased, wholly incompetent, irrelevant, and immaterial and prejudicial to the rights of the defendant.

"By the Court: Overruled.

"By Mr. Prulett: Note our exception.

"(Statement continued:) 'West Reno, in Oklahoma City, Oklahoma. My wife lives at 1111 West Reno. Updike's wife is my wife's sister. We are brothers-in-law. Updike was on a big drunk. I just walked down there for a few minutes. Updike and his wife were having a quarrel. He shot the other man, and then he shot me. The other man rooms there with him. Updike and his wife had some trouble. He said, 'Nolle, I am going to kill you.' He went to another room, and came back with a gun, and kicked a window out to get into the room. His wife left when he kicked the window in. He then shot the other man who was there, and then before I could get out he shot me. Jan. 15, 1911. [Signed] P. D. Anderson.'"

In support of this objection, counsel for appellant in their brief say: "The evidence of Mr. Zwick and Dr. Riley clearly shows that the following part of the statement was not the statement of the deceased, but that of Mr. Zwick, assistant county attorney: 'I, P. D. Anderson, of Oklahoma City, Oklahoma, being mortally wounded, and realizing and believing that I will not live, and having

given up all hope of life and recovery, make the following statement as my dying declaration.' The evidence clearly shows that Mr. Anderson never made any such statement, and we do not believe that it can be inferred from his action that he even acquiesced in the same."

So it is seen that the specific objection to the dying declaration was that the statement contained in the first paragraph was not in the language of the deceased, and that there was nothing in the record showing that he acquiesced in the language used. The paragraph objected to did not state any fact affecting the guilt or innocence of appellant. It was merely introductory to the statement as to how the homicide occurred. It is nowhere claimed in the brief of counsel for appellant that as a matter of fact it had not been proven that the statement made by the deceased was not made under such circumstances as would render it competent as a dying declaration and no such objection was made in the court below. The objection then can only be considered as to the first paragraph contained in the statement. This matter was fully investigated in the trial court. William H. Zwick, assistant county attorney, testified: That he called on the deceased at the hospital about 7:30 o'clock on the evening of the difficulty, and was with him about 20 minutes. Dr. Riley was present. That he informed the deceased that he represented the county attorney's office, and asked the deceased if he desired to make a statement as to how the shooting occurred. The deceased asked the doctor as to his condition, and asked him if he would ever recover. The doctor said: "In my judgment you will die from the effects of this wound." That witness then informed the deceased that unless he felt himself that he was going to die from the effects of the wound, and believed what the doctor had told him, he, witness, did not desire to take a statement from him, deceased, because it would be of no value. Deceased then said: "I will tell you how it occurred." That witness took out a piece of paper and wrote down what deceased said to him; when he was through, witness said to deceased, "Can you understand me?" and deceased said that he could. Witness then said, "I want to read the statement to you slowly and carefully and if it is not correct I want you to make the correction." That witness then read the statement over in full, and asked deceased if it was correct, and he replied that it was. That then two attendants raised deceased up in the bed and witness held a paper before him and the deceased signed it.

Mrs. Graham testified that she was with deceased shortly after the shooting; she saw the deceased on the back porch of the apartment where he was shot; that she knelt down by him and he was gasping to get his breath, and she saw that he was still alive;

that finally he appeared to regain consciousness; that he never mentioned his wife and child while he lay there, except to give their address, and he made no statements there except to answer questions.

Dr. J. W. Riley testified: That he was commissioner of health of Oklahoma City. That about 6 o'clock on the evening of the 15th day of January, 1911, he was called upon to visit deceased. That deceased was shot through the body, but the bullet did not come out. The deceased was carried to St. Anthony's Hospital about 7 o'clock, and witness saw deceased there, and was with him an hour or an hour and a half. When he next saw the deceased, the deceased was dead. The deceased died about midnight that night from hemorrhage from the wound inflicted. That, when he first saw the deceased, he was semiconscious. He was just coming out of the shock from the shot, but the deceased regained his consciousness completely. Witness was acquainted with William H. Zwick, the assistant county attorney, and was present when he was in the room of deceased. That deceased was conscious, and talked and answered questions intelligently, and seemed to understand what he said and what was said to him. That witness informed deceased that he was mortally wounded, and was going to die, and informed deceased he could not do anything for him, and that, if he had anything to say, he had better say it. Mr. Zwick spoke up and told the deceased that, unless he realized he was mortally wounded and was going to die, the statement would do no good. The deceased then made a statement to Zwick and it was taken down and reduced to writing by Zwick. It was then read over to the deceased and signed by him; when it was so read over, deceased said "that was the facts in the case," or words to that effect. There was no possibility of the recovery of the deceased at the time the statement was made. Deceased appeared to realize the seriousness of his condition, and appeared to realize that he was going to die and called for his wife and child.

The circumstances under which this statement was made and the statements which passed between assistant county attorney Zwick and the deceased fully justified the statements contained in the paragraph objected to, and the fact that they were afterwards read over to and signed by the deceased, makes them the statements of the deceased. It is absolutely clear that these statements were made when all hope of recovery had been lost, and when the deceased was really a dying man. When first shot, deceased fell to the floor in an unconscious condition caused by the shock of the wound. Those who first reached him found him gasping for breath, and testified that he afterwards regained consciousness. The character of the wound and all of the circumstances in this case are conclusive as

to the fact that deceased realized his condition.

In the case of *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650, the very question now before us was passed upon by the Supreme Court of Washington, and that court said: "He had been informed by the doctor that he was about to die, and said that he realized it. This was sufficient to make the declaration admissible. It also appeared that the deceased had sent for an attorney, and had related to him the circumstances of the shooting, and that some time thereafter said attorney reduced the same to writing, not in the presence of the deceased; and it also appears that in one or two minutes said attorney testified the statement was incorrect, and that he had made a mistake therein in reducing it to writing, but it appears that the statement had been read to the deceased a short time before his death, and that, after directing a portion of it to be re-read to him, he seemed satisfied with it, and signed it. The fact that it was not in the exact language of the declarant would not render it inadmissible. Nor would the testimony of the attorney who reduced it to writing that it was incorrect in one or two particulars, as it would still be a question of fact for the jury. The alleged mistake related to an unimportant matter leading up to the time of the controversy, and it probably escaped the attention of the declarant at the time the same was read over to him. None of the objections raised against the admission of the dying declaration are tenable."

In the case of *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458, discussing this very question, the Supreme Court of that state said: "The declaration thus presented was in a writing which was made by one Carrigan, in the presence of Laughlin and of one Kennedy. The facts of the case were drawn out from Laughlin by Carrigan, who then put the same in the writing. Some facts were suggested by Kennedy, to which Laughlin assented. The writing was then read to Laughlin, who assented to its correctness by a signature, and by responding, 'Yes,' in answer to a question as to whether he swore to it. The manner in which the instrument was made was not such as to render it inadmissible as the declaration of the deceased. *Wharton, Crim. Ev. § 300; Com. v. Casey*, supra [11 Cush. (Mass.) 417, 59 Am. Dec. 150]; *Murphy v. People*, supra [37 Ill. 447]; *People v. Sanchez*, supra [24 Cal. 17]."

Although a statement reduced to writing is not in the exact language used by the deceased, yet, if it clearly appears from all of the testimony in the case that the statement was made under circumstances rendering it admissible as a dying declaration and it was read over to and approved and signed by the deceased, it will be admissible in evidence. On this question in the case of *State v. Kindle*, 47 Ohio, 358, 24 N. E. 485, the Supreme Court of that state said: "We

are of opinion that in cases of homicide a statement of the injured person made in extremis, while conscious of his condition, and under a sense of impending dissolution, reduced to writing by a competent person, at the instance of the declarant, or with his consent, approved and signed by him, containing statements of the circumstances of the unlawful act which results in death, after proper preliminary proof has been introduced, is admissible in evidence." In the case of *People v. Farmer*, 77 Cal. 1, 18 Pac. 800, the Supreme Court of that state said: "It would serve no good purpose to restate here the rules which govern the admissibility of dying declarations. They are well established and generally understood, and the difficulty always is in applying them to particular cases. It is sufficient to say in the case at bar that in our opinion the circumstances in proof warranted the court in admitting the declaration. And we do not think, as argued by counsel for appellant, that the correctness of the ruling is impeached by the fact that the scribe who reduced the statement to writing concluded it with these words: 'In view of the probability of my dying, I make the above statement as my dying declaration.' The deceased was in too much pain to make a statement in a narrative form. It was taken by question and answer. It is quite as likely that the word 'probability' was suggested by the person who wrote it as that it originated with the deceased. At all events, the condition of the declarant's mind as to his apprehension of death must be determined from all that was said and done, and all the circumstances surrounding him, and not from a critical consideration of the exact meaning of a word used only once during all the conversations. And, taking all the evidence into consideration, we think that it sufficiently appears that, when the statement was made, the deceased believed that he was about to die." See, also, *Addington v. State*, 8 Okl. Cr. —, 130 Pac. 311; *Ryan v. State*, 8 Okl. Cr. 625, 129 Pac. 685; *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030; *Offitt v. State*, 5 Okl. Cr. 48, 113 Pac. 554; *Mulkey v. State*, 5 Okl. Cr. 75, 113 Pac. 532; *Blair v. State*, 4 Okl. Cr. 360, 111 Pac. 1003; *Nelson v. State*, 3 Okl. Cr. 468, 106 Pac. 647; *Hawkins v. United States*, 3 Okl. Cr. 651, 108 Pac. 561; *Bilton v. Territory*, 1 Okl. Cr. 566, 99 Pac. 163.

[2] Second. Upon the trial of this cause, among other things, the court instructed the jury as follows: "The information charges the highest degree of homicide or that of murder, but the charge therein embraces all the lower degrees of homicide, but there is, in this case, no element of manslaughter in the second degree, nor of excusable homicide as the latter is defined by our statute." To this instruction appellant reserved an exception. Section 6857, Comp. Laws 1909, is as follows: "In charging the jury, the court

must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must in addition inform the jury that they are the exclusive judges of all questions of fact. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given, if not, it must be refused. Upon each charge presented and given or refused the court must indorse or sign its decision. If part of any written charge be given and part refused the court must distinguish, showing by the indorsement or answer what part of each charge was given and what part refused." This makes it the duty of the trial court to give to the jury such instructions as the court may think necessary for their information in giving their verdict. This vests the matter of the instructions to be given in the discretion of the trial court. It is true that this discretion is subject to review upon appeal, but it will not be disturbed unless the record presents a clear case of abuse of discretion. No conviction should be reversed for the failure of the trial court to instruct upon any given issue, unless from the testimony in the case it appears that an honest and intelligent jury could legitimately arrive at a conclusion favorable to the defendant upon such issue. We fail to find any evidence in this record upon which an intelligent and honest jury could have convicted appellant of manslaughter in the second degree. The action of the trial court in giving the instruction complained of is therefore not error.

[3] Third. Upon the trial of this cause, the court, among other things, instructed the jury as follows: "Before the defendant could be found guilty of manslaughter in the first degree, you must believe from the evidence, beyond a reasonable doubt, that the homicide charged in the information was perpetrated by him by means of a dangerous weapon, in a heat of passion, but without a design to effect death, and that the same was not committed in self-defense, or under such circumstances as constitutes justifiable homicide, as defined in these instructions." To this instruction appellant excepted at the time. In support of the exception taken to this instruction, counsel for appellant in their brief say: "The court will note from this instruction that the trial court said to the jury that, before they would be warranted in finding the defendant guilty of manslaughter, they must find beyond a reasonable doubt that the homicide was perpetrated by him by means of a dangerous weapon in a heat of passion, which clearly placed the burden upon him to show that he committed the homicide in a sudden heat of passion, before the jury would be warranted in reducing the offense from murder to manslaughter, and, having previously eliminated from the

consideration of the jury second-degree manslaughter, excusable homicide, and by inference justifiable homicide, this instruction certainly placed the burden upon the plaintiff in error to show that the homicide was committed without a design to effect death, and further that the same was not committed in self-defense, or under such circumstances as constitute justifiable homicide, as defined in these instructions, and that all these things had to be found by the jury beyond a reasonable doubt before he could be found guilty of manslaughter. Had it not been for this instruction, we believe under the evidence in this case that the jury would not have returned a verdict of murder in the first degree." The position of counsel for appellant is that this instruction required the jury to convict appellant of murder unless the jury should find from the evidence beyond a reasonable doubt that appellant committed the homicide by means of a dangerous weapon and in a heat of passion, and without a design to effect death, and not in self-defense, or under such circumstances as constituted justifiable homicide as defined in the instructions. In assuming this position, counsel for appellant have not considered this instruction in connection with the other instructions given. The absurd consequences which would result from this line of reasoning can be well illustrated by quoting three passages of Scripture without reference to the connection in which they are used. In one place the Bible says: "Judas Iscariot went out and hanged himself." In another place the Bible says: "Go thou and do likewise." In another place the Bible says: "And all the people said Amen." By selecting isolated passages without reference to the context and subject-matter, counsel could easily dispose of the entire instructions given by the court. Instructions must be considered as a whole. All of their several parts must be considered in connection with each other. The court had previously instructed the jury that, before appellant could be convicted of murder, they must find from the evidence beyond a reasonable doubt that he killed the deceased with a premeditated design to effect his death, and that such killing was not justifiable under the other instructions given, and that, if they entertained a reasonable doubt upon this subject from all the evidence in the case, they should find the defendant not guilty of murder. The court also instructed the jury as follows: "If, from the evidence, facts, and circumstances in the case as disclosed upon the trial, you entertain a reasonable doubt of the guilt of the accused, it is your duty to give the defendant the benefit of that doubt and acquit him. If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of either murder or manslaughter in the first

degree, it is your duty to determine the particular crime of which he is guilty, and if you have a reasonable doubt whether the offense, if any, is murder, then it will be your duty to give the defendant the benefit of that doubt, and acquit him of that crime." The court again instructed the jury as follows: "If you do not find the defendant guilty of murder, you will next consider whether he is guilty of manslaughter in the first degree as defined in these instructions, and if you find, from the evidence, facts and circumstances, as disclosed upon the trial, beyond a reasonable doubt, that the defendant killed the said Anderson in a heat of passion by means of a dangerous weapon and without a design to effect his death, and you do not entertain a reasonable doubt from the evidence as to whether he was justified in taking the life of the deceased, you will find the defendant guilty of manslaughter in the first degree as charged in the information. If, however, you do not find the defendant guilty of murder, and you entertain a reasonable doubt as to his having killed the said Anderson in a heat of passion and by means of a dangerous weapon, without a design to effect his death, you will return a verdict of not guilty." Considering all of these instructions together, we think that they properly present the law of the case. Even if there was error in the instruction upon the subject of manslaughter, we do not think that appellant could be heard to complain thereat. Section 2271, Comp. Laws 1909, is as follows: "Homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time." The most that could be said is that appellant was angry, and was more or less intoxicated when he fired the fatal shot. His own evidence makes it clear that he fired this shot with a premeditated design to effect the death of the deceased. His act was therefore murder, notwithstanding his anger and intoxication. Anger or voluntary intoxication when not of such a character as to render the mind incapable of forming a premeditated design to effect the death of the deceased or of some other human being will not reduce an unlawful killing from murder to manslaughter. This is the plain letter of our statute. Under this statute and the testimony in this case, the trial judge would have been entirely justifiable in not submitting the issue of manslaughter to the jury.

We find no error in the record. The judgment of the lower court is in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 119)

SIMERSON v. STATE.(Criminal Court of Appeals of Oklahoma.
April 5, 1913.)*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL.**

Where a motion is made to dismiss an appeal for defects in the record, and the matter is set for a hearing, and the appellant does not appear or file a correction to the record, the motion will be taken as confessed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

2. CRIMINAL LAW (§ 1110*)—APPEAL—RECORD—CORRECTION.

For the manner in which jurisdictional defects may be cured in a record, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903-2917, 2919; Dec. Dig. § 1110.*]

Appeal from Craig County Court; S. F. Parks, Judge.

Asa Simerson was convicted of violating the prohibitory liquor law, and appeals. Dismissed.

Riddle & Bennett, of Vinita, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. Appellant was convicted of violating the prohibitory liquor law, and his punishment was assessed at a fine of \$50 and 30 days' confinement in the county jail. From this judgment appellant attempted to appeal.

On the 8th day of July, 1912, the Attorney General filed a motion to dismiss this appeal upon the following grounds:

"First. Because no written notice of appeal was ever served on the clerk of the county court in which this case was tried as required by law.

"Second. Because the record shows that this is an attempted appeal from a judgment of conviction for a misdemeanor rendered in the county court of Craig county, Okl., on the 19th day of January, 1912, at which time the court granted the defendant 60 days to prepare and serve the case-made, but did not grant any additional extension of time for filing petition in error and case-made in this court; that thereafter, to wit, on the 9th day of March, 1912, the judge of said court made an order extending the time for filing the appeal in this court for 20 days from and after the expiration of the time theretofore allowed, which said extended time expired on and with the 8th day of April, 1912, and the petition in error and case-made were not filed in this court until the 12th day of April, 1912, four days after said time had expired."

On the 16th day of July, 1912, appellant responded to this motion, and offered to prove as a matter of fact that notices of appeal had been served upon the county attorney of Craig county, Okl., and the clerk of

the county court of Craig county, Okl., as required by law, and also that on the 8th day of April, 1912, the county court of Craig county made and entered an additional order extending the time for five days in which to file the appeal in this court. The matter was set down for hearing upon this motion and response of appellant, but appellant failed and neglected to appear or to correct the record.

[2] Section 1919, Comp. Laws 1909, is as follows: "Said court (Criminal Court of Appeals) shall have power, upon affidavit or otherwise, to ascertain such matter of fact as may be necessary to the exercise of its jurisdiction." If, as a matter of fact, proper notices of appeal had been served in this case, appellant could have established that fact by affidavits or by a stipulation agreed to and signed by the county attorney of Craig county. If as a matter of fact the county court of Craig county had on the 8th day of April, 1912, granted an order extending the time for 5 days for perfecting the appeal in this court, then it was the duty of counsel for appellant to have had a nunc pro tunc order entered by the county court showing that fact and have the same certified to this court by the clerk of the county court of Craig county.

[1] Both of the defects in the record complained of in the motion to dismiss are jurisdictional. This court cannot therefore treat the motion to dismiss other than as confessed, and the appeal is accordingly dismissed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(14 Ariz. 455)

MILES v. FRANZ LUMBER CO.

(Supreme Court of Arizona. March 27, 1913.)

1. APPEAL AND ERROR (§ 1010*)—CONCLUSIVENESS OF FINDING—SUBSTANTIAL EVIDENCE.

The judgment of the trial court will not be disturbed, where there is any substantial evidence fairly tending to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. TRIAL (§ 382*)—TRIAL BY COURT—WEIGHT OF EVIDENCE—INCONSISTENCY BETWEEN ADMISSION IN SWORN ANSWER AND TESTIMONY OF PARTY.

A party plaintiff testifying is more than a mere witness, and is an actor seeking the intervention of judicial power in his behalf, so that, after having admitted certain facts in his sworn answer, the question what weight was to be given to his testimony explaining the falsity of such admission was for the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 898; Dec. Dig. § 382.*]

Appeal from District Court, Gila County; Ernest W. Lewis, Judge.

Action by the Franz Lumber Company against J. S. Miles. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

F. C. Jacobs, of Globe, for appellant. Nell M. Allred, of Globe, for appellee.

FRANKLIN, C. J. This is an action for the foreclosure of a materialman's lien. The plaintiff had judgment in the court below with a foreclosure of the lien. The appeal is from the judgment and the order denying defendant's motion for a new trial.

The complaint, which was sworn to, so far as it is material to be considered on this appeal, alleges that defendant made a contract with one Clark Kendall for the construction and improvement of certain trade fixtures in a storeroom occupied by defendant in the city of Globe; that in pursuance of said contract, and at the instance and request of said Kendall, the plaintiff furnished lumber and material which was used in the construction of said improvements; and alleges the reasonable value thereof. The defendant in his answer, under oath, admits the furnishing and use of the material under the contract, as aforesaid, but takes issue as to the reasonable value of the same. Upon the issues thus presented the case went to trial, and the defendant in his testimony attempted to explain that the admissions made in his sworn answer were false, in that he never employed or contracted with or authorized said Clark Kendall to purchase or obtain said material or perform said labor. On June 26, 1911, judgment was rendered for plaintiff, and subsequently thereto and on July 1, 1911, the defendant filed an amended answer, verified, in which he denied making the contract admitted in his original answer. What bearing this amended answer, filed four days after a final judgment in the cause, has on the issues presented to the trial court, we are not advised by appellant, and we can see none, so that the filing of the amended answer may be disregarded, the issue standing on the sworn admission in the original answer, and attempted explanation of the admission made by the defendant when testifying.

It is submitted that the judgment is not supported by the evidence; but as is very frequently the case, appellant rests his assignment largely on testimony given in support of his theory, ignoring the fact that such testimony was in conflict with that produced by the plaintiff, or, if not in conflict, might have been discredited by the court. It would serve no useful purpose to analyze the evidence in detail; suffice it to say that, aside from the admission of defendant in his answer as to the making of the alleged contract, there is evidence in the record fairly tending to support the allegation that such contract was made, and also that the reasonable value of the material was the amount as found by the court.

[1] The rule has frequently been laid down upon the question of a review of the facts. The judgment of the court below will

not be disturbed if there is any substantial evidence fairly tending to support it. *Jordan v. Duke*, 4 Ariz. 278, 36 Pac. 896; *Webber v. Kastner*, 5 Ariz. 324, 53 Pac. 207; *Jordan v. Schuerman*, 6 Ariz. 79, 53 Pac. 579; *Henry v. Mayer*, 6 Ariz. 103, 53 Pac. 590; *Barter v. Pima*, 2 Ariz. 88, 11 Pac. 62; *Willard v. Carrigan*, 8 Ariz. 70, 68 Pac. 538.

[2] Upon the question as to what, if any, weight was to be given to the testimony of defendant, in his explanation of the falsity of a deliberate admission made in his sworn answer, it was peculiarly within the province of the lower court to decide. The principle has been very well stated in the case of *Smith v. Boston Elevated Ry. Co.*, 106 C. C. A. 497, 184 Fed. 387, 37 L. R. A. (N. S.) 429: "As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. Previous inconsistent statements of a witness other than a party ordinarily go merely to the credit of the witness, and upon a second trial it may be left to a jury to decide which of the inconsistent statements is to be credited. The sworn testimony of a party, who has control of his case, with power to bind himself conclusively by pleadings, stipulations, or admissions, as to the facts resting upon his own knowledge, is of such solemn character that, in the absence of a clear showing of mistake, inadvertency, or oversight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts. While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented at the first trial is not unlimited. A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule '*allegans contraria non est audiendus*,' which, as stated in *Broom's Legal Maxims*, p. 130, 'expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to 'blow hot and cold' with reference to the same transaction,' or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest.'"

For the reasons given, the judgment of the lower court is affirmed.

CUNNINGHAM and ROSS, JJ., concur.

(14 Ariz. 458)

ALLEN v. STATE.

(Supreme Court of Arizona. April 4, 1913.)

1. STATUTES (§ 35½*)—ENACTMENT—REFERENDUM—CONTROL.

Under Laws Sp. Sess. 1912, c. 71, § 3, providing a method of testing the sufficiency of initiated and referred petitions, and empowering the court to enforce or restrain action on the part of the administrative officers as the merits of the case demand, the courts have power, at the instance of any citizen, after the filing of a referendum petition, on a proper showing, to confine and regulate the administrative acts of officers, so as to obtain a proper submission of the question raised according to law.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

2. STATUTES (§ 35¼*)—REFERENDUM—"REGULAR GENERAL ELECTION."

Const. art. 4, § 1, subd. 10, provides that, when a referendum petition shall be filed, the Secretary of State shall cause to be printed on the official ballot at the next regular general election the title and number of the measure, together with the words "Yes" and "No," in such manner that the electors may express at the polls their approval or disapproval of the measure. Laws Sp. Sess. 1912, c. 24, § 1, provides for a general election of representatives in Congress and of state, county, and precinct officers on the first Tuesday after the first Monday in November, 1912, and on the same day of every even-numbered year thereafter; and section 2 authorizes the election of presidential electors at the election so held on the first Tuesday after the first Monday in November, 1912, and quadrennially thereafter. Held that, though chapter 24 was invalid, in so far as it provided for the election of state, county, and precinct officers in 1912, it was nevertheless valid and provided for a general election, so far as it authorized the election of representatives in Congress and presidential electors in that year, and hence was the "next regular general election," to which a referendum petition filed September 20, 1912, should be submitted to voters.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6036, 6037.]

3. CONSTITUTIONAL LAW (§ 70*)—ADOPTION OF STATUTE—REFERENDUM—PUBLICITY—REVIEW.

Where a statute passed by the Legislature has been submitted to and adopted by referendum vote, it is against public policy for the court, on a subsequent review, to declare it invalid because it has not received the publicity required by law before the election.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

4. STIPULATIONS (§ 3*)—VALIDITY—MATTERS NOT SUBJECT TO STIPULATION.

On an issue as to whether a statute has been legally submitted to a referendum vote of the people, the parties cannot stipulate as to the facts attending such submission, and from such stipulations ask the court to determine the validity of the law.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 2; Dec. Dig. § 3.*]

5. CONSTITUTIONAL LAW (§ 70*)—VALIDITY OF STATUTE—REFERENDUM—DEPARTMENTS OF GOVERNMENT—INFINGEMENT.

Under the constitutional provisions separating the legislative from the judicial department of government, where a statute appears

on its face to have been properly passed by the Legislature, signed by the Governor, and referred to the people pursuant to a referendum petition, and the Governor has issued a proclamation showing that the statute has been approved by the majority of those voting thereon, and declaring the measure a law, the courts have no power to go behind the final legislative record and the Governor's proclamation, and hold the law invalid for failure to comply with some constitutional provision regulating its passage.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

Appeal from Superior Court, Maricopa County; J. O. Phillips, Judge.

Wood Allen was convicted of violating the game law by killing a quail without a hunting license, and he appeals. Affirmed.

W. L. Barnum, of Phoenix, for appellant. Frank Cox, Chalmers & Kent, and F. C. Struckmeyer, all of Phoenix, amici curiæ. G. P. Bullard, Atty. Gen., and L. C. Hardy, Asst. Atty. Gen., for the State.

PER CURIAM. The appellant was tried, convicted, and fined in the superior court of Maricopa county upon the charge of violating the game law, by killing, on December 15, 1912, a quail without first having obtained a hunting license as required by section 21 of chapter 82, Session Laws of Special Session, First Legislature. The appellant demurred to the information for the reason, as he contends, that chapter 82 is not a valid and subsisting law. He admits the fact of killing the quail, but asserts there exists no law making the act a crime.

The session of the Legislature at which chapter 82 was passed and approved adjourned June 22, 1912. "But to allow opportunity for referendum petition," it is provided in subdivision 3, § 1, art. 4, of the Constitution, that "no act passed by the Legislature shall be operative for ninety days after the close of the session of the Legislature enacting such measure. * * *" Further provisions of the same article of the Constitution are that 5 per centum of the qualified electors who voted for all candidates for Governor at the general election last preceding the filing of any referendum petition may order the submission to the people at the polls any measure, or item, section, or part of any measure, enacted by the Legislature, by filing such petition with the Secretary of State not more than 90 days after the final adjournment of the session of the Legislature which shall have passed the measure to which the referendum is applied. On September 20, 1912, a petition for referendum on chapter 82 was filed with the Secretary of State, which had the effect of referring said measure to a vote of the qualified electors of the state for their approval or rejection at the next regular general election. The right of the people to pursue this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

course with reference to chapter 82 is vouchsafed them by subdivision 1, § 1, art. 4, of the Constitution, which reads as follows: "The legislative authority of the state shall be vested in a Legislature, consisting of a Senate and a House of Representatives, but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the Legislature." In this case the people have undertaken to exercise their option of approval or rejection upon the whole of chapter 82. They filed the required referendum petition with the Secretary of State within the time allowed by law. Having done this, clearly they are entitled to be heard in the proper manner, time, and place. The manner in which they are to be heard is by their votes, the place is at the "polls," and the time is at the "next regular general election." The measure was submitted to the qualified voters of the state at the election held on the first Tuesday after the first Monday in November, 1912. That the people were heard at such election is attested by their votes. 19,455 voters, out of a total registration in the state of 24,907, voted for or against the measure. That the votes of the electors were cast at the "polls" in the manner provided by law is unquestioned. It is obvious that the great desiderata of the Constitution in reference to initiated and referred measures were a full expression pro and con of the whole electorate at the proper time, manner, and place.

The Constitution, in aid of and to facilitate the exercise of the power reserved by the people "for use at their option to approve or reject at the polls any act," named certain officers of the executive department of the state as agencies through and by whom this power was to be directed. One thing only is required of the proponents of a referendum, and that is to file a proper and legal petition with the Secretary of State, and only one thing is permitted or required of the electorate, and that is to vote on the measure at the time of its submission. The duty to file the referendum petition and refer the measure to a vote of the qualified electors is devolved upon the Secretary of State. Article 4, Constitution. It is made his duty to give the measure the prescribed publicity (subdivision 11, § 1, art. 4, Constitution, and chapter 71 Session Laws Arizona, First Special Session of First Legislature), and it is his duty to canvass the votes for and against each measure submitted. In fact, all the details of submitting the measure from the time of filing the referendum petition to the canvassing of the vote thereon are largely in the control and charge of the Secretary of

State. The voter cannot direct what he shall do or not do. He can start the election machinery, but cannot direct its operation.

[1] But the appellant objects, first, that the measure, chapter 82, was not submitted at a proper or legal election; and, second, that it was not given the publicity provided in the Constitution and the laws, and therefore is null and void. If objections had been made in the early stages of the process of submission for the reasons now assigned, the questions would have been subjects of judicial investigation and determination. Section 3, c. 71, Session Laws of Special Session 1912, provides the legal method of testing the sufficiency of initiated and referred petitions, and empowers the courts to enforce or restrain action upon the part of the administrative officers as the merits of the case demand; and this power of the courts may be invoked by any citizen of the state. If the measure, as it is now contended, was to be submitted to the voters at the wrong election, or if, as is now urged, it was impossible to give the measure the publicity required, the courts were open to any citizen, and possessed the power, upon a proper showing, to confine the administrative acts of officers within the law. Timely appeal to the courts upon the questions now raised, if meritorious, would have settled the matter before the election was had. However, the measure was submitted to the voters without question. They were invited to believe that the formalities of the law pertaining to the submission of the measure had been fully met. The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the question and went to the polls and voted thereon.

All the qualified voters of the state being authorized to participate in the rejection or approval of referred laws, it may be conceded to be essential that they give expression to their wishes at a time fixed by the fundamental law, just as it may be conceded that it is a primary requisite to the enactment of laws that there be a legal Legislature. In time and place, the members entitled so to do must lawfully convene. So the electors qualified to vote on any measure referred to them must lawfully assemble at the time fixed by law to cast their votes. Subdivision 10, § 1, art. 4, Constitution, provides that the Secretary of State "shall cause to be printed on the official ballot at the next regular general election the title and number of said measure, together with the words 'Yes' and 'No' in such manner that the electors may express at the polls their approval or disapproval of the measure."

[2] The election at which this measure was

submitted was the election provided for by sections 1, 2, and 3, chapter 24, Special Session 1912. Those sections are as follows:

"Section 1. There shall be a general election of Representatives in Congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November, 1912, and on the same day of every even numbered year thereafter.

"Sec. 2. Such number of presidential electors as shall equal the number of United States Senators and Representatives in Congress from Arizona shall be elected at an election to be held on the first Tuesday after the first Monday in November, 1912, and quadrennially thereafter.

"Sec. 3. Such elections shall be held under the provisions of the Revised Statutes of Arizona, 1901, and amendments thereto, relating to elections, subject to the provisions thereof."

In *State v. Osborne*, 125 Pac. 884, we held that chapter 24, in so far as it provided for the election of state, county, and precinct officers in 1912, was in conflict with section 11, art. 7, of the Constitution, but we did not hold it wholly incompatible. On the contrary, we expressly held it to be valid legislation in so far as it provided for an election of Representatives in Congress and presidential electors. In that connection we said: "The act also provides for the election for a Representative in Congress and for presidential electors. But this part of the act is not so inseparably connected in substance with the other parts of the act as to work the destruction of the whole act. Striking out the provision for the election of state, county, and precinct officers, the act is capable of being carried out in accordance with the legislative intent as to the election of Representatives in Congress and presidential electors in the year 1912."

It is apparent that the elections mentioned in sections 1 and 2 of chapter 24 are one and the same election, to be held at the same time and places with the same election officers. Section 3 refers to the general election laws (title 20, Revised Statutes of Arizona 1901) for the manner, method, and machinery for the conduct of the election. Paragraph 2272, Id., provides for the election of delegate to Congress at the general election, as does chapter 24, supra, the election of Representative in Congress at the general election. Section 12, art. 22, of the Constitution, provides that a representative in Congress shall be elected at the same election at which officers are elected under the enabling act and thereafter at such times and such manner as may be prescribed by law. The term of the Representative in Congress elected under the enabling act expired with the Sixty-Second Congress, and it was imperatively necessary that the Legislature provide the machinery for the election of his successor. This the Legislature did in sec-

tion 3, c. 24, and while it was not necessary for the Legislature to name the day of the election, this being the duty of Congress already exercised, it did, conforming with the laws of the United States, name the day and designate the election "a general election."

Section 11, art. 7, of the Constitution, designates the biennial election to be held on the first Tuesday after the first Monday in November "a general election," and it is none the less "a general election" because some of the officers therein mentioned are not voted for. An election for Representative in Congress and presidential electors is a general election in fact, because it is state-wide, permitting all qualified voters to vote, and because it is so named by both the organic and statutory law. The phrase "next regular general election" occurs but the one time in the Constitution. "A general election," and "the general election last preceding," and "the last preceding general election," "first general election thereafter," and "general state election" occur. We are not now concerned as to whether these varied expressions describe the same kind of an election, or different elections. Suffice it to say that the election at which chapter 82 was submitted was the "next regular general election" held after the referendum petition was filed against it in the office of the Secretary of State. "In the case of any particular statute, the construction can be determined only by considering the context in which the word is found, the purpose of the statute, and the object which it was designed to fulfill. The next regular election may mean the next election at which officers are to be regularly elected, or it may merely be used to exclude special elections, or it may be used synonymously or interchangeably with the word 'general.'" *People v. Babcock*, 123 Cal. 307, 55 Pac. 1017.

When it is considered that it was the evident purpose of the Constitution to give every qualified voter of the state an opportunity to register his approval or disapproval of initiated or referred measures, it becomes apparent that that purpose is fully effected by a reference of such measures to a general state-wide election, and we therefore conclude that "regular general election," in this instance, should be construed to mean the same as general election. We thus find that the people, who are the source of all power, in a proper manner, by their votes, at a proper place, at the polls, and at a proper time, a general election, have registered the public will upon chapter 82 and placed thereon the seal of their approval.

[3] This brings us to the second contention of appellant, wherein he asserts chapter 82 did not receive the publicity provided by law. From the view we take of this question, we deem it unnecessary to discuss what the law requires in that regard. Nor do we

propose to go into the details of what was done or not done by the administrative officers in the matter of giving publicity to the measure. We believe that we are precluded from doing so on grounds of sound public policy, logic, reason, and by the law itself. The issue in this case is not as to the construction, meaning, or scope of the act, nor whether it be void for its repugnancy to the Constitution. So far as the Constitution and the act are concerned, it is not contended that there is any incompatibility with each other. But we are requested to hold that such enactment, in the form of a statute, was never passed, or, to be more accurate, was never legally referred to the qualified electors for their approval or rejection, so as to become, under the state Constitution, a law. And we are asked to determine whether the act before us is a valid and subsisting law of this state by virtue of stipulation and admissions made by the parties at the trial as to what did or did not occur during the progress of its submission to the people and before the proclamation of the Governor declaring it to be law.

[4] The Secretary of State, as a subordinate administrative officer of the government, was charged by the Constitution with the duty of submitting the measure to the voters for their approval or rejection. He is not a party to this action, and what the parties to it may agree as to his action in the premises is not binding on him. We are of opinion that they cannot stipulate as to such matters, and from such stipulations ask the court, in a given case, whether a law is or is not in force. So, in deciding the issue, we shall not regard the stipulation or admissions made by the parties to the action. If we were bound by such stipulations, the judgments of the courts in such matters would be as different as the facts agreed upon by parties in different actions might vary.

[5] In the case of *Pacific Railroad v. Governor*, 23 Mo. 353, 66 Am. Dec. 673, the court used this language: "Whilst the power of the courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the Constitution from violation, yet such power is claimed and exercised in relation to laws which show on their face that the constitutional limit has been transcended. The reason of this principle limits the claim of jurisdiction to such cases. The Constitution is designed to limit the powers of the government, and confine each of the departments to its appropriate sphere. If the Legislature exceeds its powers in the enactment of a law, the courts, being sworn to support the Constitution, must judge that law by the standard of the Constitution and declare its invalidity. But the question whether a law on its face violates the Constitution is very different from that growing out of the noncompliance with the forms to be observed in its enactment. In the one

case a power is exercised, not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not, in its terms, contrary to the Constitution. On its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the General Assembly, in making the law, was governed by the rules prescribed for its action by the Constitution. This would seem like an inquisition into the conduct of the members of the General Assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law."

In *State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602, it was said by the court: "When a legislative act is duly promulgated according to the Constitution and laws under which it was passed, we find no authority in the judiciary department to look behind and determine its validity or invalidity from the proceedings of the General Assembly in adopting it. Such a course, it would seem, is not sustainable on the theory of the independent and separate action of the three branches of the state government. Where a legislative act is attacked on the ground that it contains provisions that are unconstitutional, the question of its validity is properly within the scope of judicial action. The courts have power, when a constitutional question is raised, to examine whether the thing ordered, permitted, or forbidden to be done may have effect under the sanction of the Constitution. The question should be, Is the law itself constitutional as to its provisions and what it declares? and not whether it is constitutional as to the manner of its enactment or the proceedings by which it was enacted."

So the doctrine of constitutional law, treating of the power of the courts to declare statutes void because in conflict with the Constitution, must not be confounded with the want of power in the courts to go behind the record of a duly authenticated and enrolled statute, and receive evidence, documentary or parol, to impeach such record and nullify the act. Article 3 of our Constitution, relating to the distribution of powers, provides: "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

All political power is inherent in the people, and governments derive their just powers from the consent of the governed. This is not a mere metaphor, that sounds pleasing to the ear, nor is it a maxim that may not have a concrete application; but it is a vital

principle, adhered to in the formation of the government of this state. By their Constitution, the legislative authority was vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserved the power to propose laws and amendments to the Constitution, and to enact or reject such laws and amendments at the polls, independently of the Legislature, and they also reserved, for use at their own option, the power to approve or reject at the polls any act, section, or part of any act of the Legislature. The people did not commit to the Legislature the whole lawmaking power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes. In this state the Legislature and the people constitute the lawmaking power. This is important when we come to consider the adjudicated cases holding that if the enrollment or original record of the statute is regular on its face—that is, if the act is framed with no infirmity on its face, is duly promulgated, or properly authenticated and deposited in the proper office—it is conclusively presumed to have been regularly enacted, the record is invulnerable to attack, and proves itself. If such sanctity and verity may be given to the acts of the delegated representatives of the people in legislative body assembled, it must with clearer reason and with greater force be given to the act of the sovereign itself, the source of all governmental power, the record of which, in its lawmaking capacity, is authenticated and promulgated as the Constitution provides.

Subdivision 5 of section 1 of article 4 of the Constitution provides: "Any measure or amendment to the Constitution proposed under the initiative, and any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the Governor, and not otherwise." In the case at bar we have an act of the Legislature deposited in the office of the Secretary of State, the legal custodian of the laws. The act is authenticated by the signatures of the Speaker of the House of Representatives and the President of the Senate, with the approval of the Governor thereon. There is also the proclamation of the Governor, giving the whole number of votes cast for and against such measure on a referendum thereof to the people, showing it to be approved by a majority of those voting thereon; the Governor declaring in such proclamation the measure to be law.

It does not follow, from the power of the courts to declare statutes unconstitutional, that they can go behind authenticated and approved statutes for the purpose of inquiring whether those statutes were passed in the manner prescribed by the Constitution. Whether the courts have this power to re-

ceive other evidence, in order to ascertain whether the lawmaking power has conformed to constitutional requirements, has been many times before the courts of this country, and has met with no little difference of opinion. It is held by one line of cases that a duly authenticated, approved, and enrolled statute imports absolute verity, is conclusive that such an act was passed in every respect as designated by the Constitution; and, by another, that while such authentication, approval, and enrollment are strong *prima facie* evidence that it was passed, still this presumption may be overcome by proper evidence. If the question were one of first impression in this jurisdiction, we would be persuaded to adhere to the doctrine announced in that class of cases holding that a duly enrolled and authenticated statute, regular on its face, is conclusive of the fact that it was regularly passed, and that the courts cannot go behind it and entertain evidence by which it may be impeached. Wherever the question is one of first impression, this rule is generally adopted, while in some states the courts continue to follow earlier precedent, and adhere to the contrary view; but this is not always the case, however, as the overruling of earlier cases is somewhat common.

That the question is not one of first impression in this jurisdiction we cite *Graves v. Alsap*, 1 Ariz. 274, 25 Pac. 836, and *Harwood v. Wentworth*, 4 Ariz. 378, 42 Pac. 1025. In the latter case the court said: "For a court to permit evidence to impeach an act which purports to have passed the legislative assembly, attested by the signatures of the presiding officers of the respective houses thereof, approved and signed by the Governor, and deposited with the officer who by law is the custodian thereof, without authority by constitutional provisions clearly expressed, would be to destroy the independence of one of the three co-ordinate branches of our government, and make the legislative department subordinate to the judicial." The principle enunciated in the case is further illuminated in an able concurring opinion by Chief Justice Baker. This case, on appeal to the Supreme Court of the United States, was affirmed by that court in 162 U. S. 547, 16 Sup. Ct. 890, 40 L. Ed. 1069, upon authority of *Field v. Clark*.

The question was first presented to the Supreme Court of the United States for decision in 1891, as a pure problem of constitutional law. Mr. Justice Harlan, speaking for the court in *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, in an able opinion, there said: "This question is now presented for the first time in this court. It has received, as its importance required it should receive, the most deliberate consideration. We recognize, on the one hand, the duty of this court, from the performance of which it may not shrink, to give full effect

to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extends. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and has been deposited in the public archives as an act of Congress, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law."

The court, after an exhaustive review of the authorities, reached a unanimous conclusion that an enrolled bill, regular on its face, duly authenticated by the official signatures of the presiding officers of both houses of Congress, is an official attestation by the two houses that such bill has duly and regularly passed Congress; and when the bill thus attested receives the approval of the President, and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the journals of either house of Congress that an act so authenticated, approved, and deposited did not pass in the precise form in which it was thus signed and approved, or that it was not passed in the manner required by the Constitution.

We make the following extended quotation from the case of *State v. Jones*, 6 Wash. 473, 34 Pac. 201, 23 L. R. A. 340, where the principle is very logically advanced and forcibly stated: "But it is argued with great force on the part of the respondent that if the courts do not look into the proceedings of the Legislature, and set aside laws when not enacted with the formalities required by the Constitution, the Legislature can at pleasure nullify all such provisions. This is no doubt true, and it is upon this line of reasoning that those courts which have gone behind the enrolled bill have justified themselves in so doing. This line of reasoning seems to assume that the judicial department is charged with seeing that all the mandatory provisions of the Constitution are complied with. But is this a reasonable construction, in view of the theory of our government, and the principles enunciated in our Constitution? Each of the three departments into which the government is divided are equal, and each department should be held responsible to the people that it represents, and not to the other departments of the government, or either of them. What are the respective duties of these departments? They may be briefly stated thus: The Legislature enacts laws, and is commanded by the Constitution to enact them

in a certain way. The executive enforces the laws, and by the Constitution it is made his duty to take certain steps looking towards such enforcement in the manner prescribed therein upon the happening of certain contingencies. The judicial department is charged with the duty of interpreting the laws, and adjudging rights and obligations thereunder. What is the law upon which the judicial department must thus determine rights and obligations? It is, first, the Constitution of the state; second, so much of the common law as is in force here, and the laws of the Legislature; and, third, the acts of the executive department in those matters in which, under the Constitution, it is given the power to exercise discretion under certain contingencies. Such being the respective duties of the several departments, it seems to us that the acts of each of them, when certified as required by the Constitution, or by such a universal course of practice as to have the force of a constitutional provision, should be conclusive upon each of the other departments; and there would seem to be no more impropriety in the Legislature seeking to go behind the final record of a court, for the purpose of determining whether or not it had obeyed the constitutional directions in making such a record, than there would be in the courts seeking to go behind the final record made by the legislative department. As we have seen, the executive, under the Constitution, is charged with doing certain things upon certain contingencies happening, and under the Constitution he is given no power thus to act excepting upon such contingency; yet if the Governor determines that such contingency exists, and acts in pursuance thereof, no court, so far as we have been able to see, has ever sought to inquire into the fact as to whether or not the contingency upon which the governor had founded his action in fact existed. For instance, under the constitution, the Governor is authorized to convene the Legislature upon extraordinary occasions, and there would seem to be the same reason for a court refusing to give force to his proclamation thus convening the Legislature, if upon investigation it found that the extraordinary occasion upon which the Governor had assumed to act did not in fact exist, as there would be to go back of the record made by the Legislature. To preserve the harmony of our form of government, it must be held that these several mandatory provisions are addressed to the department which is called upon to perform them, and that neither of the other departments can in any manner coerce that department into obedience thereto. Courts have gone behind the final record of the legislative department upon what seems to us a false theory. They have assumed that the mandatory provisions of the Constitution are safer if the enforcement thereof is in-

trusted to the judicial department than if so intrusted to the Legislature; in other words, they have acted upon the presumption that their department is the only one in which sufficient integrity exists to insure the preservation of the Constitution. How the courts have obtained this idea is somewhat difficult to ascertain; but that they entertain it, and have allowed it to influence their decisions, is so evident that even a superficial examination of such decisions will satisfy any one of the fact."

In Indiana it is held that the courts cannot look beyond the enrolled act to ascertain whether there has been a compliance with the requirements of the Constitution that no bill shall be presented to the Governor within two days next previous to the final adjournment. *Bender v. State*, 53 Ind. 254.

The doctrine that an enrolled and duly authenticated bill will be conclusively presumed to have been passed in conformity to the requirements of the Constitution, as announced in the case of *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, while subsequently departed from by that court, has recently been cited and sustained in the case of *Yolo County v. Colgan*, 132 Cal. 267, 64 Pac. 407, 84 Am. St. Rep. 41. In the latter case the court said: "The lawmaking power of this state is vested by the Constitution in the Legislature; and, while the Constitution has prescribed the formalities to be observed in the passage of bills and the creation of statutes, the power to determine whether these formalities have been complied with is necessarily vested in the Legislature itself, since, if it were not, it would be powerless to enact a statute. The Constitution has not provided that this essential power thus vested in the Legislature shall be subject to review by the courts, while it has been expressly provided that no person charged with the exercise of powers properly belonging to one of the three departments—the legislative, executive, and judicial—into which the powers of the government are divided shall exercise any functions appertaining to either of the others."

In Mississippi the subject was thus discussed in *Green v. Weller*, 32 Miss. 690: "It may be that the legislative acts may be passed without compliance with the requirements of the Constitution. If such defect or violation appear on the face of the record, which can be judicially noticed, the power of the court to determine the question is indisputable. But if the proper record shows that the act has received the sanctions required by the Constitution as evidence of its having been passed agreeably to the Constitution, and its provisions be not repugnant to the Constitution, the regularity and stability of government and the peace of society require that it should have the force of a valid law."

In *Cox v. Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. S.) 253, the court

had under consideration the question as to whether proper notice had been given as required by the Constitution prior to the enactment of the law in question. It said: "The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with section 12, art. 2, of the Constitution of this state. While that section is binding upon the conscience of the General Assembly, and doubtless is intended to be observed by that body, the courts will not undertake to review the action in that respect of a co-ordinate department of the state government, and will conclusively presume from ratification that the notice has been given."

In *Brodnax v. Groom*, 64 N. C. 244, the question was upon a private act requiring 30 days' notice of application, required by article 2, § 4, of the Constitution, and the motion was to prove that the notice had not been given. The court, speaking through Chief Justice Pearson, said: "We are of opinion that the ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives makes it a matter of record, which cannot be impeached before the courts in a collateral way. Lord Coke says: 'A record, until reversed, importeth verity.' There can be no doubt that acts of the General Assembly, like judgments of courts, are matters of record, and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim 'Omnia præsumuntur,' etc. Suppose an act of Congress is returned by the President with his objections, and the Vice President and the Speaker of the House certify that it passed afterward by the constitutional majority; is it open for the courts to go behind the record and hear proof to the contrary?"

In *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801, it was held that if a statute, regular on its face and in due form, is ratified and approved by the genuine signatures of the presiding officers of both houses of the Legislature, it is conclusive evidence that it was regularly and legally enacted, and the courts cannot go behind this record for any cause to ascertain how such record was established. In a very forcible concurring opinion in this case, Mr. Justice Montgomery said: "I insist that the decision of the court in this case upholds the integrity and independence of one of the coequal departments of the government, and preserves the power and jurisdiction of the two involved in this suit. It is better for us, and will be better for posterity, if in cases where fraud and deceit have been or shall be practiced upon the presiding officers of the House and Senate, by means of which their signatures to spurious bills have been obtained, for the Legislature to be convened (if an adjournment

was had before discovery), and allowed to correct such errors or mistakes, than that the court should assume a jurisdiction which does not belong to it, and thereby begin an encroachment upon the rights of the legislative department, to end possibly in judicial tyranny, the basest and most detestable species of oppression."

In *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, the court, in a vigorous opinion, held that the enrolled act, signed by the President of the Senate and the Speaker of the House of Representatives and the Governor, is the sole exposition of its contents, and the conclusive evidence of its existence and it is not allowable to look further to discover the history of the act. After a review of the adjudged cases, the court said: "Every other view subordinates the Legislature, and disregards the coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the Legislature, there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation, and multiplying a hundredfold the alleged uncertainty of the law. Every suit before every court, where the validity of a statute may be called in question as affecting the right of a litigant, will be in the nature of an appeal, or writ of error, or bill of review, for errors apparent on the face of the legislative records, and the journals must be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law to be declared by the court? It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill, and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the Constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace, and statutes declared to be not law as the result of their journalistic history, and the circuit and chancery courts will be constantly engaged in like manner, and this court, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of the statutes thus tested. * * * Let the courts accept as statutes, duly enacted, such bills as are delivered by the Legislature as their acts, authenticated as such in the prescribed mode."

Chief Justice Beasley, in *Pangborn v. Young*, 32 N. J. Law, 29, mentions that in the frame of the state government there are

three co-ordinate branches, in all things equal and independent, each in its sphere the trusted agent of the public; and it is arrogating an authority not given to the judiciary, to inquire into the veracity of the certificate by which the lawmaking power authenticates its acts. In the opinion of the court, the power to certify to the public laws which have been enacted is one of the trusts of the Constitution to the department of the state government charged with such duty.

The Texas Supreme Court says: "Our Constitution provides that, after the passage of a bill, it shall be signed by the presiding officer of each house in presence of the house; and we are of opinion, when a bill has been so signed and has been submitted to and approved by the Governor, it was intended that it should afford conclusive evidence that the act had been passed in the manner required by the Constitution. Such rule being the rule of the common law, we think, in the absence of something in the Constitution expressly showing a contrary intention, it is fair to presume that the same rule should prevail in this state. There is no provision in the Constitution indicating in any direct manner such contrary intention; and the fact that it is provided that journals shall be kept and that certain things should be entered therein we think insufficient to show any such purpose." *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156.

The Kentucky Court of Appeals, in a persuasive opinion, has held that the enrolled bill signed by the presiding officers and approved by the Governor was conclusive evidence of its passage according to the Constitution. The court observed: "That the act or successive acts of some agency somewhere or somehow must be held conclusive is entirely evident, unless we open the doors to all competent proof, including that of a member on the floor, an absurdity not to be thought of. * * * The enrolled bill, so attested and signed and approved by the executive, is easy of access and inspection; but what shall we say of the journals? At the session at which the law under consideration was adopted, those records consist of over 4,000 pages. They seem to have been hurriedly and imperfectly indexed, as in the nature of things they must ever be. The assiduous lawyer, who plods through those volumes, may fail to find evidence of an important step required by the Constitution to support a statute which has been promulgated as the law of the land, and the court in this case declares as a matter of fact that the prima facie law so promulgated is not, in fact, the law. In an adjoining circuit the court is more fortunate, and the missing step is found, or the erroneous entry is found corrected elsewhere in the record. So the law is upheld, and this confusing result will be reached, not because the law depends upon the testimony or the pleadings in any given

case, for the courts must take judicial notice of the journals, if they are controlling, as well as of the signatures of the presiding officers, if they are to be held conclusive; but the confusion comes from the nature of the record to be inspected. This is usually prepared by the subordinate officers hurriedly, amidst the excitement and confusion incident to legislative bodies, and with small concern for those details which are to become so important if the record is to be subjected to judicial scrutiny." *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203.

The doctrine we adhere to is affirmed in the following cases: *Lyons v. Woods*, 153 U. S. 649, 14 Sup. Ct. 959, 38 L. Ed. 854; *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377; *Hunt v. Van Alstyne*, 25 Wend. 605; *People v. Commissioners*, 54 N. Y. 276, 13 Am. Rep. 581; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Warner v. Beers*, 23 Wend. (N. Y.) 103, at page 172; *Fouke v. Fleming*, 13 Md. 392; *Clare v. State*, 5 Iowa, 510; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325; *Bender v. State*, 53 Ind. 254; *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602; *State v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Scarborough v. Robinson*, 81 N. C. 409; *Underground Cable Co. v. Atty. Gen.*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394; *Freeholders v. Stevenson*, 46 N. J. Law, 173; *People v. Burt*, 43 Cal. 560; *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711; *Usener v. State*, 8 Tex. App. 177, 181; *Donaldson v. State*, 15 Tex. App. 25; *Ex parte Tipton*, 28 Tex. App. 438, 13 S. W. 610, 8 L. R. A. 326; *People v. Clayton*, 5 Utah, 598, 18 Pac. 628; *Ritchie v. Richards*, 14 Utah, 345, 353, 47 Pac. 670; *State v. Jones*, 6 Wash. 452, 473, 34 Pac. 201, 23 L. R. A. 340; *Comstock v. Tracey* (C. C.) 46 Fed. 162, 171; *Mathis v. State*, 31 Fla. 291, 12 South. 681; *Home Telegraph Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824.

The cases cited may be distinguished in particulars, but the principle announced and adhered to is that the judicial department must keep within its sphere; that it must not arrogate to itself a superiority over the other two co-ordinate and coequal departments of the government, and erect itself into a tribunal to watch with jealous scrutiny the acts confided by the fundamental law to another department; in short, the doctrine that the records of the legislative and executive departments of the government, when promulgated and authenticated and deposited with the legal custodian thereof, as provided in the Constitution, import a verity which is conclusive upon the judicial department, and which record may not be impeach-

ed by any evidence aliunde such record is sturdily vindicated in them all.

Indeed, the courts that have taken a contrary view are generally receding from the position. In an Illinois case the court says: "We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the Legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect." *People v. Starne*, 35 Ill. 121, reading at page 136, 85 Am. Dec. 348.

In *State v. Moore*, 37 Neb. 18, 55 N. W. 299, occurs the following: "Were the question a new one in this state, we would say that a bill duly deposited in the office of the Secretary of State, bearing the signatures of the presiding officers of the respective houses of the Legislature and of the Governor, imports absolute verity, and that the courts could not look beyond the signatures of these officers to ascertain what either house has done as to any items in said bill."

Mr. Sutherland, in the latest edition of his work on Statutory Construction, says: "It is no longer true that 'in a large majority of the states' the courts have held that the enrolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act. Undoubtedly the decision of the Supreme Court of the United States in *Field v. Clark* has had much to do in creating and augmenting this current; but it may also be due to the greater simplicity, certainty, and reasonableness of the doctrine which holds the enrolled act to be conclusive. Many courts and judges, while feeling compelled to follow former decisions holding that the enrolled act may be impeached by the journals, have done so reluctantly, and have expressed doubts as to the validity of the doctrine, and in many cases, as will appear in the following sections, have qualified and restricted it in important particulars." Sutherland, *Statutory Construction*, vol. 1, p. 72, second edition by Lewis.

If a properly enrolled and authenticated act of the Legislature speaks verity, surely that same act, fortified by the approval of a majority of the qualified voters of the state and the proclamation of the Governor, issued under a mandate of the Constitution, declaring the act has become and is a law, is doubly strengthened as a record of unimpeachable character. Indeed, we feel that we could rest our decision of this question, without the support of analogous reason as applied to legislative acts, upon the plain language of the constitutional provision that any measure shall become law when approved by a majority vote and proclaimed as such

by the Governor. These are mandatory provisions of the Constitution, and they attach no other condition to a referred measure becoming a law than approval by the electorate and the Governor's proclamation. Other conditions could have been imposed, and their omission must have been intentional, and for the express purpose of preventing judicial interference in matters wholly legislative and executive. We agree with those courts that maintain that each department of government should in fact, as well as in theory, be independent of the other. Mandatory provisions of the Constitution as to the making of laws are directed to the attention of the legislative department, and are binding on the conscience of those whose duty it is to observe them. This is likewise true of the executive and judicial departments within their sphere. Until the people, through their fundamental law, shall require the courts to supervise and direct the actions of the other departments in the process of making laws, we shall adhere to the theory of government that those departments are responsible to the people for any neglect of duty, and not to the courts, and that their records, when authenticated as required by the Constitution and presented to this department, will import absolute verity, and conclude us from going beyond such records to impeach them.

As before stated in this opinion, the courts have power, and will not refuse to exercise it, if timely invoked, to command or restrain merely ministerial acts of the administrative officers. Consummated or completed acts we will not annul for reasons that might have possessed merit, if urged at the proper time. In *Prohibitory Amendment Cases*, 24 Kan. 700, a case in some respects similar to this one, that court, speaking through Justice Brewer, afterwards Associate Justice of the Supreme Court of the United States, at page 720, said: "After the contest was ended and the election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement, and struggle was simply a stupendous farce, meaning nothing, accomplishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine, lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority. *Gilleland v. Schuyler*, 9 Kan. 569; *Morris v. Vanlaningham*, 11 Kan. 269; *Wildman v. Anderson*, 17 Kan. 344; *Jones v. Caldwell*, 21 Kan. 186; *Lewis v. Comm'rs of Bourbon County*, 12 Kan. 186. In the opinion of the case last cited, we said, speaking of a case somewhat similar: 'Notwithstanding the silence of the

statute and the omissions of the order, an election would doubtless be valid, where the people generally acquiesced in the manner and took part in the election.' We could not have used language more apt if we had been anticipating this very case. While estoppel may not technically bind either party to an election, yet where a mere defect of form exists, which may, if presented seasonably, be fully corrected, and is not suggested until after the election is over, there is eminent justice in applying the principles of estoppel, and holding that they who have gone to trial on the merits shall not, when beaten there, go back to an amendable defect in the preliminary proceedings."

It appearing that the act in question is, and was at the time appellant is charged with its violation, a valid exercise of legislative authority, and a subsisting law under the police power of the state, it is the duty of the courts to administer it as such.

There appearing in the record no error prejudicial to any substantial right of the defendant, the judgment of the lower court is affirmed.

(72 Wash. 529)

C. C. BELKNAP GLASS CO. v. KELLEHER
et al.

(Supreme Court of Washington. April 1,
1913.)

1. PLEADING (§§ 211, 218*)—OBJECTIONS TO COMPLAINT—DEMURRER ORE TENUS—RESERVING DECISION.

It was not error for the trial court to allow defendants to interpose at the trial an objection to the sufficiency of the complaint in the form of a demurrer ore tenus, and to take the objection under advisement until the close of the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 472, 481, 549-566; Dec. Dig. §§ 211, 218.*]

2. PLEADING (§ 237*)—AMENDMENT TO CONFORM TO PROOF.

The withdrawal of defendants from the trial of a case after entering an objection to the complaint in the form of a demurrer ore tenus did not affect plaintiff's right to prove a cause of action, and to amend its complaint to correspond with the proofs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

3. MECHANICS' LIENS (§ 271*)—FORECLOSURE—PLEADING.

Under Rem. & Bal. Code, § 1129, providing that every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of a building has a lien thereon for such labor or material, whether performed or furnished at the instance of the owner of the property subject to the lien, or his agent, and that every contractor, subcontractor, architect, builder, or person having charge of the construction, alteration, or repair shall be held to be the owner's agent, a complaint in an action to foreclose a lien alleging that plaintiff furnished material and performed labor at the special instance and request of certain parties in and about the construction and alteration of a certain building, without showing that such parties were the agents of the owner, or were contractors, sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

contractors, architects, builders, or persons having charge of the construction, was insufficient.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 494-513; Dec. Dig. § 271.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by the C. C. Belknap Glass Company against Daniel Kelleher and Louisiana De Wolfe Whittlesey and others. From a judgment dismissing the complaint as to the defendants mentioned, plaintiff appeals. Affirmed.

Gates & Emery, of Seattle, for appellant. Bausman & Kelleher, of Seattle, for respondents.

FULLERTON, J. The appellant brought this action against the respondents Kelleher and Whittlesey and others to foreclose a materialman's lien. Issue was taken on the complaint, and a day fixed for the trial. On the day appointed, the parties appeared, whereupon the respondents Kelleher and Whittlesey entered an objection in the form of a demurrer *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and announced that they would stand on their objection, and not participate in the trial of the cause. The court, without passing on the objection, proceeded to trial on the issues made by the answers of the other defendants. At the conclusion of the trial, the court sustained the objection of the respondents, and entered a judgment in their favor denying a foreclosure of the lien, and dismissed the action as to them. The record in this court does not disclose what disposition was made of the action as to the other defendants, although it appears from the statement of facts that the court announced, at the conclusion of the trial, that it would deny a foreclosure as to all of the defendants, and allow a personal judgment for the amount claimed to be due against the defendant James Duffy. This appeal is taken from the judgment of dismissal entered in favor of Kelleher and Whittlesey.

[1, 2] In this court complaint is made of the procedure followed by the trial court. It is claimed that it was error to allow an objection to the sufficiency of the complaint after issue had been joined by answer, and error to take the objection under advisement until the close of the evidence. But the respondents had the right to rest their defense on an objection to the sufficiency of the complaint, if they so desired, even after answer filed, and this is all they did do in effect. The conduct of the respondents in this regard was a matter entirely without the control of the court. Moreover, no right of the appellant was affected by the action of the court. The appellant was at liberty,

notwithstanding the withdrawal of the respondents, to go on with its case, and prove a cause of action against them, if it could. If it succeeded in its proofs, and the court should hold its complaint defective, its right to amend would not be affected by the absence of the respondents; on the contrary, it could amend its complaint to correspond with its proofs and take judgment against them as if they were personally present.

[3] The complaint was clearly defective. It was alleged "that on the 14th day of September, 1911, plaintiff, at the special instance and request of James Duffy and Kohler & Chase, a corporation, commenced to furnish material and perform labor, which material was used, and which labor was performed, in and about the construction and alteration of a certain building or structure on the premises hereinabove described, which material was of the reasonable value," etc., but there was no allegation of the relation of James Duffy or Kohler & Chase to the owners of the property; that is to say, there was no allegation that they were the actual agents of the owner of the property, or were contractors, subcontractors, architects, builders, or persons having charge of the construction of the building on which the lien is claimed. Persons standing in one or the other of these relations to the owner are the only persons that can lawfully bind his property for materials or labor used in the construction or alteration of a building thereon, and a complaint, if it be not subject to demurrer, must set forth that the materials and labor for which the lien is claimed were furnished either at the instance of the owner or some person bearing this statutory relationship to the owner. Rem. & Bal. Code, § 1129; *Canal Lumber Co. v. Kong Yick Investment Co.*, 130 Pac. 492.

The defects in the complaint, however, were amendable, and we have searched the evidence for the purpose of ascertaining whether or not the proofs offered at the trial supplied the defects; but the evidence on this question is as much barren as the complaint. The proofs were directed to a showing of the value of the materials furnished, and there is not even an indirect reference to the matter now under inquiry.

Since it was necessary to allege that the person ordering the materials and hiring the labor bore to the owner of the structure being altered or constructed the relation of agent as defined by the statute, it was also necessary, in order to support a recovery, to prove such fact, and, therein being no such proof, the judgment must stand affirmed. It is so ordered.

CROW, J., and MAIN, MORRIS, and ELLIS, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(72 Wash. 517)

JONES v. JONES.

(Supreme Court of Washington. March 28, 1913.)

1. APPEAL AND ERROR (§ 85*)—DECISIONS REVIEWABLE—JUDICIAL CHARACTER OF TRIBUNAL.

The right of appeal from an order of the superior court fixing the fees of a party's attorneys pursuant to a stipulation that the amount of compensation due them might be fixed by the judge of such court could not be denied on the ground that the question of compensation was submitted to the court as an arbitrator; the stipulation showing that it was submitted to it as a court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 548-558; Dec. Dig. § 85.*]

2. APPEAL AND ERROR (§ 97*)—PERSONS ENTITLED TO APPEAL.

Under Rem. & Bal. Code, § 1716, subd. 1, authorizing any party aggrieved to appeal to the Supreme Court from the final judgment in an action or proceeding, which appeal shall also bring up for review any order made in the same action or proceeding before or after judgment, if the record sufficiently shows the order, and subdivision 6, authorizing any party aggrieved to appeal from any order affecting a substantial right which either determines the action or proceeding, and prevents a final judgment, discontinues the action, grants a new trial or sets aside or refuses to affirm an award of arbitrators, or refers the cause back to them, a party's attorneys could appeal from an order fixing their compensation pursuant to a stipulation by the party and the attorneys that the court might fix the compensation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 655-658; Dec. Dig. § 97.*]

3. ATTORNEY AND CLIENT (§ 103*)—EMPLOYMENT OF ASSOCIATE COUNSEL — RATIFICATION.

Where a party's attorney employed another attorney who, to the party's knowledge, actively engaged in the case in her behalf, she thereby ratified his employment, even if she had not theretofore directed it.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 154; Dec. Dig. § 103.*]

4. ATTORNEY AND CLIENT (§ 141*)—COMPENSATION—VALUE OF SERVICES.

A wife, sued for divorce, represented to her attorneys that her husband was worth over \$1,000,000; that she had been overreached in a settlement between the husband and herself, whereby he retained property worth \$1,000,000 or more, while she obtained only \$125,000; that she had good cause for divorce; and that he had no cause. Acting upon these representations, the attorneys examined a great many papers submitted by her, had a number of lengthy conferences with her, prepared and filed an answer and cross-complaint, and a number of motions and affidavits, and appeared in court at least three times for the purpose of getting an allowance for counsel fees, suit money, and alimony, getting an order preserving the status quo of the property, and restraining the husband from harassing the wife pending the litigation. They obtained an order granting an allowance of \$500 as suit money; the other applications being denied. On a hearing to determine their compensation (the wife wishing to substitute other attorneys), attorneys called by them as witnesses placed the value of the services at from \$1,000 to \$4,000, while attorneys called by her placed their value at from \$100 to \$200; the testimony being all based upon hypothetical questions. One witness in answer to a question fairly embracing the facts

placed their value at approximately \$1,000. Held, that the court erred in allowing the attorneys only \$350, and they should be allowed \$1,000.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 347; Dec. Dig. § 141.*]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Harry A. Jones against Clara B. Jones. From an order fixing the fees of George Olson and another as attorneys for defendant, the attorneys appeal. Reversed, with directions.

Geo. Olson and Milo A. Root, both of Seattle, pro se. Donworth & Todd, of Seattle, for respondent.

GOSE, J. This is an appeal from an order of the superior court of King county fixing the amount of the attorney's fees of the appellants George Olson and Milo A. Root for services rendered to the respondent Clara B. Jones in a divorce action between her husband and herself. The order was entered in the main action in pursuance of a stipulation filed therein. The stipulation, omitting title, is as follows: "It is hereby stipulated and agreed by and between the above-named defendant, Clara B. Jones, and her attorneys, George Olson and Milo A. Root, that the amount of compensation due said attorneys to this date may be fixed by the judge of the above-entitled court. Whereupon said attorneys are to turn over to said defendant any papers that they may have in their possession, and withdraw their appearance as attorneys for said defendant in the cause. Clara B. Jones, Defendant. Geo. Olson, Milo A. Root, Attorneys for Defendant." The attorneys, Olson and Root, have appealed.

The respondent has renewed her motion to dismiss the appeal upon the grounds (1) that the appellants were not parties to the action and hence have no right of appeal; and (2) that under the stipulation the judge of the superior court acted only as an arbitrator, and that his decision is final. The motion was heretofore submitted and denied without an opinion.

[1, 2] The stipulation was made for the purpose of freeing certain papers which the respondent had placed in the hands of the appellants in the progress of her suit from the attorney's lien, and fixing their compensation in order that she might substitute other counsel under the provisions of the Code (Rem. & Bal. §§ 133-138). It is quite clear from the stipulation that the question of compensation was submitted to the court as a court, and not as an arbitrator. The appellants' right to appeal from the order fixing their compensation is covered by the Code (Rem. & Bal. § 1716, subds. 1, 6). *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902. *Slater v. Stevens County Bank*, 12 Wash. 488, 41 Pac. 168, and *McMillan v. Northport S.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

& F. Co., 49 Wash. 76, 94 Pac. 761. In the case first cited an appeal was sustained from an order quashing the service of a writ of garnishment. In the second case cited it was held that an order fixing the amount of compensation of an assignee was appealable, irrespective of the disposition of the main case out of which it sprung. In the case last cited an appeal was entertained which involved only the amount of compensation that should be allowed counsel in a case where an emergency restraining order had been obtained, and a showing made that further prosecution of the suit upon the merits was unnecessary. The principal action was still pending on the merits when this appeal was taken. This distinguishes this case from *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135. The motion is denied.

[3] Upon the merits the contention is threefold: (1) That Judge Root was not employed by the respondent; (2) that Olson had no authority to associate him in the case; and (3) that the compensation allowed by the court is adequate for the services rendered. The first two contentions are without merit. The record shows that the respondent knew that Judge Root was actively engaged in the case in her behalf. She therefore ratified his employment made by his associate, even if she had not theretofore directed it.

[4] Passing to the third contention, it appears conclusively that the respondent and her solicitors at Vancouver, B. C., represented to the appellants that the plaintiff husband was worth above \$1,000,000. The respondent represented to them that she had been overreached in a settlement between her husband and herself at Vancouver, B. C., wherein he had retained property worth \$1,000,000 or more, while she had gotten about \$125,000, and that she had good cause for divorce, and that he had no cause for divorce. Acting upon these representations, the appellants examined a great many papers submitted to them by the respondent, and had a number or lengthy conferences with her about the divorce and the property. They also prepared and filed an answer and cross-complaint, setting up the facts showing that the respondent had been defrauded in the property settlement, and setting forth her grounds for a divorce and the custody of the children, and prepared a number of motions and affidavits, and appeared in court at last three times. The purposes of the several motions and affidavits and the several appearances in court were (a) to get an allowance for counsel fees, suit money, and alimony; (b) to get an order preserving the status quo of the property; and (c) to restrain the husband from harassing the respondent pending the litigation. The court made an order in the principal case directing the husband to pay the respondent \$500 as suit money, and denied the other applications. The husband paid this sum by a check

drawn in favor of the respondent, which she indorsed to the appellant Olson. She has made no other payments to the appellants. The court allowed the appellants \$350 as counsel fees, ordered them to pay \$150 (the balance represented by the check) to the respondent, substituted other counsel, and ordered the appellants to deliver to them all papers, files, and documents in their possession relating to the action. They raise the single question of the adequacy of the counsel fees allowed by the court. The attorneys who testified in the case differ widely as to the value of the appellants' services. The attorneys who testified for the appellants put the value of the services at from \$1,000 to \$4,000; whilst the attorneys who testified for the respondent put the value at from \$100 to \$200. This testimony was all based upon hypothetical questions. Judge Battle, in answer to a question which fairly embraced the facts, stated that the services were worth approximately \$1,000. In view of the value of the property and the services required and rendered, we feel constrained to accept Judge Battle's estimate.

The case will be remanded with directions to the court to allow the appellants to retain the \$500 heretofore paid them, and to enter a judgment in their favor against the respondent for \$500 additional. The appellants will recover their costs.

CROW, O. J., and PARKER and MOUNT, JJ., concur.

CHADWICK, J. (dissenting). It was never the intention of Mrs. Jones to hire Judge Root. He was employed, or rather associated by his coappellant Olson and for his benefit. The fact that he was working out the case for Olson should not bind Mrs. Jones to pay for his services. For the services performed—considering also those unperformed—I think the compensation allowed by the lower court was ample.

I therefore dissent.

(64 Or. 519)

BELL v. MARTIN, County Auditor.

(Supreme Court of Oregon. April 1, 1913.)

JUSTICES OF THE PEACE (§ 17*)—FEES.

Act Feb. 25, 1895, p. 88, § 1, provides that justices of the peace in all cities having 50,000 or more inhabitants shall receive an annual salary of \$2,000, which shall be in full compensation for all services performed as justices, and no other fees or compensation shall be received by them, which section was amended by L. O. L. § 3178, so as to make the salary \$200 a month, and section 2 of the act of 1895 provides that justices shall perform the duties of their office as now required by law, and collect in advance from all litigants the fees now allowed them by law, and turn the same over to the county treasurer. *Held*, that a justice could only receive fees collectible from litigants under the justice's fee bill, and, while he had no right to fees collected for solemnizing marriages, the county could not recover such fees

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

collected from him by setting them off against his salary, since the county was only entitled to fees properly collected by the justice, nor would the county be authorized to set off such fees against his salary by L. O. L. § 3121, providing that uncollected fees shall be deducted from the salary of an officer remiss in collecting fees.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 28; Dec. Dig. § 17.*]

Appeal from Circuit Court, Multnomah County; J. U. Campbell, Judge.

Action by J. W. Bell against Samuel B. Martin, Auditor of Multnomah County, State of Oregon. From a judgment for plaintiff on demurrer to the answer, defendant appeals. Affirmed.

The plaintiff is a justice of the peace in Portland, a city of more than 100,000 inhabitants, in Multnomah county, of this state, of which county the defendant is the auditor. On plaintiff's petition the circuit court of that county issued its alternative writ of mandamus directed to the defendant commanding him to forthwith audit and approve the claim of the petitioner for \$200 salary allowed by law to him for the month of June, 1911, and report the same to the county commissioners of the county, or, in default thereof, that he show cause why he had not done so. Availing himself of the alternative permitted by the writ, the defendant alleged, in substance, that during the plaintiff's incumbency in the office of the justice of the peace he had received the sum of \$1,060 as fees for solemnizing marriages, and making returns thereof which he had neglected to pay to the county treasurer. The circuit court sustained a demurrer to this answer, and, as the defendant refused to plead further, directed a peremptory writ to issue, and from this judgment he appeals.

Arthur A. Murphy, of Portland (Geo. J. Cameron, Dist. Atty., and Frank T. Collier, Deputy Atty., both of Portland, on the brief), for appellant. Claude Strahan, of Portland (Wm. Reid, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] It is stipulated that the appeal is to test the one question of whether or not the justices of the peace of Portland district have the right to keep the fees collected for solemnizing marriages. Originally such officers throughout the state derived their compensation through fees collected from litigants in their court, or those to whom they rendered ministerial services. Some of these fees were directly connected with litigation, and others were derived from services such as taking the acknowledgment of deeds and the like. Among others was a fee of \$5 for performing a marriage ceremony and making a return thereof. An innovation upon the former statutory emoluments was made by the act of February 25, 1895 (Laws 1895, p. 88), entitled "An act to fix the compensa-

tion of justices of the peace and constables in the state of Oregon, in cities having over 50,000 inhabitants." Section 1 of that act reads thus: "The justices of the peace in all cities within the state of Oregon having 50,000 or more inhabitants shall receive an annual salary of \$2,000 to be paid in like manner as the salaries of other officials are now paid which said salary shall be in full compensation for all services or duties performed by said justices of the peace and no other fees, commissions or compensation whatever shall be allowed to or received by them." This section was subsequently amended to make the salary \$200 per month. L. O. L. § 3178. If this statute had stopped at this point, there is no question but what all fees whatever payable to justices of the peace of the class named therein would have been abolished, and no law would have existed whereby they could have collected any fee whatever. Section 3 of that act, however, provided that: "Said justices shall perform the duties of their office as now required by law and shall collect in advance (except in criminal cases) from all litigants, the fees now allowed them by law and shall on the first day of each month turn the same over to the county treasurer of their respective counties and take his receipt therefor." Construing both these sections to stand as we must by well-recognized canons, we must hold that in the case of justices in cities having over 50,000 inhabitants the general rule prescribed by section 1 would sweep out of existence all fees, commissions, or compensations whatever theretofore allowed such officers, but that section 3 constitutes an exception to the more general provisions of section 1, and exempts from the effect of the former section the fees at that time collectible from litigants under the general justices' fee bill. As the law then stood, when the act of February 25, 1895, went into effect, the justice had no authority to exact a fee for the performance of the marriage ceremony because it was only from suitors in his court that he could demand any fee. That act left him authority to exact fees from litigants alone. It is solely by virtue of the statute that the county has any right to the fees collected by the justices, and, if the latter had no right to collect them, neither has the county any right to demand the same from him. This is the doctrine taught by the case of *State ex rel. v. Dunbar*, 53 Or. 45, 98 Pac. 878, 20 L. R. A. (N. S.) 1015. The title of the county to the money cannot be better than that of the officer who collected it.

The defendant bases his refusal to obey the writ upon the terms of section 3121, L. O. L., providing substantially that the uncollected fees shall be deducted from the salary of the officer who is remiss in his duty in that respect, or, if the amount uncollected

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

exceeds his salary for any one month, then so much thereof as will cover the salary is to be credited to him, and the remainder deducted from his future salary until the whole amount is paid. This section, however, furnishes no obstacle to the allowance of the plaintiff's salary, for, as we have seen, the fee in question is not a litigant fee, neither is it one allowed by law to a justice of the class in which plaintiff is included.

The judgment of the circuit court is affirmed.

(64 Or. 491)

SPAULDING et al. v. McNARY et al.

(Supreme Court of Oregon. April 1, 1913.)

1. INJUNCTION (§ 118*)—ACTION—PLEADING—ANTICIPATING DEFENSES.

Where the complaint, in an action to enjoin criminal prosecutions for the violation of a statute imposing a license tax on agents for nonresidents selling goods in interstate commerce, fairly showed that the goods when ordered were in another state, the complaint was sufficient in that respect, and it was not incumbent upon plaintiff to anticipate a defense and to set forth matters which properly belonged to the adverse party to allege.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

2. APPEAL AND ERROR (§ 832*)—REHEARING—GROUNDS — OBJECTION NOT TAKEN TO PLEADINGS.

Where defendant, in an action to enjoin criminal prosecution for the violation of a statute imposing a license tax for nonresidents selling goods in interstate commerce, in which the complaint sufficiently showed that the goods when ordered were outside the state, filed no answer averring that the goods sold by plaintiff's agents had been shipped into this state in original packages before orders therefor had been taken, his petition for a rehearing, on the ground that it had not been shown that the goods were outside the state when ordered, should be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

On petition for rehearing. Denied.

For former opinion, see 130 Pac. 391.

MOORE, J. In a petition for a rehearing it is maintained by defendants' counsel that they are at a loss to understand where this court ascertained the facts, as outlined in the opinion, with respect to the vehicles being outside Oregon when orders therefor were taken. Paragraph 7 of the complaint, as far as material herein, reads as follows: "That plaintiffs are now, and for several years past have been, engaged in carrying on their said business solely in the following manner: One of their agents, called a canvasser or salesman, solicits in his territory for customers; when he finds a purchaser, he takes a written order for a certain style of vehicle to be delivered to said customer in 30 days, or as soon as transportation will permit; thereafter a separate agent, called a deliveryman, delivers the vehicle to the

purchaser in pursuance of said order, and the sale is then completed." A part of paragraph 1 of the complaint reads: "That C. A. Hanson, of Grinnell, Iowa, is employed as one of their (the plaintiffs') agents and as superintendent of agents, and is engaged in the delivering of said vehicles manufactured by plaintiffs in Iowa and shipped into the state of Oregon, to be delivered to customers in the various counties of the state of Oregon." In the brief of plaintiffs' counsel it is said: "The facts as to the conduct of plaintiffs' business are alleged in the complaint and admitted by the demurrer. These show that the course of business was carried on by plaintiffs by their agents soliciting orders for future delivery, the orders being thereafter sent to the superintendent who investigated the financial condition of the signer; and if satisfied that the sale would be a good business risk, provided it were made on credit, he would order the vehicle and later direct a separate deliveryman to deliver the vehicle to the purchaser at his home."

[1] It is believed that the excerpt last quoted is fairly deducible from the averments of the complaint, as hereinbefore set forth, from which it is reasonably to be implied that, when an order for a vehicle was secured in Oregon, the written application was immediately forwarded to Grinnell, Iowa, to Superintendent Hanson, and, if he found the customer financially responsible, he ordered a vehicle of the class desired to be shipped to one of plaintiff's agents in this state, with directions to deliver the carriage to the purchaser.

In defendant's brief it is stated: "Counsel do not show in their complaint but what the goods are shipped to the state of Oregon, the original packages there broken, and the goods disseminated among the goods of this state, and thereafter sold and peddled in the manner described in paragraph 7 of plaintiff's complaint. * * * They want us to infer, from the fact that their head office is in a foreign state, that the goods are outside of the state of Oregon when the orders are taken, but this is not their allegation, and, what is more, is not a fact. * * * In order for counsel to show that their business is interstate business, their complaint must allege that the goods are without the jurisdiction of the state of Oregon when the order is taken." Since it fairly appears from the averments of the complaint that the vehicles when ordered were in Iowa, the plaintiff's primary pleading was sufficient in that respect. It was not incumbent upon their counsel to anticipate a defense, and thereby set forth matters which properly belonged to the adverse party to allege. Bliss, Code Pl. (3d Ed.) § 200.

[2] Defendants' counsel had an opportunity first to move to strike from the complaint

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the great amount of wholly immaterial matter, and, after a ruling on the motion, to file an answer averring that the vehicles agreed to be sold by plaintiffs' agents had been shipped into Oregon before orders therefor had been solicited, that the original packages had been broken, and the goods thus contained had become commingled with other property in the state; but, since they did not avail themselves of this filing occasion, the petition for a rehearing should be denied, and it is so ordered.

(65 Or. 170)

FIREBAUGH v. BENTLEY et al.

(Supreme Court of Oregon. April 1, 1913.)

1. DEEDS (§ 211*)—MISTAKE—SUFFICIENCY OF EVIDENCE.

Evidence in an action to cancel a deed on the ground of mistake as to the land agreed to be sold held to show a mutual mistake as to the location of the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

2. BROKERS (§ 102*) — REPRESENTATIONS OF AGENTS—RESPONSIBILITY OF PRINCIPAL.

The purchaser of land could rely upon the representations of the seller's agent as to the true location of the land; such representations being within the ordinary scope of the authority of real estate brokers.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 146; Dec. Dig. § 102.*]

3. CANCELLATION OF INSTRUMENTS (§ 55*) — MISTAKE—RELIEF.

Where the parties by a mutual mistake as to the location thought that the land sold was practically all level land suitable for orchards when a part of it was hilly and unfit for that purpose, they should be restored to their positions before the conveyance was made by the purchaser reconveying the land, and the seller paying the part of the price paid and canceling the note and mortgage given for the remainder.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 55.*]

Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by L. D. Firebaugh against Leon M. Bentley and another. From a judgment for defendants, plaintiff appeals. Reversed for further proceedings.

On April 16, 1909, the defendants conveyed to the plaintiff the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 16, township 2 N., range 11 E., Willamette meridian, containing 80 acres. Contending that all parties to the conveyance were mutually mistaken as to the topographical situation of these legal subdivisions, the plaintiff brought this suit to set aside the deed on the ground of such mistake. He alleges, in substance, that he informed the real estate agent of the defendants that he wanted a tract of land suitable for an orchard, that he was taken upon the land by the agent, and as it was shown to him practically all of it laid south of a deep canyon,

and was quite suitable for the purpose intended, when, in fact, as he discovered afterwards, it was situated in about equal proportions on both sides of the canyon, and that a great part of it was steep and rocky, unfit for cultivation, and in no way suitable as a location for an orchard. The plaintiff alleges that he paid in cash to the defendants \$1,150, and gave his note and mortgage on the land for \$2,000, the remainder of the purchase price. It is alleged in the complaint and admitted by the answer that the plaintiff tendered a deed to the defendants for the property and demanded a repayment to him of the \$1,150, with interest from April 17, 1909, a year's interest on the \$2,000 note above described, and some taxes on the land, together with a cancellation of the note and mortgage. The answer admits the conveyance from defendants to plaintiff, also that the defendants authorized a real estate firm, composed of J. H. Devlin and W. A. Firebaugh, a brother of the plaintiff, to sell the property for them as stated in the complaint. Otherwise the complaint is traversed. For new matter the defendants allege, in substance, that the plaintiff ought not to be permitted to maintain the suit or to make the allegations in his complaint which are traversed, because, as the answer avers, after defendants gave Devlin & Firebaugh authority to sell the land, the plaintiff induced the firm to act as his agents without the knowledge of defendants, and during the negotiations those agents were informed by the defendants that the latter would not warrant the location of the boundary lines of the land; that its precise limits were unknown to defendants; that they had never had the lands surveyed, and, further, that, if the plaintiff purchased the land he must do so assuming the risk of the location of the boundaries. They say also that they had no knowledge or information sufficient to form a belief as to whether or not the agents did so inform plaintiff, but say that it was their legal duty to do so, and the plaintiff is bound by the agents' knowledge. This new matter was traversed, in turn, by the reply. The court below upon the testimony reported by a referee made findings of fact and conclusions of law in favor of the defendants, and dismissed the bill. From this decree the plaintiff has appealed.

B. E. Youmans, of Portland, for appellant. George R. Willbur, of Hood River, for respondents.

BURNETT, J. (after stating the facts as above). In addition to the facts above stated, it appears in testimony that the real estate firm of Devlin & Firebaugh maintained an office in Hood River, about six miles from the land in question. Attached to this office as an employé was one Frank Chandler, a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Indexes.

cousin of the defendant L. M. Bentley. To this cousin as such employé of the firm of real estate agents the defendant L. M. Bentley intrusted the lands in question for sale. Chandler filled out a blank furnished by the firm describing the land as 80 acres composed of 75 acres level and 5 acres rolling, and giving other data usual in cases such as this, which description the defendant L. M. Bentley signed. Chandler himself owned real property near the land in question, was supposed to be familiar with the location of the latter, and took J. L. Firebaugh, another employé of the real estate firm, into the country, and showed him as the tract offered for sale a body of land bordering on the south bank of the canyon in question. The land pointed out was comparatively level and well suited for orchard purposes, if cleared and reduced to cultivation. With this information, the firm advertised the land for sale, stating that the entire tract could be cleared, plowed, and planted to a standard variety of trees at a total cost not to exceed \$75 per acre. This advertisement was brought to the notice of plaintiff. Besides this, J. L. Firebaugh, to whom Chandler had shown the land, took the plaintiff and showed him the same tract that Chandler had shown him. The original commission given by Bentley to the firm allowed them to make as their compensation all above \$40 per acre. After plaintiff had seen the land as stated, the firm told Bentley they had an offer of \$3,000 net to him for the tract of 80 acres, one-third in cash and the remainder of \$2,000 as a deferred payment. As a matter of fact they charged the plaintiff \$3,150 for the land, of which they retained \$150 as commission, paying Bentley \$1,000 in cash, and plaintiff gave his note and mortgage to Bentley for \$2,000. About 14 months after the sale had been consummated, the plaintiff had the land surveyed, and discovered then for the first time that the canyon in question ran approximately through the center of the tract from northwest to southeast, and that in reality only about half the land was available for orchard purposes, the remainder being situated in the ravine which was deep and inaccessible and on a rocky hillside not fit for cultivation. From all the testimony the plaintiff was clearly mistaken about the location of the land which he purchased. In short, he bought 80 acres of what he supposed and was led to believe was comparatively level land suitable for orchard purposes, when, in fact, he only acquired about 36 acres of such land; the remainder being totally unfit for that or any other purpose except possibly grazing.

It remains to be seen whether the defendant was also mistaken. As reported by his cousin to the firm of real estate agents by whom the latter was employed, he represented the land to be 75 acres level and 5 acres

rolling. In his testimony, when asked to describe the land generally in reference to the situation and character, he said: "It looked out on the Mosier valley. To the west there is a hill. I would call it table land. To the north there is another. At the south there is another hill on the south side. The north side and to the east it is canyon. This particular piece of land slopes to the east, is rolling and generally timbered and brush land." In addition to this, some time prior to the commencement of this suit, the plaintiff interviewed Bentley about the situation of the tract, and the latter drew a rough plat indicating the lay of the land showing the canyon on the north side substantially as Chandler had pointed it out to Firebaugh, and as the latter had shown it to his brother, the plaintiff. This plat was admitted in evidence, and its making was avowed by the defendant Bentley. He did not pretend to give the precise location of the lines of the government survey, but he did understand and so state to the plaintiff that the land lay south of the canyon, and that substantially all of it was comparatively level.

[1] As against the actual survey it is giving Bentley the credit of being an honest man when we say that he was mistaken as to the true situation of the land. He shows this by his testimony and his representations to his cousin and to the plaintiff. Although Chandler was on the stand as a witness for the defendants, he did not pretend to question in any way the fact that he had taken the plaintiff's brother on the land and described it to him substantially as it was afterwards represented to the plaintiff. The testimony clearly establishes a mutual mistake of the parties as to the true location of the land. There is nothing in the testimony showing that the firm or its employes ever acted in any way disloyal to the interests of the defendants. Nothing out of the ordinary course of business of a real estate broker finding a purchaser for his client's land and reporting the offer to the seller is disclosed by the record. As to informing the agents that the plaintiff must purchase the land at his own risk about the location of boundaries, the defendant Bentley says this: "He [referring to one of the agents] asked me if I had a survey of the tract, if I knew where the lines were. I told him I did not know only indefinitely; that I had never had the place surveyed; that I had sent to Portland through J. L. Henderson to get the government field notes and attempted to find the government corners, but I had also tried to satisfy myself approximately where we were then working on the land, so I could know whether I was clearing my own land or some one else's, but I could give him no satisfaction in regard to the boundary lines, but if he or his customer required a survey that they would have to add the cost of a survey to their price." There is nothing in

the testimony tending to show that this statement was communicated to the plaintiff, and, even if it had been made known to him, there is nothing in it at variance with the representation made by Chandler through Firebaugh to the plaintiff. On the other hand, its tendency is to lull the plaintiff into the belief that the defendant knew where the lines were approximately, and was warranted in representing that the land was substantially all level.

[2] The plaintiff had a right to rely upon the representations of the agents of the defendants as to the true location of the land, for such statements were within the ordinary scope of the authority of real estate brokers. That these were authorized by the defendant Bentley is shown by the description filled out by his cousin, by the plat which he drew for the plaintiff, and by his own testimony in describing the land. At the argument counsel for the defendants criticised the accuracy of the survey which plaintiff claims disclosed the mistake upon which he relies. In our judgment, however, it is prima facie correct or at least sufficiently accurate to require of defendants a better survey if they are dissatisfied. It is hardly probable that an experienced surveyor such as the one who made the survey, having established the government corner of a section, would so far miss the lines of the subdivisions involved as to change the canyon from the north boundary to the middle of the tract.

[3] The case is much like that of *Copeland v. Tweedle*, 61 Or. 303, 122 Pac. 302, in which we sustained the circuit court in setting aside a conveyance of land on the ground of misrepresentation of the quantity of timber then standing on the same. True enough, that case was grounded on the fraud of the seller's agent, although the seller herself was innocent. But by as much as accidental shot will kill as certainly as one designedly aimed, by so much, when one contracting party is led into a losing position by a mutual mistake of himself and the other party, is the result as harmful as if he was wronged by the active fraud of the person with whom he deals. We are of the opinion that the parties ought to be restored to their former status as the same existed before the conveyance from the defendants to the plaintiff. This would include a reconveyance from the plaintiff and his wife if he has one to the defendant L. M. Bentley or his wife or to both of them according to what the state of the title was in the beginning of the transactions narrated in the pleadings as well as the repayment of the \$1,150 cash portion of the purchase price and the return and cancellation of the \$2,000 note and mortgage. It does not appear whether the defendants or either of them are the holders of the note and mortgage so as to be able to surrender the same. The only alternative in default

of their surrender would be a decree for plaintiff against defendants for the amount thereof in addition to a personal decree for \$1,150 or so much thereof as should remain unpaid. Considering the possibility that plaintiff could collect such a decree for the amount of the note and leave the land holden by virtue of the mortgage for the payment of the sum secured thereby to an innocent purchaser of the yet unmatured note, it is quite important to the defendants that they have reasonable opportunity to surrender those securities.

The decree will therefore be reversed, with leave to the parties to apply to the circuit court by supplemental pleadings or otherwise, for such decree as will carry into effect the doctrine of this opinion.

(64 Or. 502)

HIRSCHFELD v. McCULLAGH

(Supreme Court of Oregon. April 1, 1913.)

1. CORPORATIONS (§ 637*)—STATUTES (§ 64*)—LICENSE FEES—FOREIGN CORPORATIONS—CONSTITUTIONAL LAW.

L. O. L. § 6707 (Sess. Laws 1908, p. 43, § 5), in so far as it requires the payment of a license fee based upon the whole amount of the capital stock of a foreign corporation, whether employed within the state or not, is unconstitutional and void; but the other provisions, providing a penalty for not filing a report, are valid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 637;* Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

2. COURTS (§ 97*)—FEDERAL QUESTIONS—CONTROLLING DECISIONS.

Whether a state statute providing a license fee for foreign corporations based upon the whole amount of capital stock whether employed within the state or not violates the United States Constitution is a federal question, and a holding of the United States Supreme Court is controlling on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.*]

3. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS.

L. O. L. § 6726, requiring the appointment of a resident attorney by foreign corporations, should be construed with section 6707, requiring a report by such corporations to the Secretary of State, giving the name of such attorney among other things, and prescribing a penalty for failure to file a report, and a failure to appoint such attorney does not render contracts void, but renders it impossible to file the required report, for which a penalty is provided.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. § 657.*]

4. CORPORATIONS (§§ 648, 661*)—FOREIGN CORPORATIONS—ENTRANCE FEE—RIGHT TO SUE.

The entrance fee of \$50 required of foreign corporations is reasonable, and under the express provisions of L. O. L. § 6708, the right of a foreign corporation to maintain an action in the state is suspended until such fee is paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2516, 2536, 2539, 2542-2544, 2546, 2563-2567; Dec. Dig. §§ 648, 661;* Licenses Cent. Dig. § 47.]

5. CORPORATIONS (§ 672*)—LICENSE FEES—PLEADING—ABATEMENT OF ACTION.

Under L. O. L. § 6709, providing that the objection that a plaintiff foreign corporation had not complied with section 6708 as to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

payment of fees could be raised any time before trial, such objection must be raised by plea in abatement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. § 672.*]

6. CORPORATIONS (§ 661*)—DELINQUENT CORPORATIONS—ASSIGNMENT—DEFENSES.

Where a foreign corporation which has not yet paid the entrance fee required by statute assigns a note after maturity, the assignee takes the note subject to such defense, but under L. O. L. § 6708, providing that, while such delinquencies continue, the right to sue shall be deemed to be in abeyance, such defense fails when such fee has been paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542, 2543, 2544, 2546, 2563-2567; Dec. Dig. § 661.*]

On rehearing. Former opinion affirmed, and judgment below reversed.

For former opinion, see 127 Pac. 541.

MCBRIDE, C. J. [1] The petition for rehearing challenges the constitutionality of section 6707, L. O. L., being section 5, p. 43, Session Laws of 1903, on the ground that it imposes a tax upon the whole capital stock of a foreign corporation, irrespective of whether it is employed in this state. That the imposition of such tax is unconstitutional is clearly held in the following cases: *W. U. Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *Ludwig v. W. U. T. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436; *Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236.

[2] Whatever might be our own opinion, the contention presents a federal question in regard to which the holding of the Supreme Court is controlling; and we therefore acquiesce in the conclusion reached in the cases above cited, and hold that, in so far as the section in question requires the payment of a license fee based upon the whole amount of the capital stock of a foreign corporation, whether employed within the state or not, it is void. But it does not follow that because this part of the section is void that the whole section is void. Its provisions are not so interdependent that other requirements cannot be separated from the single invalid provision. A corporation is required to file with the Secretary of State a statement, showing, among other things, the location of the principal office, the names and post office addresses of its president, secretary, treasurer, managing agent, and attorney in fact in this state; and a failure or refusal to file such report or to pay the license fee subjects it to a fine of \$100. It will be noticed that this penalty may be incurred (1) by failure to file the report; or (2) by failure to pay the license fee. If the corporation pays the license fee, but fails to make a report com-

plying with the provisions of the section, it is amenable to the prescribed penalty; or, if it makes the report, but fails to pay the fee, it is also held liable. The fact that the requirement to pay the license fee is void because of a conflict with the federal Constitution does not render void other requirements not so in conflict.

[3] No penalty is expressly denounced by the succeeding sections for failure to appoint a resident attorney; and, following the rule announced in *Bank of British Columbia v. Page*, 6 Or. 431, we would be compelled to hold that a contract made by a corporation before appointing an attorney in fact is absolutely void. But the law abhors forfeitures, and we are disposed to construe section 6707, L. O. L., and section 6726, L. O. L., together. The section last cited requires the appointment of such attorney, and the preceding section requires a report to the Secretary of State, giving the name of such attorney. Taking the act by its four corners and construing the sections together, we think it may reasonably be deduced that the corporation must appoint the attorney, and report that fact to the Secretary of State in its annual statement. If it has neglected to appoint the attorney, it cannot, of course, make the report required by law, and is liable to a penalty for its failure so to do. The law having prescribed the penalty by way of fine, the courts should not impose an additional penalty by way of forfeiture; the omission not being *malum in se*.

[4, 5] The entrance fee of \$50 required by the statute is not in conflict with any provision of the federal Constitution, and is a reasonable requirement. The corporation has not paid nor offered to pay this fee, and its right to maintain an action in the courts of this state is suspended until such fee is paid. Section 6708, L. O. L. And this objection must be raised by plea in abatement. Section 6709, L. O. L.

[6] The assignment of the note after maturity and especially an assignment made as in this case merely for the purposes of collection cannot confer on the assignee any better right than that of the payee at the time of the assignment. Plaintiff took the paper subject to all defenses which existed as against the original payee. The petition for rehearing seems to assume that we have held that the contract between plaintiff's assignor and defendant is absolutely void, and the note also void; but such was not our holding. Plaintiff can enforce payment in our courts whenever his assignor or principal complies with our laws and pays the \$50 entrance fee which the statute requires.

The suit should abate without prejudice to another action upon plaintiff's assignor complying with the statute in so far as held valid herein.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(65 Or. 311)

FLANAGAN ESTATE et al. v. MARSHFIELD REALTY & TRADING CO.

(Supreme Court of Oregon. April 1, 1913.)

1. DEEDS (§ 137*)—DESCRIPTION—CERTAINTY—RESERVATION.

Where a deed excepts land described as one acre lying in the northeast corner of a lot, and the corner was round and irregular, so that it was possible to lay off an acre with the base given in a half dozen different ways, the exception was too indefinite to include any particular land, unless the parties by their subsequent conduct have identified it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 457; Dec. Dig. § 137.*]

2. QUIETING TITLE (§ 30*)—NECESSARY PARTIES.

In a suit to quiet title to a particular block in a large lot of land, a railroad which claimed no interest in that block is not a proper party, even though the defendant had claims to land in the lot which might conflict with those of the railway company.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 64-66; Dec. Dig. § 30.*]

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Suit to quiet title by the Flanagan Estate, a corporation, and others, against the Marshfield Realty & Trading Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is a suit to quiet title to block A in Railroad addition to the city of Marshfield. In 1873 E. B. Dean and David Wilcox were the owners of lot 9, section 35, township 25 south, range 13 west of the Willamette meridian, and in April of that year formed a partnership with C. H. Merchant, conveying to him a one-eighth interest in lot 9. In 1889 the partnership was dissolved, and Dean and Wilcox conveyed to Merchant all of lot 9, "excepting one acre lying in the northeast corner thereof." Merchant still retained his one-eighth interest in the excepted acre until October, 1892, when he conveyed it to E. B. Dean & Co. by a deed which described it as "one acre in the northeast corner of lot 9, section 35, township 25 south, range 13 west of Willamette meridian, known as 'Fire Pit.'" In 1890 one R. A. Graham proposed to build a railroad to Marshfield, and entered into an agreement with Merchant whereby lot 9 was to be platted as part of Railroad addition to Marshfield; Graham to have one-half of the addition as a bonus for building the road. Merchant selected block A, the land in controversy, as his own under this agreement, and in the same year gave Graham a contract of purchase, and Graham, under this contract, sold block A to plaintiff's predecessors in title, conveying it by deed executed by himself and Merchant. Lot 9 is made fractional by the meanders of Coos Bay, and its northeast "corner" approximates a crescent, but is irregular along its concave side, caused by the sinuosities

of the bank. The defendant claims title to the whole or a greater portion of block A by virtue of the exception in the deed from Dean and Wilcox to Merchant.

John D. Goss, of Marshfield, for appellant. Cassius R. Peck, of Marshfield (Chas. B. Selby, of Oklahoma City, Okl., on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). [1] It requires no citation of authorities to support the proposition that, where the corner is included within two straight lines, a description of an acre in such corner is sufficiently definite; but in this case the "corner" is rounding and irregular, and it is possible to lay off an acre with the base given in the deed in half a dozen different ways. The exception is too indefinite to include any particular land, unless the subsequent acts of the parties have made it definite. By the great preponderance of the testimony, we are of the opinion that the intention was to reserve an acre, including the fire pit mentioned in the subsequent deed from Merchant to E. B. Dean & Co., and that the true location of such acre, according to the intention of the parties, is in accordance with the Cathcart survey mentioned in the testimony and shown by plaintiff's Exhibit B. Unless the parties have by their own acts identified this as the property, the description is not otherwise identified. This leaves the acre entirely east of block A.

[2] The motion to make the Coos Bay & Eastern Railroad Company a party was properly denied. The controversy in this suit is as to the validity of defendant's claim to block A. Whether it owned an acre in some other location was not material. It does not appear that the railroad company claimed any interest in block A, and the plaintiff would have subjected itself to costs by making it a defendant.

The decree is affirmed.

(65 Or. 30)

KITCHIN v. OREGON NURSERY CO., Limited.

(Supreme Court of Oregon. April 1, 1913.)

1. EVIDENCE (§ 501*)—OPINION EVIDENCE—FACT OR CONCLUSION.

In an action by a buyer of nursery stock for damages caused by the delivery of defective stock, his statements that the real value of the trees was \$1,017, and that the value of those that died was \$1,000, without showing the basis of such statements, were conclusions not entitled to consideration by the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

2. SALES (§ 418*)—ACTION FOR BREACH—MEASUREMENT—DAMAGES.

In an action by a buyer of nursery stock for the delivery to him of defective stock, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

measure of damages was the price charged by the seller for the number of trees that died.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1488; Dec. Dig. § 418.*]

On petition for rehearing. Modified.
For former opinion, see 130 Pac. 408.

EAKIN, J. [1] On the motion for rehearing defendant urges that there is no evidence to justify the verdict in the sum of \$901.28, for the reason that the purchase price at Orenco of the trees proved to have died, according to the testimony of plaintiff, was only \$549.81. Testimony was offered by plaintiff, but excluded by the court, that the price plaintiff was to receive for these same trees was \$938.37. However, he was allowed to state that the real value thereof was \$1,017.25; and to a former question he was allowed to state the total amount or value of those trees that died to be \$1,000. Neither of those statements was of fact, but they were conclusions, and it is not shown upon what they were based; they were not confined to the value or purchase price at Orenco, and were not entitled to consideration by the jury.

[2] As we understand the evidence, the answer of plaintiff to the question (transcript of testimony, page 96), "I will ask you to state to the jury the price charged you by the Oregon Nursery Company on those dead trees," was the correct statement of plaintiff's damage. He had previously testified to each lot of trees, with the name of the purchaser, and in the answer he names each purchaser, the number of dead trees in each lot, and the amount paid the Oregon Nursery Company therefor, amounting in all to \$549.81. The jury allowed plaintiff for freight paid by him \$78.88, so that the amount of the verdict should have been \$628.69, less the amount due from plaintiff to defendant in the sum of \$157.59, which leaves the amount for which judgment should have been rendered \$471.10.

The opinion will be modified accordingly, and under the provisions of section 3 of article 7 of the Constitution, as amended (see Laws 1911, p. 7), this court will direct judgment to be entered for that amount, appellant to recover the costs on this appeal.

(64 Or. 522)

MASON v. MELHASE.

(Supreme Court of Oregon. April 1, 1913.)
EVIDENCE (§ 376*)—DOCUMENTARY EVIDENCE
—BOOKS—AUTHENTICATION.

Ledgers of a sawmill company showing the number of feet in logs, made up from papers called scale cards, were properly rejected where the only witness who could testify as to the accuracy of the scale sheets admitted that they were founded to a considerable extent on mere guesswork, and there was no other evidence as to the regularity of this documentary evidence; for, while books regularly kept may be admitted, the regular keeping must be es-

tablished as a fact preliminary to their introduction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.*]

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by W. H. Mason against Fred Melhase. From a judgment for plaintiff, defendant appeals. Affirmed.

As admitted in the pleadings, the parties to this action made the following agreement: "This article of agreement, entered into by and between W. H. Mason, party of the first part, and Fred Melhase, party of the second part, witnesseth: That the said party of the first part hereby agrees, for and in consideration of the sum of four and ⁵⁰/₁₀₀ dollars per thousand feet, to cut five million feet, more or less, of timber into saw logs, furnished by the second party on parts of sections 10, 11, 14, 15, 22 and 23, township 35 S., R. 6 E., W. M., in Oregon. The said first party shall deliver the logs so cut, in the water at the mouth of Crystal creek, at or near the upper end of Upper Klamath lake, in Klamath county, Oregon. It being understood and agreed that the said timber, being on government land, is to be indicated by the government forester in charge of said lands. The said first party also hereby agrees to pile all of the brush of the said timber to be cut, according to the requirements of the forest ranger in charge. It is also understood and agreed by the parties hereto that the basis for calculation shall be what is known as the "Scribner scale," all logs to be measured by the said first party in the woods, by taking both large and small diameters of the small end of each log and then taking the average of the two diameters, which average shall be taken as the true diameter. Also the scale is to be checked and verified at the mill. It is also hereby agreed by the said party of the first part that after the first month's logging he will deliver at the mouth of said Crystal creek a minimum of four hundred thousand feet each month. The said second party hereby agrees to furnish the timber according to the foregoing, and to pay for the cutting and delivery of said logs at the mouth of said Crystal creek, the sum of \$4.50 per thousand. Said payments to be made from time to time on the delivery of each raft of said logs at said point. It is also understood and agreed that said second party shall accept each raft of 100,000 feet or more of said logs as soon as it shall be delivered at the mouth of said Crystal creek, and in case he shall fail to do so, he hereby agrees that the said first party shall not be liable for any damage which may accrue by reason of logs becoming scattered on account of there being no one at the point of delivery to receive them at the time of delivery of any one of said rafts. The said party of the first part hereby agrees to furnish a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

good and sufficient bond for the faithful performance of his part of this contract. Signed this 14th day of March, 1910. W. H. Mason, Party of the First Part. Fred Melhase, Party of the Second Part. Witness: H. J. Mattoon." In his first cause of action the plaintiff claims that operating under this contract he cut 3,898,586 feet of the timber, and delivered the same at the place specified in the contract, whereby the defendant became indebted to him in the sum of \$15,293.61, of which he has paid \$11,650, leaving a balance due to the plaintiff of \$3,643.61. For a second cause of action the plaintiff alleges that, although he was actively engaged in the performance of the agreement according to its terms, the defendant rescinded the contract without cause September 10, 1910, and prevented the plaintiff from continuing the work, whereby he was damaged by a loss of profits in the sum of \$1,600. In the answer the contract is admitted, but the defendant denies that plaintiff cut or delivered more than 2,471,995 feet of logs, whereby he earned no greater sum than \$11,123.98. The defendant, admitting that he paid the sum of \$11,650, claims a recoupment of \$528.02 from the plaintiff as an overpayment. As affecting the rule by which the proper measurement of logs should be determined, the amended answer alleges a custom about deductions to be made from the full scale as an allowance for rotten, crooked, or hollow logs, and, in substance, avers that the correct amount of timber was stated in the answer, and was thus ascertained.

The answer was traversed by the reply. As the result of a jury trial and verdict a judgment was entered for plaintiff for the sum of \$3,643.61, and the defendant appeals.

J. C. Rutenic and O. F. Stone, both of Klamath Falls (Stone & Barrett, of Klamath Falls, on the brief), for appellant. D. V. Kuykendall, of Klamath Falls (Kuykendall & Ferguson, of Klamath Falls, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). At the argument but two questions out of the many reserved in the record were presented to the court for consideration. One was the office and effect of the custom in such cases as relied upon by the amended answer. The other was the admissibility of the ledger of the Long Lake Lumber Company, together with certain papers called scale cards, purporting to show the scale of the logs sawed by the lessee of the Long Lake Lumber Company at its mill.

On the first cause of action the ultimate material question in dispute was what was the amount of logs cut and delivered under the contract mentioned. It appears in evidence that the mill alluded to in the contract where the scale was to be checked and verified was the property of the Long Lake Lumber Company. One McGowan was at the

time running the mill as lessee under contract to saw the logs into lumber at so much per thousand feet of the lumber. The defendant was interested in the mill company, and bought the logs from the government forest reserve, transferring them to the lumber company at exactly what it cost him to deliver them at the mill. The logs, having been floated from the place of delivery along Upper Klamath lake, a distance of 20 miles or more, to the mill, were there taken in charge by employes of McGowan. It was the duty of one of these men called the "pondman" to haul the logs out of the pond and put them upon the carriage to be sawed. It was also his duty to scale the logs as they were delivered upon the carriage. During the period when the logs in question were sawed, various men occupied the position of "pondman" under the employment of McGowan. In scaling the logs it was their duty to put down on pieces of paper kept by them the scale of each log, showing the number of feet, and these papers were turned over to the Long Lake Lumber Company each day as a rule, though some of them were delivered to McGowan, who, in turn, gave them to the officers of the company. W. O. Huson, the secretary of the company, testified that these sheets came into his possession, and he made up the ledger offered in evidence from the data thus afforded. He was absent from the mill a considerable portion of the time while the logs were being sawed, and had no immediate supervision of the scaling, although he says he went to see about it casually every day he was in town, and, if a new man was put at the work, he saw to it that he knew how to scale. Huson produced 83 pages of what he said were scale sheets thus furnished to him. They consist of numerous columns of figures in pencil headed Mason logs, Vose logs, Brown logs, and other names. They are not signed by any one, and no offer was made to prove the handwriting of the persons who made them. None of the scalers or pondmen were offered as witnesses, although two of them at least were in the town of Klamath Falls where the trial was held. Huson testified that he did not know the whereabouts of any of the others except that he heard one was either in Alaska or Texas, but no showing of any diligence was made to procure the testimony of any of the men who actually did the scaling or made the sheets offered in evidence.

Some of the testimony from McGowan, the employer of the pondmen, is here quoted: "Q. Mr. McGowan, in making this scale of the logs that were delivered at the mill under the contract between Mr. Mason and Mr. Melhase, were the logs scaled that were sawed? A. Well, if they were not scaled, they were supposed to have been guessed at. Q. Supposed to have been guessed at? What do you mean by that? A. Our man was supposed to scale all the logs, but he must

keep the mill going, and, if it was a case of neglecting one, he neglected the log scale, but he was supposed to scale very liberal as to the amount of feet in any log. Q. What amount of logs would it probably be that he would not have time to scale? What class of logs, large or small? A. Small. You see, sometimes when the carriage would get to him, they would be out of logs, and, as soon as the logs were hauled up, he would not have time to scale the logs, so he would roll one onto the carriage, and start sawing, and then he would judge the number of feet there was in that log, without putting the rule onto it. Q. Do you know whether they did that with reference to all the logs or not? A. That was my instructions to do that. You see the Long Lake Lumber Company claimed our tally was overrunning the log scale pretty strong, and we were cutting mostly two-inch, and we figured on getting an overrun, so I did not want the men to judge a log under its footage. I would rather they judge it over, because, if they judge it under, it would look worse for me on the board measure tally, so they were instructed to be liberal as to the footage in the log; that is all. Q. Were those logs marked so they could be identified when they reached the pond? A. I did not look into that. That was up to the man on the logging deck. Q. What position did that man hold in the work? A. We called him 'pondman.' He was supposed to gather up the logs in the pond and bring them to the mill. Q. Was he working under your supervision? A. Yes, sir. Q. Was that work done by one man or various people? A. During the season? Q. Yes, sir? A. By various people. By the Court: He may state, if he knows, what they (the tally slips) are. A. You want me to state if I recognize these figures? By Mr. Stone: Q. I want you to state, if you recognize those slips, what they are? A. I recognize what they are meant for. The idea is this: That there are lots of these tallies I have never seen the log scales. There would be some of these I would recognize. I don't recognize these figures here, although my man may have written down these figures, yet I don't know that. Q. Well, then, that scale that was made of those logs was made under your supervision, was it? A. Well, my man, the

man I had, was hired to bring those logs up into the mill, any logs, and he was also instructed to scale the logs, but, if he could not do both, then he had to keep the logs up there." It was from these slips that Mr. Huson, the secretary of the lumber company, compiled the ledger offered in evidence.

Books regularly kept under certain circumstances may be admitted in evidence, but the regularity of their keeping must be established as a fact, preliminary to their introduction, by competent evidence. This introductory step of determining the authenticity of the books is a question to be passed upon by the court. This is analogous to the principle by which the court is required to determine in the first instance whether a confession is voluntary or not, or whether a witness is of sufficient understanding to be allowed to testify and the like. The testimony of Mr. Huson could not throw any light upon the regularity of the making of these scale sheets because he was not present when they were made, and had no knowledge of how they were kept except by hearsay. The testimony of McGowan clearly discloses their inaccuracy, and shows that they were founded to a considerable extent on mere guesswork. The court as a trier of preliminary fact concerning the authenticity of these scale sheets was amply justified in deciding against their reception in evidence. The ledger being confessedly a mere compilation of these scale sheets, so called, rests upon no better foundation than the sheets themselves, and was likewise properly rejected on the showing made. *Stidger v. McPhee*, 15 Colo. App. 252, 62 Pac. 332; *Trainor v. German American, etc., Ass'n*, 204 Ill. 616, 68 N. E. 650; *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449; *Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023; *Taylor-Woolfenden Co. v. Atkinson*, 127 Mich. 633, 87 N. W. 89. This evidence about the measurement of the logs being properly rejected, it is immaterial whether that process was conducted according to the custom pleaded or not so far as this case is concerned. It is unnecessary, therefore, to consider the question of custom.

Finding no error in the matter complained of, the judgment of the circuit court is affirmed.

(72 Wash. 587)

DAVIES v. CAREY et ux.

(Supreme Court of Washington. April 1, 1913.)

1. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR ANOTHER'S DEFAULT.

Where an owner of standing timber told a merchant, who had been furnishing supplies and provisions to a party engaged in logging operations under a contract with such owner, to continue to supply the camp with whatever was wanted and to charge the whole account to him, this constituted a direct original promise on his part to pay the previously incurred debt as well as that thereafter incurred, and not a mere promise to answer for another's debt, required to be in writing by the statute of frauds (Rem. & Bal. Code, § 5289).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

2. FRAUDS, STATUTE OF (§ 33*)—ORIGINAL PROMISE—CONSIDERATION—SUFFICIENCY.

Where an owner of standing timber contracted for its sale to another on terms such as to leave him a profit dependent on the other's success in removing and marketing the logs, his interest in the other's logging operations was a sufficient consideration to support his promise to pay for supplies and provisions furnished for use in connection with such operations.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.*]

3. HUSBAND AND WIFE (§ 239*)—ACTIONS—JUDGMENT.

In an action against a husband and wife on the husband's promise to pay for supplies and provisions furnished a person engaged in logging operations under a contract with him, judgment could be rendered against the wife only as a member of the community, and a judgment against her individually was improper.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 855, 856, 860, 862, 983; Dec. Dig. § 239.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Henry Davies against William Carey and wife. Judgment for plaintiff, and defendants appeal. Affirmed in part and reversed in part.

Peterson & Macbride, of Seattle, for appellants. Jas. W. Carr, of Bremerton, for respondent.

PARKER, J. The plaintiff, a storekeeper at Port Orchard, in Kitsap county, seeks to recover from defendants the value of merchandise delivered by him to Harris Bros., who were at the time engaged in logging operations in that county under a contract with the defendant William Carey. The plaintiff rests his right to recover from the defendants upon the promise of the defendant William Carey to pay for the merchandise so delivered. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff for the full amount claimed, from which the defendants have appealed.

In the early summer of 1910 appellant William Carey was engaged in logging in Kitsap county, having acquired certain standing timber there which he was to pay for from time to time as he removed it from the land. In June of that year he entered into a contract with Harris Bros., by which they were to take over his outfit and log this timber in his stead, and pay him therefor from time to time as the logs were removed and marketed. Respondent was aware of the fact that both Carey and Harris Bros. were interested in the logging of this timber, but did not know of the real nature of the contract they had with each other relative thereto. The evidence tends to show that respondent had good reason for believing, and did believe, that Harris Bros. were employed by Carey to remove the timber, though it appears that they actually had a contract for the purchase of the timber from Carey on such terms as to leave him a profit. It is in any event plain that Carey was interested in the success of Harris Bros. in removing and marketing the logs, and that his profits depended thereon. Between July 14, and August 19, 1910, respondent sold and delivered to Harris Bros. merchandise consisting of the usual supplies and provisions for carrying on logging operations of the total value of \$438.10. During this period Harris Bros. paid to respondent thereon \$150, leaving a balance of \$288.10 due on August 19th. On August 20th appellant William Carey and respondent had a conversation at his store relative to this unpaid balance due him from Harris Bros.

[1] Respondent's version of this conversation and what he then did as a result thereof is given in his testimony as follows: "A. At that time I told Mr. Carey that I was a small concern, that the account of the camp was getting almost too large, and that I had to have money to pay my bills, and he said to me that he was going to take over the camp and would pay the bills. Q. What else did he say, if anything? A. And I asked him if I should still continue to supply the camp, and he told me, 'Yes,' to let them have what goods that they wanted, and that he would not only pay for what went down, but pay for what they had got. Q. What, if anything, did he say with reference to charging the account to him? A. He said charge the account to him, sir, which I did. Q. About the balance due, what did he say about charging it? A. Charging the whole thing. I handle the McKaskey system, one account is brought right forward onto the other. Q. What did he say, if anything, about charging the balance that was due? A. He told me to charge balance to him, the whole account, that he would become responsible for the whole account. Q. You may state, Mr. Davies, whether at that time you made any memorandum of the agreement be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 130 P.—72

tween you and Mr. Carey? A. I certainly did; I went right in and called Mrs. Dilk's attention to the fact, made the notation on what I called my daily balance." This testimony of respondent is corroborated by another disinterested witness who was present at the time, though it was denied by Carey. The slips upon which respondent noted his charges against and in favor of his customers from time to time, constituting his book of original entry, kept in due course of business, show that this balance was then charged by him thereon against appellant William Carey. Thereafter respondent continued to deliver goods to Harris Bros. at their request from time to time, and as delivered charged the goods to appellant William Carey until September 19th, at which time there was due upon the account the total sum of \$404.95, no payments having been made since August 20th, the day of the conversation between respondent and appellant William Carey. About this time appellant William Carey took possession of the camp and outfit which had been previously turned over by him to Harris Bros., evidently for the reason that Harris Bros. had failed to carry on the logging operations as agreed under their contract.

It is first contended on behalf of appellant that the evidence does not warrant the finding of the trial court to the effect that appellant William Carey promised to pay the balance due respondent from Harris Bros., and also to pay for the goods thereafter to be furnished to Harris Bros. as testified to by respondent. A careful reading of the entire evidence convinces us, however, that it clearly preponderates in support of the version of that conversation given by respondent in his testimony, which we think shows a direct original promise on the part of Carey to pay the previously incurred debt of Harris Bros. as well as the debt thereafter to be incurred in the furnishing of goods, as his own debt.

It is contended that the promise of appellant William Carey to respondent was in any event only a "promise to answer for the debt, default, or misdoings of another," and therefore void and not enforceable because not evidenced in writing as required by our statute of frauds. Section 5289, Rem. & Bal. Code. We think this contention finds its answer in the fact that the promise was not collateral, but was a direct promise on the part of Carey to pay both the past debt incurred by Harris Bros. as well as the future debt to be incurred upon furnishing them goods as his original debt. It was not a mere promise to pay if Harris Bros. failed to pay, but it was manifestly a direct promise on the part of Carey to assume and pay for all of the goods as his own debt.

[2] This being true, there is nothing wanting to render appellant William Carey liable thereon, unless it be a lack of sufficient

consideration to support and render that promise binding in law. William Carey's interest in the logging operations and the fact that his prospective profits depended upon the logging operations being carried on we think leave little to be argued upon the question of the sufficiency of the consideration moving to Carey to support his promise as a legal liability on his part. From all the circumstances it is clearly manifest that the primary purpose of Carey was to secure and promote his own interest. This, we think, was sufficient in law as a consideration, even though the result of his promise to respondent was to incidentally answer for a debt of Harris Bros. *Burns v. Bradford-Kennedy Lbr. Co.*, 61 Wash. 276, 112 Pac. 359; *Howell v. Harvey*, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077, and note. See note in 15 L. R. A. (N. S.) 222; 20 Cyc. 163. Appellants rely upon the early decision of this court in *McKenzie v. National Bank*, 9 Wash. 445, 37 Pac. 668, 43 Am. St. Rep. 844. A careful reading of that decision we think will show that there was no consideration whatever moving to the promisor. It is apparent from the language of that decision that, had there been a consideration operating to the advantage of the promisor, it would have been held sufficient to render the promise legally binding. Appellants also rely upon our recent decision in *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60. That case, however, involved the construction of the language of the complaint, which was somewhat involved; the court concluding that the alleged promise was collateral, being a promise of indemnity only.

[3] The judgment is: "That the plaintiff have and recover of and from the defendants herein and each and every of them, to wit, William Carey and Jessie Carey. * * *" It is contended in behalf of appellant Jessie Carey that the judgment is in any event erroneous in so far as it awards recovery against her individually, or otherwise than as a member of the community. We think it is quite plain from the record that the debt upon which the judgment rests is a community debt for which she is not liable beyond her interest in the community property. It was therefore error to enter the judgment in this form rendering her separate property liable therefor. *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502.

The judgment is reversed in so far as it awards recovery against appellant Jessie Carey, otherwise than as a member of the community. The judgment is affirmed in so far as it awards recovery against appellant William Carey and the community. The superior court is directed to correct the judgment accordingly. Respondent is awarded his costs in this court against appellant William Carey and the community. Appellant

Jessie Carey is awarded her costs in this court against respondent.

CROW, C. J., and GOSE, CHADWICK, and MOUNT, JJ., concur.

(72 Wash. 585)

STATE ex rel. WAUGHOP v. SUPERIOR COURT FOR KING COUNTY.

(Supreme Court of Washington. April 1, 1913.)

MARRIAGE (§ 60*)—ACTION FOR ANNULMENT—JURISDICTION—ORDER FOR PARTIES TO APPEAR.

The superior court, in an action to annul a marriage, cannot require the parties to meet, accompanied by their counsel, in the hope of bringing about an amicable adjustment of difficulties, and of ascertaining whether plaintiff husband was bringing the action of his own free will, since the law provides a way for the judicial ascertainment of that fact; nor can it, on ex parte application by the husband, finally enjoin the wife from visiting or entering his residence, or molesting or interfering with him or his mother, with whom he was residing, though the court, on being satisfied of grave danger of interference with personal or property rights, may issue an ex parte restraining order on application to show cause, upon the hearing of which the matter may be determined with full notice and opportunity to protect the rights of the respective parties.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 125-128, 130-135; Dec. Dig. § 60.*]

Prohibition by the State of Washington on relation of Philip R. Waughop against the Superior Court for King County; Everett Smith, Judge. Writ issued.

Walter A. Keene, of Seattle, for relator. Thos. A. Meade, of Seattle, for respondent.

MORRIS, J. Relator and his wife, Nellie Waughop, were married February 4, 1913. A few days thereafter, relator commenced an action to annul the marriage upon the ground that, at the time it was contracted, he was mentally incompetent and suffering from the effects of certain drugs. On February 19, 1913, on the ex parte application of relator, the respondent judge issued an order enjoining the wife from visiting or entering the residence of relator, or molesting or in any wise interfering with, or going about, the relator or his mother, with whom he was residing. The wife then appeared and contested this order and the power of the court to make it. Some sort of hearing was had, the nature of which is not disclosed in the record before us, at which time the court suggested a meeting of the husband and wife, accompanied by their attorneys, for the purpose evidently of ascertaining whether the relator was bringing the action of his own free will, or, as evidently suggested to the court by the wife, acting under the influence of others. The wife was dissatisfied with the result of this meeting, and through her counsel gave oral notice to

counsel for relator that application would be made to the court to fix the time and place for a second meeting. Counsel for relator, claiming lack of sufficient notice, refused to attend upon the court, and, on the application of the wife, the court made an order directing the parties to appear at the office of a certain physician on March 10th, accompanied only by their respective attorneys, for the purpose "of talking over their affairs." Counsel for relator thereupon came to this court and made application for a writ of prohibition to prevent the court below from enforcing this last order. Upon this application a show-cause order was issued, upon the return of which respondent judge filed his return, and the matter was submitted to this court for final determination.

The writ as prayed for must issue. The trial court has no power or authority, in an action of this character pending before him, to order the parties to meet in the hope of bringing about an amicable adjustment of their differences. As to whether a trial court should suggest such a meeting is a personal matter for each judge to determine for himself; but, when he goes beyond that and issues the solemn mandate of the court compelling parties to submit thereto or subject themselves to possible punishment for a refusal to obey, he goes beyond any authority vested in him by the law. The law will not uphold nor sanction such an infringement upon personal rights. Although the order of February 19th is not before us for review, we think it proper to say that this order was issued without legal warrant. So far as the private rights of parties litigant are concerned, there is no distinction between action for the annulment of a marriage and any other equitable proceeding involving the rights of the parties to do or not to do a certain thing. If, on a proper showing, a trial court is satisfied that there is grave danger of interference with personal or property rights, an ex parte restraining order may be issued upon the application for a show-cause order, upon the return day of which the matter may be determined after full notice and opportunity to guard the rights of the respective parties. But no court has the power to issue a final injunction, which was the effect of the order of February 19th, upon an ex parte application. If this wife believed that relator was acting under restraint and duress when he commenced his action to annul the marriage, the law provides a simple way to bring him into court to have that fact judicially determined, with proper safeguards for the rights of all parties. The question submitted by this application seems so plain to us that we refrain from further discussion.

Let the writ issue.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(72 Wash. 525)

FLETCHER v. MURRAY COMMERCIAL CO.

(Supreme Court of Washington. March 28, 1913.)

1. EVIDENCE (§ 81*)—PRESUMPTIONS—FOREIGN LAW.

In a suit by an ad interim receiver in bankruptcy, appointed in proceedings in the Supreme Court of Hong Kong, it would be presumed that, in the absence of information to the contrary, the bankruptcy law of China was the same as that of the United States.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 102; Dec. Dig. § 81.*]

2. BANKRUPTCY (§ 114*) — AD INTERIM RECEIVERS—RIGHT TO SUE.

An ad interim receiver of a bankrupt appointed in bankruptcy proceedings in the Supreme Court of China is authorized only to hold and preserve the assets, and is not entitled to sue to recover mere choses in action alleged to be due to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by M. Fletcher against the Murray Commercial Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellant. Jesse A. Frye, of Seattle, for respondent.

MOUNT, J. This appeal is from an order of the lower court sustaining defendant's demurrer to the amended complaint. Plaintiff elected to stand upon the allegations of the amended complaint. The action was dismissed. Plaintiff appeals.

The complaint alleges: "That the plaintiff is the trustee and official and interim receiver of the estate of Dady Burjor & Co.; that said Dady Burjor & Co. was, during all the times herein mentioned, a copartnership consisting of D. S. Dady Burjor and Frederick Charles Mow Fung; that on the 17th day of June, 1911, the plaintiff was duly appointed official and interim receiver in bankruptcy of the estate of said copartnership by the Supreme Court of Hong Kong, China, in cause No. 21 of 1911, in bankruptcy, in said court in Re Dady Burjor & Co., debtors, Ex parte Wong Chung, Petitioning Creditor, and duly qualified as such receiver, and is now the duly qualified and acting official and interim receiver and trustee of the estate of said copartnership; that said court was and is a court of competent jurisdiction, exercising general jurisdiction in bankruptcy in said district of Hong Kong; that, as such official and interim receiver and trustee, the plaintiff secured and is vested with the title to all the assets of said copartnership; that plaintiff was directed by said court to institute this action; that this action does not involve or affect the rights of any local or domestic creditor." The complaint then sets up three causes of action, to the effect, first, that Dady Burjor & Co. in 1909 entered into

a contract with the defendant, by which it was agreed that an agent should be sent to Shanghai to solicit orders for certain goods manufactured in England; that these parties were to share the expenses and profits equally; that defendant was to finance the business by letters of credit; that the agent was sent as agreed and obtained certain orders for goods; that the defendant thereafter refused to secure the letters of credit, and refused to pay any part of the expenses of the agent; that Dady Burjor & Co. were damaged thereby in the sum of \$1,000. For a second cause of action the complaint alleged that between November, 1907, and May, 1911, Dady Burjor & Co. sold goods in China for defendant upon commission, and advanced money for defendant amounting to \$2,534.05; that there is a balance due thereon amounting to \$891.30. For a third cause it is alleged that it shipped certain lumber to said Dady Burjor & Co. in China to be sold upon commission on account and at the risk of the defendant; that Dady Burjor & Co. advanced the freight charges and the charges for storing and caring for such lumber for defendant, in the amount of \$1,239; that, on account of the inferior quality of said lumber, the same was unsalable, except at a great loss; that defendant has refused to reimburse the said Dady Burjor & Co.

The trial court sustained the demurrer to the complaint upon the ground of want of capacity in the plaintiff to sue in this jurisdiction. The respondent makes three points against the complaint as follows: (1) An interim receiver in bankruptcy has no legal capacity to sue in courts other than those of his appointment; (2) the bankruptcy laws of a foreign country do not operate as a transfer of property located in the United States; (3) a receiver has no extraterritorial jurisdiction on power of official action. Our view upon the first of these points renders a discussion of the other two unnecessary. The complaint alleges: "That on the 17th day of June, 1911, plaintiff was duly appointed official and interim receiver in bankruptcy of the estate of such copartnership by the Supreme Court of Hong Kong, China, * * * and duly qualified as such receiver, and is now the duly qualified and acting official and interim receiver and trustee of the estate of said copartnership."

[1] The bankruptcy law of the district of Hong Kong, China, is not pleaded, and we are not informed that the bankruptcy law of that district is different from the bankruptcy law in the United States. In the absence of such information, we must presume that such law is the same there as it is here. *Daniel v. Gold Hill Mining Co.*, 28 Wash. 411, 68 Pac. 884. The law here "authorizes bankruptcy courts to appoint receivers or the marshals, in certain cases, to take charge of and preserve the estate." 5 Cyc. 246.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Courts of bankruptcy may appoint receivers upon the application of parties in interest to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified, if they find it absolutely necessary for the preservation of the estates." 5 Cyc. 270.

[2] Such receivers are merely temporary or interim. They are not vested with title to the estate of the alleged bankrupt, but hold the property merely to preserve the subject-matter of the action (Collier on Bankruptcy [1st Ed.] p. 32.), and they have no extraterritorial powers. In re Benedict (D. C.) 140 Fed. 55; In re Rubel (D. C.) 166 Fed. 131. The allegation in the complaint that the plaintiff is the "acting official and interim receiver and trustee" can mean no more than a mere temporary officer in bankruptcy, because the duties of receiver cease upon the qualification of the trustee. 5 Cyc. 270. Conceding that the temporary receiver of the property may, before the selection and qualification of the permanent trustee, proceed to take the property of the alleged bankrupt in a foreign country, there must be some showing that the property sought is in danger of being dissipated. There is no such showing here, for it appears that the items sought are mere choses in action, and two of them, at least, unliquidated damages which cannot be lost, except by the insolvency of the defendant.

We are of the opinion, therefore, that the interim or temporary officer has no right to maintain the action, even though we should conclude that a permanent trustee might do so.

The judgment is therefore affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(73 Wash. 550)

HAMMONS et ux. v. SETZER et al.

(Supreme Court of Washington. April 1, 1913.)

1. MASTER AND SERVANT (§ 332*)—INJURY TO THIRD PERSON—EXISTENCE OF AGENCY—JURY QUESTION.

Evidence in an action against a grocery store owner for injuries from an automobile truck claimed to have been in charge of defendant's agent held to make it a jury question whether the person operating the machine at the time was defendant's agent for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

2. PRINCIPAL AND AGENT (§ 24*)—JURY QUESTION.

The question of agency is often a mixed one of law and fact.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.*]

Mount, J., dissenting.

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Action by William J. Hammons and wife against J. J. Setzer and others. From a judgment for plaintiffs, the defendant named appeals. Affirmed.

O. A. Swartz and Hadley, Hadley & Abbott, all of Bellingham, for appellant. Neterer & Pemberton, of Bellingham, for respondents.

CHADWICK, J. Appellant Setzer conducts a grocery store in the city of Bellingham, and delivers goods to his customers in the city and its suburbs. This he does with a delivery wagon and horses driven by one George Lee. This method seemed archaic and wasteful of time to defendant Louis E. Wattam, who sold automobiles for the Northwest Automobile Company, of Portland, Or., on commissions to be paid out of the purchase price, and in the course of time—that is, on the 17th day of June, 1911—he called on appellant, and suggested the need of an automobile delivery truck in his business. The machine was at the door, the odor of gasoline was in the air, and appellant was interested. It was arranged that a "demonstration" would be had on the morrow, that Wattam would send a truck and a driver to the store, and would make a delivery of goods at Geneva, a hamlet some four miles away on the shore of Lake Whatcom. Lenhart, the driver, and Lee loaded the truck and started on the way. While they disagree as to who was the principal, it is certain that Lee was to show the driver where to deliver the goods. Returning, Lenhart showed Lee "which was high and which was low, and where the gas and the spark was." Lee finally took the wheel, he says, in obedience to his own impulse to experiment with the thing. He had driven a distance of about two city blocks, when he came upon respondent, who was walking along the side of the road, the path being little more than two feet outside the wagon track and between it and the shore of the lake. For some reason—Lenhart and Lee are not quite agreed—Lee lost his control, or his head—there seems to be an impulse on the part of novices to drive into everything in sight—and drove square into respondent, who fell headlong into the lake and over an uprooted stump, with the machine after and pressing upon him. The stump rolled so as to relieve the pressure. Lenhart stopped the machine, and respondent was extricated. He suffered a fracture of at least one rib, and was injured so that his back has been weak, rendering him unable to follow his avocation of a kneebolter, and compelling him to accept less remunerative employment. Action was brought against all parties, a verdict was rendered in favor of Wattam and Lenhart, and against Setzer. The verdict is attacked because, as it is al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

leged, there was no sufficient showing of agency. .

When Lee came in the night before and had checked up his accounts and turned in his orders, appellant told him that he "need not hitch up in the morning, as there would be an automobile down here to take the groceries out, and, if that fellow knows where the customers are, you can work in the store that morning." Lenhart testifies, and it is the testimony upon which the verdict rests, as follows: "Q. Why did you let Mr. Lee run the automobile? A. I was instructed to show him how to run the machine. Q. Who instructed you? A. Mr. Setzer said the man that was going along was the man to run the machine and to show him all about it. Q. Mr. Setzer said that to you? A. Yes, sir. Q. And to show him all about it? A. Yes, sir. Q. He specially said, 'This man is to run the machine, and show him all about it'? A. He said the man that went was the man that was going to run the machine if he got it, and to show him all about it. * * * Q. He said he was the man who would have to run it if we buy it, and I want you to show him all about it? A. Yes, sir."

[1] This, it is contended, does not show an agency nor fasten any responsibility upon appellant. We think, however, that the question was one for the jury.

[2] Agency is often a mixed question of law and fact. This court has frequently held that, where the evidence is conflicting, it is a question for the jury. But it is said that, because the following question put to Lenhart, "You were not instructed to let him run it, is that a fact?" was answered, "Yes, sir," the verdict cannot stand, as the evidence would thereby show that he exceeded his authority, and would himself become responsible for the consequences. The answer may bear that construction, but, taken with the testimony which we have quoted and that of other witnesses, we think the jury was warranted in finding as it did. When appellant said that Lee was the man who was going to run the machine if he got it, and "to show him all about it," it is not for us to say that he was not warranted in turning the machine over to Lee. If I ask a man to show my boy how to swim, "all about it," I should not be heard to complain if he takes him in the water.

Other errors are assigned. They are predicated upon inconsistencies in the pleadings, upon instructions given, and the refusal of the court to submit special interrogatories. Upon the theory that a person may be an agent of two persons at the same time, the complaint was sufficient to pass the objections made to it. The exceptions to the instructions were all made for the purpose of saving the questions we have discussed. The interrogatories which were refused by the

court were so far as material covered by the general verdict, and the discretion of the court was not abused.

It is complained that the verdict was so excessive as to indicate passion and prejudice. Respondent was unable to work at all for one month, and has been unable to work at kneebolting, suffering a loss in difference of wages of \$1.50 per day. There is some evidence to sustain the finding of the jury that his condition may continue for a time. He suffered considerable pain, and paid out \$25 in doctor's bills. The verdict seems unreasonable in the light of all the evidence, for had the writer been on the jury he would have said that the injuries were not continuing or permanent, but the jury saw the respondent; the verdict has been passed by the trial judge; he has shown a loss in wages of \$567, which may continue. This, coupled with the money paid out and an allowance for pain and suffering, may sustain the verdict. At any rate the excess, if any, is not so clear as to warrant our interference.

Judgment affirmed.

CROW, C. J., and GOSE and PARKER, JJ., concur.

MOUNT, J. I dissent. The appellant neither owned nor operated the automobile. The carelessness which caused the injury was the carelessness of the owner or person operating the machine. The appellant was not present and had not authorized the operator to teach his clerk how to run the car. He had not even agreed to buy the car. It is most unjust to hold him for the damage in this case.

(72 Wash. 514)

McGILL v. BROWN et al.

(Supreme Court of Washington. March 28, 1913.)

1. RECEIVERS (§ 69*) — RIGHTS OF RECEIVER — ASSIGNEE OF ASSETS.

A partnership having a contract with a city to furnish certain police post castings assigned its claim against the city to the company from whom it purchased the necessary pig iron, which assignment was duly filed and accepted by the city. After the posts were practically completed, and after part had been delivered, a receiver of the partnership's property was appointed in a foreclosure suit who completed the delivery, and by some artifice obtained from the city a warrant in payment of the posts. Held, that the receiver was properly required to pay the proceeds of such warrant to the assignee; he having no greater interest than the partnership which had duly assigned its interest prior to his appointment.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 124, 125; Dec. Dig. § 69.*]

2. RECEIVERS (§ 78*) — REMEDIES AGAINST RECEIVER IN RECEIVERSHIP PROCEEDINGS.

Where a receiver in a foreclosure suit wrongfully obtained a warrant for a claim against a city assigned to a third person prior to the receivership, it was proper for the assignee after the judgment to appear in the ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion in which the receiver was appointed, and ask an order requiring the payment of the proceeds of such warrant to it.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 145-147; Dec. Dig. § 78.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Suit to foreclose a mortgage by Mabel V. McGill against Neta Brown and others, in which A. K. Isham was appointed receiver of the mortgaged property. After the decree of foreclosure E. P. Jamison & Co. filed in such action a motion for an order requiring the receiver to pay over certain money. From an order to that effect, the receiver appeals. Affirmed.

Shank & Smith, of Seattle, for appellant. Edwin C. Ewing, of Seattle, for respondent.

MOUNT, J. This proceeding was brought by E. P. Jamison & Co., a corporation, against the receiver in the case of McGill v. Brown et al. to require the receiver in that case to pay over to E. P. Jamison & Co. the proceeds of a warrant, amounting to the sum of \$425.08, wrongfully collected by the receiver. The trial court, after hearing the evidence, made the order as prayed for. The receiver has appealed.

[1] There is substantially no dispute upon the facts, which are as follows: On May 4, 1910, Neta Brown, Florence C. Dawson, and C. N. Dawson were copartners, doing business under the name of the West Coast Iron Works. On that day the copartners executed a mortgage covering all the assets of the company to secure the payment of a certain sum of money. The descriptive clause in the mortgage concluded as follows: "And all accounts receivable now forming or hereafter to become a part of the business and assets of the said West Coast Iron Works." Nearly a year later, on, to wit, May 25, 1911, the West Coast Iron Works was awarded a contract for the construction and delivery of 20 complete sets of police post castings to the city of Seattle for the price of \$480. Thereupon the West Coast Iron Works desired to purchase from E. P. Jamison & Co. the pig iron necessary to construct these police posts. The Jamison Company refused to sell their iron without security for the purchase price. The West Coast Iron Works then agreed to, and did on July 3, 1911, assign its claim against the city on account of the posts to the Jamison Company. The city accepted the assignment, and placed the same on file in the comptroller's office on July 6, 1911. Thereafter the West Coast Iron Works completed the posts and delivered a part thereof to the city. Afterwards on September 16, 1911, Mabel V. McGill, the assignee of the mortgage first above noticed, brought an action to foreclose the mortgage, and in that action A. K. Isham was appointed receiver of all the assets of the West Coast Iron Works. After the receiver was

appointed, the remainder of the posts were delivered to the city. There is some slight dispute whether the posts were entirely completed prior to the appointment of the receiver. If anything was done thereon by the receiver, it was insignificant, being only a part of a day's work by one man. The receiver thereupon demanded and received the warrant in payment of the posts from the city, and collected the money thereon, \$480. He refused to pay the Jamison Company the amount due for the iron, \$425.08.

Appellant argues that the respondent had no lien or claim upon the posts, and no right to demand that the receiver furnish the posts to the city; that the receiver, having furnished the posts, was entitled to collect the pay therefor; and that, if respondent had any claim to the proceeds, it was its duty to intervene in the action and set up its claim. There is no merit in any of these positions. It seems too plain for argument that the city warrant, or the proceeds of the contract, never became an asset of the West Coast Iron Works, because it never came into possession of the West Coast Iron Works. Their right to the warrant had been assigned and the assignment had been accepted by the city before the posts were delivered or manufactured, and long before the receiver was appointed. The respondent never claimed any lien upon the posts themselves. It rested upon its claim to the warrant which had been assigned to it. If the receiver had not been appointed to take over the assets of the West Coast Iron Works, that company could not have reasonably claimed the warrant from the city, after the posts were delivered, because of this previous assignment. The receiver took no greater interest in the estate than the West Coast Iron Works had at the time of the appointment of the receiver. High on Receivers (4th Ed.) § 440; 34 Cyc. pp. 191, 193.

[2] This warrant had been assigned to the respondent by the valid and binding assignment long prior to the appointment of the receiver. When the receiver demanded the warrant from the city, he had no right thereto, nor to the funds which he derived therefrom. It is true a few of the posts were delivered to the city after the receiver was appointed and some work was done upon the posts, but this was done in accord with the contract, and did not alter the right of the respondent to the warrant, the right to which had previously passed, and the receiver had notice of that fact. The receiver obtained the warrant by artifice—not necessary to discuss—and wrongfully; under a misapprehension of his duties, no doubt, but none the less wrongfully. He was bound to return it, or the proceeds by order of the court appointing him, to the person rightfully entitled to it. The procedure adopted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was regular. 84 Cyc. 422; High, Receivers (4th Ed.) § 299; (3d Ed.) § 254b.

The judgment is therefore affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(72 Wash. 522)

WILLIAM A. EASTMAN & CO. v. WATSON
et ux.

(Supreme Court of Washington. March 28, 1913.)

1. EVIDENCE (§ 158*)—PAROL EVIDENCE—LICENSE FEE.

Proof that plaintiff corporation had paid its annual license fee may be made by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158;* Corporations, Cent. Dig. § 1736.]

2. LICENSES (§ 32*)—LICENSE FEE—PAYMENT.

Proof that a corporation has paid its license fee for the current year is prima facie evidence that it was paid for the previous year, and is conclusive, in absence of proof to the contrary.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 66; Dec. Dig. § 32.*]

3. CORPORATIONS (§ 499*)—ACTIONS—PAYMENT OF LICENSE FEE.

Rem. & Bal. Code, § 3715, providing that no corporation shall be permitted to sue in the courts without alleging and proving that it has paid its annual license fee last due, is primarily a revenue measure; and, while an action may upon proper showing be abated until the license fee has been paid, yet if it is paid before trial the corporation may maintain the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919, 2030; Dec. Dig. § 499.*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by William A. Eastman & Co. against Harry E. Watson and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Paul B. Phillips, of Seattle, for appellants. Hamlin & Meier, of Seattle, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover upon a promissory note for \$250 and interest. The complaint alleged that the plaintiff was a domestic corporation and had "paid its annual license fee last due to the secretary of state." The complaint then set out the note and alleged nonpayment. For answer the defendants, upon information and belief, denied the corporate existence of the plaintiff and the payment of the annual license fee, admitted making the note, and alleged four affirmative defenses. These affirmative defenses were each denied by reply. The case was tried to the court, without a jury, on May 1, 1912. The president of the plaintiff company was the only witness examined. He testified that the plaintiff had paid its annual license fee. Upon cross-examination he testified, by

reference to the certificate of license, that the fee was paid on February 16, 1912. The action was begun on December 23, 1911. No evidence was offered by the defendants, who rested upon an objection to the oral evidence that the license fee had been paid, and that there was no evidence that the fee was paid for the year 1911. The trial court thereupon made findings of fact in favor of the plaintiff, and entered a judgment for the amount prayed for in the complaint. The defendants have appealed.

[1, 2] Numerous errors are assigned, but the appeal is based upon three "propositions," stated in the appellant's brief as follows: "(1) A private corporation having a capital stock is not entitled to affirmative relief under the statutes of this state, unless it allege, and, if the allegation be denied, it also prove, that at the time of the commencement of the action it had paid its annual license fee then last due to the secretary of state. (2) A corporation cannot prove payment of its annual license fee by oral proof in preference to production of the official certificate of payment issued by the secretary of state, where oral proof is objected to as being not the best evidence. (3) Proof of payment of corporation license fee must follow the pleadings, and where new issues are developed on the trial respecting time and terms of such payment they must be embodied in amendments to the pleadings or in supplemental pleadings, and opposing parties must be fairly and openly apprised of such new issues, or else be granted a continuance to enable them to meet the new issues." These propositions are elaborately argued in the briefs. The second presents the question whether the payment of the annual license fee may be proved by parol. We may assume for the purposes of this case, without deciding, that the denial upon information and belief is sufficient to put the fact of payment of the license fee in issue. We have heretofore held payment of the license fee may be proved by parol. *Richards v. Bussell*, 129 Pac. 90; *Miller v. Simmons*, 67 Wash. 294, 121 Pac. 462. These cases are conclusive upon that question. The fact that the license fee was paid for the current year is prima facie sufficient to show that it was paid for the previous year, and, in the absence of proof that previous years have not been paid, will be conclusive.

[3] The first and third propositions present the question whether the action can be maintained or judgment entered for the plaintiff when the license fee was in default when the action was begun. The plaintiff admitted that the license fee due July 1, 1911, was paid in February, 1912. Appellants argue from this that the license fee was not paid at the time the action was begun in December, 1911, and that under the statute (section 3715, Rem. & Bal. Code) plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

could not commence the action and, without amending its complaint, could not prove that the fee was paid subsequent to the commencement of the action. The statute provides, at section 3715, supra: "No corporation shall be permitted to commence or maintain any suit * * * in the courts of this state without alleging and proving that it has paid its annual license fee last due." In discussing this provision in *North Star, etc., Co. v. Alaska-Yukon, etc., Ex.*, 63 Wash. 376, 115 Pac. 855, we said: "The license tax is a revenue measure, and the prohibiting of suits or actions on the part of corporations without alleging and proving payment of the license fee is intended as a measure to enforce the collection of the tax." And in *State ex rel. Preston Mill Co. v. Howell*, 87 Wash. 377, 121 Pac. 861, we said: "These respective acts were not primarily directed against corporations; they were revenue acts pure and simple, and the provisions directed against corporations were for the purpose of enabling the state to enforce the payment of its revenue and not leave it to the voluntary act of the corporation."

There can be no doubt that the objects of the statute were correctly stated in these cases. If the plaintiff corporation failed to prove at the trial that its license fee has been paid, the court is required to dismiss the complaint; but where it is shown that the fee is paid at that time, the courts will not dismiss the action, because the requirement of the statute is fully met. If the action is brought when the fee is in default, the action may be abated, upon proper showing, until the fee is paid. If no showing is made, the defendant waives the question. *Rothchild v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *North Star Trading Co. v. Alaska-Yukon, etc., Ex.*, 68 Wash. 457, 123 Pac. 605. But after the fee is paid, though tardy, the corporation is restored to its right to maintain actions. The amendment of the complaint was therefore unnecessary.

Judgment affirmed.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

(73 Wash. 543)

SCHUMACHER et ux. v. BRAND et ux.

(Supreme Court of Washington. April 1, 1913.)

1. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—ACQUISITION.

Where plaintiffs and defendants acquired their lands from a common source, and it appeared that the original owner laid out a drainage ditch over the land now owned by defendants to carry off the waste water, that is necessary to the enjoyment of plaintiffs' land, which was first sold, defendants' land is subject to the easement in favor of plaintiffs' land, which passes by implication; for if the owner of land has artificially created a condition favorable to one portion, and then sells that, the grantee takes it with the right to have the favorable condition

continued, and easements, of necessity, pass by implication.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

2. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—TRANSFER.

Where plaintiffs' grantor had a right to the maintenance of a drainage ditch as an easement by implication, plaintiffs took title to their land as it was when they purchased; and the fact that the location of the ditch had been slightly changed at the time of purchase will not defeat their rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

3. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—ABANDONMENT.

The abandonment of an easement is a question of intention; and the fact that the owners of the dominant tenement consented for some period of time to a change in the location of a drainage ditch by the owner of the servient tenement will not establish an abandonment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

4. WATERS AND WATER COURSES (§ 154*)—RIGHTS.

Where plaintiffs, as owners of the dominant tenement, were entitled to an easement in a drainage ditch, the fact that other persons used the ditch is immaterial in the establishment of plaintiffs' rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by E. C. Schumacher and wife against John T. Brand and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. A. Funk, of Sunnyside, for appellants. Luhman & Clark, of North Yakima, for respondents.

GOSE, J. The plaintiffs seek to enjoin the defendants from obstructing or otherwise interfering with an alleged waste ditch across the land of the latter. The plaintiffs base their claim upon the ground of an implied easement. The court adjudged that the plaintiffs had an easement or right of way for the waste ditch across the defendants' premises, entering on the north side thereof at a point "about 90 feet east of the northwest corner thereof, and running thence southwesterly across said defendants' premises, and leaving the same at a point about 90 feet south of the said northwest corner thereof," and enjoined the defendants from interfering with the ditch. The defendants have appealed.

[1] The appellants and the respondents each own a 10-acre tract of arid land in Yakima county. The tracts adjoin; the appellants' tract lying south of the respondents' tract. The facts found by the court, material to a consideration of the appeal are,

that from February, 1905, to June, 1906, one Newbill and his wife were the owners of both tracts; that in June, 1906, they sold the 10-acre tract now owned by the respondents to one Arpke, retaining the remainder of said tract; that during their ownership the Newbills irrigated and farmed the entire tract, and disposed of the waste water incident to the irrigation of the tract now owned by the respondents through the ditch described in the decree; that the ditch was constructed along a natural draw which formed a natural drain for the respondents' land; that the ditch had been used by the respondents and their predecessors in title for 17 years last past; that it was so used when the Newbills conveyed to Arpke; that Arpke and his successors in title, including the respondents, continued to use it until it was obstructed on the 16th day of May, 1911; that the Newbills continued to own the south 10-acre tract until May, 1907, when they sold and conveyed it to the appellants; that the respondents acquired and now hold title through mesne conveyances from Arpke; that during their ownership they have disposed of the waste water accruing from the irrigation of their land through the ditch; that it has at all times been and "now is necessary as an outlet for the waste water accruing from the irrigation of the plaintiffs' premises and for the beneficial use and enjoyment thereof; and that the said plaintiffs have no other outlet for said waste water." These findings are supported by a decided preponderance of the evidence, except in one particular; that is, that in 1908 or 1909 the appellants changed the waste ditch, causing it to enter upon their land at the northwest corner, thence continuing along and upon the west line thereof, where it remained until the month of May, 1911, when they obstructed it, thus throwing the waste water upon the respondents' land, whereupon the respondents caused the old waste ditch to be opened. The evidence shows that the ditch followed the course found by the court at the time the appellants purchased their land; that it was plainly marked upon the ground so as to be visible to casual observation; and that it remained in use until changed by the appellants, as we have stated. The respondents acquired title to their tract in the spring of 1910. The ditch is a necessary outlet for carrying off the waste water incident to the irrigation of the respondents' land. From the point where the ditch enters upon the appellants' premises, it extends in a southwesterly course about a half mile, where it discharges into the Yakima river. As early as 1902 one Mahan, being then the owner of both tracts, opened the ditch across the land now owned by appellants, and used it as a waste ditch until he sold both tracts to Newbill in February, 1905.

"If the owner of land has artificially created upon his property a condition which is

favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have the favorable condition continued. * * * Upon the severance of a heritage a grant will be implied of all those continuous and apparent easements which had been, in fact, used by the owner during the unity, though they had then no legal existence as easements; and a continuous easement is one to the enjoyment of which no act of the party is necessary, such as * * * a water course, whether natural or artificial. * * * The rule includes drains for closets, cesspools, and vats, as well as surface drains." 3 Farnham, Waters and Water Rights, § 831.

"All easements of whatever class which pass by implication or construction of law must not only be reasonably necessary and apparent, but also permanent in their character." 14 Cyc. 1168d.

"In some cases it is held that easements will not pass by implication, except in cases of strict necessity. But the weight of authority sustains a rule less exacting than that of strict and indefensible necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. * * *" 14 Cyc. 1171.

The view that a reasonable necessity will support an implied easement is supported by the following authorities: Powers v. Hefernan, 233 Ill. 597, 84 N. E. 661, 16 L. R. A. (N. S.) 523, 122 Am. St. Rep. 199; German Sav. & Loan Soc. v. Gordon, 54 Or. 147, 102 Pac. 736, 26 L. R. A. (N. S.) 331. Other cases hold that the controlling inquiry is whether the easement "is beneficial to and adds to its value for use, and will continue to do so in the future." Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182. See, also, note to Rollo v. Nelson, 26 L. R. A. (N. S.) 318 et seq. It is not necessary, for the purposes of this case, to determine which is the better rule, because, as we have said, the record discloses that the waste ditch is reasonably necessary to the enjoyment of the respondents' estate.

[2] The appellants contend that the respondents cannot assert the right to an easement in the waste ditch, because, at the time they purchased their land, it was not at the point established by the decree of the court. They knew, however, that it had been located at that point and used as a waste ditch for years and until temporarily changed by the appellants. Moreover, the appellants took title to their land as it was when they purchased. Toothe v. Bryce, supra.

[3] The appellants further insist that the right to have the waste ditch at its present location has been lost to the respondents by abandonment. Abandonment is a question of intention. The mere fact that the owners of

the dominant estate permitted the appellants, for their own convenience, to temporarily change the course of the ditch for the period of two or three years from one point on their land to another point on the same tract, and so as to still subserve the purpose of a waste ditch, is far from showing an intention to abandon.

[4] An argument is made to the effect that the respondents have lost their right to the waste ditch because other parties are using it. The question here is, What are the respondents' rights? The rights of the other parties are not before us. *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952. The appellants have cited authorities upon the questions of "a way of necessity," and an implied reservation of a way in favor of the grantor. It is not necessary to review these authorities. They would only confuse the issue. The courts generally hold that there is a difference between an implied reservation of an easement and the grant of an easement by implication. The distinction is put upon the ground that the former is in derogation of the deed and its covenants, and stands upon narrower ground than a grant. Judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

(72 Wash. 547)

BRAND et ux. v. LIENKAEMPER et al.

(Supreme Court of Washington. April 1, 1913.)

1. WATERS AND WATER COURSES (§ 154*)—DEEDS—EASEMENTS—IMPLICATION.

Where an easement in a drainage ditch, necessary to the proper irrigation of the land, has been acquired by long use, it passes by implication by a conveyance of the dominant estate.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

2. EASEMENTS (§ 10*) — ACQUISITION — PRESCRIPTIVE RIGHT.

The continuous, adverse use of a way over another's land, with the knowledge of the owner, ripens into an easement by prescription.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 27-32; Dec. Dig. § 10.*]

3. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—DRAINAGE DITCH.

The easement in a drainage ditch which was appurtenant to land is not lost because of the use by third persons.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

4. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—USE—CONTINUOUS USE.

Where an easement in a drainage ditch is claimed by prescription, the use of the ditch at the times when the owner of the dominant tenement needed it is regarded as a continuous use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by John J. Brand and wife against August Lienkaemper and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. A. Funk, of Sunnyside, for appellants. Luhman & Clark, of North Yakima, for respondents.

GOSE, J. The single question presented by this appeal is whether the respondents have acquired an easement by prescription to flow waste water over the premises of the appellants. The court found in favor of the respondents. The respondent Lienkaemper owns a tract of land lying immediately east of the lands of the appellants. A public road has been laid out between the two tracts. The respondent Arpke owns a tract of land immediately to the east of the Lienkaemper tract. Arpke acquired title in 1906. Lienkaemper acquired title in 1905. The appellant acquired title in 1907. The lands of all the parties are arid, and are made productive by means of artificial irrigation. The testimony shows that a natural drain, beginning upon the lands of Arpke, extends through the lands of Lienkaemper and thence through the lands of the appellants, taking a northwesterly course and flowing off their lands at a point near the northwest corner of the same. The testimony also shows that this drain has been used as a ditch for conveying the waste water from the premises of the respondents across the premises of the appellants, thence in a general southwesterly direction for a distance of a half a mile to the Yakima river, since 1893; that during all that time this right has been exercised by the respondents and their predecessors in title openly, exclusively, continuously, and adversely.

[1] The appellants contend that there can be no tacking of possession, because the easement was not included in the respondents' deeds. It suffices to say that the prescriptive right which began in 1893 was complete when the respondents acquired title and that the easement passed by implication by a conveyance of the dominant estate. *Schumacher v. Brand*, 130 Pac. 1145, recently decided.

[2] The record discloses all the elements of a prescriptive right to use the waste ditch. It was shown that the use has been continuous, uninterrupted, adverse to the owner of the land over which the way is claimed, with the knowledge of the owner while he was able, in law, to assert and enforce his rights, and that the use has continued over a practically uniform route. This creates a prescriptive title. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; 14 Cyc. 1148, 1149.

It appears from the record that in the ir-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

rigation of arid lands waste ditches for the disposition of the surplus water are as necessary as the irrigation itself.

[3] The testimony shows that the appellants at times used the waste ditch in common with the respondents, for the purpose of disposing of their waste water. The appellants argue that a user in common with others never ripens into an easement. As we have already said, the prescriptive right to the easement was complete before the appellants acquired title. Moreover, where an easement is appurtenant to an estate, it may be used by all persons having a lawful right to enjoy it. 14 Cyc. 1208, 1209; *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569. As was said in the *Hart Case*: "It can coexist with a right in the defendant or any one else to use the same waterways, so long as such use does not restrict or interfere with the right owned by the plaintiff." The controlling question is, Do the respondents own the easement? If so, it is immaterial that others may also have a right to use it.

It is contended that the waste ditch was shifted from place to place by the appellants as their convenience required, and that therefore no right attached in the respondents. This has been sufficiently answered in what we have already said. It may be further remarked, however, that the testimony shows that the ditch has continued since 1893 through a natural depression in the appellants' land, with no appreciable change of course.

[4] An argument is made that the use has not been continuous. The rule is that, where one uses a waste ditch at such times as he needs it, the law regards the use as continuous. The sufficiency of the continuity must depend largely on the nature of the use. *Hesperia, etc., Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

It is also argued that the respondents have recently acquired additional water rights. The court found, and the evidence shows, that there has been no appreciable change in the quantity of waste water.

The judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

(72 Wash. 532)

FIRST NAT. BANK OF RITZVILLE v. CUNNINGHAM.

(Supreme Court of Washington. April 1, 1913.)

1. HUSBAND AND WIFE (§ 276*)—COMMUNITY ESTATE—CLAIMS FOR COMMUNITY DEBTS.

The entire community estate is subject to administration upon the wife's death, and all community debts were proper claims against it.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1032-1045; Dec. Dig. § 276.*]

2. HUSBAND AND WIFE (§ 276*)—COMMUNITY ESTATE—CLAIMS AGAINST.

Since a judgment against a husband alone for a community indebtedness was a community judgment, it was properly filed as a claim against the community estate, even though also enforceable out of the separate property of the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1032-1045; Dec. Dig. § 276.*]

3. HUSBAND AND WIFE (§ 276*)—COMMUNITY ESTATE.

Rem. & Bal. Code, § 1481, providing that if any action be pending at intestate's death plaintiff shall present his claim to the administrator, and no recovery shall be had in the action, unless proof be made of presentment, did not require one who had sued the husband upon promissory notes executed by him, representing a community debt, to abandon the action when the wife died and present the debt as a claim against the community estate, but the judgment obtained would be a lien upon both the separate estate of the husband and the community estate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1032-1045; Dec. Dig. § 276.*]

Department 2. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the First National Bank of Ritzville against W. R. Cunningham, as executor of Rebecca Cunningham, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter Staser, of Ritzville, and C. H. Spalding, of Lind, for appellant. Lovell & Davis, of Ritzville, for respondent.

MORRIS, J. Appeal from a judgment establishing as a proper claim against the estate of a deceased wife a judgment obtained in an action against the husband alone upon a community indebtedness. The respondent first brought an action against the husband upon two promissory notes, without making the wife a party. Pending this action the wife died. The action proceeded to judgment. This judgment is admitted to be a community judgment. Respondent then filed the judgment as a claim against the community in the estate of the deceased wife. It was rejected, and this suit was brought thereon, resulting in the judgment appealed from.

[1, 2] These facts support the judgment so clearly that it is difficult to find anything to discuss without again opening up the long ago settled law of this state. When the wife died, the entire community estate was subject to administration, and all community debts were proper claims against that estate. The judgment against the husband, being a community judgment, was properly filed as a claim against the community estate; such a judgment being enforceable out of the separate property of the husband or the community property. *Oregon Imp. Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101; *McDonough v. Craig*, 10

Wash. 239, 38 Pac. 1034; Ryan v. Fergusson, 3 Wash. 356, 28 Pac. 910; In re Hill's Estate, 6 Wash. 285, 33 Pac. 585.

[3] That this is the law is admitted by appellant; his contention being that, under section 1481, Rem. & Bal., providing that: "If any action be pending against the testator or intestate at the time of his death, the plaintiff shall, in like manner, present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases; and no recovery shall be had in the action, unless proof be made of the presentment"—the wife having died during the pendency of the first action and by her death subjected the entire community estate to administration, respondent should have abandoned the first action, and presented a conceded community indebtedness as a claim against the community estate, and not having done so all rights of enforcement against the community estate have been lost. This contention overlooks the fact that, the husband alone having signed the note, it became, when established as a just claim, not only a presumptive community indebtedness, but one enforceable against the separate estate of the husband; and no law required respondent to abandon his pursuit of the separate estate of the husband in order to establish the claim against the community estate. Respondent had a right to proceed to judgment against the husband, and, the community character of the indebtedness being admitted, that judgment became a lien both on the separate estate of the husband and the community estate.

Neither do we think that the wife is within the description of the statute. No action was pending against her at the time of her death. There was no attempt to subject her separate property to any claim of respondent. All that was sought in that first action was to obtain a judgment against the husband, which judgment is, not only presumptively, but admittedly, a claim against the community estate. As such it is properly enforceable against the community estate, and the judgment so holding is affirmed.

CROW, C. J., and FULLERTON, ELIS, and MAIN, JJ., concur.

(37 Okl. 396)

CHOCTAW, O. & G. R. CO. v. DREW.†
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. NUISANCE (§ 1*)—"PRIVATE NUISANCE."

Under the law in force in the Indian Territory prior to statehood, a private nuisance may be defined as anything wrongfully done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5574-5576.]

2. NUISANCE (§ 6*)—ACTS DONE UNDER LEGISLATIVE AUTHORITY.

Legislative grants of privileges or powers to corporate bodies, like those to a railroad company, to locate, construct, maintain, and operate its line of railway and necessary appurtenances under the act of Congress of February 28, 1902, c. 134, 32 Stat. 43 (U. S. Comp. St. Supp. 1911, p. 708), confer no license to construct and use them in disregard of the private rights of others, and with immunity for their invasion.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 35-38; Dec. Dig. § 6.*]

3. TORTS (§ 16*)—IMMUNITY FROM LIABILITY—LEGISLATIVE AUTHORITY.

The granting of such powers and privileges does not exempt the beneficiary thereunder from liability for injury to adjacent property, caused directly by the unlawful exercise of such authority.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 23; Dec. Dig. § 16.*]

4. RAILROADS (§ 113*)—CONSTRUCTION AND MAINTENANCE—PRIVATE NUISANCE—RIGHT OF ACTION.

A railroad company located and erected a roundhouse, switches, turntable, and cinder pit near the residence property of plaintiff, and so used them as to greatly impair the value thereof, by filling the atmosphere with offensive gases, dust, steam, and dense smoke, by throwing cinders over and upon said premises, and by loud noises and offensive odors. Held, a nuisance, causing special injury to the plaintiff, for which he had a right of action for damages; it appearing that the railroad company might have constructed said appurtenances at another suitable location, where such injuries would not have been inflicted, either to plaintiff or others.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.*]

5. RAILROADS (§ 114*)—PRIVATE NUISANCE—CONSEQUENTIAL DAMAGES.

Damages resulting from injurious acts of the above nature are not unavoidable and consequential, for which no action will lie, but result from the construction and use of the railroad company's property in close proximity to the premises of the plaintiff, and which do not affect in a like injurious manner the public generally, or other similar property situated elsewhere.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 365-371; Dec. Dig. § 114.*]

6. RAILROADS (§ 222*)—CONSTRUCTION AND MAINTENANCE—PRIVATE NUISANCE.

A railroad company has no more right than an individual to so use its property as to unreasonably interfere with the peaceable and comfortable enjoyment by others of their property, or to cause special injury to particular property, without making compensation for the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

7. PUBLIC LANDS (§ 39*)—TOWN SITES—LOT OWNERS—TORTS AFFECTING.

The owner of permanent improvements on town lots in government town sites in the Indian Territory, and to whom said lots were scheduled and set apart by the Town Site Commission acting pursuant to law, and who subsequently received patents therefor, has sufficient title, prior to the issuance of a patent, to support an action to recover damages to the said lots inflicted by a railroad company which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 5, 1913.

is in no way connected with any claim or interest in the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-90, 92-99; Dec. Dig. § 39.*]

8. NUISANCE (§ 50*) — INJURY TO REALTY — DAMAGES RECOVERABLE.

Under the rule of decision in the Indian Territory prior to statehood, where the structures and appurtenances contributing to the injury were of a permanent nature, and their injurious use continued for a long number of years, without effort to abate, all damages for injury to adjacent lands, both present and prospective, were recoverable in a single action.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 118-127; Dec. Dig. § 50.*]

9. NUISANCE (§ 50*) — INJURY TO REALTY — MEASURE OF DAMAGES.

The true measure of damages is compensation for the loss or injury sustained, and, as a general rule, the damages are measured by the depreciation in the market value of the property injured, where the injury caused by the nuisance is of a permanent nature.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 118-127; Dec. Dig. § 50.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Carter County; S. H. Russell, Judge.

Action by Byron Drew against the Choctaw, Oklahoma & Gulf Railroad Company for damages on account of a private nuisance. From a judgment for plaintiff for \$1,995, defendant brings error. Affirmed.

C. O. Blake, H. B. Lowe, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. Cruce, Cruce & Bleakmore, of Ardmore, for defendant in error.

SHARP, C. Among the errors urged by plaintiff in error are the following: First, that a railroad company is not liable to an abutting owner in damages on account of noise, smoke, or other like inconveniences, resulting from the operation of its trains in a lawful, careful, and proper manner; second, that a nuisance cannot arise so as to give a common-law right of action from that which the law authorizes; third, that, its right of way having been obtained pursuant to law, and compensation made for the lands taken, claims of abutting owners for consequential damages cannot be maintained. The railroad company's right of way was acquired under the act of Congress of February 28, 1902, commonly known as the Enid and Anadarko Act (Act Feb. 28, 1902, c. 134, 32 Stat. 43 [U. S. Comp. St. Supp. 1911, p. 706]). By virtue thereof the company acquired the right to locate, construct, own, equip, operate, use, and maintain its line of railway through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, by whomsoever owned. It was further provided in said act that additional lands, not exceeding 40 acres at any one place, could be taken when necessary for yards, roundhouses, turntables, machine

shops, water stations, and other railroad purposes. Provision was made for the institution of condemnation proceedings in the United States courts in the Indian Territory, and for the assessment and payment of damages for all lands taken, and all damages done or to be done by the construction of the railroad, or the taking of any lands for railway purposes.

It is of the use of the appurtenances and structures, and machinery therein, or operated thereon, that plaintiff complains. It is shown: That the plaintiff was the owner of certain lots in the town of Ardmore, Ind. Ter., and was in possession thereof at the time the defendant built its line of railroad into and through said town, and had erected thereon lasting and valuable improvements, including houses, barns, and fences, and had set out trees, shrubbery, and flowers, and was occupying one of the residences on said lots as a home for himself and family. The other residences were occupied either by servants or by tenants, from whom plaintiff derived rents and revenues. The plaintiff had expended upon said premises about \$5,000 in improving them for residence purposes and for a home, and that the same was desirable residence property, and that the total value of the premises was between \$8,000 and \$10,000. That the railroad company, within a short distance of plaintiff's property, erected and maintains a roundhouse, machine shops, and a cinder pit, and had also built and maintains switches, upon which engines were continuously being operated, and that in the operation of the roundhouse and machine shops large volumes of smoke, dust, and cinders were constantly and continually emitted therefrom and thrown upon and around the premises of the plaintiff to such an extent as to destroy the trees, shrubbery, and flowers, and to constitute a nuisance, and to render plaintiff's property almost worthless for residence purposes, the only purpose for which it was fitted or of value.

It was shown by the witness Hill that the railroad company was in the habit of killing its engines at the cinder pit just south of his house, which caused, to use the language of the witness, "an awful steam and smell," and that a solid, dense smoke always followed, causing great discomfort, and that it was necessary to let down the windows in order to remain in the house. The witness Wallace testified that it was particularly noisily down there at night and in the early morning, and that when the engines were let die it would rattle the windows to such an extent as to prevent hearing, and that the gas and smoke were very offensive at times, especially when they were killing the engines or putting out the fires; that the smoke was very injurious; and that they could not successfully put out washing. The plaintiff testified that the railroad company was operating from four to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

eight engines in and out, both day and night; that two railroads used the roundhouse, and located the site of the switches, cinder pit, and roundhouse near his property on the south; that in operating its road there was much noise, and that the smoke was very dense, to such an extent that it was necessary to close down the windows and go in the house to escape the discomforts of the smoke and cinders; and that at times the noise coming from the railroad premises was so loud that conversation could not be carried on.

[1] Obviously the agencies affecting this result constituted a nuisance. They interfered seriously, not only with the enjoyment by plaintiff of his property, acquired before their construction, but greatly reduced both its usable and salable value. A nuisance is defined by Blackstone as: "Anything that worketh hurt, inconvenience or damage to another." Sutherland on Damages (section 1035) defines a private nuisance as anything wrongfully done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and adds that it may be anything which is calculated to interfere with the comfortable enjoyment of a man's house, as smoke, noise, or bad odors, even when not injurious to health. It may be any wrongful act which destroys or deteriorates the property of another, or interferes with the lawful use and enjoyment thereof, or any act which unlawfully hinders the enjoyment of a common or public right and thereby causes a special injury.

In *Baltimore & Potomac Ry. Co. v. Fifth Baptist Church*, 108 U. S. 329, 2 Sup. Ct. 726, 27 L. Ed. 739, it is said: "That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him." And in which it is held that for such annoyances and discomfort courts of law will afford redress by giving damages against the wrongdoer.

It was charged by plaintiff that the injury sustained was one peculiar to him, and not suffered by the public at large, and this allegation is sufficiently shown by the testimony, and that the plaintiff in this particular has brought himself within the rules entitling him to redress. If it were true that the damage sustained was such as merely incidentally inconvenienced plaintiff, and which unavoidably followed the exercise of charter powers, plaintiff would be without a remedy, as in such cases private inconvenience must be suffered for the public accommodation. An actionable nuisance may be said to be anything wrongfully done or permitted, which injures or annoys another in the enjoyment of his legal rights. Cooley on Torts (2d Ed.), p. 670. Sutherland on Damages, § 1035. Such nuisances are of many kinds, and may consist of flooding lands by water, fouling the water of streams, offensive noises, jar of machinery,

offensive odors, dust, smoke, escaping steam, soot, and acts causing personal discomfort or mental disquietude. An attempt to enumerate all nuisances would be almost the equivalent of an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights.

[2-6] The fact that the law authorized plaintiff in error to acquire a right of way and, where necessary for the purposes named, additional grounds, did not authorize the construction of machine shops, roundhouses, cinder pits, and appurtenances of a like nature, wherever deemed proper, without regard to the property rights of others. Whatever the extent of the authority conferred by the act, it was accompanied by the implied qualification that the works should not be so placed as by their use to unreasonably interfere with, disturb, or destroy the peaceable and comfortable enjoyment of others in their property. Grants of privileges or powers to railroads, like those involved, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. *Anderson v. Chicago, M. & St. P. R. Co.*, 85 Minn. 337, 88 N. W. 1001; *Louisville & N. T. Co. v. Lellyett*, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. (N. S.) 49; *Louisville & N. T. Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 957, 61 L. R. A. 188; *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 13 Atl. 187; *Booth v. Rome, W. & O. Terminal R. Co.*, 140 N. Y. 273, 35 N. E. 593, 24 L. R. A. 105, 37 Am. St. Rep. 552; *Alabama & Vicksburg Ry. Co., v. King*, 93 Miss. 379, 47 South. 857, 22 L. R. A. (N. S.) 603; *King v. Vicksburg R. & Light Co.*, 88 Miss. 458, 42 South. 204, 6 L. R. A. (N. S.) 1036, 117 Am. St. Rep. 749; *Terrell v. Chesapeake & O. Ry. Co.*, 110 Va. 340, 66 S. E. 55, 32 L. R. A. (N. S.) 371; *Cogswell v. New York, etc., Ry. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Northern Pac. Ry. Co. v. United States*, 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80; *Baltimore & Potomac Ry. Co. v. Fifth Baptist Church*, supra. The liability of the defendant company for the injury resulting was the same as that of individuals committing a similar wrong. The legislative authorization exempted only from liability to suits, civil or criminal, at the instance of the sovereignty, and did not affect any claim of a private citizen for damages for any special inconvenience, discomfort, or injury suffered, and not experienced by the public at large. It is therefore no sufficient defense for the railroad company to say that, its right of way having been lawfully acquired in the first instance, it is not liable for damages incurred of the kind shown by the testimony. Neither does the fact that the engines, trains, shops, and turntables may have been operated in a careful and skillful manner prevent a liability, as was held in *Balti-*

more & Potomac Ry. Co. v. Fifth Baptist Church, *supra*.

In Chicago G. W. Ry. Co. v. First Methodist Episcopal Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, the Circuit Court of Appeals for the Eighth Circuit, in an able opinion, followed the rule announced by the Supreme Court in the First Baptist Church Case. Answering the charge made by plaintiff in error that if any damages were sustained they were consequential in their nature and not actionable, and came within that class of injuries that are termed in law *damnum absque injuria*, Mr. Justice Caldwell said: "Conceding that the noise, vibrations, and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby. The smoke, cinders, and offensive smells, and loud and protracted noises, which constitute the nuisance to the plaintiff are not the usual and unavoidable result of the mere operation of the defendant's trains over its track laid in the street, but they result from other uses by the defendant of the street and its track in the immediate vicinity of the plaintiff's property, which do not affect in a like injurious manner the public generally, or other abutting owners of property on the street. The smoke, cinders, offensive smells, and loud and protracted noises which are a nuisance to the plaintiff are not the consequential and unavoidable damages due from a lawful running of the defendant's trains over its track in the street, but result from the erection and use by the defendant of its water hydrant and station, the one in and the other on the street, in close proximity to the plaintiff's church, and which do not affect in a like injurious manner the public generally, or other property situated elsewhere on Choctaw street. In legal effect, the nuisance resulting from the use made of these structures by the defendant constitutes a partial taking of the plaintiff's property, for which compensation must be made." Numerous authorities are cited by the court in support of the rule announced, to which we may add *Town of Norman v. Ince*, 8 Okl. 412, 58 Pac. 632; *Bates v. Holbrook*, 171 N. Y. 462, 64 N. E. 184; *Willis v. Kentucky & I. Bridge Co.*, 104 Ky. 190, 46 S. W. 489; *Louisville Ry. Co. v. Foster*, 108 Ky. 749, 57 S. W. 481, 50 L. R. A. 813; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 741, 72 S. W. 954, 61 L. R. A. 188; *Shirely v. Cedar Rapids, etc., Ry. Co.*, 74 Iowa, 169, 37 N. W. 133, 7 Am. St. Rep. 471; *Anderson v. Chicago, etc., Ry. Co.*, 85 Minn. 337, 88 N. W. 1001; *Exley v. Southern Cotton Co. (C. C.)* 151 Fed. 101; *Stockdale v. Rio Grande, etc., Ry. Co.*, 28 Utah, 201, 77 Pac. 849; *Wylie et al. v. Elwood*, 134 Ill. 281, 25 N. E. 570, 9 L. R.

A. 726, 23 Am. St. Rep. 673; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 228, 35 N. E. 750; *Gainesville, etc., Ry. Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654, 3 Ann. Cas. 660.

It was further observed by Caldwell, J., in the course of the opinion in the principal case: "If two private citizens own adjacent lots, one of them cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot, without making compensation for the injury; and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting owner of the beneficial use of his property, without making compensation for the injury. There is no such thing as a natural person or a private corporation having a 'lawful right' to invade the premises of an abutting owner and appropriate his property; and there is no difference in principle between an actual, physical invasion of one's property and the creation and maintenance of a nuisance which has the effect to deprive him of his beneficial use. The abutting owners of property on a public street have as good right to the free enjoyment of the easements of light and air as they have of their property itself. Without the free enjoyment of these easements, they could have no beneficial use of their property. And it is well settled that filling the air with smoke, cinders, and offensive odors materially injures the easements of light and air, to the free enjoyment of which the abutting owners of property upon a street have a legal right, and constitutes, in legal effect, a taking of property. * * * The defendant can no more escape making compensation for such damages than it could appropriate the plaintiff's church to its own use, without making compensation therefor."

The underlying principle, involving the question of liability, is discussed in *Markwardt v. City of Guthrie*, 18 Okl. 32, 90 Pac. 26, 9 L. R. A. (N. S.) 1150, 11 Ann. Cas. 581, in which it was held that a municipal corporation was liable for damages for the maintenance of a nuisance, where it discharged sewage into a river or creek, polluting the water of the stream, causing it to become foul and impregnated with noxious and poisonous substances, rendering it unfit for domestic or other uses, and there creating and maintaining a nuisance which was detrimental to the health, comfort, and repose of a lower riparian owner, and which diminished the value of his lands, and where it was observed that the great weight of the American and English authorities was in accord with the court's conclusion. To the same effect is the case of *Colbert v. City of Ardmore*, 31 Okl. 537, 122 Pac. 508. There the character

of nuisance was similar to that in the Markwardt Case, and it was held that the city was liable for maintaining a nuisance, whereby it was made impossible for plaintiff and his tenants to cultivate his adjacent lands, and on account thereof the same were made less valuable, and where the noxious and poisonous substances discharged into the sewer so polluted the waters of the stream as to make them offensive to the smell and a menace to the health of persons living or working in that vicinity. See, also, *City of Chickasha v. Looney*, 128 Pac. 136; *City of Ardmore v. Orr*, 129 Pac. 867, not yet officially reported.

The acts complained of arose in the Indian Territory, and the action for redress was instituted in a court of that territory. The decisions of the Supreme Court of the United States and the Circuit Court of Appeals for the Eighth Circuit, on questions of the kind presented, were controlling upon the court in which said action was instituted, as well as upon this court. *Summers v. Alexander*, 30 Okl. 198, 120 Pac. 601, 38 L. R. A. (N. S.) 787; *Moore v. Atchison, T. & S. F. Ry. Co.*, 26 Okl. 682, 110 Pac. 1059; *Chicago, R. I. & P. Ry. Co. v. Newburn*, 27 Okl. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432.

It was charged in plaintiff's amended petition, and there was testimony in support thereof, that the railroad company had other suitable land upon which it could have erected and maintained its roundhouse, machine shops, switches, cinder pits, etc., at a point from one-quarter to one-half mile distant, where no one resided, and where no damages could have been done to contiguous or nearby property. That it is necessary that railroads have, in the successful operation of their business, such property and that they have the right to maintain and operate the same, is not to be questioned; but it does not follow that a corresponding right is given to construct and maintain such structures and appurtenances in close proximity to valuable residence property, where another suitable and convenient location may be had, without an attendant liability for damages for the injuries sustained. In *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church*, supra, in this connection the court observed: "The defendant did not claim or show that different and more suitable locations for these structures could not be found. It was shown that its freight station was two blocks west of the church, notwithstanding which it located its water hydrant, where all its trains stopped to take water, in the middle of the street, and within 35 feet of the church." See, also, *Dolan v. Chicago, M. & St. P. Ry. Co.*, 118 Wis. 366, 95 N. W. 386; *Bates v. Holbrook*, supra; *Shirely v. Cedar Rapids, etc., Ry. Co.*, supra.

Counsel for plaintiff in error, among other cases cited, relies largely on the rule announced in *Northern Transportation Co. v.*

Chicago, 99 U. S. 635, 25 L. Ed. 337, and *Atchison, T. & S. F. Ry. Co. v. Armstrong*, 71 Kan. 366, 80 Pac. 978, 1 L. R. A. (N. S.) 113, 114 Am. St. Rep. 474. The former was an action to recover damages alleged to have been sustained by plaintiffs in consequence of the action of the city authorities in constructing a tunnel along the line of the public street, and under the Chicago river, where it crossed the street. The plaintiffs were the lessees of a lot bounded on the east by the street and on the south by the river, and the principal injury of which they complained was that by the operations of the city they were deprived of access to their premises, both on the side of the river and that of the street, during the prosecution of the work. The city authorities were acting under authority of an act of the Legislature, as well as by an ordinance of the city council. The state, and city council as its agent, had full power over the highways of the city, to improve them for the uses for which they were made highways, and the construction of a tunnel was an exercise of that power. It was held that in making the improvements of which the plaintiff complained the city was the agent of the state, and performed a public duty imposed upon it by the Legislature, and that persons appointed or authorized by law to make or improve a highway were not answerable for consequential damages if they act within their jurisdiction, and with care and skill. The case is therefore clearly not in point.

In the latter case it was held that the damages sustained were purely incidental and arose from a proper operation of the defendant's locomotive engines, and that all such inconvenience and incidental damage must be endured by the individual for the general good. It does not appear that the injury sustained was one peculiar to plaintiff, and not suffered by the public at large, though the case does not seem to be rested upon this ground.

[7] That the plaintiff had title sufficient to sustain the judgment, we think, is clear. The act of June 28, 1898 (30 Stat. at L. 495, c. 517), fully recognized the rights of owners of permanent improvements on town lots in the towns and cities in the Chickasaw Nation, under which plaintiff's land was platted and laid off into lots. This was done anterior to the location of the railroad. There were on these lots permanent improvements, consisting of four residence houses, a barn, smokehouse, servant's house, fruit orchard containing 1½ acres, and other improvements, costing about \$5,000. All were in plaintiff's possession, and were subsequently scheduled to him by the Town Site Commission in pursuance to the provisions of said act, and to all of which lots he was afterwards given patent. That the damage may have been sustained after the title was initiated, but before it was perfected by the

issuance and delivery of patent, is not material. During such period plaintiff was the owner of the equitable title, and was entitled to a patent passing the legal title upon the full performance of the statutory conditions or provisions. In *Foster Lumber Co. v. Arkansas Valley & Western Ry. Co.*, 20 Okl. 583, 95 Pac. 224, 30 L. R. A. (N. S.) 231, in an opinion in which numerous authorities are reviewed and collected, it was held that the owner of the equitable title to real property in possession could maintain an action for permanent injuries thereto. *Shelby et al. v. Zeigler*, 22 Okl. 799, 98 Pac. 989.

Gulf, Colorado & Santa Fé Ry. Co. v. Clark, 101 Fed. 678, 41 C. C. A. 597, was a case arising in the Indian Territory. The plaintiff had filed upon a homestead in the Oklahoma Territory immediately across the South Canadian river from where the dikes in question were constructed. His only title to the lands destroyed was his possession and his receiver's receipt as a homesteader. Plaintiff's right of recovery was disputed, on the ground that plaintiff had no title to the land. Answering this contention, it was said by the court in the opinion: "But the receiver's receipt of one in possession claiming land under it, in accordance with the provisions of section 2290 of the Revised Statutes of the United States, constitutes ample title, as against a wrongdoer who does not connect himself with any claim or interest in the land, to warrant a recovery from him of all the damages which he causes to the property. *Wisconsin Cent. Ry. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Carroll v. Safford*, 3 How. 441 [11 L. Ed. 671]; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Railroad Co. v. Lewis*, 7 U. S. App. 254, 2 C. C. A. 448, 51 Fed. 658; *Railway Co. v. Johnson*, 10 U. S. App. 629, 637, 4 C. C. A. 447, 452, 54 Fed. 474, 479; *Wilson v. Owens* [1 Ind. T. 163], 38 S. W. 976; *Mansf. Dig. (Ark.)* § 2628; *Brummett v. Pearle*, 36 Ark. 471; *Hill v. Plunkett*, 41 Ark. 485." The case is one squarely in point and favorable to the contention of plaintiff.

[8] Plaintiff in error complains of the giving of instruction No. 4, fixing the measure of damages at the difference between the market value of the premises immediately before the railroad began to operate its road, machine shops, cinder pit, and other appurtenances in the vicinity of the plaintiff's property and the market value of said property immediately thereafter, and says that if any damages were sustained it was that of the personal discomfort of the plaintiff, and that the true rule in such cases is that, where the damage is temporary and the nuisance abatable, the damages are measured by the depreciation to the usable or rental value, in addition to which plaintiff may recover such incidental damages as he may prove.

It was charged in the amended petition that the construction and maintenance of the nuisance complained of destroyed the trees, shrubbery, and flowers growing on his lots, and rendered plaintiff's property almost worthless for residence purposes—the only purpose for which it was fitted or of value. The evidence tended to establish this allegation; in fact, there was testimony introduced, without objection, that went to show that plaintiff had sustained actual damages in the market value of the premises (without regard to the personal discomfort suffered) exceeding the amount of the verdict. The action was brought May 9, 1904, and the structures and appurtenances complained of were constructed a considerable time prior thereto; the exact date not being material. The trial occurred February 24, 1910. The agencies contributing to the creation and continuance of the nuisance, therefore, sufficiently appear to have been of a permanent nature, if, indeed, such appurtenances, considering their common construction and the use to which they are adapted, may ever be considered of any other nature. The permanency of the structures, taken in connection with the use to which they were daily put, is of controlling force in determining the proper measure of damages, and was so held in *Gulf, C. & S. F. Ry. Co. v. Moseley*, 88 C. C. A. 236, 161 Fed. 72, 20 L. R. A. (N. S.) 885, where the dikes complained of were permanent in character. It was observed by the court that there was great conflict in the decisions of the courts touching the application of the statute of limitations to nuisances of the character under consideration, and many authorities are reviewed and cited in support of the court's conclusions. It was held that, as the dikes constituted permanent structures, damages for injury to plaintiff's land, both present and prospective, were recoverable in a single action. Speaking with reference to the character of the dikes, the court said: "In such case there is not infrequently present elements of uncertainty, such as the insufficiency of the openings in the embankments, which, the presumption may be indulged, the railroad might at any time in the future sufficiently enlarge, rather than submit in the first action to the recovery of all the consequential damages. In the second place, where the damage is to crops, it may depend entirely upon the possibility of the nonrecurrence of the overrunning flood in any given year, or the contingency of no crop being planted thereon, or being cultivated in a product subject to little damage from a temporary overflow. Such are not the conditions of the nuisance in question. The very purpose to be subserved by the defendant's permanent structure does not admit of any rearrangement to obviate sending the force of the current of the river against the plaintiff's shore line. Neither did the situation admit of the probability of the removal of the dikes in

the future, as the burden of the defendant's proof was that they are indispensably necessary to prevent the destruction of its right of way, roadbed, and tracks. Moreover, the injury to the plaintiff did not consist in now and then flooding her land with water, damaging possible crops; but it was the destruction of the freehold by the constant eating away of the protecting bank—a process as certain to continue as the annual rainfalls and the flow of water in a large river, and a result reduced to a demonstration more than three years before this suit was instituted."

It is not for the railroad company which has suffered an injury to continue for a long term of years, during which the land has declined in value, or where losses have been sustained by a sale at a greatly reduced price, but which represented the then market value, to say that, should it conclude to remove or abate the nuisance, the original value would be restored, and this for two reasons: As to that part of the land already sold, the sale terminated the plaintiff's title, and as to him there could be no restoration of values; while, as to that remaining unsold, its desirability and value may have ended and been minimized on account of the length of time that the nuisance has been allowed to continue. Certainly we cannot indulge such a presumption, and there is nothing in the testimony upon which to base such a conclusion.

[8] The true measure of damages is compensation for the injury or loss sustained, and, as a general rule, in such cases the damages are measured by the depreciation in the market value of the property injured, where the injury caused by the nuisance is of a permanent nature, or of the rental or usable value, in case the injury is of a temporary or recurrent nature. 29 Cyc. 1275, and authorities cited. We have already shown that both the structures and injury are of a permanent nature, to which it may be added that the injury was one not of a recurrent character, but, instead, fixed and permanent, so long as used and operated by the railroad.

In discussing what damages for an injury may be recovered in a single action, Sedgwick on Damages (9th Ed.) § 95, says: "A typical instance is an action against a railroad company for a nuisance caused by its embankment or other permanent structure. In such case, when the Constitution permits recovery, the great weight of authority is to the effect that the injured party may, and therefore must, recover compensation in one action for the entire loss. And where the building and operation of the railroad produces a nuisance, as by the pollution of the air by smoke, or by the obstructing a street by its tracks lawfully located, the rule is generally held to be the same. In some cases it is held that the plaintiff may recover

prospective damages, treating the injury as a permanent one; and this election is not infrequently allowed in case of intermittent injury as by successive floods. But if he may, it is clear that he must." Numerous authorities are cited by the author as supporting the rule announced, in addition to which may be cited the following: *Ottawa Gas, etc., Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Chicago North Shore St. Ry. Co. v. Payne*, 192 Ill. 239, 61 N. E. 487; *Denison & F. S. Ry. Co. v. O'Malley*, 18 Tex. Civ. App. 200, 45 S. W. 227; *Porter v. Midland Ry. Co.*, 125 Ind. 476, 25 N. E. 556; *Fowler v. Des Moines & K. C. Ry. Co.*, 91 Iowa, 533, 60 N. W. 116; *Jeffersonville, etc., Ry. Co. v. Esterle*, 76 Ky. (13 Bush) 667; *Clark v. Lanier*, 104 Ga. 184, 30 S. E. 741.

In *City of Ardmore v. Orr*, 129 Pac. 867, lately decided and not yet officially reported, negligent construction of storm sewers, whereby surface waters were diverted from their accustomed course and on account of which plaintiff's property was overflowed and damaged, was under consideration. It was held that the city in grading the streets and constructing the sewers was acting within its lawful authority; that the wrong consisted in negligently constructing the sewers with a capacity inadequate to carry off the surface waters; that if said sewers were enlarged, or additional sewers built sufficiently large to carry off the surface waters, no further injury would result, and it would not be presumed, its liability having been determined, that the negligent construction of said sewers would not be remedied so as to prevent further injury. The case is one readily distinguishable from the one under consideration, and is not opposed to the rule announced in the *Moseley Case*.

In *Chicago, R. I. & P. Ry. Co. v. Davis*, 26 Okl. 434, 109 Pac. 214, it was held that, where the wrong is of a permanent nature and continuous, springing from the manner in which the ditch or channel is completed, and on account of the diversion of surface waters the land of an abutting proprietor is necessarily injured by such diverted water, the proprietor may treat the act of the railway company as a permanent injury and recover damages for the consequent depreciation of the value of his property. The opinion is one strongly fortified by authorities, and is in harmony with the conclusion reached in the *Moseley Case*. It will be noted that the court quoted with approval from *Savannah, A. & M. Ry. Co. v. Buford*, 106 Ala. 303, 17 South. 395, in which the court said: "The roadbed and embankment are permanent and continuous structures." No less so, in our opinion, is the roundhouse, the switches, the turntable, cinder pit, and other structures, the use of which so injuriously affected plaintiff's property. We therefore conclude that under the rule announced in *Gulf, C. & S. F. Ry. Co. v. Moseley*, su-

pra, which in the instant case must control, the instructions given correctly stated the law defining the measure of damages.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(41 Okl. 660)

TURNER et al. v. CITY OF ARDMORE
et al.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

(Syllabus by the Court.)

1. INJUNCTION (§ 105*)—CRIMINAL PROSECUTIONS—ADEQUATE REMEDY AT LAW—MUNICIPAL CORPORATIONS.

Plaintiffs obtained an order restraining the city of Ardmore from prosecuting them for refusing to pay an occupation tax assessed against them by such city. *Held*, such order was erroneous for the reason that plaintiffs had an adequate remedy under the statutes by appeal from the judgment of the municipal courts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

2. INJUNCTION (§ 16*)—GROUNDS—ADEQUATE REMEDY AT LAW.

Courts of equity will not grant relief where complainants have a plain, speedy, and adequate remedy for the redress of their wrongs under the law. This doctrine is universally recognized by courts of equity and is founded upon the very sound principle that Legislatures have authority to define the rights of citizens and prescribe the rules by which such rights are to be determined; and, where it has done so, then litigants have the right to demand that their grievances be determined by the rules prescribed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.*]

Commissioners' Opinion, Division No. 2. Error from District Court; Carter County; S. H. Russell, Judge.

Action by R. F. Turner and others against the City of Ardmore and others for an injunction. Judgment for plaintiffs, and defendants bring error. Reversed.

J. B. Moore, of Ardmore, for plaintiffs in error. Thos. Norman, of Ardmore, for defendants in error.

HARRISON, C. This is an action wherein R. F. Turner and some 18 other resident attorneys of the city of Ardmore sued to enjoin the municipal courts of such city from prosecuting them for refusal to pay an occupation tax of \$5 each assessed by the city against each practicing attorney. The application was heard and order of injunction granted by the judge of the district court May 31, 1910, and from the order of injunction the city of Ardmore brings error.

[1] The question whether the court was authorized to grant the prayer for the injunction depends in this case solely upon the ground whether or not the plaintiffs had an adequate remedy at law for the things complained of. We hardly feel disposed to treat

the question of the validity of the ordinance imposing the license tax as properly before the court. The petition for the injunction seems to be based more upon the ground that petitioners had been arrested and were being prosecuted by the municipal court for failure to pay such tax, and the court seems to have granted the order upon this ground.

Now if plaintiffs had been arrested for refusal to pay an illegal tax, and such tax were in fact illegal, and such plaintiffs were being prosecuted for refusal to pay same, this would constitute sufficient grounds for an injunction against the city, provided the applicants had no adequate remedy at law for relief from the abuses complained of. But if they had an adequate remedy under the law and in the courts of law, then a court of equity was not authorized to intercede and grant relief until the rights of the parties had been determined under the law or until their remedy under the law had been exhausted. If defendants had been wrongfully arrested under process issued from the municipal courts and were being prosecuted or threatened with prosecution in such courts for the violation of an invalid ordinance, section 746, Snyder's Comp. Laws 1909, affords a plain, specific, speedy, and adequate remedy for redress of such wrongs by appeal to the district court where the legality of the tax and the prosecution could both have been determined, and the rights of the parties adjudicated, and, having such remedy at law, the petitioners should have resorted to a court of law for redress of their wrongs.

[2] A court of equity will not grant relief in such matters where an adequate remedy is provided by law. *Golden v. City of Guthrie*, 8 Okl. 128, 41 Pac. 350; *Wallace v. Bullen*, 6 Okl. 17, 52 Pac. 95; *Thompson v. Tucker*, 15 Okl. 486, 83 Pac. 413, 6 Ann. Cas. 1012; *Smith v. Board of Com'rs*, 26 Okl. 819, 110 Pac. 669; *Fast v. Rogers et al.*, 30 Okl. 289, 119 Pac. 241. This doctrine is founded upon the very sound principle that the Legislatures have authority to define the rights of citizens and prescribe the rules by which such rights are to be determined; and, where it has done so, then litigants have the right to demand that their grievances be determined by the rules prescribed.

In the case at bar, the plaintiffs showed by their petition that they had a remedy at law of which they had not availed themselves. It is true that they alleged "that said city has heretofore declined and refused, and will in the prosecution against these defendants decline and refuse, to allow these plaintiffs a trial by jury; and said city has declined and refused, and will in the prosecution against these plaintiffs decline and refuse, to allow an appeal from whatever decision the judge of said municipal court may render." These allegations are not sufficiently definite and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

certain upon which to base equitable relief. It is true, also, that plaintiffs alleged that they had no adequate remedy at law, but such allegation does not destroy nor affect the remedy which the law provides. The allegations disclose a state of facts for redress of which the law prescribes a remedy as above stated. Hence mere allegations that they had no adequate remedy at law would not warrant the intercession of a court of equity unless such allegations were true.

Therefore the judgment of the trial court is reversed, with instructions to dissolve the injunction.

PER CURIAM. Adopted in whole.

(35 Okl. 395)

DEMING INV. CO. v. BRUNER OIL CO.
et al.

(Supreme Court of Oklahoma. Feb. 3, 1913.)

(*Syllabus by the Court.*)

INDIANS (§ 15*) — ALIENATION OF LAND — HEIRS.

Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of act of Congress approved June 28, 1890, entitled, "An act for the protection of the people of the Indian Territory and for other purposes" (chapter 517, 30 U. S. Stat. at L. p. 517), died subsequent to the 1st day of April, 1899, but before having received the allotment of lands to which he was entitled as a member of said Tribe of Indians, said lands, by reason of section 28 of the Original Treaty with the Creek Tribe of Indians (chapter 676, 31 U. S. Stat. at L. p. 869), descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians (chapter 1323, 32 U. S. Stat. at L. p. 503), and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee-simple title thereto.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by the Deming Investment Company, a corporation, against the Bruner Oil Company and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Biddison & Campbell, of Tulsa, for plaintiff in error. Benjamin F. Rice and Thomas D. Lyons, both of Tulsa, for defendants in error.

HAYES, J. Plaintiff in error brought this action in the court below to quiet its title to 40 acres of land situated in Tulsa county. The cause was tried to that court upon an agreed statement of facts, the substance of which we here state: Martha Hohlahta, who was a full-blood citizen of the Creek Nation, died in May, 1899, at the age of two years. She left no surviving brothers or sisters or descendants of such, and left as her only

heirs at law her father and mother, Cheparn and Lucy Hohlahta, who were also full-blood citizens of the Creek Nation. On the 6th day of April, 1904, said Martha Hohlahta was enrolled by the Commission to the Five Civilized Tribes as a full-blood Creek Indian, and the lands in controversy were allotted to the heirs of deceased as her homestead on the 13th day of the following July, and a certificate issued to them. Subsequently a patent executed by the Chief of the Muscogee or Creek Nation, and approved by the Secretary of the Interior, conveying said 40 acres of land to the heirs and designating the same as a homestead, was filed for record with the Commission to the Five Civilized Tribes. On the 27th day of May, 1905, the said Cheparn and Lucy Hohlahta executed and delivered their warranty deed to one Charles W. Lefler, conveying said lands. On the 18th day of January, 1906, Lefler executed and delivered his warranty deed conveying the same lands to one J. C. Eddy, who took the title thereto as trustee for plaintiff in error, and who thereafter conveyed by warranty deed the lands to plaintiff in error. All of the deeds mentioned herein were duly recorded prior to the time of the execution of the leases sought to be canceled by this action. On the 15th day of April, 1907, Cheparn and Lucy Hohlahta executed and delivered an oil and gas mining lease on part of the land to defendant Bruner Oil Company, and on the same day they executed a similar lease on a part of the land to the Payne Oil Company, both of which leases have been duly recorded. Said leases constitute the cloud upon plaintiff's title of which it now complains.

It is agreed that at the time of the death of the said Martha Hohlahta the laws of the Creek Nation governed the descent of her allotment, and that, pursuant to those laws, Lucy Hohlahta, the mother of deceased, was the sole heir to inherit the land in controversy. The question of law this proceeding presents is a construction of the provisions of the treaty with the Creek Tribe of Indians under which the allotment was made to the heirs of the deceased Martha Hohlahta. Section 16 of the Treaty of the United States with the Creek Tribe of Indians (chapter 1323, 32 U. S. Stat. at L. p. 503), generally known as the Supplemental Treaty with the Creek Tribe of Indians, provides: "Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Index

which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity." The foregoing section is substantially the same as section 7 of the Original Creek Treaty (chapter 31, U. S. Stat. at L. p. 863), to which the treaty of 1902 was amendatory and supplementary. It is contended by defendants in error that, by virtue of the first sentence of the foregoing section of the treaty, no land allotted to any citizen of the Creek Tribe of Indians could be alienated at any time before the expiration of five years from the ratification of that treaty, except with the approval of the Secretary of the Interior. The deed from the heirs of deceased, Martha Hohlahta, to the person from whom plaintiff derails its title, was executed before the expiration of five years from the ratification of said agreement, and was never approved by the Secretary of the Interior; but said lands were not allotted to the heirs of deceased by virtue of this section, or by virtue of any preceding section of the treaty. Section 28 of the Original Treaty, in part, provides: "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be en-

titled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

It was under the foregoing section that the lands in controversy were allotted and patented to the heirs of deceased. It is contended, however, by defendants in error that the five-year restriction upon alienation imposed by section 16 of the Supplemental Treaty applies to the heirs of citizens who died before allotment was made, as well as to heirs of citizens to whom allotments were made before their death. The recent case of *Mullen et al. v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, although the foregoing provisions of the Creek Treaty were not directly involved in that case, sheds some light upon its construction. The court had under consideration in that case certain provisions of the Chickasaw and Choctaw Treaty with the United States, imposing restrictions upon the alienation of lands allotted to members of those two tribes of Indians. Section 12 of said Treaty (chapter 1362, 32 U. S. Stat. at L. p. 642) requires each member of the tribe at the time he selects an allotment to designate a homestead out of his allotment which is made inalienable during the lifetime of the allottee not exceeding 21 years from the date of certificate of allotment. Section 16 provides that all lands allotted to members of the tribe, except such land as is set aside to each for a homestead, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years, in each case from date of patent. Section 22 of the same treaty reads in part as follows: "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas." The question involved in that case was whether lands allotted in the name of deceased Indians under the foregoing provisions of section 22 were subject to the restrictions upon alienation imposed by sections 12 and 16. In holding that such restrictions did not apply to the lands allotted to deceased members of the tribe, the court, speaking through Mr. Justice Hughes, who delivered the opinion, made reference in the opinion to the provisions of the Creek treaties here involved, and to an opinion given to the Interior Department by the then Assistant Attorney General for the Interior Department (now Mr. Justice Van Devanter), in which he said: "After a care-

ful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule." This language of the Assistant Attorney General is quoted with approval and made the basis of the court's reasoning by analogy to the conclusion it reached in the application of the Chickasaw and Choctaw Agreement; and in speaking of the provisions of Creek, Chickasaw, and Choctaw Treaties, after noticing a slight difference in the language thereof, the court said: "In both cases the lands were to go immediately to the heirs, and the mere circumstance that under the language of the statute the allotment was made in the name of the deceased ancestor (referring to the Chickasaw and Choctaw Treaty), instead of the names of the heirs, furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

This expression of that court should be taken as high authority, if not decisive, that the portion of section 7 of the Original Creek Agreement and of section 16 of the Supplemental Creek Agreement, *supra*, requiring the selection of a homestead of 40 acres by each citizen out of his allotment and imposing restrictions upon its alienation for a period of 21 years, has no application to allotments made under section 28; and, if those sections apply at all to allotments made under section 28, they do so only in part. But there is no language in either section 7 of the Original Treaty or in section 16 of the Supplemental Treaty, or in section 28, specifically expressing an intent that any of the provisions of the two first-named sections shall apply to allotments made under the last section to the heirs of persons who died subsequent to the 1st day of April, 1890, but before receiving their allotments. Two classes of allotments of land are provided for by the treaty: First, an allotment to each member of the tribe that he is entitled to receive because of his membership in the tribe and his interest in the tribal property; and, second, an allotment which the treaty deems just for the heirs to receive, not because they are members of the tribe, but because they are heirs of a person who would have been entitled to take an allotment had he lived until the ratification of the treaty. It was with the former of these classes of

allotments, we think, section 16 of the Supplemental Treaty and its counterpart, section 7 of the Original Treaty intended to deal, and that it intended to divide the lands embraced in such allotments into two classes, consisting of those upon which there is a restriction upon the alienation for a period of 5 years from the ratification of the treaty and of those upon which there is restriction upon the alienation for a period of 21 years; but section 28 provides for no such division of the lands allotted thereunder, and makes no reference to restrictions upon the alienation thereof. An Indian having died before taking an allotment, the land he was entitled to receive as allotment descends directly to his heirs under the law of descent and distribution named, and shall be allotted and distributed to them accordingly. The land allotted to the heirs of deceased is neither homestead nor surplus; and there is no more reason for applying the restrictions upon alienation of the surplus to this entire allotment than there is to apply the restrictions upon the alienation of homesteads.

Our attention has been called to the fact that the views we here express are in conflict with decisions of this court in *Barnes v. Stonebraker*, 28 Okl. 75, 113 Pac. 903, and *Sanders v. Sanders et al.*, 28 Okl. 59, 117 Pac. 338. After a more thorough consideration of the treaty provisions involved, and in the light of the expressions of the Supreme Court of the United States in *Mullen et al. v. United States*, whose decisions on these questions are controlling, we are of the opinion that in so far as said cases are in conflict with the views herein expressed the same should in harmony with the decision of this court in *Rentle et al. v. McCoy et al.*, 128 Pac. 244, decided at this term, be overruled.

It follows that the judgment of the trial court should be reversed and the cause remanded, with direction to enter judgment in accordance with this opinion.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

(25 Okl. 473)

MANUEL v. SMITH et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

INDIANS (§ 15*)—RIGHT to ALIENATE LAND —REMOVAL OF RESTRICTIONS.

P., a freedman member of the Creek Tribe of Indians, who had selected an allotment, died in the month of June, 1902. On March 26, 1904, there were delivered to his heirs two deeds for his said allotment, denominating portions of it as homestead and surplus. On September 13, 1905, the mother, as heir of the said decedent, executed a deed to the said allotment, homestead, and surplus. Held, that the homestead character never attached to any portion of the said allotment, and under and by virtue

of the terms of the Act of April 21, 1904 (chapter 1402, 33 Stat. 189), the restrictions, if any existed, were removed for its alienation by the heirs of the deceased.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by Malinda Manuel against Ada Smith and another. Judgment for defendants, and plaintiff brings error. Affirmed.

N. B. Maxey, John B. Campbell, and William O. Beall, all of Muskogee, for plaintiff in error. Owen & Stone, of Muskogee, for defendants in error.

DUNN, J. This case presents error from the district court of Okmulgee county. Malinda Manuel, as plaintiff, brought her action against Ada Smith and James C. Smith, as defendants, to cancel certain deeds and for an accounting. Counsel for plaintiff in error states that the case was submitted to the court below on an agreed statement of facts setting up substantially the following: That the lands in suit were lands allotted to Clyde Perryman who was a freedman member of the Creek Tribe of Indians, and who died in the month of June, 1902; that he was the son of plaintiff herein, who on September 13, 1905, executed a deed to Ada Smith, the consideration named being \$600; that the plaintiff offered to return the money, with interest, and prayed that an accounting be had, and that she be allowed reasonable rents and profits for the time which the defendants had possession of the land. The contention is made that the deed was executed for an inadequate and unconscionable consideration and in violation of the express provisions of the original and supplemental Creek agreement, and was void. It is further contended that it was void in so far as it affected the homestead allotment, and, being void in part, was void in toto. The only question really presented by the agreed statement of facts and argued and briefed is the one relating to the right of plaintiff to alienate the land, homestead, and surplus, on September 13, 1905; and this question, on the authority of *Parkinson v. Skelton*, 128 Pac. 131, *Rentle v. McCoy*, 128 Pac. 244, *Gracie Hawkins v. Oklahoma Oil Co.*, 195 Fed. 345, an opinion of the Circuit Court of the United States for the Eastern District of Oklahoma, filed December 28, 1911, and *United States v. Jacobs*, 195 Fed. 707, 115 C. C. A. 507, an opinion of the United States Circuit Court of Appeals of the Eighth Circuit, must be decided in accordance with the judgment rendered by the trial court. The opinions in those cases holding, in effect, that the homestead character did not attach to any portion of this land, notwithstanding the fact

that one of the deeds issued denominated a portion of it as such, and that, if any restrictions existed, they had been removed in 1905 by the act of April 21, 1904 (chapter, 1402, 33 Stat. L. 189), and the heirs had the right to alienate.

The judgment of the trial court is therefore affirmed.

TURNER, J., concurs. HAYES, C. J., and WILLIAMS, J., absent. KANE, J., concurs in the conclusion.

(33 Okl. 399)

WEST & RUSSELL v. RAWDON et ux.

(Supreme Court of Oklahoma. Jan. 9, 1912. Rehearing Denied Aug. 28, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 246*)—RIGHT TO AMEND.

Where an amended petition does not change substantially the original claim of the plaintiff, it is not error for the trial court to allow it to be filed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTION.

Where it is apparent that an instruction given could not prejudice the rights of the losing party under the theory on which his case was tried below, giving the same will not be held to be reversible error, although the instruction given may not have been technically correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

3. PATENTS (§ 200*)—SALE OF TERRITORY—CONDITIONS PRECEDENT TO SUIT — RECONVEYANCE.

Where the evidence reasonably tended to show that the plaintiff returned to the defendants all the papers they received from them in relation to the sale of patent right territory, and disclaimed any further interest therein, long prior to the commencement of an action wherein the sale of said territory incidentally came into question, and that the enterprise had long been abandoned by all the parties to the transaction on account of defects in the patented article which made its sale impracticable, a more formal reconveyance of such territory was not necessary before the commencement of said action.

[Ed. Note.—For other cases, see *Patents*, Dec. Dig. § 200.*]

4. PROPERTY (§ 9*)—PRESUMPTION—TITLE OF WARRANTOR.

It is a presumption of law that one conveying by a general warranty deed holds the original grant.

[Ed. Note.—For other cases, see *Property*, Dec. Dig. § 9.*]

5. WITNESSES (§ 55*) — COMPETENCY — HUSBAND AND WIFE.

Section 5842, Comp. Laws 1909, provides that: "The following persons shall be incompetent to testify: * * * Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action."

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 147-152; Dec. Dig. § 55.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6. WITNESSES (§ 55*) — COMPETENCY — HUSBAND AND WIFE.

The wife, jointly with her husband, signed certain deeds of warranty, conveying certain lands, which deeds were the evidence introduced tending to show in whom the title to said lands was vested. In a suit for the purchase price and to foreclose a statutory vendor's lien, she joined her husband as party plaintiff, without objection. The defendants prayed for a judgment against husband and wife on their cross-petition for breach of warranty. *Held*, that the husband and wife were joint parties with a joint interest in the action, and the wife, therefore, was competent to testify therein.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 147-152; Dec. Dig. § 55.*]

Error from District Court, Woodward County; R. H. Loofbourrow, Judge.

Action by J. Rawdon and Maggie T. Rawdon, his wife, against L. D. West and John R. Russell, copartners. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. M. Appelget and C. W. Herod, both of Woodward, for plaintiffs in error. Hoover & Swindall, of Woodward, for defendants in error.

KANE, J. This was an action commenced by the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below, to recover the purchase price of a certain piece of real estate, and to enforce the statutory vendor's lien for securing payment of the purchase price. The original petition alleged, in substance: That on or about the 7th day of September, 1901, the plaintiffs were the owners in fee simple of the land in controversy. That on or about said time they entered into a certain verbal agreement with the defendants, whereby it was agreed that the plaintiffs would convey to the defendants an undivided one-half interest to and in said land for a consideration of \$2,700, to be paid as follows: West & Russell agreed to sell to the plaintiffs certain counties in the state of Pennsylvania, within which they were authorized to dispose of a certain quilting device covered by a patent owned by West & Russell, who were to go with said plaintiffs into said territory and assist them in selling said patent right. That, in the event they failed to realize the sum of \$2,700 out of the territory, the defendants were to pay the plaintiffs \$2,700 in cash for the undivided one-half interest in the land. That later, about the 17th day of October, 1901, they made a contract of like import for the remaining undivided one-half interest in said land for certain quilting territory in the state of Alabama. That it was further agreed in each of said contracts that in the event that West & Russell sold territory in any other state prior to the time that they had paid the defendants in error the full sum of \$5,400 for the land in Woodward county, per the above agreement, then the money derived from the sale of territory in any other state would be applied upon the agreement be-

tween them until the consideration was fully paid. That, acting upon the agreement, the said plaintiffs executed to the defendants a warranty deed conveying said land. That, after the plaintiffs had conveyed said land, the defendants paid a total of \$1,147, said payments being made at different dates, after the deeds were executed, up to December, 1903, after which time the defendants refused to make further payments; and, after promises at different times to carry out the contract and delaying the plaintiffs by their promises until the 13th day of June, 1905, this action was commenced to recover the balance remaining due and unpaid, amounting to \$4,200, with accrued interest. Afterwards the plaintiffs filed an amended petition, wherein they set up their causes of action in two paragraphs, stating the facts in more detail, and prayed for relief as before. The defendants' answer admitted the contract, the execution of the deeds, etc., as alleged by the plaintiffs, and by way of defense alleged that said quilting territory constituted the sole consideration for the conveyances, and that they were under no obligation to see that the plaintiffs realized any specific sum of money from the sale thereof. The answer further alleged that the defendants were residents of the state of Kansas at the time of the making of each contract, and were such during all the periods during the making thereof, and were at the commencement of this action; that, by the laws of the state of Kansas, an action upon a contract, not in writing, can only be brought within three years from the making thereof; that, at the time of the commencement of this action, they were and are barred by the statute of limitations of the state of Kansas; that by the laws of the state of Oklahoma and the territory of Oklahoma, at the time of the commencement of this action, it was provided that all causes of action arising in another state between non-residents of this state, where the cause of action in such other state would be barred by the laws thereof, then no action can be maintained thereon within this state. By way of cross-petition, the defendants alleged a breach of warranty on the part of the plaintiffs in that there were certain incumbrances against the land at the time of the conveyance of same, which the defendants were required to pay, and that they were entitled to judgment against the plaintiffs for breach of their warranty in the sum of \$2,675. The reply of the plaintiffs consisted of a general denial and an allegation to the effect that defendants agreed with said plaintiffs on the 27th day of October, 1904, in writing, to see that the contract which was made between them was carried out to the letter. Upon the issues thus joined, the cause was submitted to the jury, which returned a verdict in favor of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiffs for the balance due them, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It is clear that the only issue of fact joined by the pleadings is whether the agreement between the parties was as the plaintiffs alleged it to be, or whether the sale of quilter territory constituted the entire purchase price. The jury resolved that question in favor of the plaintiffs; and, as there was evidence reasonably tending to support their verdict, in our examination of the errors complained of we must proceed upon the theory that, upon the merits of the case, the plaintiffs were entitled to recover. Counsel for plaintiffs in error assign numerous errors; but the following embrace all the grounds for reversal which we deem it necessary to notice in detail: (1) The amended petition stated an entire new cause of action, and it was therefore error to allow the amendment. (2) The original cause of action is not enforceable, because there was no disaffirmance of the contract by the plaintiffs, within a reasonable time, and the cause of action was barred by the statute of limitations when the action was commenced. (3) Because Maggie T. Rawdon was an incompetent witness in the cause for any purpose, for the reason that she was the wife of the coplaintiff, J. Rawdon.

[1] We do not believe that any of these grounds are well taken. In their amended petition, the plaintiffs stated their cause or causes of action in two paragraphs, instead of one, as originally, and set out in more detail the facts which constituted the same. There seems to be no material variance between the agreements originally declared on and the ones set up in the amended petition, and the prayer for relief is substantially the same in both pleadings. It is not practicable to lay down a rigid rule in reference to the amendment of pleadings which shall govern in all cases. Their allowance must, at every stage of the cause, rest in the sound discretion of the court, and that discretion must depend largely on the special circumstances of each case. The ends of justice should never be sacrificed to mere form or a too rigid adherence to technical rules of practice. *Lookabaugh v. Bowmaker*, 21 Okl. 489, 96 Pac. 651; *Alcorn v. Dennis*, 25 Okl. 135, 105 Pac. 1012; *Kuchler et al. v. Weaver*, 23 Okl. 420, 100 Pac. 915, 18 Ann. Cas. 462; *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712, 1 Ann. Cas. 970. The amendment complained of does not substantially change the original claims of the plaintiffs, and that seems to be the only limitation upon the court below in the matter of allowing amendments.

On the question of the statute of limitations, the court below instructed the jury as follows: "The court instructs the jury that the defendants in this case have wholly

failed to sustain, by proper evidence, their plea of the statute of limitations set up in their answer, and you are instructed not to consider the same." This instruction seems to be correct. We have examined the record with considerable care, and fail to find anything to sustain counsel's contention on this point.

[2] Some point is sought to be made by counsel in their brief to the effect that the court erred in instructing the jury that two years was a reasonable time in which the defendants might have performed the alleged contract. It is not clear how such instruction could injure the defendants. If they had alleged in their answer that they had, in good faith, attempted to carry out their contract to sell the quilter territory in Pennsylvania, and could realize the purchase price, but that they had been unavoidably prevented from so doing by want of sufficient time, it is possible that the question of the reasonableness of the time of performance should have been submitted to the jury. But their sole defense to the merits of the case was that the sale of the quilter territory constituted the entire consideration for the land, and that they had no further duty to perform toward the plaintiffs in that regard. They tried their case upon that theory and lost, and not upon the theory that they had not had a reasonable opportunity to comply with the terms of the contract entered into.

[3] One of the assignments of error is predicated upon the theory that the plaintiffs cannot recover, for the reason that they did not reconvey the quilter territory to defendants before commencing the action. There was evidence reasonably tending to show that the plaintiffs returned all the papers they received from the defendants in relation to the sale of the patent right, and that they are not claiming any title to the quilter territory. But, however that may be, it does not seem to us that the question of rescission arises under the theory upon which the case was tried. The plaintiffs alleged, and the verdict of the jury established the verity of the allegation, that the defendants guaranteed that the plaintiffs would realize the purchase price of the land out of the quilter territory sold to them; that, in order to do this, the defendants agreed to go with said plaintiffs and assist them in selling said territory; and that they failed to do so. Their defense necessarily admits that they not only failed to carry out that part of the contract, but that they also refused to do so, upon the ground that it was not required of them by the terms thereof. Under either theory, the sale of the quilter territory was absolute, and there is no apparent reason why it should not remain intact after the consideration for the land was paid. The only effect of payment would be to permit the defendants to leave the plaintiffs upon their own resources for any further profits

which might accrue to them from the sale of gullter territory. It is also disclosed by the evidence that, even with the expert advice and assistance of the defendants, the gullter territory was not a very valuable asset to the plaintiffs, and, as the years went by, it became less so, until finally the venture was entirely abandoned by all the parties on account of defects in the patented article, which made its sale impracticable. So completely had the enterprise dwindled as a money-making proposition at the commencement of this action, it could safely be said there is nothing left to restore.

[5] Section 5842, Comp. Laws 1909, provides that: "The following persons shall be incompetent to testify: * * * Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action."

[6] In the case at bar, Mrs. Rawdon signed the deeds which conveyed the land to the defendants, and joined with her husband, as a party plaintiff, to recover the purchase price; and the defendants prayed for a joint judgment against husband and wife in their cross-petition for breach of warranty. Upon the face of the record husband and wife are joint parties, and as she signed the deeds it must be presumed that she was jointly interested with him in the land and she is certainly jointly interested with her husband in defending against the cross-petition of the defendants.

[4] "It is a presumption of law that one conveying by a general warranty deed holds the original grant." 18 Cyc. 728.

There is no evidence in the record other than the deed itself to show in whom the title to the land was vested, and of course, under such circumstances, the presumption would be that the Rawdons owned the land jointly. We think Mrs. Rawdon was clearly within the statutory exception, and therefore competent to testify in the cause.

We have examined the record with considerable care, and are satisfied that the parties had a fair trial before the jury in the court below, and that there was no error committed which would warrant this court in reversing the judgment rendered on the verdict.

It is therefore affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

(9 Okl. Cr. 719)

JOHNSON v. STATE.

(Criminal Court of Appeals of Oklahoma. April 5, 1913.)

Appeal from Garfield County Court; Winfield Scott, Judge.

Ben Johnson was convicted of violation of the prohibition law, and appeals. Dismissed.

D. W. Buckner, of Enid, for plaintiff in error. Chas. West, Atty. Gen., and E. G. Spilman, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted in the county court of Garfield county on a charge of selling intoxicating liquor, and was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50.

The judgment and sentence was entered on May 2, 1912. When judgment was rendered, the defendant was given 60 days to perfect his appeal to this court. On June 29th an order was made extending the time 10 days, which time expired July 12th. On July 19th, after the expiration of the time granted by the court, a further extension of time was entered for a period of 10 days. The second order extending the time was made after the trial court had lost jurisdiction of the case, and the order made giving such extension was void. July 30, 1912, a petition in error, with case-made, was filed in this court.

Under the statute (section 6948), "in misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered; providing, however, that the trial court or judge may for good cause shown extend the time within which said appeal may be taken, not exceeding sixty days." An extension of time within which to perfect an appeal under the statute should be secured by written application presented to the court or judge, and if the order so extending the time is not made within the time allowed by the statute, or within the extended time, the court or trial judge is without authority, and such order is void.

The Attorney General has filed a motion to dismiss the appeal for the reasons stated, which motion is sustained, and the appeal is hereby dismissed, and the cause remanded to the county court of Garfield county, with direction to enforce its judgment and sentence therein.

(37 Okl. 106)

OKLAHOMA CITY et al. v. HUBATKA.

(Supreme Court of Oklahoma. Feb. 18, 1913.)

Commissioners' Opinion, Division No. 2. Error from Superior Court, Oklahoma County; Russell G. Lowe, Special Judge.

Action by John Hubatka against the city of Oklahoma City and others. Judgment for plaintiff, and defendants bring error. Dismissed.

Flynn, Ames & Chambers, of Oklahoma City, for plaintiffs in error.

HARRISON, C. The petition in error and case-made in this cause was filed in this court April 13, 1911, and assigned for submission December 6, 1912. No briefs having been filed by either party, the appeal is deemed to have been abandoned, and the cause is dismissed.

PER CURIAM. Adopted in whole.

(38 Okl. 33)

POTTER v. CHECOTE.

(Supreme Court of Oklahoma. April 15, 1913.)

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by Louisiana Checote against A. C. Potter. Judgment for plaintiff, and defendant brings error. On motion to affirm judgment. Denied.

R. M. Dick, of Tulsa, and Mark L. Bozarth, of Okmulgee, for plaintiff in error. Almond D. Cochran, of Okmulgee, for defendant in error.

PER CURIAM. On June 6, 1912, the district court of Okmulgee county rendered and entered a judgment in favor of Louisiana Checote against A. C. Potter for \$4,988.75, who thereafter, it is alleged, superseded the same for six months by filing bond in that court in the sum of \$10,000, but has failed to commence proceedings in error in this court.

On January 7, 1913, came Louisiana Checote and made known to the court as stated, and that she had filed in this court a transcript of the pleadings, evidence, and judgment, and moved the court to affirm said judgment. But we are unable to do so, for the reason that no statute is in force in this jurisdiction providing for the affirmance by this court of a judgment where the losing party in the trial court files a supersedeas bond there and fails to prosecute a proceeding in error in this court. 3 Cyc. says: "In most jurisdictions provision is made, by statute or rule of court, for the affirmance of the judgment appealed from, on a proper application by appellee, where appellant fails to prosecute his appeal as required by law." Not so here.

Motion overruled.

(9 Okl. Cr. 719)

BAUGH et al. v. STATE.

(Criminal Court of Appeals of Oklahoma. April 12, 1913.)

Appeal from Seminole County Court; T. S. Cobb, Judge.

Charley Baugh and S. Moore were convicted of violating the prohibitory liquor law, and they appeal. Affirmed.

A. S. Norvell, of Wewoka, for appellants. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. Appellants were found guilty of violating the prohibitory liquor law, and their punishment was assessed at a fine of \$75 each and 30 days each confinement in the county jail. We find no material error in the record. The judgment of the lower court is in all things affirmed.

It being made to appear to the court that

the present county judge of Seminole county is disqualified from acting in this matter, the clerk of the county court of Seminole county is hereby directed, upon receipt of the mandate of this court, to forthwith issue warrants for the enforcement of the judgments against both of the appellants.

(9 Okl. Cr. 128)

TEGELER v. STATE.

(Criminal Court of Appeals of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. GRAND JURY (§§ 2, 8, 17*) — CLERKS OF COURTS (§ 6*)—CRIMINAL LAW—IMPANELING GRAND JURY — POWERS OF DEPUTY CLERK — CHALLENGES TO PANEL — DISCRETION OF COURT.

(a) The act of the Legislature of the territory of Oklahoma directing the manner in which grand juries should be impaneled was expressly repealed by Act Cong. Feb. 9, 1903, c. 155, § 34 Stat. 11.

(b) A deputy clerk may perform the purely ministerial duties which are performed by the clerk of the district court in the matter of recording the list of jurors upon the journal of the court and certifying to the correctness thereof.

(c) It was not error for the trial court to overrule a challenge to the panel of the grand jury because the grand jury was selected after the commencement of the term of the court at which the indictment complained of was returned, instead of before the commencement of such term.

(d) A substantial compliance with the law in the matter of selecting, summoning, and impaneling grand jurors is all that the law requires.

(e) It is discretionary with the court to permit the withdrawal of a plea of not guilty for the purpose of allowing a defendant to file a motion to set aside an indictment, and such action will not be reviewed upon appeal, unless an abuse of this discretion is shown.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 1, 16-20, 42-47, 52; Dec. Dig. §§ 2, 8, 17; Clerks of Courts, Cent. Dig. §§ 12-20; Dec. Dig. § 6.*]

2. CRIMINAL LAW (§§ 134, 1150*)—CHANGE OF VENUE—PROCEEDINGS.

(a) Where a defendant has filed a motion for a change of venue supported by affidavits as provided by law, the state may file counter affidavits putting in issue the grounds upon which such change of venue is sought.

(b) Where a motion for a change of venue is filed and affidavits in opposition to such change of venue are presented by the state, the court may have the parties making such affidavits on both sides or such other persons as the court may think proper sworn as witnesses and examined in open court regarding the controversy.

(c) The presumption of law is that a defendant can get a fair and impartial trial in the county in which the offense was committed, and, if this is not true, the burden is upon the defendant who seeks a change of venue to establish his right thereto.

(d) The granting of a change of venue is discretionary with the trial court, and will not be reviewed upon appeal, unless it is made clearly to appear that there has been an abuse of this discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252, 3044; Dec. Dig. §§ 134, 1150.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. JURY (§§ 33, 84, 97, 99, 103*)—CRIMINAL LAW (§ 1162*)—RIGHT TO JUSTICE—QUALIFICATIONS OF JURORS—"PREJUDICE"—"IMPARTIAL"—HARMLESS ERROR.

(a) It is the constitutional right of every citizen of Oklahoma, if charged with a criminal offense, to have a public trial by an impartial jury of the county in which the offense was committed, and that upon such trial justice shall be administered to him without sale, denial, delay, or prejudice.

(b) The acts of the Legislature with reference to the conduct of criminal cases and the qualifications of jurors must be construed in connection with and in subordination to the provisions of our Constitution. The words "prejudice" and "impartial," as used in our Constitution, have no narrow, technical meaning in a legal sense, and must be construed as used in the everyday affairs of life, and as understood by persons of ordinary intelligence.

(c) "Prejudice" means prejudged; without due examination; an opinion formed beforehand.

(d) "Impartial" means not favoring one more than another; treating all alike; unbiased; equitable, fair and just.

(e) Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind to a fair consideration of the testimony, constitute no sufficient objection to a juror, but those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, and which will combat that testimony and resist its force, will disqualify a juror.

(f) Where a juror testifies on his voir dire that he has a fixed opinion as to the guilt of a defendant, which it will take strong evidence to remove, and that he was then upon one side of the case, such juror is clearly disqualified; and the mere fact that the juror may be of the opinion that he can try the case fairly and impartially by the testimony heard in court and the instructions of the judge does not qualify such juror.

(g) The doctrine of harmless error has no application to a case in which the defendant has been deprived of a substantial right.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 226-232, 401, 431-433, 435-437, 438-448, 456, 460, 481-479, 497; *Dec. Dig.* §§ 33, 84, 97, 99, 103; *Criminal Law*, Cent. Dig. § 3085; *Dec. Dig.* § 1162.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3418, 3419; vol. 6, pp. 5501, 5502; vol. 8, p. 7760.]

Appeal from District Court, Oklahoma County; G. A. Brown, Judge pro tem.

Rudolph Tegeler was convicted of murder and his punishment assessed at confinement in the penitentiary for life, and he appeals. Reversed and remanded for new trial.

Taylor, Prulett & Snigga, A. C. Oruce, A. N. Munden, and E. G. McAdams, all of Oklahoma City, for appellant. Smith C. Matson, Asst. Atty. Gen., and Sam H. Harris, for the State.

FURMAN, J. [1] First. When this case was reached for trial, appellant requested the court to permit him to withdraw his plea of not guilty, and file a motion to quash and set aside the indictment. This motion was by the court overruled, and the motion to quash the indictment which had been filed was stricken from the records, to all of which appellant duly excepted.

The motion to quash, and set aside the

indictment contains 44 separate paragraphs, alleging that the grand jury which found the indictment in this case was not organized as directed by law. There are a number of good and sufficient reasons why the trial court did not err in striking out and refusing to consider this motion. It is only necessary to state one of these reasons, viz.: The territorial law upon which counsel rely had been repealed nearly two years before this indictment was presented. The indictment in this cause was presented by the grand jury of the district court of Oklahoma county at the first term of said court after the incoming of statehood in 1907. The act of the Legislature of the territory of Oklahoma directing the manner in which grand juries should be impaneled was expressly repealed by the act of February 9, 1906, of the Congress of the United States. See *Federal Statutes Annotated*, Supplement 1909, p. 327; Act Feb. 9, 1906, c. 155, 34 Stat. 11. So it appears that the statute upon which counsel rely had been repealed nearly five years before the motion was filed, and nearly two years before the indictment was presented. If counsel had investigated this question thoroughly, they would have saved themselves much inventive labor in thinking up reasons why the law had not been literally complied with, for this court has twice passed upon this question and construed the act of Congress of February 9, 1906. In the case of *Reed v. Territory of Okl.*, 1 Okl. Cr. 481, 98 Pac. 583, 129 Am. St. Rep. 861, this court held that a deputy clerk may perform the merely ministerial duties directed by this act of Congress to be performed by the clerk of the district court in the matter of recording the list of the jurors upon the journals of the court, and certifying to the correctness thereof.

In the case of *Price v. Territory*, 1 Okl. Cr. 508, 99 Pac. 157, this court in construing this act of Congress held that it was not error for the trial court to overrule a challenge to the entire panel of the grand jury because the grand jury was selected after the commencement of the term of the district court at which the indictment complained of was returned, instead of before the commencement of such term, as provided by this act of Congress, and that the provisions of the act as to the time of the selection of the grand jury were directory only. These opinions have never been questioned, and will be found quoted in the Supplement of 1909 of the *Federal Statutes Annotated*, on page 328. All of the decisions cited by counsel for appellant were in cases where the indictments in question were presented by grand juries before the repeal of the territorial law. They therefore have no reference to the law existing at the incoming of statehood. This court is committed to the doctrine that where there has been a substantial

*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*.

compliance with the law with reference to the selection of a grand jury, and where no injury is shown to a defendant, a motion to quash the indictment upon the grounds relied upon in this case should be denied. It is nowhere contended in the brief of counsel for appellant that there was a failure to comply substantially with the requirements of the act of Congress of 1896 which was in force when this indictment was presented in the matter of impaneling the grand jury. The trial court, therefore, did not err in striking from the record the motion to set aside the indictment.

In addition to this, the court had the right to refuse permission to withdraw the plea of not guilty. The statutes on this subject are specific and reasonable. The failure of a defendant to file a motion to set aside an indictment at the proper time cannot reasonably be said to give him the right to file such a motion at any time upon the ground that the facts stated in such motion were not previously known to one of his attorneys when appellant had had for years a number of other attorneys employed in his defense. Even if the motion now under consideration had been good upon its face, it was discretionary with the court to permit the withdrawal of the plea and a consideration of the motion. This is not an open question in Oklahoma. See *Hunter v. State*, 3 Okl. Cr. 533, 107 Pac. 444; *Weatherholt v. State*, 131 Pac. 185, decided at the present term. The views expressed in these cases are without exception sustained by the authorities.

In the case of *State v. Lamon*, 10 N. C. 175, the Supreme Court of that state said: "It is complained of that the prisoner moved the court for leave to withdraw his plea of not guilty, and to plead in abatement, or to add a plea in abatement, to the plea of not guilty, which the court refused. This, however, was a subject altogether with the discretion of the court, and could not be claimed as a matter of right, for, when the prisoner had once pleaded, he was bound to abide by the defense he had chosen. An act done in the exercise of a legal discretion is not the subject of appeal to this court." In the case of *Richards v. State*, 82 Wis. 172, 51 N. W. 652, the Supreme Court of Wisconsin said: "Assuming (but not deciding) that there was a failure or omission of a legal examination, the accused waived the same by pleading to the merits before he offered or attempted to interpose the plea in abatement. His application, after such waiver, for leave to withdraw his plea in bar, and to interpose such plea in abatement, was therefore addressed to the sound discretion of the circuit court, and the refusal of the court to grant such leave cannot properly be held erroneous, unless there was a clear abuse of discretion involved in the ruling. Considering that the application was delayed until the cause was called for trial and the

prosecution had been put to the expense of preparing for trial, and considering also that, had the application been granted, and had judgment gone for the accused on the dilatory plea, it would not have barred—presumably would not have prevented—the institution of another prosecution for the same crime, we are unable to say that the denial of the application was an abuse of discretion. On the contrary, under the circumstances of the case, we think it was a very proper exercise of its discretion by the circuit court." In 12 Cyc. p. 800, the law on this subject is stated as follows: "It is wholly in the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but, unless an abuse of discretion is shown, the refusal to permit the withdrawal of a plea is not error." See, also, the following authorities: *State v. Collyer*, 17 Nev. 275, 30 Pac. 891; *Adams v. State*, 28 Fla. 511, 10 South. 106; *Mills v. State*, 76 Md. 274, 25 Atl. 229; *Early v. Commonwealth*, 86 Va. 921, 11 S. E. 795; *People v. Allen*, 43 N. Y. 28.

In this case the plea interposed was purely dilatory. If it had been sustained, it would not have barred or prevented the presentation of another indictment against appellant by the grand jury of Oklahoma county. Under all of the circumstances, we think that, even if the motion had been good upon its face, the ruling of the trial court was a proper exercise of discretion.

[2] Second. Appellant filed a motion for a change of venue, in which it was alleged that the minds of the inhabitants of Oklahoma county were so prejudiced against appellant that he could not receive a fair and impartial trial in said county. This motion was duly sworn to by appellant. It was supported by the affidavits of five compurgators. In reply to this motion, the state filed the affidavits of 104 citizens of Oklahoma county, in each of which it was stated that there was no such feeling or prejudice against appellant in Oklahoma county as would prevent him from having a fair and impartial trial before a jury of said county. Section 28, *Williams' Const. of Okl.*, provides that the venue of a criminal case may be changed to some other county of the state on the application of the accused. Section 6766, *Comp. Laws 1909*, among other things, provides that a change of venue may be had on the application of the defendant by petition, setting forth the facts verified by affidavit, supported by the affidavits of at least three credible persons who reside in said county. It further provides that the county attorney may introduce counter affidavits "to show that the persons making affidavits in support of the application for a change of venue are not credible persons, and that a change is not necessary." Under this statute, the state may file counter affidavits stating any fact or facts that would

show that a change of venue was not necessary. If the court is of the opinion upon an inspection of the affidavits filed in support of and in opposition to a motion for a change of venue that a change of venue should not be granted, then it should be so ordered; but, if the court is not satisfied on this question, it may have all of the parties making these affidavits on both sides and such other persons as the court may think proper sworn as witnesses and examined in open court touching the matter in controversy. The presumption of law is that a defendant can get a fair and impartial trial in the county in which the offense was committed, and, if this is not true, the burden is upon the defendant to establish his right to a change of venue. The granting of a change of venue is by the Constitution and statute made discretionary with the trial court, and this court will not reverse a ruling of the trial court denying an application for a change of venue, unless it is made clearly to appear that there has been such an abuse of this discretion as to amount practically to a denial of justice. By abuse of discretion is meant a clearly erroneous conclusion and judgment; one that is clearly against the logic and effect of the facts presented in support of and against the application. Whatever the decisions in other states may be, this is not an open question in Oklahoma. See *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356; *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988; *Black v. State*, 8 Okl. Cr. 547, 107 Pac. 524; *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300.

[3] Third. Appellant complains at the action of the trial court in overruling his challenge to a number of the jurors. Section 14, Williams' Const. of Okl., is as follows: "The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Section 28, Williams' Const. of Okl., among other things, provides: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed." These two sections of our Constitution constitute the paramount law which must control in the selection of juries and the conduct of all criminal trials in the state of Oklahoma. Any act of the Legislature with reference to the conduct of criminal cases, and the qualifications of jurors must be construed in connection with and in subordination to these two provisions of our Constitution. Justice must be administered without prejudice, and the juries in criminal cases must be impartial in the courts of Oklahoma, is the express and imperative mandate of our Constitution, and

by this mandate we are bound, it matters not what our individual views may be or what any other court may have decided. This is the end of the matter, and shuts out all discussion so far as the courts of Oklahoma are concerned. The words "prejudice" and "impartial" have no narrow, technical meaning in a legal sense, but are words commonly used in the everyday affairs of life, and their meaning is well understood by all persons of ordinary intelligence. Webster's New International Dictionary defines "prejudice" as "an opinion or judgment formed beforehand, or without due examination; a prejudgment." It therefore necessarily follows from this that justice is not administered without prejudice where the jury have prejudged the matters of fact submitted to them for determination. Webster's New International Dictionary defines "impartial" as "not favoring one more than another; treating all alike; unbiased, equitable, fair, and just." It therefore necessarily follows that, if a juror favors one side in a criminal case more than the other, such juror is not "impartial."

This interpretation of the two provisions of the Constitution above quoted is not only in harmony with common sense and justice, but it is supported by the great weight of legal authority. We will only cite a few of the decided cases. "Prejudice" is prepossession; judgment formed beforehand without examination. *Hudgins v. State*, 2 Ga. (2 Kelly) 173, 176. "Prejudice" means prejudgment, judgment beforehand; and such is its meaning when applied to a juror. *State v. Anderson*, 14 Mont. 541, 545, 37 Pac. 1. "Prejudice" means a prejudging of a case from any cause. It means a settled and fixed opinion, either as to the guilt or innocence of an accused, no matter from what cause that opinion is derived or upon what it is based, whether from rumor, hearsay, newspaper report, or evidence upon a former trial, or from anything else, if it is fixed and settled. *Hinkle v. State*, 94 Ga. 595, 597, 21 S. E. 595, 600. The word "prejudice," as used in Code Cr. Proc. art. 578, providing for a change of venue when there exists so great a prejudice against the accused as to preclude a fair trial, refers to a prejudice which may exist, either as against the accused himself, or by reason of a prejudgment of his cause. *Randle v. State*, 34 Tex. Cr. R. 43, 57, 28 S. W. 953, 954. "Prejudice," as used with respect to veniremen, means the same as prejudgment; that is, one who has prejudged a person's guilt of the accusation charged against him has a prejudice against such person. *Randle v. State*, 34 Tex. Cr. R. 43, 28 S. W. 953, citing approvingly in *Faulkner v. State*, 43 Tex. Cr. R. 311, 65 S. W. 1093, 1095. The word "prejudice" in a statute making the prejudice of a juror a ground of challenge "seems to imply nearly the same thing as 'opinion,' a prejudgment

of the case, and not necessarily an enmity or ill will against either party. The statute intended to exclude any person who had made up his mind or formed the judgment in advance in favor of either side." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 297, 52 Am. Dec. 711. "Prejudice" means prejudgment, judgment beforehand: *State v. Anderson*, 14 Mont. 541, 37 Pac. 1. "According to the definition of our standard lexicographers, a man who is impartial is one who is not biased in favor of one party more than another; who is indifferent, unprejudiced, disinterested; as an impartial judge or arbitrator. The primary idea contained in this definition is freedom from personal bias, indifference between the parties as persons; not prejudiced against one or the other; disinterested as between them." *Eason v. State*, 65 Tenn. (6 Baxt.) 466, 469. "Impartial" means not partial; not favoring one party more than another; unprejudiced; disinterested; equitable; just. *Randle v. State*, 34 Tex. Cr. R. 43, 28 S. W. 953, citing *Webst. Dict.*; *Curry v. State*, 5 Neb. 412, 413; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 498, 16 Atl. 554; *Cole v. Curtis*, 16 Minn. 182, 194 (Gil. 161). "A juror, to be impartial, must, to use the language of Lord Coke, be indifferent as he stands unsworn." *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244 (quoting *Co. Litt.* 155b). "As used in Const. § 9, art. 1, securing to the accused in all criminal prosecutions a public trial by an impartial jury, the word is not used exclusively in its primary sense, as freedom from any bias, or indifference or disinterestedness. An impartial juror is one who enters the box indifferent in feeling and in opinion." *Eason v. State*, 65 Tenn. (6 Baxt.) 466, 469. "The constitutional guaranty that in all criminal prosecutions the accused shall have the right of trial by an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested. This right to have an impartial jury cannot be abridged, and therefore the body of the triers should be composed of men indifferent between the parties, and otherwise capable of discharging the duty of jurors. Whether in the practical administration of justice the right is infringed is necessarily a judicial question, and whether, in a particular case, a proposed juror has the state of mind which will render him impartial, is a question of fact which it is the duty of the court trying the case to decide." *Curry v. State*, 5 Neb. 412, 413. "'Impartial,' as applied to a jury, means not favoring a party or an individual because of the emotions of the human mind, heart, or affections. It means that, to be impartial, the party, his cause, or the issues involved in his cause, should not, must not, be prejudged." *Randle v. State*, 34 Tex. Cr. R. 43, 58, 28 S. W. 953, 954. With

this explanation and construction of the provisions of our Constitution governing this matter we will now consider our statutory provisions. Section 6814, Comp. Laws 1909, is as follows: "In a challenge for implied bias, one or more of the causes stated in the second preceding sections must be alleged. In a challenge for actual bias the cause stated in the second subdivision of the third preceding section must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor; statements in public journals, or common notoriety; provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court." It will be seen from an examination of this section of our statute that any juror who has formed or expressed an opinion from any source whatever upon the matter or cause to be submitted to him is *prima facie* disqualified, unless it appears to the court that such juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

In the early case of *Johnson v. State*, 1 Okl. Cr. 343, 97 Pac. 1068, 18 Ann. Cas. 300, this provision of our statute was construed in connection with the provision of our Constitution as follows: "But the enumerated causes of challenge in the statute are not exclusive of all others not enumerated. When the juror has any opinion as to the guilt of the defendant, it matters not how this opinion was formed, the closing paragraph of the statute provides that it must appear to the court that the juror can and will act fairly and impartially in the case. But, if this provision was not in the statute, we would be forced to place this construction upon the first part of the statute, because section 29 of our Constitution (Bunn's Ed.) is in this language: 'In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury.' Const. art. 2, § 20. Any statute which would even tend to deprive a defendant of a trial by an impartial jury would be unconstitutional and void. Although a juror may know absolutely nothing about the facts of the case, and may not have the slightest opinion as to the guilt of the defendant, yet, if from any cause or upon any ground it appears to the trial court that the juror is biased or prejudiced against the defendant, it cannot be said that he would be a fair and impartial juror, and he should be excluded from the jury; otherwise the Constitution of the state would be disregarded and trampled upon. The trial court should resolve all doubts upon this matter in favor of the defendant. Upon the other

hand, when no personal, class, or race bias or prejudice appears to exist in the mind of the juror against the defendant, but it does appear that from rumor, or reading the public press, or from notoriety, the juror has an opinion as to the guilt of the defendant, but that such opinion will not combat the testimony or resist its force, and the court is satisfied that the juror can and will lay this opinion aside, and base his verdict alone upon the testimony of the witnesses and the instructions of the court, then the juror is competent. To our minds this is the duly rational construction which can be placed upon our statute." Whenever upon the examination of a juror it appears that he has an opinion as to the guilt or innocence of the accused, or whenever the fairness and impartiality of such juror is called in question, the trial court must be clearly satisfied that such juror is fair and impartial, and that such opinion will not in any manner influence such juror in considering the testimony and arriving at his verdict, and it is the duty of the trial court to resolve all doubts on this question in favor of the accused; otherwise the constitutional provisions hereinbefore quoted would become idle and nugatory.

In the case of *Scribner v. State*, 3 Okl. Cr. 610, 108 Pac. 426, 35 L. R. A. (N. S.) 985, in an opinion by Judge Owen, this court said: "It has been urged in this case that on the evidence produced the jury could not have returned other than a verdict of guilty, and therefore the defendant was not prejudiced by reason of the fact that some of the jurors had formed an opinion as to his guilt. As to whether a different verdict could not have been returned on the evidence we are not called upon to decide. We might concede that such is true; that being true, we cannot agree that the defendant was not deprived of the rights guaranteed to him under our Constitution. The fact remains that this jury fixed his punishment at death. In determining this case, although the evidence may show the defendant guilty beyond all peradventure of a doubt, and sufficient to support a verdict with the death penalty, we must nevertheless set a precedent under which a perfectly innocent man may be tried and have preserved to him his constitutional rights of the presumption of innocence and a trial before an impartial jury. If a juror has prejudged the guilt of the defendant before hearing the sworn testimony, then it cannot be said that the defendant had a trial before an impartial jury. It is a physical impossibility for a juror, who has an opinion based on what he has understood to be the facts in the case, to weigh the evidence as though he had never heard of the case, and had not already made up his mind. He may have an earnest and conscientious desire to do so and to deal out exact justice, but he will unconsciously attach a greater weight to the evidence which conforms to his pre-

conceived opinion than he would otherwise do. He is not in that frame of mind which the Constitution contemplates, and which is necessary to enable him to fairly and impartially judge as to the weight to be given to the evidence of each witness appearing before him. The determination of the qualifications of a juror is a matter addressed to the discretion of the trial court, and the question to be determined here is whether the trial court in this case abused this discretion, to the prejudice of the defendant. After a careful review of the numerous authorities called to our attention by the counsel in the case, and those which we have been able to find by our own efforts, we are convinced that the court did abuse such discretion to the prejudice of the defendant. The principle that every reasonable doubt must be resolved in favor of the defendant applies in this instance as well as to the evidence offered before the jury on the final trial. The evidence offered as to the qualifications of the jurors enters into and becomes a material part of the trial, as much so as the evidence offered by the witnesses on the part of the state, and in this case the trial court should have resolved that doubt in favor of the defendant, and sustained his challenge for cause to these jurors."

In the case of *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988, in an opinion by Judge Doyle, this court reaffirmed the doctrine announced in the case of *Johnson v. State*, supra, and in the case of *Scribner v. State*, supra. After quoting from *Johnson's* and *Scribner's* cases, Judge Doyle said: "Under the statute, an opinion formed or expressed as to the guilt or innocence of the defendant founded upon rumor or newspaper reports does not disqualify a juror, provided it appears to the court, upon the declaration of said juror, he can and will, notwithstanding such opinion, act impartially and fairly upon the law and evidence. As we construe the statute, the competency of a juror is a question of fact to be determined by the court in the exercise of a sound discretion and constitutes a legislative definition of the constitutional provision; however, it cannot be regarded as changing in any degree the essential qualifications which jurors must possess. It merely furnishes a test by which those qualifications are to be determined. It makes the declaration of the juror, 'that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him, competent, as bearing upon the question of his impartiality, and requires the court to consider such declaration, when so made.' The statute does not attempt to determine what shall be the probative force of the declaration of the juror, or how far it shall have the effect of relieving him on the qualification arising from such an opinion. The declaration when so made is evidence to be received and giv-

en such weight as, under all circumstances appearing, it is fairly and justly entitled to. Before it can operate to remove the disqualification, the court must be satisfied of its truth, and that question is left to be determined from all the facts and circumstances appearing from his examination upon the voir dire. In the case of *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, a similar statute was construed. Chief Justice Bailey, rendering the opinion of the court, in part said: 'In the review of the authorities we have already made, it has sufficiently appeared that where the opinion of the juror is only slight or transient, or is hypothetical, very considerable reliance is placed upon his statement under oath that his opinion is not of such character as will interfere with his action as a juror. Indeed, where the opinion is shown to be of that character, such statement is usually one of the most satisfactory tests of the juror's impartiality. But the holding of this and other courts is substantially uniform that, where it is once shown that there exists in the mind of the juror at the time he is called to the jury box a fixed and positive opinion as to the merits of the case, or as to the guilt or innocence of the defendant he is called to try, his statement that, notwithstanding such opinion, he can render a fair and impartial verdict according to the law and the evidence, has little if any tendency to establish his impartiality. This is so because a juror who is shown to have in his mind a fixed and positive opinion as to the guilt or innocence of the accused is not impartial, as a matter of fact, to say nothing of those legal conclusions which formerly prevailed, and which would still prevail, if the statute were not in existence. His statement that he can render a fair and impartial verdict does not tend to show that he is not partial, since it does not tend to show the nonexistence of the fixed and decided opinion to which he had already confessed. It merely tends to show that the juror, while admitting that he has prejudged the prisoner's guilt, believes in his ability to act as though he had not done so, or that, while admitting his actual partiality, he believes in his ability to act as though he were impartial. It being constantly kept in mind that the fact to be proved by the juror's answer is that he is impartial in the constitutional sense of the word, it is difficult to see how, after a juror has avowed a fixed and settled opinion as to the prisoner's guilt, a court can be legally satisfied of the truth of his answer that he can render a fair and impartial verdict, or find therefrom that he has the qualifications of impartiality, as required by the Constitution.' The fact in the present case that the juror was possessed of an opinion that the defendant was guilty, and that this opinion was based upon the statements of the two principal witnesses for the state, whose

names appear as the first indorsed upon the indictment, and upon whose testimony the state expected to prove its case, was clearly sufficient to render the juror incompetent, and we believe that the court below erred in overruling the defendant's challenge for cause to the juror Blackburn."

Let us now apply the principles of law hereinbefore stated to the question now before us. We only deem it necessary to discuss the objections made to J. B. Johns, who acted as foreman of the jury. He frankly stated in answer to the first question that he had formed an opinion as to the guilt or innocence of the defendant; that he was present for a short time at one of the former trials of the defendant; that it was possible that he may have talked with some of the witnesses in the case, but that he was positive he had talked with other parties who detailed to him the purported evidence in the case, and that he had read accounts of this matter in the newspapers; that evidence might change the opinion which he had as to the guilt or innocence of the defendant, provided such evidence was sufficient to overcome it; that, if selected as a juror, it would be his duty to try the case under the instructions of the court and from the evidence heard upon the witness stand; that, if such evidence was sufficient, it would change the opinion which he then had as to the guilt or innocence of the defendant.

On cross-examination by counsel for appellant the record contains the following questions and answers:

"Q. All right; now we will get at it this way. You have an opinion now as to this man's guilt or innocence, haven't you? A. Yes, sir. Q. You are standing now on one side of this question, aren't you? A. Yes, sir. Q. Now, if you are sworn as a juror, you would go into the jury box having that opinion, wouldn't you? A. Yes, sir. Q. And you say it would require strong evidence to remove that opinion? A. Sufficient. Q. Yes. If what you hear here on the witness stand is in harmony with what you heard before going into the jury box, that opinion never would be changed, would it? A. Unless subsequent evidence would change it. Q. Well, now; catch my question, Mr. Johns. I think you understand it fully. If what you hear here on the witness stand in this case is in harmony, and not in conflict with what you have heard in the past, that opinion would not be changed when you would go to make up your verdict, would it? A. No, sir. * * * Q. Now, Mr. Johns, so I can explain to you. Now, taking for granted that your opinion is one way or the other, that the defendant is guilty or that he is innocent, now, I will give you the two propositions so you can thoroughly understand them, and don't answer the first until I give you the second. If you should be selected as a juror in this case, if that opinion is that

the defendant is guilty, it would require less evidence upon the part of the state for you to convict him than it would if you did not have the opinion you have, and, if you believe him innocent, it would require greater evidence upon the part of the state for you to convict him than if you did not have that opinion. Your answer 'Yes' or 'No' just with the two propositions together. A. Yes; I think that would be the right answer, if I understand the question correctly. Q. In other words, you would go in there with a fixed opinion in your mind that would require strong proof to remove it? A. I think so; yes, sir. Q. You have no doubt about that, have you? A. None in the world.

"Mr. Pruett: Challenge the juror for cause.

"Examined by the Court: "Q. Did you ever sit on the trial of a felony case, Mr. Johns? A. No, sir. Q. If you are selected as a juror, you would be required and instructed to try the case and arrive at your verdict alone upon the evidence adduced in this case, under the instructions of the court as to what the law is; that the defendant is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, and in the event you have a reasonable doubt, after you have heard all the evidence, then you must acquit him. Now, if you were taken on the jury in this case, after you have heard the evidence, and sworn to try the case according to the evidence, could you do that and would you do it, uninfluenced in any degree by what you have read in the newspapers, or the opinion you have formed, or would you be influenced in arriving at your verdict by that opinion or those newspaper reports? A. I would be influenced; my mind would be influenced until changed by evidence to influence it; it would have no more effect than if I had not that knowledge or mind made up until it was changed by evidence that I was satisfied. Q. Well, you understand that, if you are taken as a juror, you are to try the case upon the evidence? A. Yes, sir. Q. Not upon what your personal idea might be. It would be your duty to ignore them—disregard them—it would not make any difference which way it is, and to try the case alone upon the evidence and base your verdict alone from the evidence heard, disregarding altogether what you have read or the opinion you have formed therein. A. Yes, sir. Q. Now, the question is, could you do that? A. I certainly could and certainly would. Q. You feel that you could and you would? A. Yes, sir. Q. Have you any doubt at all about your ability now to wholly disregard the opinion you have formed, and what you have read in the newspapers and return your verdict, if selected as a juror, alone upon the evidence heard here and submitted under the rules of the court? A. I could. Q. Have you any doubt at all about your ability to do that? A. None in the world."

The court held the juror competent and overruled appellant's challenge, to which appellant excepted and the juror was duly sworn.

This juror testified positively that he then stood on one side of the case, and that he had in his mind a fixed opinion as to the guilt of the appellant, which it would take strong evidence to remove. When asked as to whether he had any doubt about that, his emphatic reply was, "None in the world." Neither of these statements were ever modified by him. Considering the entire examination of this juror in connection with all of the facts which are presented by this record, and the effect is the same as if the juror had testified that he had a fixed opinion that appellant was guilty which it would take strong evidence to remove, and that the juror was then on one side of the case. With what show of reason and truth can it be said that justice has been administered without prejudice? What is the duty of this court? To feel the public pulse or to vindicate the supremacy of the Constitution? As is well said by Judge Doyle in Turner's case, supra: "But it may be said that the juror stated upon his voir dire that he had no bias or prejudice against the defendant, and that he could try the case fairly and impartially, and notwithstanding his opinion he would be governed exclusively by the evidence in the case and the instructions of the court, regardless as to what Carters had said. These statements were made in response to leading questions by the court, which questions were objected to by the defendant. In the case of State v. Otto, 61 Kan. 58, 58 Pac. 995, Justice Smith, delivering the opinion of the court, used this language: 'It is the duty of the court, imposed both by statute and by the principles of natural justice, to stand as a vigilant guard over the jury box, to the end that bias, prejudice, and preconceived opinions do not enter. It is better that the first impression of a case come from the testimony of the witnesses after the jurors are sworn to try the case. While there is recognized in the law a distinction between an impression and an opinion, yet there is so little difference between the two, and the step so short from one to the other that courts should be certain that a juror's mind which is possessed of the one has received it with pressure too weak to break over the dividing line.' The juror was probably sincere in his answers to the questions propounded, and he probably would make the same statements even though the questions were not leading, as he undoubtedly and honestly believed that he could try the case impartially. Men are seldom conscious of being biased or prejudiced, or of being in such a condition of mind that they could not try any case impartially." The fact that said juror did testify in answer to questions from the court that if selected as a juror he could and would wholly disregard such

opinion, and base his verdict alone upon the testimony and the charge of the court, did not in our judgment do away with and destroy the effect of his previous testimony; for, if it did, the juror would then become the judge of his own qualifications. When a juror states that he has an opinion as to the guilt of the defendant, he is not made competent to sit in the case merely because he may have stated that he can and will lay aside this opinion if taken on the jury and give the defendant a fair and impartial trial, and be governed alone in making up his verdict by the testimony of the witnesses and the charge of the court. No man is a competent judge of his own impartiality and of his own freedom from prejudice. No statute can clothe a juror with such judicial discretion and power. The competency of a juror is to be decided by the court, who is not bound by the answers made by such juror. It is the judge, and not the juror, who is charged with the duty of passing upon the competency of the juror, and in the discharge of this duty the judge may have recourse to any other means of information within his power. In fact, he should carefully investigate every source which would be calculated to throw any light upon the competency of the juror, and, if upon such investigation it does not clearly appear that such juror is competent, he should be excluded.

In this case the record shows that there had been three previous trials resulting from the death of James R. Meadows; that appellant had been tried twice, and Mrs. J. R. Meadows had been tried once; that full reports of the testimony and proceedings of these trials had been published in the Daily Oklahoman, a newspaper of large circulation and great influence; that as a result of these trials and publications more or less prejudice existed in the minds of a number of people against appellant which had resulted in a motion for a change of venue. While these things did not make it impossible for appellant to obtain a fair and impartial trial in Oklahoma county, yet they should have caused the trial judge to exercise the greatest caution in passing upon the qualifications of jurors to see that no one who had prejudged appellant should sit upon the jury. The fact that a juror had formed or expressed an opinion as to the guilt of appellant would not necessarily disqualify such juror. The question to be inquired into was as to whether or not this was a fixed opinion such as would place the juror on one side or the other of the case. A mere impression or transitory inclination of the mind which would readily yield to evidence would not constitute a disqualifying opinion. Chief Justice Marshall of the Supreme Court of the United States in *Burr's Trial*, Fed. Cas. No. 14,694, correctly states the rule of law in such cases as follows: "Light impressions, which may fairly

be presumed to yield to the testimony that may be offered, which may leave the mind to a fair consideration of the testimony, constitute no sufficient objection to a juror, but those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them—which will combat that testimony, and resist its force—do constitute a sufficient objection to him."

The juror Johns testified emphatically that he had a fixed opinion as to the guilt of appellant, which it would take strong evidence to remove, and that he was then upon one side of the case. Who can assert that this juror was not in a condition in which his mind would resist the testimony and combat its force? To hold that such a juror was qualified would be to suspend those provisions of the Constitution which guarantee to every man charged with crime an impartial trial and the administration of justice without prejudice. This court possesses no such power, and has no such inclination. The Constitution is not to be obeyed only when it is convenient to do so, and, when this is not convenient, it cannot be regarded as so much mere sentimental rubbish. It is our duty to give full and vital force to each and every provision of the Constitution which is involved in a criminal trial. The Constitution should be literally construed in favor of the rights and liberties of the people, but should be strictly construed against usurpations of authority and neglect of duty on the part of all officers from governor to constable.

But it is claimed that upon an examination of the entire record it clearly appears that appellant is guilty, and that the error of the trial court in this matter therefore becomes immaterial and harmless. We heartily assent to the proposition that, when a defendant has been properly indicted and the evidence clearly shows that he is guilty, a conviction should not be set aside on account of any error in matters of form or any technicality or exception which did not deprive the defendant of some substantial right. We have uniformly adhered to this rule, as our decisions will show; but it is an utter misconception of the doctrine of harmless error to suppose that, where a defendant has been deprived of a substantial right, such error was or could be harmless. The Constitution of Oklahoma and the Constitution of the United States declares that no person shall be deprived of life, liberty, or property without due process of law. There can be no such thing as due process of law in the trial of a case where the defendant has been deprived of a material constitutional right. We are not unmindful of the fact that appellant has been twice convicted for the murder of James R. Meadows. The first conviction was set aside, because after overruling a motion for a new trial, and before the case-made could be prepared and presented

to him for approval, Hon. J. G. Lowe, who presided at the first trial, departed this life. There being no provision of law permitting the approval of a case-made by any other person than the judge who presided at the trial, appellant without fault on his part was thereby deprived of his constitutional right to appeal upon a case-made. See *Tegeler v. State*, 3 Okl. Cr. 595, 107 Pac. 949, 139 Am. St. Rep. 976. There was a second trial, upon which the jury disagreed. Upon the third trial appellant was again convicted of murder. So two juries have said that appellant is guilty. The prosecution of this case has consumed much time and cost many thousand dollars to the people of the state of Oklahoma. We believe there should be an end to criminal cases, and that justice should be executed as speedily as possible. We also believe that the unnecessary reversal of convictions of guilty men places an unjust burden in the matter of expense upon the people. For these reasons, we are loath to disturb this verdict, except upon the most grave and serious grounds. But no court has the right to place a price upon or to elevate convenience and expense above justice. Section 14, Williams' Const. of Oklahoma, declares that justice shall be administered by the courts to every person without sale and without prejudice. In Oklahoma justice is not a luxury for the rich, but it is equally the right of the poor as of the rich, without regard to costs and trouble. It is the fundamental constitutional right of every citizen of Oklahoma to receive justice at the hands of the courts without sale and without prejudice, and in case of his indictment, to be tried by an impartial jury. The members of this court would be both cowards and traitors if, influenced by public clamor, they denied these rights to the humblest, poorest, and most friendless person, it matters not how strong and influential the feeling against him might be. It is of far more importance to the free, intelligent, and justice-loving people of Oklahoma that the principles declared in their Constitution should remain intact and be rigidly enforced, and that absolute fairness, impartiality, and justice should control the action of their courts than it is that one man, no matter how guilty, should be convicted. If the substantial provisions of the Constitution may be disregarded in one case, they may be disregarded in all cases, and thus a precedent be established which would eventually result in arbitrary punishment; a consummation dangerous to innocence, destructive to the harmony of the law and utterly inconsistent with our free institutions.

For these reasons, we feel that we are without discretion in this case, and that it is our plain duty to set aside this verdict and grant appellant a new trial for the errors hereinbefore pointed out.

The questions presented in the other assignments of error will probably not arise upon a subsequent trial of this case. It is therefore not necessary that they should now be discussed.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

ARMSTRONG, P. J., and DOYLE, J., concur.

(3 Okl. Cr. 176)

BISHOP v. STATE.

(Criminal Court of Appeals of Oklahoma. April 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—SUFFICIENCY OF EVIDENCE.

Where there is any evidence from which the jury could legitimately conclude that the defendant is guilty, a verdict will not be disturbed upon the ground that it is contrary to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—INTERNAL REVENUE LICENSE.

Where a person applies for and obtains a United States internal revenue license to engage in the business of a retail liquor dealer at a given place, and thereby secures immunity from prosecution by the United States on account of such sales, he cannot be heard to say, when prosecuted in a state court for violating its prohibitory liquor law, that he had no connection with the sale of such liquor at such place.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Appeal from Garfield County Court; Winfield Scott, Judge.

E. Bishop was convicted of maintaining a place for the sale of intoxicating liquors, and appeals. Affirmed.

A. J. Jones, of Enid, for appellant. O. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. Appellant, E. Bishop, and one Ollie Ostendorf were jointly prosecuted by information, charged with the offense of keeping and maintaining a place, during the month of August, 1912, in the city of Enid, where spirituous, vinous, and malt liquors were kept with intent to sell the same. A severance was requested, and appellant was placed first upon trial and was convicted, and his punishment assessed at a fine of \$500 and six months' confinement in the county jail.

[1, 2] But one question is presented upon appeal, and that is that the verdict is contrary to the evidence. The testimony is conclusive that the place in question, alleged to have been kept by appellant and Ostendorf, was maintained and kept for the purpose of selling intoxicating liquors. The contention

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of appellant is that it was not shown that he had any connection therewith. It is true that no witness testified that he ever saw the appellant at this place, but the state introduced a certified copy of the records of the United States internal revenue collector, showing that a United States internal revenue license was issued to E. Bishop, authorizing him to conduct the business of retail liquor dealer at the place and during the time named in the information.

Under the United States Law (section 3233, Revised Statutes [U. S. Comp. St. 1901, p. 2091]), before the revenue collector issues a license, the person to whom it is issued must register with the collector his name, place of business, and, in case of a firm, the names of the several persons constituting the firm. We therefore have the right to assume that E. Bishop complied with this statute prior to the issuance of a license to him.

Under the United States Law (section 3241, Revised Statutes [U. S. Comp. St. 1901, p. 2094]), when a person who has paid for the license desires to transfer the location of his business, he may do so; but before changing the location he must make a new registration with the collector showing the change. When this is done, the internal revenue collector's office makes a record of this transfer.

The certificate of the internal revenue collector in this case is dated January 28, 1913, and does not show any transfer under the license mentioned therein. But it is contended that there is no proof that appellant is the same person as E. Bishop to whom the license was issued. In the motion for a change of venue it was stated that the name of appellant was Edward B. Bishop. From this it is claimed that there is a variance between the name mentioned in the information and in the license and that of appellant. If the name of appellant had been improperly stated in the information, he might have had his true name entered of record. But he went to trial without objection under the name of E. Bishop, and it is too late now for him to claim that there is a failure of evidence in this respect. The law takes no notice of middle names, and if appellant applied for and received the license as E. Bishop he cannot be heard to complain that it was not issued in the name of Edward Bishop.

Appellant offered no evidence at all in his behalf, and did not try to explain any testimony for the state. If, as a matter of fact, the appellant was not the party mentioned in the certificate, it would have been a very easy matter for him to prove this fact. It was not necessary for the state to prove that appellant was present when the liquor was sold. It was enough for the state to prove that he had obtained a license to conduct this business, and that under said license sales occurred thereon. All persons concern-

ed in the commission of an offense are guilty as principals, whether they are present at its commission or not.

We think the evidence sufficient to sustain the verdict. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 135)

MCGLASSEN v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 5, 1913.)

(Syllabus by the Court.)

1. MALICIOUS MISCHIEF (§ 1*)—WHAT CONSTITUTES.

When personal property is defaced or destroyed, without malice, by a person acting in good faith under the belief that it is his and that he has a legal right to do the act complained of, a charge of malicious mischief cannot be sustained.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

2. INDIANS (§§ 12, 13*)—LANDS HELD IN COMMON—INCLOSURE—IMPROVEMENTS—REMOVAL.

(a) Prior to allotment, the lands of the Choctaws and Chickasaws were held in common, and, until legislation providing for allotment was passed, any member of such tribes had a right to inclose and occupy any unoccupied portion of the lands belonging to his tribe.

(b) A member of the Choctaw or Chickasaw Tribe, who was entitled to an allotment of the lands of said tribe, and who, after taking such allotment for himself and family, had improvements remaining on other lands, was entitled to remove the same or sell such improvements to other members of said tribe who were entitled to take allotment, or remove them, at his option.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28, 30; Dec. Dig. §§ 12, 13.*]

3. INDIANS (§ 36*)—CRIMES BY INDIANS—WHAT CONSTITUTES—EVIDENCE.

A member of the Choctaw or Chickasaw Tribe, who, at the time of allotment, had more lands inclosed than he and his family were entitled to take in allotment, and who removed fencing therefrom without knowing the same had been allotted, cannot be prosecuted for malicious mischief under the statute.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 63, 65; Dec. Dig. § 36.*]

Error from Carter County Court; M. F. Winfrey, Judge.

J. M. McGlassen was convicted of malicious mischief, and brings error. Reversed and remanded.

Sigler & Howard, of Ardmore, for plaintiff in error. Chas. West, Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, J. M. McGlassen, was convicted at the October, 1911, term of the county court of Carter county on a charge of malicious mischief.

The facts in this case show that McGlassen

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and his family were entitled to allotments of the lands of the Choctaws and Chickasaws. That prior to allotment he had fenced certain lands. That, without his knowledge, the prosecuting witness, William Toby, was allotted a portion of the lands which had been fenced by the accused. That subsequent to the allotment of the land by Toby, and when the accused was still without information that the same had been allotted, he removed certain wire fences and posts from the premises, whereupon an information was filed against him at the instance of Toby, and this conviction resulted.

A number of errors are assigned by counsel for the accused, among others error of the court in refusing the following instruction: "You are further instructed that if you believe, or have a reasonable doubt thereof, that the defendant, at the time he removed the fence, acted in good faith, believing he was the owner thereof and had a right to so remove same, you are instructed that you should acquit the defendant."

[1-3] This instruction should have been given. This court said in the case of *Colbert v. State*, 7 Okl. Cr. 401, 124 Pac. 78: " * * * An act will not constitute malicious mischief where it is done in good faith and under a reasonable claim of right. * * * In prosecutions for malicious mischief, malice toward the owner of the property injured is the gravamen of the offense, without which it would be a mere trespass. * * * The intent with which an act is done is material; and if it be shown that the defendant acted in good faith under a reasonable claim of right, the charge of malicious mischief cannot be sustained. * * *"

The doctrine upon which this case must stand or fall was thoroughly elucidated in the *Colbert Case*, supra, and a complete discussion of the principles involved herein will there be found. The opinion in the *Colbert Case* was handed down by this court subsequent to the trial of the case at bar. Prior to the *Colbert* decision, there had been no discussion of the statutes under which this prosecution was brought by this court, and this probably accounts for the fact that this case is before us with the record in the condition in which it is.

The proof in this case indicates clearly that the fence and posts removed by the accused were the fruits of his honest labor, and that the prosecuting witness had never invested a single cent therein. That the accused believed he had a right to remove the fence and posts; and we are unable to see how any other reasonable man could hold a contrary view. The most the prosecuting witness would be entitled to, under the law, would be to maintain a civil action for the value of the fencing, and we think that is doubtful. He certainly would not be entitled to invoke the power of the state to prosecute the ac-

cused criminally. In equity and good conscience, he is not entitled to anything, and ought to be required to pay the cost of this prosecution.

The judgment is reversed, and the cause remanded, with direction to dismiss.

DOYLE and FURMAN, JJ., concur.

(9 Okl. Cr. 172)

MITCHELL v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 12, 1913.)

(Syllabus by the Court.)

1. VAGRANCY (§ 3*)—EVIDENCE.

The information in this case charged the defendant with being a vagrant, to wit, "a professional gambler," and, upon the trial, the court admitted evidence of the defendant's general reputation to support the charge. *Held*, error, and that it devolves upon the state to prove the particular facts showing the defendant to be a professional gambler.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. VAGRANCY (§ 3*)—EVIDENCE—GENERAL REPUTATION.

Whether a defendant is or is not a professional gambler depends upon matters of fact, and not his reputation or character, and evidence of general reputation to prove such fact is not admissible.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. VAGRANCY (§ 1*)—"PROFESSIONAL GAMBLER."

A professional gambler is one who makes his living in pursuing the business or practice of unlawful gaming, by the use of cards, dice, or other gambling device, with the purpose of thereby winning money or other property, or who conducts either as owner or employé a place for gambling.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. VAGRANCY (§ 3*)—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* insufficient to support the verdict.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. § 3.*]

Error from Pottawatomie County Court; Ross F. Lockridge, Judge.

Ben Mitchell was convicted of vagrancy, and brings error. Reversed.

J. T. Williams, of Shawnee, for plaintiff in error. Chas. West, Atty. Gen., and Smith O. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, Ben Mitchell, was convicted of vagrancy in the county court of Pottawatomie county, and the judgment and sentence of the court was that he be confined in the county jail for a period of 30 days and to pay a fine of \$100. To reverse the judgment, an appeal was perfected.

Error is assigned upon the rulings of the court "in admitting evidence that the defendant's general reputation was that of a professional gambler." The information charged a violation of section 2790 of Comp. Laws 1909, which enacts that: "The following

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

persons are vagrants within the meaning of this act: * * *. Fifth. Any professional gambler, or gamblers commonly known as tinhorn gamblers, card players or card sharp. * * *"

Three witnesses testified for the state: E. A. Pierce, the first witness, testified that he was sheriff of Pottawatomie county, and knew defendant 13 years, and that he had lived in the town of McComb during that time. He was then permitted to testify, over the defendant's objections, properly made, as follows: "Q. Did you ever know him to be engaged in gambling? A. I never saw him gambling. Q. Are you acquainted with the general reputation of Ben Mitchell in the community where he lives, and from what the people say about him generally, on or about the 27th day of May, 1911, and three years prior thereto, as to his being a professional gambler? A. Yes, sir; he has a reputation of being a professional gambler." Similar questions were repeatedly asked and similar answers given. Substantially the same questions were asked of the next witness, R. W. Grimes, and the same answers given, over objections properly made. And Albert Coleman testified in answer to a similar question: "Some say he is a gambler, I was never in a gambling house. Don't know anything about it."

[1, 2] This evidence was merely hearsay, and its admission was error prejudicial to the substantial rights of the defendant upon the merits. The statute under which the defendant was prosecuted condemns as a vagrant "any person who is a professional gambler"; and evidence that the defendant was and is by reputation a professional gambler is not admissible; his acts, not his character, must be shown.

Thus in *Commonwealth v. Hopkins*, 2 Dana (Ky.) 418, the court said: "It is the general course of conduct, in pursuing the business or practice of unlawful gaming, which constitutes a common gambler. A man's character is, no doubt, formed by, and results from, his habits and practices; and we may infer, by proving his character, what his habits and practices have been. But we do not know any principle of law which sanctions the introduction of evidence to establish the character of the accused, with a view to convict him of offending against the law, upon such evidence alone. If the statute had made it penal to possess the character of a common gambler, the rejected testimony would have been proper. But we apprehend that the question whether a man is or is not a common gambler depends upon matters of fact—his practices, and not his reputation or character—and therefore the facts must be proved, as in other cases."

In the case of *Arnold v. State*, 28 Tex. App. 480, 13 S. W. 774, the headnote is: "The rule is elementary that, if an offense is laid generally in an indictment or information, evi-

dence of general reputation to prove such offense is not admissible; the particular facts which constitute the offense must be proved. The information in this case, in general terms, charged the accused with being a vagrant, to wit, a common prostitute, and upon the trial the court admitted evidence of general reputation to support the charge. Held, error, and that it devolved upon the state to prove the particular facts showing the accused to be a common prostitute." See, also, *Wharton's Crim. Ev.* 1-260.

[3] A professional gambler is a person who makes his living in pursuing the business or practice of unlawful gaming, by the use of cards, dice, or other gambling device, with the purpose of thereby winning money or other property, or who conducts, either as owner or employé, a place for gambling.

In this case it devolved upon the state to prove the particular facts showing that the defendant was a professional gambler, and for the jury to determine what inference shall be drawn from the facts proved; and this proof could not be made by evidence of his general reputation in that respect.

[4] It is also contended that the verdict is contrary to the evidence. We have read all the evidence, and it shows that the defendant lived in McComb, owned his home, had a family, and had a legitimate business. Our conclusion is that the evidence is insufficient to sustain the verdict.

The judgment of the lower court is therefore reversed, and the cause remanded thereto, with direction to dismiss.

ARMSTRONG, P. J., and FURMAN, J., concur.

(9 Okl. Cr. 184)

STARR v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 12, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1081*)—NOTICE OF APPEAL—NECESSITY.

Where an appeal is taken by a defendant, notice of such appeal must be served upon the clerk of the court in which the judgment was rendered and also upon the prosecuting attorney.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2722-2724, 2962; Dec. Dig. § 1081.*]

Appeal from District Court, Mayes County; Preston S. Davis, Judge.

Joe Starr was convicted of aggravated assault, and he appeals. Appeal dismissed.

A. C. Brewster, of Pryor, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. Appellant was convicted in the district court of Mayes county of an aggravated assault and his punishment was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assessed at confinement in the penitentiary for the period of one year and one day. From this judgment he attempted to prosecute an appeal. But no notices of appeal have been served upon the clerk of the district court of Mayes county or upon the county attorney as is required by law. These notices of appeal are jurisdictional, and when they have not been served this court does not acquire jurisdiction of the cause.

The appeal is therefore dismissed, with directions to the district court of Mayes county to proceed with the enforcement of its judgment.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 186)

WILLIAMS v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 12, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1130*)—APPEAL—FAILURE TO FILE BRIEF.

Where counsel for appellant fail to file a brief pointing out the specific errors upon which they rely, and also fail to appear and make an oral argument when the case is set for submission, the court will treat the appeal as abandoned, and will not examine the record, except for jurisdictional errors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

Appeal from District Court, Craig County; Preston S. Davis, Judge.

John Williams was convicted of perjury, and appeals. Affirmed.

Jas. S. Davenport, of Vinita, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. Appellant was prosecuted in the district court of Craig county, charged by indictment with the offense of perjury. He was found guilty, and the jury assessed his punishment at confinement in the penitentiary for the period of five years. From this judgment he has appealed. But no appearance has been made in this court by any one representing appellant as counsel. Neither has any brief been filed pointing out the supposed errors upon which the appeal was taken. We therefore assume that the appeal has been abandoned.

In the case of Price v. State, 5 Okl. Cr. 147, 113 Pac. 1061, this court said: "There are three good and sufficient reasons which support the rule requiring that briefs must be filed: First. The Attorney General's office is overcrowded with work, and it is unfair to that department, already burdened as it is, to be called upon to file a reply brief for the state, when no brief has been

filed on the part of the appellant. Every presumption must be indulged in favor of the regularity of the proceedings of the lower court; and he who complains of a want of such regularity has the burden of showing where such irregularity exists, and how he has been deprived of a substantial right thereby. When no such showing is made, the judgment of the trial court should be affirmed, unless it appears, upon the face of the record, that the court was without jurisdiction. Second. It is unfair to the public, when our docket is already crowded with cases which should be disposed of, to require the judges of this court to spend time in examining the record in each case to see if errors were not committed by the trial court, although none are complained of. Third. It is unfair to the members of this court, who are already burdened with work to the limit of human endurance, to expect its members to search records for errors, either real or supposed, of which counsel for appellant do not complain, and of which they think so little that they have not taken even the time and trouble to call the attention of the court to them. Where counsel perfect an appeal and fail to file briefs, it is equivalent to saying to the members of this court, 'I have taken this appeal only for the purpose of delay,' or 'If errors occurred in the trial of this cause, I do not know it, and I want you to get out a search warrant and see if you can find any.' This is just what we understand when a cause is submitted, and we find that briefs have not been filed. Owing to the great multiplicity of appeals that have been taken, we are now over one year behind with our work, although we give it our entire and undivided time and attention. We cannot act in the double capacity as counsel for parties and as a court. This court does not act upon the presumption that everything which was done in the lower court is erroneous until it is shown to be correct, and is not hunting for excuses to set aside verdicts and judgments; but, on the contrary, we act upon the presumption that all proceedings in the trial court are proper and regular until it is shown that such is not the case. The appellant assists in the selection of the jury, and he thereby vouches to this court for their intelligence, fairness, and integrity. Being thus recommended, the court must accept the verdict of the jury as being correct, unless the appellant clearly points out errors committed by the judge or jury. It is the duty of this court to decide questions properly submitted to it; and when no briefs have been filed, except in cases of the gravest character, we will not do more than examine the record for jurisdictional errors."

Owing to the gravity of this case, we have examined the record. The indictment is regular, the evidence is sufficient, and we find no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prejudicial errors in the instructions of the court.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 189)

JONES v. STATE.

(Criminal Court of Appeals of Oklahoma. Oct. 15, 1912. Rehearing Denied April 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1105*)—APPEAL AND ERROR—RECORD—TRANSCRIPT.

A transcript of the record, not certified by the clerk of the district court, will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887-2889; Dec. Dig. § 1105.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§§ 1098, 1104*)—"CASE-MADE"—"TRANSCRIPT OF RECORD."

A "case-made" consists of those things which transpired in court during the trial, and which are not a part of the record, while a "transcript of the record" contains everything of which the clerk is required to make a record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2863, 2865, 2776, 2885, 2886; Dec. Dig. §§ 1098, 1104.*]

Appeal from District Court, Atoka County; Robert M. Rainey, Judge.

Jonas Jones was convicted of murder, and his punishment assessed at confinement for life in the penitentiary, and he appeals. Dismissed.

See, also, 3 Okl. Cr. 593, 107 Pac. 738.

James E. Whitehead, of McAlester, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. [1] Section 6951, Comp. Laws 1909, regulates the manner in which an appeal must be taken. Among other things it provides as follows: "The plaintiff in error shall attach to and file with the petition in error the original case-made filed in the court below, or a certified transcript of the record of said case. * * * The case and amendments shall be submitted to the judge who shall settle and sign the same and cause it to be attested by the clerk or county judge and the seal of the court to be thereto attached. It shall then be filed with the papers in the case. Such original case-made shall be filed with the petition in error." This statute was passed prior to statehood, and at that time many of the county judges did not have clerks. Therefore the provision for the county judge to attest a case-made in his court. A case does not become a case-made until it is made as above directed and filed with the papers in the case. Prior to such filing, the matters therein stated are no part of the record.

[2] The case-made consists of those things which transpired in court during the trial, and which are not a part of the record. The certificate of the trial judge that these things happened is necessary to make them a part of the record and bring them before this court for review upon appeal. The transcript of the record is entirely another thing. It includes a copy of the record of the action, namely, the indictment, the clerk's minutes of the trial, the charges given or refused, and the indorsements, if any, thereon, the verdict, and a copy of all orders or judgments of the court in the case. In fact, it contains everything of which the clerk is required to make a record. See section 6919, Comp. Laws 1909. It is seen from this statute that a party appealing may bring up the entire case for review, if he so desires, which will include the case-made and transcript of the record, or, if he desires, he may appeal alone upon a case-made or a certified transcript of the record.

There is in this record what purports to be a case-made, but upon an examination we find that it lacks every element of a case-made. This case has been before us once before. The first appeal will be found in 3 Okl. Cr. 593, 107 Pac. 738. The opinion was delivered on the 30th day of March, 1910, and the case was reversed and remanded for a new trial.

More than two-thirds of what purports to be the case-made now before us relates entirely to the first trial of this cause, and purports to be a copy of the record of that trial, and states matters which did not occur upon the second trial, and of which the judge, who presided at the second trial, could have no personal knowledge, because he did not preside at the first trial.

We have not overlooked the case of Day v. State, decided at the May term of this court. See 7 Okl. Cr. 274, 123 Pac. 436. Judge Doyle, speaking for the court, there said: "An application for a change of venue and affidavits in support thereof, and proceedings had thereon, are not properly a part of the record, and can only be presented for review on appeal by incorporating the same into a bill of exceptions, as provided by article 12 of Procedure Criminal (Comp. Laws 1909, §§ 6885-6894), or by a case-made. Only the record proper can be reviewed by this court on appeal by transcript under the certificate of the clerk of the trial court. For this reason, the question argued by the defendant's counsel cannot be reviewed upon the record before us." This is in harmony with the views herein expressed, because the application for a change of venue and the affidavits in support thereof set out in this pretended case-made were presented to and passed upon by another judge. If appellant had desired to make these things a part of the case-made, he should have presented

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

them in proper form to Judge Rainey, who tried this case, otherwise it would be legally impossible for Judge Rainey to certify to them. Therefore we cannot consider the application and affidavits contained in this pretended case-made, which were presented to and passed upon by a preceding judge, and their improper incorporation in this record does not make it a case-made. It is true that the order granting the change of venue is properly in the record, because it purported to be a judgment of the court; but we cannot consider it because not certified to by the clerk of the court, as the law directs. That portion of the purported case-made now before us, which relates to the second trial of this cause, contains nothing except a copy of the clerk's minutes of the trial, the verdict, the motion in arrest of judgment, and the order of the court thereon, and the final judgment of the court. These things were all matters of record; and, if appellant desired to bring them before us, he should have had the transcript of the record properly certified by the clerk of the court as the law requires. A judge cannot certify to the records of his court, because he is not the custodian of such record, save and except in those cases where a county judge has no clerk, and he performs the clerical work himself.

As was said by Judge Doyle in the case of Day v. State, supra: "Only the record proper can be reviewed by this court on appeal by transcript under the certificate of the clerk of the trial court. For this reason, the question argued by the defendant's counsel cannot be reviewed upon the record before us."

In the case of Cohn v. State, 4 Okl. Cr. 493, 113 Pac. 219, Judge Richardson, speaking for this court, said: "A transcript of the record proper can be authenticated only by the custodian of the record, and this the special judge is not. The regular judge of the county court is the custodian of the records of the county court just as the clerk of the district court is the custodian of the records of that court." This case was tried before a special judge in the county court of Pittsburg county, and the special judge attempted to verify a transcript of the record, and the appeal was dismissed on the ground that he was not the custodian of the records.

In the case of Durant v. State, 3 Okl. Cr. 447, 106 Pac. 651, this court said: "A transcript of the record, not certified to by the clerk of the district court, will not be considered on appeal."

In the case of Sampson Lewis v. State, 3 Okl. Cr. 449, 106 Pac. 647, this court said: "There is no certificate of the clerk of the district court to what purports to be the transcript of the record. The clerk must certify to the accuracy of the transcript. There is nothing before this court which we can consider."

In the case of David Makatch v. State, 5

Okl. Cr. 34, 113 Pac. 200, this court said: "Where an appeal is attempted to be taken upon a transcript of the record, the clerk of the court, from which the appeal is taken, must certify that the transcript contains a true and correct copy of the record of the proceedings of the lower court."

In the case of Dobbs v. State, 5 Okl. Cr. 481, 115 Pac. 371, this court said: "Where an attempt is made to appeal a case unless the provisions of the law regulating the manner of taking an appeal are complied with, this court does not acquire jurisdiction of such case."

If the record before us had been properly certified by the clerk of the district court of Atoka county, we could consider this appeal as upon a transcript of the record. But there is no such certificate in the record. The time for preparing and filing a certified transcript of the record has long since expired. Our statute upon the subject of appeals is so simple that even a child should understand it, and it has been so often construed by this court that we are at a loss to understand why lawyers will continue to attempt to take appeals without making the least effort to comply with the statute.

For the purpose of preventing further litigation with reference to this case, we will say that the proposition attempted to be raised by counsel for appellant is stated in his brief as follows: "The plaintiff in error was indicted in the United States Court for the Central District of the Indian Territory, at Atoka, prior to the admission of the state into the Union. After statehood the district court of Atoka county, Okl., assumed jurisdiction of the cause, and thereafter, upon May 18, 1908, plaintiff in error was granted a change of venue to the district court of Coal county. Thereafter, upon May 30, 1908, the court adjourned the May, 1908, term until court in course. Thereafter, upon July 18, 1908, a stipulation to withdraw the change of venue was filed by the county attorney, and Ralls Bros. and James M. Humphrey, attorneys, then representing plaintiff in error, but no order was made in either of the district court of Atoka county or the district court of Coal county setting aside or canceling the order for the change of venue, or in any way changing or modifying the order made at the previous term of the court. Plaintiff in error was thereafter tried in the district court of Atoka county, convicted, sentenced to the penitentiary for life, and appealed his case to this honorable court, where it was reversed. See 3 Okl. Cr. 593 [107 Pac. 738]. The case was remanded to the district court of Atoka county, Okl., where plaintiff in error was again tried at the October, 1910, term thereof, and again convicted and sentenced to life imprisonment in the state penitentiary. The plaintiff in error filed a motion in arrest of judgment, which motion was by the court

overruled, and plaintiff in error now again appeals to this court. * * * The said district court of Atoka county, Okl., erred in again attempting to assume jurisdiction of the said cause and in forcing plaintiff in error to go to trial, over his objections, when an order changing the venue in this action to Coal county had been granted upon the 18th day of May, 1908, by which said order the said district court of Atoka county, Okl., lost jurisdiction of the said cause. That the said order changing the venue to Coal county, Okl., still remains in full force and effect. That the same has never been vacated, neither has any attempt ever been made to vacate the same or to have the order annulled or set aside. That the said district court of Atoka county, Okl., was without jurisdiction to hear and determine the said cause."

Even if everything claimed by counsel for appellant was properly before us, he would be confronted with the difficulty: It appears from the pretended case-made that the application for a change of venue and the affidavits in support thereof were first presented to Hon. A. T. West, the regularly elected judge of the district court of Atoka county, and that on the 12th day of May, 1908, such application for a change of venue was denied by him. On the 18th day of May thereafter we find the following order or judgment in the record before us: "State of Oklahoma v. Jonas Jones. This cause coming on upon the motion to set aside former order of A. T. West, judge, overruling motion for change of venue. The court having heard the motion read and argument by attorneys for both state and defense, and being fully advised in the premises, finds that a change of venue should be granted. It is therefore ordered that this cause be, and it is hereby, sent to Coal county for trial, and the clerk is ordered to make up transcript and transfer same to district court of Coal county, Okl. [Signed] W. S. Farmer, Special Judge." It is also made to appear in the record that on the same day on which this order was entered, and before the order was made, W. S. Farmer was elected by the bar and took the oath of office as special judge of the district court of Atoka county to try this case. At the time of this attempted election by the bar of a special judge, there was no law providing the machinery for the election of a special judge; neither does the record show that Judge West was disqualified or was unable to preside at the trial of this case. Neither the lawyers in a case or the entire bar can take a case out of the hands of the regular judge in this way. The regular judge must be disqualified from trying the case. Judicial power cannot be conferred in this manner.

Section 194, Williams' Const. of Oklahoma, among other things provides: "In the event any judge shall be disqualified for any rea-

son from trying any case in his district, the parties to such case may agree upon a judge pro tempore to try the same, and if such parties cannot agree, at the request of either party a judge pro tempore may be elected by the members of the bar of the district, present at such term. If no election for judge pro tempore shall be had, the Chief Justice of the state shall designate some other district judge to try such case." This section of the Constitution is not self-executing, and did not go into effect until section 2014, Comp. Laws of Okla. 1909, was enacted by the Legislature, which provides the machinery for the election of a special judge. This law was not passed until the 22d day of March, 1909. The election, therefore, of Mr. W. S. Farmer to sit as special judge in this case was void, and he was not a judge either de facto or de jure, and had no right, or shadow of right, to set aside the previous order of Judge West overruling the motion for a change of venue, and such pretended order was void.

This question was not passed upon on the previous appeal, because at that time the members of this court were divided in opinion as to whether or not the provision of the Constitution, providing for the election of a special judge, was self-executing. At that time the writer was inclined to think that it was self-executing; the other members of the court questioned this. Upon more mature reflection, we unanimously reached the opinion that such was not the case. It was on account of this conclusion that the act of February 22, 1909, was passed by the Legislature. So even if the question attempted to be presented was properly raised by the record, this conviction would be affirmed. This court has not acquired jurisdiction of this cause. The record before us is a nullity.

The attempted appeal must be dismissed, with directions to the district court of Atoka county to proceed with the execution of its judgment.

ARMSTRONG and DOYLE, JJ., concur.

(165 Cal. 95)

EMPIRE STEAM LAUNDRY v. LOZIER.
(L. A. 2,942.)

(Supreme Court of California. March 7, 1913.)

INJUNCTION (§ 56*)—SUBJECTS OF PROTECTION—DISCLOSURE OF USE OF TRADE SECRETS—"TRADE SECRETS AND COMMUNICATIONS."

Civ. Code, § 1985, provides that everything which an employé acquires by virtue of his employment, except his compensation, belongs to his employer. Plaintiff, a laundry company, employed defendant as a driver, and furnished him a list of customers thereon. It was his duty to revise the list by notice of changes of address and of the address of new customers, and to furnish plaintiff with a complete list of customers on that route, and agreed that he would not solicit work from any of plaintiff's customers, either for himself or as an employé of any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other person or corporation. Defendant left plaintiff's employment, and solicited laundry work from its customers along such route, and disclosed the list in his possession to his new employer, and took away the patronage of many of plaintiff's former customers. *Held*, that the list, though in part made by defendant, was plaintiff's absolute property; that defendant's agency was one of trust and confidence; that the knowledge he so acquired fell within the meaning of "trade secrets and communications"; and that, independent of the express contract, defendant's disclosure of such trade secrets and confidential communications would be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the Empire Steam Laundry against Rudolphus Lozier. Judgment for plaintiff, and defendant appeals. *Affirmed*.

J. R. Wilder, of Los Angeles, for appellant. Hunsaker & Britt and Lucien J. Clarke, all of Los Angeles, for respondent.

HENSHAW, J. This is an appeal from the judgment of the superior court of Los Angeles county awarding plaintiff a perpetual injunction. The appeal is on the judgment roll.

The facts pleaded and found are that plaintiff is a corporation engaged in the laundry business in the city of Los Angeles, having a large number of regular customers and a valuable and growing business. This business to a large extent is conducted through its agents and the drivers of its wagons, who canvass from house to house soliciting orders for laundry work, collect and return the clothes. Each of these agents and drivers has a particular route. On this he is required to call for laundry work upon regular recurring days of each week. Thus the whole week is consumed by each driver in covering his route. The names and addresses of plaintiff's customers, together with the day of the week their laundry is to be called for, are kept in special prepared lists by plaintiff, and are used for plaintiff's business purposes by its drivers and agents. These lists have been compiled and are maintained at the expenditure of a large sum of money, and they enable the plaintiff to keep a check upon its business, and to increase and extend it where possible. They constitute a trade secret of great value to plaintiff. Upon September 1, 1909, defendant, who had previously been employed by plaintiff, became one of its agents and drivers, and was put in charge of a route known as route No. 6, covering a designated portion of the city of Los Angeles. Plaintiff at its own expense furnished defendant a team and a wagon which were used by the latter on plaintiff's business in connection with his route. The route superintendent of plaintiff accompanied defendant upon his earlier trips and introduced him to plaintiff's customers. Thereafter, from time

to time, other agents of plaintiff canvassed this section of the city, and secured additional customers for plaintiff. The laundry work of these additional customers was thereafter called for and delivered by defendant; the names of these additional customers being added to the list kept by plaintiff. On September 22, 1909, defendant voluntarily entered into a contract with plaintiff concerning the duties and liabilities of the employment. By its terms the plaintiff agreed to furnish a horse and wagon at its own expense. Defendant agreed to use the horse and wagon for the purpose of collecting the laundry in the manner indicated. The compensation of defendant was fixed upon a commission basis. Defendant agreed that at any time during his employment he would, on demand, furnish plaintiff and its successors a complete list of the correct names and places of residence of all its customers along any of its routes to which he might have been assigned, that he would immediately notify plaintiff of the name and address of any new customer, and report all changes of residence of old customers, so that upon the termination of his employment the laundry company should have a complete list of the correct names and places of residence of all its customers with whom it had dealt. Paragraph 7 of the contract is in the following language: "The said party of the second part further agrees that he will not solicit laundry work from any of the customers of the Empire Steam Laundry or its successors in said laundry business, either for himself or as employé of any other person or corporation, nor in any manner attempt to induce any of the customers of the Empire Steam Laundry to withdraw their custom from it or its successors, either during his employment, after his employment shall cease, or in contemplation of the cessation of his employment, and that if he threatens or attempts to solicit such laundry work from any of the customers of the said Empire Steam Laundry, or its successors in the laundry business, then in any suit that may be brought by the Empire Steam Laundry, or its successors, for the violation of this contract in that respect, the party of the second part agrees that an order may be made in such suit, enjoining him from violating any of the said provisions of this agreement, and an order to that effect may be made pending the litigation as well as upon the final determination thereof, and that such application for such writ of injunction shall be without prejudice to any other right of action which may accrue to the Empire Steam Laundry or its successors by reason of the breach of its contract on the part of the party of the second part."

A termination of this contract was made optional with each party to it upon 30 days' notice to the other. Defendant continued in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this employment until February 12, 1910, when, in violation of the contract, and without cause or notice to plaintiff, he quit its employ and entered the employ of a rival competitor of the plaintiff, and thereafter commenced to canvass and continued to canvass and solicit laundry work from the customers of plaintiff along route No. 6. Defendant, when he quit the employment of the plaintiff, intended to divulge and make use of all the information he had acquired while employed by plaintiff as its driver and agent and to disclose this to his new employer, and he did so use his knowledge and information, including the lists of customers which he had in his possession, and which he refused to deliver to plaintiff. As a result defendant has been able to carry the patronage of many of plaintiff's former customers to the new employer, to the great business loss and injury of plaintiff. Upon these facts and the logical conclusions of law drawn therefrom, judgment was entered perpetually enjoining the defendant "from in any manner soliciting or receiving laundry work from any of the persons who were on February 12, 1910, customers of the plaintiff along the route assigned by plaintiff to defendant while the defendant was in the employment of plaintiff, and known and designated as route No. 6, which is embraced within that portion of the city of Los Angeles, county and state aforesaid." Here follows a description of the district covered by route No. 6.

The sole proposition advanced upon this appeal is that the contract between the parties was void under sections 1673, 1674, and 1675 of our Civil Code, as being a contract in restraint of trade, not countenanced by our law. Wherefore the injunction to enforce the terms of the contract is itself without warrant in law. It is true that the court finds that the contract between these parties was freely and voluntarily entered into and that it was not in restraint of trade, but into this question it is wholly unnecessary to enter. For the judgment of the court does not rest alone upon its findings as to the validity of the contract, but declares a violation of plaintiff's rights under circumstances cognizable in equity, without any express contract whatsoever upon the subject. Equity always protects against the unwarranted disclosure and unconscionable use of trade secrets and confidential business communications. So little does this equitable jurisdiction depend upon an express contract that it has been said by high authority that it exists in every contract of service "in the absence of a stipulation to the contrary." *Robb v. Green*, L. R. [1895] 2 Q. B. Div. 1, 10. Therefore the question of the contract between the parties becomes immaterial, except that its consideration plainly evinces the intent of the parties, the one to protect itself against the doing, the other to abstain from doing the very things which the court

finds that defendant upon the termination of his employment immediately proceeded to do.

There can be no question, under the findings here presented, but that defendant's agency was one of trust and confidence. His duties were to serve well the customers of plaintiff, to increase the business of the plaintiff, to solicit new business, and keep a complete and confidential list of all the customers. This list, even though in part prepared by him, was the absolute property of plaintiff, and was a valuable part of its property. *Civ. Code*, § 1985; *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Burns v. Clark*, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233. Thus in *Lamb v. Evans*, L. R. [1893] Ch. Div. 218, canvassers for a directory, after leaving the service of their former employer, used the data they had collected to assist a rival publication in procuring advertisements from the same parties. An injunction was granted, and the court said: "What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. No case, unless it be the one which I will notice presently, can I believe be found which is contrary to the general principle upon which this injunction is framed, viz., that an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got."

That equity will always protect against the unwarranted disclosure of trade secrets and confidential communications and the like is, of course, settled beyond peradventure. *Joyce on Injunction*, § 451; 1 *Story's Eq. Jur.* (10th Ed.) § 325; 1 *High on Injunction* (3d Ed.) § 19; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102; *Stevens & Co. v. Stiles*, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933, 17 Ann. Cas. 140; *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874, affirmed 131 App. Div. 922, 115 N. Y. Supp. 1150; *Witkop & Holmes Co. v. Boyce*, 64 Misc. Rep. 374, 118 N. Y. Supp. 461; *Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co.*, 66 Misc. Rep. 90, 124 N. Y. Supp. 936; *Union Switch & Signal Co. v. Sperry* (C. C.) 169 Fed. 926; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Loven v. People*, 158 Ill. 159, 42 N. E. 82.

It would seem, therefore, that the only question left in the case is whether the knowledge so acquired by defendant and

which he was so using comes fairly within the meaning of trade secrets and communications. Upon this question neither reasoning nor authority can leave one in doubt. The English case, from which quotation has already been made, is well nigh parallel. In *Hackett v. A. L. & J. J. Reynolds Co.*, 30 Misc. Rep. 733, 62 N. Y. Supp. 1076, it was held that the knowledge acquired by the canvassing agent of a grocery company of the names and addresses of its customers is knowledge against the misuse of which equity will protect as being in the nature of a trade secret; the court there saying: "This knowledge was in the nature of a trade secret, and was imparted to the plaintiff at the time he was employed by defendant, solely to enable him to profitably and intelligently attend to the business of the defendant." And, finally, we can do no better than to quote from *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874. There it appeared that plaintiff was a corporation engaged in the general business in the city of Buffalo of dealing in teas, coffees, spices, etc. It maintained branch stores in other cities, and as an inducement to its customers it gave trading stamps, redeemable at any of its stores. A large part of its business was done through its agents and canvassers who were sent out by plaintiff and given a written list of the names and addresses of the customers. These canvassers were assigned to specific routes, and their work included the calling upon customers once a week and delivering to them the goods previously ordered. The plaintiff's contract with the defendant, as in this instance, contained an express provision by which defendant agreed that upon leaving plaintiff's employ he would not solicit for another business from plaintiff's customers. Defendant, as here, left plaintiff's employ, and entered the employ of a competitor of plaintiff and immediately commenced to solicit orders from plaintiff's customers. The court issued its injunction, saying: "The plaintiff further contends that, independent of the contract between the parties and by virtue of general principles of equity, the defendant should be enjoined from enticing away or dealing with such of the plaintiff's customers as had theretofore given orders to the plaintiff through the defendant. We think the plaintiff may well rest its case on the last ground alone, and that the injunction is well sustained on principle and well-considered authority. * * * The doctrine has been most frequently applied to cases where some secret process or formula of manufacture has been involved. * * * The principle of law, however, is not confined to secret processes of manufacture or methods of doing business, but has a much wider application, as stated by Mr. Justice Story. The names of the customers of a business concern whose trade and patronage have been secured by years of busi-

ness effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret of compounding some article of manufacture and commerce. * * * In recent years there has been developed, by the adjudications of our courts and by legislation, a considerable body of law looking toward the protection of the business world against unfair competition; and, if we correctly interpret these decisions, a court of equity stands ready to restrain such acts. We therefore are of the opinion that, independent of any express contract between the parties, equity will restrain the acts of which the plaintiff complains, and which the defendant threatens and claims the right to do. This arises out of a violation of duty having its origin in the relation of employer and employed, and an implied contract that an employee will not divulge confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice."

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(165 Cal. 108)

FOLEY et al. v. NORTHERN CALIFORNIA POWER CO. (Sac. 1,967.)

(Supreme Court of California. March 8, 1913.)

1. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE.

Notwithstanding the trial court's refusal to grant a new trial, the jury's finding of contributory negligence did not become the law of the case, even though the evidence as to contributory negligence, on the second trial by the court, a jury being waived, was the same as on the first; the new trial having been granted by the appellate court, with a statement that the testimony on such issue left room for candid difference of opinion, because of error in an instruction requiring of the injured person too high a degree of technical knowledge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE.

As regards the question of application of the law of the case, additional evidence on the second trial, even though cumulative, is not to be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

3. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE.

Evidence on a new trial, in an action for death from contact with a live wire lying on the ground, is not merely cumulative to that on the first trial, as regards the law of the case on the question of contributory negligence; it for the first time attempting to show the position of the wire before the accident, authorizing a deduction that deceased from his position could not have seen it was attached to a pole,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and that it might have seemed to him a loose piece of wire lying on the ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

4. INFANTS (§ 81*)—ACTION—GUARDIAN AD LITEM.

Plaintiffs, in an action by infants by guardian ad litem, need not show that the guardian had filed a bond, or taken an oath, or had received letters of guardianship; the authority of such a guardian being evidenced only by the entry in the minutes of the court appointing him, and Code Civ. Proc. §§ 372, 373, providing for appointment of such a guardian, not requiring her to give any bond or subscribe any oath.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 222-229; Dec. Dig. § 81.*]

5. EVIDENCE (§ 358*)—MAPS.

There being no suggestion that it is incorrect, a map of an addition to a town is properly admitted in evidence, being used merely to locate the premises and as a diagram of the scene of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358.*]

6. EVIDENCE (§ 528*)—OPINIONS—CAUSE OF DEATH.

A physician, who has examined the body of deceased, may give his opinion on the cause of death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.*]

7. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR.

Error in sustaining an objection to a question is harmless; witness having subsequently, without objection, testified fully on the subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Pauline F. Foley and others, by their guardian ad litem, against the Northern California Power Company. From an order denying a motion for new trial, defendant appeals. Affirmed.

See, also, 14 Cal. App. 401, 112 Pac. 467.

Reid & Dozier, of San Francisco, and James T. Matlock, Jr., of Red Bluff, for appellant. W. P. Johnson, of Red Bluff, and Frank Freeman, of Willow, for respondents.

MELVIN, J. Defendant appeals from an order denying its motion for a new trial.

Pauline F. Foley, on her own behalf and as guardian ad litem of her two minor children, brought this action against defendant for damages because of the death of James M. Foley, husband of said Pauline and father of the minor children. Foley was killed by an electric current passing through one of defendant's power wires which had been broken and allowed to hang down from the pole to the ground. The case was tried first by a jury and a verdict for defendant was rendered. The district court of appeal reversed the order denying the motion of plaintiffs for a new trial because of error in an

instruction. On the second trial a jury was waived, and by stipulation the case was submitted on the testimony and exhibits of the former trial, with some additional testimony of one John Berg. The court gave judgment for plaintiffs in the sum of \$4,000.

[1] Appellant takes the position that the added testimony of Berg neither aids nor detracts from the proof of the contributory negligence of the deceased Foley; that the existence of such contributory negligence, sufficient to excuse defendant, was found by the jury at the former trial; that the court thereafter denied a motion for a rehearing, thus indorsing the conclusion of the jury; that thereby defendant's freedom from liability became "the law of the case"; and that the court, upon the submission of the evidence at the second trial, could properly render only a judgment in favor of defendant.

It is not necessary to review the testimony given at the previous trial. It is sufficient, for the purposes of this opinion, to refer to the statement of facts in the opinion of the District Court of Appeal (14 Cal. App. 401, 112 Pac. 467). At the conclusion of that statement and a citation of applicable authorities, the court said: "We have therefore no hesitation in declaring that on the question of the negligence of defendant the conclusion should be in favor of plaintiffs." Upon the question whether or not Foley's contributory negligence was such as to preclude recovery by plaintiffs, the District Court of Appeal said that there was "more room for candid difference of opinion." The order denying a new trial was reversed, however, because the jury was instructed erroneously that: "A man of ordinary prudence and understanding, who has lived in a city, neighborhood, or community where electricity is conveyed by means of power and pole lines for purposes of heat, light, and power, and where electric power transmission lines are installed and maintained, and who has been around electric power lines, transmission lines, service lines, machinery, and appliances, is presumed to know the powers, dangers, and potentialities of electricity and electric power."

In view of this reversal and the reason for it, we cannot see that the jury's conclusion regarding the contributory negligence of Foley became "the law of the case," even though the trial court had refused to grant a new trial. The jury, under an instruction requiring too high a degree of technical knowledge on the part of Foley, found that he negligently contributed to his own death to such an extent as to prevent recovery of damages by his widow and children. The court, holding, of course, to the erroneous doctrine announced in the instruction, denied a motion for a new trial. It follows by no means that, under a proper view of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

law, the same facts would have led to the same conclusion either by a court or by a jury. Indeed, the reversal of the superior court's order by the District Court of Appeal indicates that, upon a proper view of the law, the record might have supported a verdict against the defendant. The judge at the second trial stood in exactly the same position which a new jury would have occupied if the case had been presented upon the same evidence as that adduced at the former trial, but considered under proper instructions with reference to the degree of knowledge and care imputable to Foley. Appellant cites several authorities upon "the law of the case," but none applies to the question before us. *Snyder v. Jack*, 140 Cal. 585, 74 Pac. 139, 355, is typical of these citations. In the former trials of that action, the undisputed facts had been practically the same as those developed at the latest hearing, and the law applicable to those facts had been definitely announced by this court. Conceding, but not deciding, that in the case before us the facts developed at the two trials were substantially the same, the rule of law followed at the second trial, in measuring the responsibility of Foley, was very different from that declared by the District Court of Appeal and indorsed by this court in the refusal to transfer the case here for hearing. It is obvious that a determination whether or not Foley was contributorily negligent would depend both upon the facts and the declared law. A change in either might change the verdict of the jury or the conclusion of the court in a case in which a jury had been waived. In this case, in which the testimony upon the issue of contributory negligence left room, as the District Court of Appeal expresses it, "for candid difference of opinion," the trial court's views might well be entirely modified after the declaration of the law by the District Court of Appeal.

[2, 3] Thus far we have discussed the case upon the theory that the evidence at the two trials was practically the same. We are of the opinion, however, that Berg's new testimony had a very important bearing upon the question of negligence. He described the condition of the broken wire on the day before Foley's death. Even if this evidence should be regarded as cumulative, it should not for that reason be disregarded. *Wallace v. Sisson*, 114 Cal. 49, 45 Pac. 1000. But it was not merely cumulative. By it, for the first time, Berg sought to show the position of the wire before the fatal accident. He placed it nearer the spot where the body was afterwards found than it was on the following day. Among other things he said: "I saw where the wire struck the ground and went along the ground and curled up and went down to the ground again. A regular curl in the end of the wire. The curl went right back to the

ground—the end of it—I suppose it was the end of it. I don't know. I didn't see the end of the wire. I saw there was a bend right in the wire, going down." There was snow on the ground, and the court might well have believed, from Berg's testimony at the second trial, that as Foley approached the wire while he was walking under the low trestle, and was obliged to stoop down, he could not see that it was attached to the pole. To him it may have appeared as a piece of loose wire lying in the snow. Evidence justifying such a deduction would, of course, have an important influence upon the mind of the court in deciding the question of contributory negligence. The doctrine of "law of the case" has its origin usually in the presupposition of error in announcing a rule of law. Here appellant makes no attack upon the law as declared by the Court of Appeal, and this case does not come within that very limited class in which the doctrine is applied to matters of evidence, as distinguished from rulings of law. The "law of the case" is therefore not here properly invoked. *Allen v. Bryant*, 155 Cal. 258, 100 Pac. 704; *Moore v. Trott*, 162 Cal. 273, 122 Pac. 462.

[4] Appellant asserts error in the failure of plaintiffs to prove that Pauline F. Foley had filed a bond as guardian ad litem; had taken an oath as such guardian; and had received letters of guardianship under seal of the court. It was sufficient for her to show, as she did, that she had filed a petition for appointment, and that the court had made an order appointing her. Code Civ. Proc. §§ 372, 373. The children were not of sufficient age to nominate a guardian. It has been held that the provision authorizing an appeal from a judgment or order revoking letters of guardianship does not include an order appointing a guardian ad litem; and the court said: "No letters of guardianship are issued to a guardian ad litem, but his authority is evidenced by the entry in the minutes of the court appointing him." *In re Hathaway*, 111 Cal. 271, 43 Pac. 755. The sections of the Code providing for appointment of guardians ad litem do not require such guardian to file any bond or to subscribe any oath.

[5] There was no error in admitting in evidence an amended map of the Clark addition to the town of Red Bluff. The map was used merely to locate the premises and as a diagram of the scene of the accident. It is proper for courts to admit illustrative charts, photographs, and maps. *People v. Loper*, 159 Cal. 21, 112 Pac. 720, Ann. Cas. 1912B, 1193. It is not even suggested that the map as offered was incorrect.

[6] Dr. John Fife was asked the following question: "What, in your judgment, was the cause of his [Foley's] death?" There was no error in propounding such a question. Dr. Fife had examined the body of deceased, and it has long been the rule

that a physician who has made such examination may not only give his opinion upon the cause of death, but may state his views regarding the instrumentality by which the fatal force was probably applied. *People v. Durrant*, 116 Cal. 210, 48 Pac. 75; *State v. Young Harris*, 63 N. C. 1; *State v. Porter*, 34 Iowa, 133; *Williams v. State*, 64 Md. 393, 1 Atl. 887; *Davis v. State*, 38 Md. 35; *Territory v. Egan*, 3 Dak. 119, 13 N. W. 570.

[7] The court sustained an objection to a question propounded to witness Hughes by defendant's counsel, "On the morning of the 17th of January, when you found the lines down, what did you do?" Hughes was the superintendent in the employ of defendant, and the question was proper as bearing upon the subject of his care in repairing the lines which had been injured by the storm; but the error was harmless because Mr. Hughes afterwards testified very fully, without objection, about the repairs to the broken lines and the precautions taken by him to avert accidents. No other alleged errors require notice.

The order is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(166 Cal. 112)

BELLUS v. PETERS. (L. A. 2,797.)
(Supreme Court of California. March 12, 1913.)

1. PRINCIPAL AND AGENT (§ 72*)—CONVERSION—CORPORATE STOCK.

Where defendant, who was plaintiff's agent in purchasing a gas plant, falsely stated the purchase price to be larger than the actual amount, and received stock in the new company in consideration of his agreeing to pay part of the consideration which he falsely represented to be due, he was guilty of a conversion of the stock received.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 148, 149; Dec. Dig. § 72;* *Trover and Conversion*, Cent. Dig. § 70.]

2. EVIDENCE (§ 598*)—WEIGHT—NUMBER OF WITNESSES.

The rule that juries are not bound to decide according to the greater number of witnesses declared by Code Civ. Proc. § 2061, subd. 2, is equally applicable to a trial to the court.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.*]

3. TROVER AND CONVERSION (§ 40*)—ACTIONS—EVIDENCE.

In an action for the conversion of corporate stock, evidence held to show a conversion in that defendant through his fraudulent misrepresentations obtained it without consideration.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

4. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

In case of trial to the court, the weight of conflicting testimony is for that tribunal, instead of the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

5. PRINCIPAL AND AGENT (§ 79*)—CONVERSION OF STOCK—RIGHT OF ACTION.

Where defendant, who was plaintiff's agent in the purchase of a gas plant, obtained stock in the new concern, through his misrepresentations, without payment of any consideration, plaintiff's right of action for the conversion is not barred because of the sale of other stock of theirs in the company.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 178-193; Dec. Dig. § 79.*]

6. TROVER AND CONVERSION (§ 69*)—JUDGMENT.

Where the conversion of corporate stock and its value was admitted, an order for the return of the stock is not a condition precedent to the entry of a judgment for the value of the stock.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 308-313; Dec. Dig. § 69.*]

7. EVIDENCE (§ 591*)—STATEMENTS BY A PARTY'S WITNESS—CONCLUSIVENESS.

Statements by a witness called by plaintiff in an action for the conversion of corporate stock that defendant did pay a consideration will not preclude the court from finding to the contrary, on the theory that a party is bound by the testimony of his own witnesses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2440-2443; Dec. Dig. § 591.*]

8. CONTRACTS (§ 286*)—RESCISSION.

Where plaintiffs, through defendant as their agent, arranged to purchase a gas plant, and because of defendant's misrepresentation as to the amount of the purchase price gave him stock in the company in consideration of his agreement to pay part of the consideration which was not really due, plaintiffs may rescind the contract without returning the stock they had received in the new company; it appearing defendant had paid nothing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1186; Dec. Dig. § 286.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by M. L. Bellus against D. L. Peters. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

Tanner, Taft & Odell and Hunsaker & Britt, all of Los Angeles, for appellant. John S. Mitchell, M. B. Silberberg, and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

SHAW, J. "The action was one by Bellus in his own behalf and as assignee of John W. Kemp to recover the price and value of a certain 40,000 shares of stock, in a corporation, alleged in the complaint to be the property of plaintiff, and by said defendant converted to his own use. The court found the allegations of the complaint to be true and the value of the stock to be \$10,000, and rendered judgment accordingly against defendant Peters. From this judgment, and from an order denying a new trial, defendant appeals.

"The allegations of the complaint, in substance, are these: That in January, 1909, one Willits was the owner of a gas plant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in Orange county; that Peters, Bellus, and Kemp entered into negotiations for its purchase; that Peters, representing Bellus and Kemp, conducted the negotiations and reported to his associates that Willits' price for the gas plant was \$28,500, \$6,000 of which was to be paid in cash, a mortgage thereon for \$10,380 to be assumed by the purchasers, and that the balance of the purchase price, to wit, \$12,120, should be secured by a second mortgage upon the property so to be purchased; that plaintiff and Kemp, believing these representations of Peters to be true, entered into a contract with Peters, whereby they mutually agreed that the three should purchase the plant at the price above named, and further agreed that, when purchased, the title thereto should be taken in the name of plaintiff, who was to hold the same in trust for himself and the other two parties; that of the cash payment Bellus was to contribute \$5,000, Peters \$1,000, and Kemp, an attorney, was to contribute his labor and skill in and about the incorporation of a new company to take over such property, and to pay all fees necessary to effect such organization; that, when said property was acquired, it should be conveyed by Bellus to the new corporation, so to be organized through Kemp's efforts, which corporation was to have a capital stock of 200,000 shares of the par value of \$1 each, and the stock of such new corporation was to be equally divided between the three parties; that, relying upon such representations, plaintiff contributed his \$5,000 and Kemp his skill and services as agreed, but Peters did not pay the \$1,000 agreed to be paid by him, and it is averred that Willits, upon receipt of the \$5,000 contributed by Bellus and the assumption of the mortgage and the execution of a second mortgage, made the conveyance as agreed. It is averred that the representations of Peters that the purchase price was \$28,500 were false; that as a fact the purchase price of said business was \$27,500, and the amount of cash to be paid was \$5,000; that the representation made by Peters that under the agreement he was to pay \$1,000 was untrue; that he never did pay the \$1,000, and never intended so to do; that the purchase by Bellus and Kemp was based upon their belief in the truth of the statements and representations of Peters. It is further averred that, after the gas plant was transferred by Bellus to the new corporation, of its capital stock 120,000 shares were issued, 40,000 to each of the three purchasers; that neither Bellus nor Kemp had knowledge of the falsity of Peters' representations until September following, upon learning which they served notice upon him of their rescission of the agreement existing between them with reference to the purchase, and they demanded of Peters that he surrender to them the 40,000 shares of the stock so issued to him as having been issued

without any consideration and which in equity and good conscience belonged to Bellus and Kemp, they having paid the whole consideration therefor; that Peters refused to comply and has not complied therewith, and has converted all of the stock so held by him to his own use; that the market value of the stock is \$10,000. The plaintiff by assignment has become the owner of Kemp's rights in the premises.

"The answer of Peters denies that \$27,500 was the consideration price to be paid; that, on the contrary, \$28,500 was the lowest price that Willits would receive. He alleges that the \$1,000 which he contributed was covered by \$1,100 commission earned by him, and which Willits agreed to pay and did pay for his services in effecting the sale. He denies that \$6,000 cash was not paid to Willits, but alleges that Bellus paid \$5,000, and he paid \$1,000 of the cash consideration. Defendant, by an amendment to his answer with reference to his statements as to the amount of commission received, places the amount at \$100, instead of \$1,100 originally alleged to have been received by him. However, there is no denial of the fact that defendant received the 40,000 shares of the stock and converted the same to his own use, and that such stock was of the value of \$10,000.

"The court found the allegations of the complaint to be true; found that the representations of Peters as to the amount of money necessary to purchase the plant were untrue; that in truth and in fact the purchase price of said gas business and property was \$27,500, and that the amount of the cash payment so to be made under the agreement was \$5,000; that Peters never paid his \$1,000, or any sum, and never intended so to do; that he made the representations as to his intention to pay and his payment with the intent to cheat and defraud plaintiff and said Kemp, his associates; that they relied upon these representations and believed them to be true, and in the absence of such representations would not have entered into the transaction. The court found that due demand was made upon Peters to surrender to Kemp and Bellus the amount of the stock by him held and received without consideration, which demand was refused, and the stock converted by defendant to his own use.

[1] "Appellant's first contention is that the complaint does not state facts sufficient to constitute a cause of action. We think this criticism cannot be maintained. From the allegations of the complaint it appears that a fiduciary relation existed between Peters and his associates by virtue of the agreement, and that Peters' negotiations with the owner of the gas plant were as agent of the association. The false and fraudulent statements alleged to have been made by such agent, and the obtaining of property in connection therewith in fraud of his associates, and without consideration, in our opinion, was a

statement of fact sufficient to entitle plaintiff to a judgment for the value of the stock issued to defendant without consideration and in fraud of plaintiff and by defendant converted to his own use.

[2-4] "The principal contention of appellant is that the finding that the agreement between Peters and Willits was that Willits should receive \$27,500 only for the property, \$5,000 of which was to be received as the cash payment and the residue by mortgage, has no support in the evidence. This contention is based upon the fact that Willits testified that, under the agreement with Peters, he was to forego the payment of \$1,000 by Peters in consideration of Peters causing to be issued to him the shares of stock to which Peters was entitled under the agreement with his associates; and, further, that Peters in his testimony states that, while he did not pay the \$1,000 in money, it was agreed that in lieu thereof certain of the stock was to be delivered to Willits, the amount of which is not stated, he not being clear upon that subject. It must be conceded that these men testified in substance as claimed, and the only evidence to the contrary arises from the facts and circumstances surrounding the parties, their conduct, and subsequent acts in relation to such stock claimed to have been the subject of their contract. The undisputed evidence is that as a fact Willits received only \$5,000 as the cash consideration for the sale. There is no dispute as to there having been executed and Willits having received a mortgage in the amount represented, and that the incumbrance existing was assumed by the purchasers without personal liability as by their agreement they were bound to do. The question, then, is, Was there any evidence before the court justifying its finding that \$5,000 was the total amount which Willits was to receive for the property, in addition to the mortgages given and assumed? Considering alone the evidence of Willits, if his statements were accepted by the court to be true, Willits received an equivalent of the \$1,000 which Peters had agreed to pay; and upon such assumption no injury is shown to have resulted to plaintiff, for if Peters in fact received no benefit by the transaction, and agreed that Willits should receive the one-third of the stock to be received by Peters in consideration of the payment of \$1,000, no reason suggests itself why Willits might not make a valid agreement with Peters to accept such stock in lieu of the \$1,000 in money, and through which agreement, if actually carried out, plaintiff and his assignor would have received all that they were entitled to receive, and, even though Peters did not in strict terms carry out his agreement, he, nevertheless, paid to Willits that which he was willing to receive in lieu of the \$1,000. Upon the other hand, were the court to have accepted as true the statement of Peters that a part only of the

stock was to be transferred, in that event Peters held the excess of what he actually agreed to transfer without consideration and in fraud of plaintiff's rights, and a finding of the amount of such excess would be necessary as establishing a basis for the judgment. The court, however, seems from its findings to have determined that the circumstances connected with the transaction were such as to cast discredit upon the statements of both Peters and Willits, and impliedly found that no stock transaction was involved as between said two last-named parties. The rule that juries are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds (subdivision 2, sec. 2061, Code Civ. Proc.), applies with equal force to instances where the case is tried by the court. As said by Mr. Justice Field, speaking for the Supreme Court of the United States in *Quock Ting v. United States*, 140 U. S. 417 [11 Sup. Ct. 733, 851, 35 L. Ed. 501], cited and followed in *County of Sonoma v. Stofen*, 125 Cal. 35 [57 Pac. 681]: 'Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his own account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced.' See, also, *Blankman v. Vallejo*, 15 Cal. 639; *People v. Milner*, 122 Cal. 171 [54 Pac. 833]; *People v. Mock Yick Gar*, 14 Cal. App. 336 [111 Pac. 1039]; *Sterling v. Cole*, 12 Cal. App. 93 [106 Pac. 602]. The question then presented is, Were the circumstances connected with this transaction such and was the conduct of the parties such as, under this rule, would justify the court in disregarding their positive evidence? In so far as the evidence of Peters is concerned, the court had the right to consider the allegations of his verified answer, which were totally at variance with his subsequent testimony. It possessed the right to consider, when considering the testimony of Willits, the amount and value of the stock which he claims was to be transferred to him; to consider the fact that no

memorandum of any kind was entered into in relation to such transfer; that nearly a year elapsed between the time of the transfer and the time when he gave his testimony, and yet he made no effort to obtain this stock which possessed a value of \$10,000. In other words, Willits was careful to see that he received the \$5,000 in money to be paid by Bellus, and yet was indifferent as to double the amount which he was to receive from his claimed contract with Peters. Even when he claims to have made a demand for the surrender of the stock, no sufficient excuse is presented for noncompliance. The circumstances of receiving Peters' checks under the guise of a cash payment and immediately retransferring the same to Peters, all without the knowledge of the other contracting parties, might well have indicated to the trial court that the claim of an agreement to transfer the stock by Peters to Willits was an afterthought. Certain it is that it was not present in the mind of Peters when he verified his answer, or the amendment thereto. Considering all of these circumstances and the conduct of the parties, as shown by the record, we do not feel warranted in saying that the learned trial judge made his finding complained of without any evidence in its support. There being some evidence which we think it was proper for the trial court to consider, its weight and effect is for that court to determine, and with the question of conflict we have nothing to do.

"Appellant calls attention to the fact that there was a contract offered in evidence which showed that at the time of its execution Peters held only 20,000 shares of the stock. This, however, is not material when we consider the allegations of the complaint and the admissions of the answer with reference to the amount of stock actually held by him at the time of the bringing of the action.

[5, 6] "Appellant also contends that, because Kemp sold his 40,000 shares originally issued to him and Bellus subsequently did the same, therefore neither was in a position to recover in this action, even if the fraud be established. We do not believe that the sale of any definite number of shares of the company's stock by plaintiff and by Kemp would have that effect. If, as a matter of fact, the 40,000 shares held by Peters was their stock, they having paid the whole consideration price therefor, the mere selling of other stock in the corporation by them would not affect their right to recover as to the 40,000 shares so held by Peters. There is no issue presented by the pleadings, nor any positive evidence in the testimony, showing any merger or reissue of any stock, or

a change in the relation of Peters to the gas company originally formed by himself and his associates. Nor do we believe that where the conversion of stock was admitted and its value conceded that any necessity existed for the court to order, through its judgment, the return of the stock by Peters as a condition precedent to the entry of the judgment.

[7, 8] "The rule invoked that plaintiff was bound by the statements of Willits, because he was a witness on behalf of plaintiff, does not go to the extent of requiring the court to believe and accept as true the statements of such witness. Nor do we see any force in the suggesting that Peters possessed rights by virtue of a lapsed option theretofore held by him on the property. Appellant contends that the notice of rescission of the agreement given by Bellus and Kemp to Peters was ineffectual because no tender or offer was made to restore that which had been received by plaintiff and Kemp under the agreement. If, as found by the court, Peters never paid and never intended to pay any part of the consideration price for the gas plant, his possession of the shares of stock was obtained by fraud; he never acquired any interest therein, nor was he interested in the management or control thereof, or of the salaries paid to its employes. Having no interest in the property, there was nothing he was entitled to receive in order to place the parties in statu quo. The shares of stock so held by him belonged to the parties who had paid the consideration price therefor.

"Other questions are presented, but we do not think they require specific notice, as, in our opinion, the decision of the trial court in connection therewith did not in any way prejudice the rights of appellant. Assuming the accuracy of the chief finding, which related to the amount of the consideration actually paid and agreed to be paid, the judgment was a proper one, and should be affirmed."

The foregoing opinion, prepared by Mr. Justice Allen, was filed in the District Court of Appeal for the Second District, and thereupon the judgment of the superior court was affirmed. Afterwards, in due time, on petition of the appellant, the affirmance was vacated and the cause was transferred to this court for further hearing and decision. Upon a further consideration of the record we are satisfied that the opinion of the district court fairly states the case, and we approve the reasons there given for the affirmance.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; LORIGAN, J.

(185 Cal. 121)

TURNER v. HITCHCOCK et al.
(Sac. 1,971.)

(Supreme Court of California. March 13, 1913.)

L. VENDOR AND PURCHASER (§ 145*)—CONVEYANCE—REFUSAL.

Where defendants, after agreeing to purchase land from plaintiff, who agreed to execute escrow deeds, and after accepting a deposit from the purchaser from themselves, which they turned over to plaintiff, also sold the land to another, and attempted to use the deposit as a partial payment upon the second sale, they cannot complain that plaintiff, after having been informed of the first contract of sale, refused to deed the property to the second prospective purchaser procured without a release from the prior purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.*]

2. VENDOR AND PURCHASER (§ 145*)—PERFORMANCE—TENDER OF PERFORMANCE—NECESSITY.

If the owner of land refused to place deeds in escrow, as agreed by him, with persons to whom he sold it, under Civ. Code, § 1440, providing that, if a party to an obligation notifies another, before the latter is in default, that he will not perform the other may enforce the obligation without previously performing, the purchasers could have enforced the contract of sale without waiting for the deposit of the escrow deeds.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.*]

3. VENDOR AND PURCHASER (§ 145*)—OBLIGATION TO CONVEY—AUTHORITY OF AGENT.

Persons who had undertaken to sell land, which they contracted to purchase from plaintiff, could not use a check deposited with them by a purchaser from them as plaintiff's agents, for the purpose of making payment upon a subsequent sale by them to another without paying the first purchaser the amount of the deposit, so as to release plaintiff from liability therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.*]

4. QUIETING TITLE (§ 44*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action to quiet title to land which plaintiff had agreed with defendant to sell, in which it appeared that defendant had sold the land to another and received \$2,000, which he paid to plaintiff when the contract with plaintiff was executed, evidence as to where defendant got the \$2,000 paid to plaintiff, as well as the contract under which such purchaser paid the \$2,000 to defendant, was admissible.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by James Turner against J. R. Hitchcock and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. L. Russell, of Tulare, for appellants. Bradley & Bradley, of Visalia, for respondent.

MELVIN, J. Plaintiff sued to quiet his title to certain real property in the county of Tulare. Defendants, by their answer, admitted that the title was in plaintiff; but they set up a certain contract of sale and

asked for a decree compelling plaintiff specifically to perform said contract. From a judgment in favor of plaintiff, the defendants appeal.

The agreement in question was made on the 22d of July, 1907, between James Turner and the defendants, who were operating under the name of Hitchcock & Co. By it Turner agreed to sell a tract of land described by metes and bounds, containing "500 acres more or less." The sum of \$2,000 was paid upon the execution of the contract, and the receipt thereof was acknowledged in said agreement. There were other covenants not material to this discussion. All rights under this agreement were to lapse if Hitchcock & Co. should fail to comply with the terms thereof. Turner was bound to place in escrow with the Bank of Tulare, at Tulare City, such deeds to the property as the other parties to the agreement should request, executed to such persons as they might designate. Time was made of the essence of the contract, and the balance of the purchase price, \$12,250, was made payable on or before the 1st day of November, 1907. The \$2,000 paid on this contract were represented by a check drawn by one Rehard, and it was understood that Hitchcock & Co. were to sell the land, or a portion of it, to him. On August 31, 1907, an amendment to the contract was executed, whereby it was agreed that, upon the payment of the purchase price, the east line of the property described would be run so that just 500 acres would be included in the tract sold; but the purchasers retained the right to buy the balance of the land contained in the original description for the price per acre at which they were entitled to purchase the 500 acres. Previous to the execution of the contract of July 22, 1907, Hitchcock & Co., who were agents for the sale of Turner's land, made a contract as such agents with Rehard, whereby the latter was obligated to pay \$15,000 for 300 acres of the land involved. This contract was dated July 20, 1907; the parties thereto were James Turner and Willis Rehard; the terms were \$2,000 paid upon the execution of the agreement and the balance on or before November 1st; and a member of the firm of Hitchcock & Co. executed it for said firm as the agents of Turner; yet it was not exhibited to Turner before the signing of the contract by which he agreed to sell 500 acres to defendants, and he did not know of the existence of the prior agreement, as he testified, until Rehard exhibited it to him on November 15, 1907. It was stated by Turner on the stand, and denied by Richardson in his testimony, that the latter had agreed, upon the 31st of August, to attend to the matter of getting an abstract of the property.

[1] Upon this conflict we must, of course, take the version which is in support of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment. Turner testified also that he went to Tulare late in September, and also about October 20, 1907, ready on each date to carry out his part of the contract, but that on one occasion a postponement was caused by the fact that the abstract was not ready, and upon the other a delay was due to some objection to the title made by Rehard. There was sufficient evidence to justify the trial court in determining that the delay in preparing the deeds and placing them in the bank was due as much to defendants as to plaintiff. Finally deeds to the property, naming Rehard as grantee, were deposited with the Bank of Tulare on November 1, 1907. These deeds were accompanied by a letter of instructions, as provided in the contract. Regarding this matter, Turner testified that Richardson assisted in the preparation of the deeds, and they were deposited pursuant to an arrangement that more time should be granted defendants and Rehard to make the final payment. According to the testimony of Richardson, this extension was to be until the 15th of November, and the deeds were to remain in escrow until that time. While the transactions between Turner, Rehard, and defendants were in progress, Turner notified Hitchcock & Co. that he would accept only gold coin in payment of the balance on the contract of sale to them. This, according to Turner, occurred on October 29th; but Richardson said it was on November 1, 1907. Richardson also testified that the verbal agreement of November 1st, to extend the option to November 15th, was made for the purpose of giving his firm and Rehard an opportunity of raising the necessary amount of gold coin. On November 16, 1907, Turner wrote to Hitchcock & Co.: "I have decided not to extend the time for meeting the payments on the land deal." On November 30th he wrote them again, saying: "E. P. Foster writes me that you are making arrangements to meet the payments on the land transaction as soon as the so-called holidays are over, but that it will cost you considerable. Now, I feel it my duty to let you know that I do not intend to deliver a deed to you or any one else for the 220-acre tract on the south part of the land. If Mr. Rehard still wants the 300-acre tract and can arrange so as to pay for it in a reasonable time and you are satisfied with your percentage of \$750 for selling, we can settle the whole matter at once, otherwise it will be no sale." On November 15th the deeds had been withdrawn from the Bank of Tulare by plaintiff.

It is a fact that from October 31 to December 21, 1907, the Governor of California declared a series of holidays. December 22d was a Sunday, and on December 23, 1907, plaintiff re-deposited deeds to the property in the Bank of Tulare, and notified Hitchcock & Co. of that fact. The deeds were left in escrow until midnight of December 23d, but

no offer of payment was made. In January, 1908, Turner repaid Rehard the \$2,000 theretofore paid by defendants, and was released by the latter from all obligations on the contract of July 20, 1907, which defendants had made as Turner's agents. On December 23d, before Turner re-deposited the deeds, he was requested by Hitchcock & Co., in writing, to make a new deed of the land to one Glannini. This he refused to do, telling them that they had already bound him to Rehard.

Upon these facts, defendants contended, first, that their time to fulfill the contract of July 22d was extended by the holidays; second, that they could not be placed in default until after the required deeds had been put in escrow; third, that no tender of money was required until the deeds were thus in escrow; fourth, that Turner's letter of November 30th was a repudiation of the contract, which excused defendants from the duty of being ready to pay the balance due thereunder on the first day following the series of holidays; fifth, that, in any event, they have never been in default because of Turner's refusal to execute and place in escrow a deed to the property, naming Glannini as grantee.

If we concede the effect of the holidays to have been that for which appellants contend, we do not think they can properly maintain that plaintiff was in default on December 23, 1907. Part of the difficulty in determining their rights arises from their protean position, now as agents for Turner assuming to sell his land, and accepting a deposit on his behalf, and again using that deposit as an initial payment upon a contract whereby they were to acquire the same property and some other land for less than the amount for which, as Turner's agents, they had agreed to sell the 300 acres to Rehard. We do not mean to impute wrong motives to them. None are charged in the pleadings. Doubtless it was understood that they were to subdivide and sell the property at a profit to themselves. But, by concealing from their principal that they had bound him to the sale of 300 acres to Rehard, they placed him in the position of having promised to sell that tract to Rehard and to them. The only way in which they could possibly reconcile these transactions, if at all, was by requiring, under their contract of July 22d, that a deed to Rehard for the 300 acres should be put in escrow. This they did, and Turner prepared the deeds accordingly. They cannot complain, therefore, if Turner, having been informed of the contract with Rehard and of the acceptance in his behalf of \$2,000 as a payment thereon, refused again to complicate the situation by deeding the property to Glannini without a release from Rehard. He did all that he could be required to do when he placed the original deeds in escrow on the first business day following the holidays. Appellants may not complain if he in-

sisted upon construing the two contracts together. The had created that situation.

[2] But they say that by his letter of November 30th he had repudiated the contract of July 22d, and that they were therefore excused from being ready to perform on December 23d (citing section 1440, Civ. Code). We do not think his letter placed them in a position to sit idly by and wait for him to put deeds in escrow. The only effect of the cited section would have been to enable them to enforce the contract without waiting for him to deposit the deeds (*Remy v. Olds*, 88 Cal. 541, 26 Pac. 355); yet up to May 13, 1910, when this action was commenced, they had taken no steps to do so. They testified, however, that they were ready to perform on December 23d; yet they did not either accept the only deposit of deeds which, under the circumstances, they had the right to demand, nor seek to put Turner to the election of refusing or accepting the contract price. But, as a matter of fact, the evidence fails to show that they were ready to perform in case a deed was made to Giannini. According to the testimony of Mr. Hitchcock, they were ready to pay but \$12,250.

[3] Surely they had no right to the credit of \$2,000 unless they could assure Turner that Rehard had been compensated for his payment of that amount, and had relieved Turner from all liability under the contract with him. They could not utilize the check from Rehard to bind the bargain of July 20th, and also as a payment on the sale to Giannini. In other words, they could not obtain an advantage as vendees by ignoring their obligations as agents. The trial court correctly concluded that defendants were not entitled to a decree of specific performance of their contract.

[4] It was proper to ask defendant Richardson, on cross-examination, where he got the \$2,000 which he paid plaintiff when the contract of July 22, 1907, was executed. The court was entitled to know all of the circumstances connected with and surrounding that transaction. For the same reason, the contract of July 20th, under which Rehard paid the \$2,000, was admissible.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(21 Cal. App. 80)

PEOPLE v. METZLER. (Cr. 416.)

(District Court of Appeal, First District, California. Feb. 4, 1913. Rehearing Denied by Supreme Court April 4, 1913.)

1. PERJURY (§ 25*)—INDICTMENT—SUFFICIENCY.

Averment in an information for perjury of the materiality of the claimed false testimony is sufficient, unless it appear from the accusation as a whole that the testimony was immaterial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

2. PERJURY (§ 27*)—INFORMATION—SUFFICIENCY—MATERIALITY OF TESTIMONY.

An information for subornation of perjury was not demurrable as failing to show the materiality of the claimed suborned testimony where it averred the materiality of such testimony and recited the substance thereof, with other facts tending to show its materiality to the issues involved in the action in which the perjury was committed.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 95; Dec. Dig. § 27.*]

3. PERJURY (§ 11*)—MATERIALITY OF TESTIMONY—IMPEACHING EVIDENCE.

Testimony affecting the credibility of a witness is material to the issues in the sense that it will afford a basis for perjury or subornation of perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

4. CRIMINAL LAW (§ 1159*)—PROVINCE OF JURY—CONFLICTING TESTIMONY.

A conviction is not vitiated by a conflict between the testimony of two witnesses for the prosecution; it being the province of the jury to accept the testimony of the witness who seems to them to be most credible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

5. PERJURY (§ 34*)—SUBORNATION OF PERJURY—ACCOMPLICE.

A conviction of subornation of perjury is not affected on the theory that the suborned witness, who testified for the prosecution, was an accomplice, if his testimony is corroborated by other witnesses not accomplices, admissions by accused, and independent facts and circumstances tending to connect accused with the offense.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 125-132; Dec. Dig. § 34.*]

6. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REFUSAL—PARTLY INCORRECT INSTRUCTIONS.

An instruction which erroneously states the law in part is properly rejected as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

7. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

An instruction substantially covered by those given is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. CRIMINAL LAW (§ 1037*)—IMPROPER ARGUMENT—WAIVER OF OBJECTION.

Objection to argument of the prosecuting attorney, first presented on appeal, will not be considered; objection to the argument at the time it was made and a request that the trial court admonish the jury to disregard the remarks claimed to be improper being essential to preserve the objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

C. Metzler was convicted of subornation of perjury, and he appeals. Affirmed.

Traber & South, of Fresno, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant in this case was convicted in the superior court of the county of Fresno of the crime of subor-

nation of perjury. He has appealed from the judgment entered against him and from an order denying a new trial.

[1, 2] The defendant insists that the demurrer to the information should have been allowed upon the ground that the information fails to show the materiality of the alleged suborned testimony. The information charges in substance that on February 27, 1912, the defendant procured one J. P. Helmuth to commit perjury in a certain civil action then pending in the superior court of Fresno county entitled "Metzler v. Spomer," wherein the defendant here was the plaintiff. In addition to the allegations usually employed in charging the crime of subornation of perjury, the information expressly avers the materiality of the alleged suborned testimony. The information then proceeds to recite the substance of such testimony in conjunction with other alleged facts, all of which tends clearly enough to show the materiality of the alleged suborned testimony to the issues involved in the civil action in which it was alleged the defendant induced the witness Helmuth to give such testimony.

It is a settled rule in this state that, where an indictment or information expressly alleges the materiality of perjured testimony, such indictment or information is sufficient, unless it affirmatively appear from the indictment or information as a whole that such testimony was immaterial. *People v. Brilliant*, 58 Cal. 214; *People v. Ross*, 103 Cal. 425, 37 Pac. 379. In the present case the allegations of the information upon the subject of materiality are as a whole clear, concise, and consistent, and therefore the defendant's demurrer was properly disallowed.

[3] The sufficiency of the evidence to support the verdict of the jury is assailed upon the ground that it was not shown in evidence as a part of the people's case that the alleged suborned testimony was in fact material to the issues raised by the pleadings in the civil action. This contention is based upon the fact that the witness Helmuth was called and procured by the defendant to testify in the civil action to matters and things which affected only the credibility of Spomer, the defendant in that action. In other words, it is the defendant's contention that because the testimony of the witness Helmuth was offered and received in evidence in the civil action for purposes of impeachment, rather than as tending to prove the precise fact in dispute, such testimony was not material to the extent that it could be made the foundation for a charge of perjury.

This contention is untenable. Upon a trial evidence may be given, not only of the precise fact in dispute, but such other facts as serve to show the credibility of a witness may be offered and received in evidence. Code Civ. Proc. § 1870. Evidence affecting the credibility of a witness usually tends to strengthen the case of a party to an action

or to weaken the defense of his adversary, and therefore such evidence is material. *People v. Brilliant*, 58 Cal. 214; *People v. Barry*, 63 Cal. 62; *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155; *People v. Prather*, 134 Cal. 436, 66 Pac. 589, 863.

[4] Counsel for the defendant contends that the testimony of the two principal witnesses for the people in the present case is contradictory and irreconcilable upon material matters; and because of this it is insisted that the testimony of neither witness should be credited in support of the verdict. This is but an argument directed against the credibility of the witnesses, which doubtless was presented to the jury, and by them given the consideration which it deserved. Whatever contradiction there may have been in the testimony of these witnesses created at best but a conflict in the evidence, which left the jury free to accept the testimony of whichever witness seemed to be the most credible and worthy of belief.

[5] Conceding, as counsel for the defendant says, that the suborned witness Helmuth was an accomplice of the defendant, nevertheless the evidence upon the whole case sufficiently supports the verdict, because the testimony of Helmuth as to the fact of the perjury and its subornation was amply corroborated by the testimony of other witnesses not accomplices, the admissions of the defendant, and independent facts and circumstances which tended to connect the defendant with the commission of the offense charged against him.

[6] Complaint is made of the refusal of the trial court to give several instructions requested upon behalf of the defendant. Upon an examination of the record we find that some of the requested instructions did not in their entirety correctly state the law; and, when a requested instruction is erroneous in part in its statement of the law, it may be rejected as a whole. *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *People v. Walters*, 98 Cal. 138, 32 Pac. 864.

[7] With reference to the remaining requested instructions the record shows that the subject-matters thereof were substantially and correctly covered by the charge of the court, and therefore the refusal of the trial court to charge in the exact language of the requested instructions was without prejudice to the defendant. In brief, the record shows that, in so far as the requested instructions were correct in their statement of the law applicable to the case, they were incorporated in and made a part of the charge of the court, and that is all that the defendant was entitled to. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917; *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

[8] Certain portions of the argument of the district attorney to the jury are assigned here for the first time as prejudicial miscon-

duct. The portions complained of, however, appear to be fair deductions from the evidence adduced upon the whole case, and were therefore legitimate argument; but, even if this were not so, no objection was made in the lower court to such portions of the district attorney's argument, and in the absence of an objection, coupled with a request that the trial court admonish the jury to disregard the alleged improper remarks, their possible effect upon the jury will not be considered for the first time on appeal. *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497.

The judgment and order appealed from are affirmed.

We concur: MURPHEY, Judge pro tem.; HALL, J.

(21 Cal. App. 92)

KINARD v. WARD et al. (Civ. 1,122.)

(District Court of Appeal, First District, California. Feb. 5, 1913.)

1. MINES AND MINERALS (§ 104*)—MINING CORPORATIONS — DIRECTORS — REMOVAL — BREACH OF STATUTORY DUTY.

In an action by a stockholder under Civ. Code, § 590, to remove the directors of a mining corporation for failure to make and post, in the office of the company, the current accounts of the corporation, as required by section 588, it was unnecessary to allege or show that plaintiff suffered any actual damage.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 228; Dec. Dig. § 104.*]

2. MINES AND MINERALS (§ 104*)—MINING CORPORATIONS — DIRECTORS — REMOVAL — BREACH OF STATUTORY DUTY.

In an action by a stockholder under Civ. Code, § 590, to remove the directors of a mining corporation for failure to make and post the current accounts of the corporation, as required by section 588, the complaint did not show that the default occurred during a yearly term of office which expired before the action was commenced, where it alleged that defendants "have failed and refused to cause to be made, for any month or at any time," an itemized account, etc.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 228; Dec. Dig. § 104.*]

3. CORPORATIONS (§ 289*)—DE FACTO DIRECTORS—HOLDING OVER—DUTIES.

Directors of a corporation, who hold over, must perform the duties enjoined by law with the same fidelity as regularly elected officers, and are subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1240-1245; Dec. Dig. § 289.*]

4. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS.

In the absence of a bill of exceptions or a statement of the case, it must be assumed that

the evidence adduced upon the trial supports the findings of fact as made by the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

5. PLEADING (§ 129*)—ANSWER—ADMISSIONS.

Allegations of a complaint, not denied by the answer, are deemed to be admitted.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by C. E. Kinard against James W. Ward and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Crittenden Thornton, of San Francisco, for appellants. C. E. Kinard, in pro. per.

LENNON, P. J. The plaintiff in this action, as a stockholder in the Socrates Consolidated Mining Company, Incorporated, sought and secured a judgment removing the defendants, as directors of the corporation, for the alleged violation of the provisions of section 588 of the Civil Code. That section declares it to be the duty of the directors of every corporation, foreign or domestic, formed for the purpose of mining in California, to cause to be made, on the second Monday of each and every month, "an itemized account or balance sheet for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were derived, and to whom and for what object or purposes such disbursements or payments were made; also all indebtedness or liabilities incurred or existing at the time, and for what the same were incurred, and the balance of money, if any, on hand. Such account or balance sheet must be verified under oath by the president and secretary and posted in some conspicuous place in the office of the company." Section 590 of the same Code provides: "If the directors fail to have the reports and accounts current made and posted as required by section 588 they are liable, either severally or jointly, to an action by a stockholder complaining thereof, and on proof of such refusal or failure he may recover judgment for actual damages sustained by him with costs of suit. Each of the defaulting directors is also liable to removal for such neglect."

The plaintiff's complaint, among other things, alleges that the defendants were, at all times since the year 1909, the directors of the Socrates Consolidated Mining Company; that the defendants, as such directors, have failed and refused to cause to be made and posted in the office of the company, as required by the Code sections previously quoted, an itemized account and balance sheet for any month or for any time at all during the period of their incumbency as directors. Plaintiff's prayer for relief was pri-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

marily for the removal of the defendants from office as directors of the mining company.

Without denying, or attempting to deny, any of the allegations of plaintiff's complaint, the defendants answered merely that they " * * * were chosen to be the directors of said company at the regular annual meeting of said company, * * * held in the city and county of San Francisco on the 21st day of September, 1909; that such election was for one year; and that the same expired on the 21st day of September, 1910. Wherefore these defendants and each of them say that neither they nor any of them have been such directors under said election since the 21st day of September, 1910." Upon these pleadings the case was tried; and, from the evidence which was offered and received upon the trial, the lower court made its findings of fact substantially in accord with the material allegations of the complaint, from which was deduced the conclusion of law that the plaintiff was entitled to a judgment of ouster against each and all of the defendants. Judgment was entered accordingly, from which the defendants have appealed upon the judgment roll alone.

[1] The defendants insist that the complaint does not state a cause of action in this: That it is not alleged therein that the plaintiff suffered any actual damage by the failure and refusal of the defendants to make and post the current accounts of the corporation, as required by section 588 of the Civil Code. This contention is based upon the assumption that section 590 of the Civil Code, which provides the penalty for the failure here complained of, contemplates that the removal of the directors of a mining company cannot be decreed for such neglect unless, in addition thereto, it be alleged that the plaintiff has suffered actual damage by reason thereof. No authority has been cited to us in support of this construction of the statute; and, inasmuch as the direct language of the statute is plainly repugnant to the contention of the defendants, the point need not be further discussed.

[2] The defendants further contend, for a reversal of the judgment, upon the assumption that the plaintiff's complaint charges that the default of the defendants occurred during the year for which they were first elected as directors of the mining company. With this assumption as a basis, the defendants argue that they can be rightfully removed from office only for the term during which the default complained of occurred; and that, inasmuch as that particular term had expired before the action was commenced, the complaint does not and cannot be made to state a cause of action. There would be much force in this contention if the

assumption upon which it is founded were correct. That this assumption is erroneous is manifest even from a casual reading of the plaintiff's complaint, which expressly alleges that the defendants, "as a board of directors, * * * have failed and refused to cause to be made for any month or at any time or at all an itemized statement of account or balance sheet or any statement of account, * * * as required by law." While this allegation of the complaint might have been assailed upon demurrer for uncertainty, it cannot be fairly said, as counsel for the defendants contends, that it limits the occurrence of the defendants' default to a time within the term for which they were first elected as directors.

The directors of a corporation must be elected annually (Civ. Code, § 303); and as a matter of law, once elected, they continue in office until they resign or until their successors have been elected and qualified. While it does not affirmatively appear, either from the allegations of the plaintiff's complaint or from the trial court's findings of fact, that the defendants were regularly or otherwise elected as directors of the mining company upon the expiration of the year for which they were originally elected, nevertheless the answer of the defendants makes it clear that they continued in office after their elective term had expired as *de facto* directors, and therefore it may be said to be an admitted fact in the case that the defendants were, during all of the time specified in the plaintiff's complaint, either *de jure* or *de facto* directors.

[3-5] The directors of a corporation, who hold over, must perform the duties enjoined by law with the same fidelity as regularly elected officers, and they are likewise subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over. 2 Cook on Corporations, 624. In the absence of a bill of exceptions or a statement of the case, it must be assumed that the evidence adduced upon the trial supports the findings of fact as made by the trial court. Moreover, the answer of the defendants does not purport or pretend to deny the allegations of the plaintiff's complaint, and therefore those allegations must be deemed to be admitted.

The findings of fact are in accord generally with the admitted allegations of the plaintiff's complaint and the admitted facts of the defendants' answer, all of which support the findings of the trial court, and they in turn support the judgment.

The judgment appealed from is therefore affirmed.

We concur: MURPHY, J., pro tem.; HALL, J.

(21 Cal. App. 85)

KINARD v. WARD. (Civ. 1,121.)

(District Court of Appeal, First District, California. Feb. 4, 1913.)

1. MINES AND MINERALS (§ 104*)—RIGHTS OF STOCKHOLDERS—ACTION—COMPLAINT.

Under Civ. Code, §§ 589, 590, providing that a stockholder of a mining corporation shall be entitled to an order of the president directing the superintendent to exhibit the mine property, and declaring that, for the president's refusal, the stockholder may recover the sum of \$1,000 and costs from such president, a complaint to recover the penalty was not defective for failure to allege specific damage.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.*]

2. MINES AND MINERALS (§ 104*)—MINING PROPERTY—EXAMINATION BY STOCKHOLDER—DEMAND—"THOSE IN CHARGE."

Under Civ. Code, §§ 589, 590, requiring the president of a mining corporation to give to a stockholder, on application, an order on the superintendent commanding him to exhibit the mining property to the stockholder, and imposing a penalty for refusal to do so, an application for an order on "those in charge" of the mining property of the corporation named was not fatally defective because it did not demand an order on the superintendent; the superintendent being, as a matter of definition, the person or officer "in charge."

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.*]

3. MINES AND MINERALS (§ 104*)—REGULATION—EXAMINATION BY STOCKHOLDERS—STATUTES—WRITTEN DEMAND.

Civ. Code, § 589, providing that any stockholder of a mining corporation is entitled to visit, accompanied by his expert, and examine the mines owned by the corporation, and that, when such stockholder applies to the president, he must immediately cause the secretary to deliver to the applicant an order to the superintendent commanding him to show such parts of the mines as the party named in the order may desire to examine. *Held*, that the president of a mining corporation could not decline to issue an order granting a right of a stockholder to inspect the mine because the form of order submitted with the application provided for "visiting and examining the mining property and its affairs," since the president could have properly ignored the form presented and granted the application in any form which would have accomplished its purpose.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.*]

4. MINES AND MINERALS (§ 104*)—MINING CORPORATION—STOCKHOLDERS' RIGHTS—VISITATION.

Civ. Code, § 589, giving the stockholders of mining corporations the right to visit and examine the company's mines with an expert, on an order to be issued to the mine superintendent by the secretary of the corporation at the instance of the president, does not require either that the application for the order or the order from the president to the secretary shall be in writing, or that either comply with any fixed standard of sufficiency.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by C. E. Kinard against James W.

Ward. Judgment for plaintiff, and defendant appeals. Affirmed.

Crittenden Thornton and Nowlin & Fassett, all of San Francisco, for appellant. James H. Boyer, of San Francisco, and C. E. Kinard, in pro. per., for respondent.

MURPHEY, Judge pro tem. The action was prosecuted under sections 589 and 590 of the Civil Code. These sections, in so far as they relate to the subject-matter of this litigation, are as follows:

"Sec. 589. Any stockholder of a corporation formed under the laws of this state for the purpose of mining is entitled to visit, accompanied by his expert, and examine the mine or mines owned by such corporation and every part thereof, at any time he may see fit; and when such stockholder applies to the president of such corporation he must immediately cause the secretary thereof to issue and deliver to such applicant an order, under the seal of the corporation, directed to the superintendent, commanding him to show and exhibit such parts of said mine or mines as the party named in said order may desire to visit and examine.

"Sec. 590. In case of the refusal or neglect of the president to cause to be issued by the secretary the order mentioned in section 589, such stockholder is entitled to recover against said president the sum of one thousand dollars and costs as provided in the last section."

[1] Defendant questions the sufficiency of the complaint on the ground that it contains no specific allegation of damage. The failure and refusal of the defendant to comply with the statutory requirements above set out is aptly pleaded. The prayer asks for the \$1,000 penalty named in the statute. This is manifestly sufficient. No case has been called to our attention wherein the exact point has been discussed for the reason, in all probability, that the point is so evidently untenable that it has not heretofore been called to the attention of the appellate tribunal.

[2] Plaintiff, as a stockholder, made formal written demand upon the defendant, as president of the Socrates Consolidated Mining Company, for an order on the secretary requiring him to issue the necessary permit and order on "those in charge of the mining property of the Socrates Consolidated Mining Company," to permit him to visit and examine the mines and mining claims, etc. Defendant contends that the use of the words "those in charge," rather than the word "superintendent," as used in the statute, is fatally defective. To sustain this extremely technical contention would be to make the statute a plaything in the hands of designing officials of mining corporations. A complete evasion of the statute could be effected by substituting some other title, such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'; *Indices*

as "manager" or "foreman," for that of superintendent, as applied to the chief executive officer in charge of the property or works of a corporation. The superintendent is, as a matter of definition, according to standard authority, the person or officer "in charge."

[3] Complaint is also made that the written form of order submitted with the application directed the secretary to issue an order or permit for "visiting and examining the mining property and its affairs" was improper and beyond anything contemplated by the statute. The answer to this is that no such form of order was required, and that the president could, with propriety, have ignored this form and granted the application in any verbiage satisfactory to himself that would have accomplished its purpose.

[4] There is nothing in the statute requiring either that the application for the order or the order from the president to the secretary shall be in writing, or that either shall measure up to any fixed standard of sufficiency. We are entirely satisfied that the application in this case was sufficient, and that the president's refusal to comply therewith subjected him to the penalty prescribed by the statute.

No other points are made for a reversal. The findings are responsive to all the issues raised, and fully support the judgment.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

(21 Cal. App. 112)

ENGEL v. EHRET.

ENGEL v. EHRET et al. (Civ. 1,126.)

(District Court of Appeal, First District, California. Feb. 6, 1913.)

1. APPEAL AND ERROR (§ 82*)—ORDERS APPEALABLE—ORDER TAXING COSTS AFTER ENTRY OF JUDGMENT.

An order taxing costs, made after entry of judgment, is a special judgment from which an appeal will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 379-385, 414, 416, 478, 479, 482, 483, 517-522; Dec. Dig. § 82.*]

2. WITNESSES (§ 24*)—FEES—MILEAGE.

The right of a witness to mileage and other fees in civil cases is solely of statutory creation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 44-49; Dec. Dig. § 24.*]

3. WITNESSES (§ 29*)—FEES—MILEAGE—STATUTES.

Under Pol. Code, § 4300g, allowing as witnesses' fees mileage actually traveled one way only, there is no justification for the practice of the local courts of refusing mileage to witnesses residing in San Francisco; that being a matter entirely within the legislative control, and over which the court can exercise no discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 67-69; Dec. Dig. § 29.*]

4. COSTS (§ 154*)—ITEMS OF DEPOSITION NOT USED.

While the allowance of costs for depositions is governed by the Code, the disallowance of costs for taking the depositions of witnesses,

who testified at the trial, was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 596-604; Dec. Dig. § 154; Depositions, Cent. Dig. §§ 340-342.]

5. CONSTITUTIONAL LAW (§ 248*)—LIBEL AND SLANDER (§ 129*)—EQUAL PROTECTION OF LAW — ATTORNEY'S FEES IN ACTIONS FOR LIBEL AND SLANDER.

St. 1871-72, p. 533, providing that, in actions for libel and slander, the party recovering judgment shall be allowed \$100 costs to cover counsel fees, does not conflict with the constitutional guaranty of equal protection of the laws, since all litigants in such cases are placed upon an equal footing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 248; Libel and Slander, Cent. Dig. § 379; Dec. Dig. § 129.*]

Appeals from Superior Court, City and County of San Francisco; John Hunt, Judge.

Actions by Albert M. Engel against John C. Ehret and against Dora Ehret and John C. Ehret, her husband. Verdict for defendants, and from orders striking out items of their cost bills for mileage, for taking a deposition, and for an attorney fee, defendants appeal. Orders as to items of mileage and attorney fee reversed, and order as to deposition affirmed.

Fabius T. Finch, Paul F. Fratessa, and William M. Gibson, all of San Francisco, for appellants. Carl E. Lindsay and Emil Liess, both of San Francisco, for respondent.

MURPHEY, Judge pro tem. Plaintiff brought an action against John C. Ehret for slander, claiming that Ehret had told one Tonna that he (Engel) burnt his house down to get the insurance. Plaintiff also brought another action against Mrs. Ehret, wife of the defendant in the first action, in which the husband was joined as defendant, claiming that Mrs. Ehret had made similar statements to a Mrs. Roehrer. The actions were consolidated and tried together before the same jury, resulting in a verdict for the defendant in each case.

A cost bill was filed by defendant in each of the cases, and the appeals are from the orders taxing costs. Objection is made to the orders of the trial court striking out three several items in each of the cost bills as follows: (1) The court struck out all items of mileage paid to defendant's witnesses "upon the ground that it was the practice of said court not to allow mileage when the witnesses reside in San Francisco, notwithstanding the fact that said witnesses traveled the distance charged for in said cost bill." (2) Item for taking deposition of John Tonna, the person to whom the slanderous statement is alleged to have been made, "upon the ground that said deposition was not used at the trial, and because said John Tonna appeared at said trial and testified in person." (3) Item of attorney fee allowed by statute, "upon the ground that the act allowing said attorney's fee is unconstitutional, for the reason set forth in Builders' Supply Depot v. O'Con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nor, 150 Cal. 265 [88 Pac. 982, 119 Am. St. Rep. 193, 11 Ann. Cas. 712]."

[1] We will first dispose of the respondent's contention that the order is not an appealable order, not being classified, as counsel assert, as a "special order made after final judgment"; and they invoke *Quitow v. Perrin*, 120 Cal. 255, 52 Pac. 632, to support their position. In that case the real question determined was as to the allowance of costs, where the amount recovered is less than \$300. The court, however, basing its conclusions on *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101, uses this language: "Having allowed costs in the first instance in the judgment [without fixing the amount], the subsequent proceedings, it seems to us, have relations to the original or final judgment, and became part of it, and the error may be corrected on the appeal from it." That case is expressly overruled in *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334. In that case the superior court made an order requiring defendant to pay plaintiff \$140 for counsel fees and \$40 costs in order to enable plaintiff to prosecute an appeal to the Supreme Court from the judgment in favor of defendant. The court says: "The order appealed from is a special order made after final judgment, but is none the less an order made in a case in equity, and is equally within the appellate jurisdiction of this court as the judgment itself"—citing Const. art. 6, § 4: "The Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts; also in all cases at law * * * in which the demand * * * amounts to \$300." "Under this provision of the Constitution," continues the court, "this court has appellate jurisdiction in all cases in equity, irrespective of the value of the property in controversy." The court then says: "The correctness of the decision of *Fairbanks v. Lampkin*, supra, was never brought before the court in bank; and, as it establishes no rule of conduct or of property, we have less hesitation in holding that, to the extent that it is inconsistent with the views here expressed, it is not to be regarded as an authority."

Caffey v. Mann, 3 Cal. App. 124, 84 Pac. 424, was a direct appeal from an order of court striking out items of a cost bill. The respondent objected that the court had no jurisdiction, as the amount of costs claimed did not amount to \$300. The court disposes of this contention by citing *Harron v. Harron*, supra, to the effect that that case overrules earlier cases holding that the amount of the cost bill governs jurisdiction.

The direct point in controversy here was passed upon in *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360. The respondent superior court made an order cutting down the amount of the cost bill of the prevailing party. Petitioner obtained a writ of review to annul the order on the ground that the

court had no jurisdiction to make the order. The Supreme Court said: "The order sought to be annulled was a special order made after final judgment previously given. * * * Although the cost bill is referred to as the basis of this action, the order of the court applies to the judgment and not to the cost bill. The order could have been reviewed *either upon an appeal taken directly therefrom*, independent of an appeal from the judgment, or its correctness could have been determined upon an appeal from the judgment as modified, in accordance with its terms. *Being an appealable order*, it cannot be reviewed upon a writ of *certiorari*" (the italics are ours)—and citing *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789, where the same rule was specifically declared. So that it may be safely asserted that it is the settled rule in this state that an order taxing costs made after entry of judgment, as the record discloses the situation to be in the case at bar, is a special order from which an appeal will lie.

[2, 3] The first point made for reversal is that the court struck out all items of mileage, as it was the practice of the court to refuse mileage of witnesses residing in San Francisco. The section of the Code, in so far as it is applicable to the subject-matter under discussion and is determinative of that point, is as follows: Political Code, § 4300g: "Witness fees except as in this title otherwise provided * * * mileage actually traveled, one way only, per mile 10 cents."

"The right of a witness to mileage and other fees in civil cases is primarily and solely of statutory creation." *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

While this practice of the court is no doubt very gratifying to defeated litigants, it is correspondingly unfair to witnesses who, by the mandate of the court, are compelled to leave their personal pursuits and assist in determining controversies in which they have no individual interest or concern. There is no justification or warrant in the law for this "practice." A mere reading of this statute affords an unanswerable confirmation of this view. If the no mileage limitation may be carried by arbitrary construction of the court to the exterior boundaries of the city, why not to the exterior boundaries of the township or any other territorial subdivision of the county? There is as much reason and logic to sustain the one position as the other. These are matters entirely within the legislative control and over which the courts exercise no discretion.

[4] As regards the action of the trial court in striking out the item of costs expended in taking the depositions of witnesses who appeared and testified at the trial, we are unable to say from the record that there was an abuse of discretion.

Appellants cite *Jacobi v. Baur*, 55 Cal. 554,

as taking this class of cases out of the statutory rule as to costs; and Libel and Slander Act, Hennings' General Laws of Cal. § 7, p. 688, as stating that the prevailing party "shall recover his actual costs." Neither of these citations measures up to the claims of counsel. In *Jacobi v. Baur* the court says that the law "does not give plaintiff, recovering judgment, any costs beyond the amount allowed by general law as provided in the Code of Civil Procedure." The Libel and Slander Act provides that the prevailing party "shall be allowed one hundred dollars (\$100) to cover counsel fees in addition to the other costs." The question is manifestly covered and governed by the Code provisions, and the court was clearly acting within its discretionary powers in determining the matter adversely to appellants' contention.

[6] The last point discussed is with reference to the validity of the item of the \$100 attorney's fee. The trial court disallowed this item "upon the ground that the act allowing said attorney's fee is unconstitutional for the reasons set forth in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 119 Am. St. Rep. 193, 11 Ann. Cas. 712. The reasoning of that case is not applicable to the case at bar, either as to the facts or the law. In holding the provision for an attorney's fee unconstitutional in *Builders' Supply Depot v. O'Connor*, supra, the Supreme Court said: "It is to be noticed that this section [referring to section 1195, Code Civ. Proc.] provides for an attorney's fee to the plaintiff, but not to the defendant, even though the latter be successful in the action; and that attorney's fees are allowed even to plaintiff only in actions under the *mechanics' lien law* [our italics]; the general rule being that the measure and amount of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. Code Civ. Proc. 1021. This provision is in our opinion violative both of the federal and state Constitutions, of the fourteenth amendment of the former, which guarantees to every person the 'equal protection of the law,' and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws. * * * A statute which gives an attorney fee to one party in an action

and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded upon a constitutional or natural difference, is clearly violative of the constitutional provisions above noticed."

Section 7 of an act entitled, "An act concerning actions for libel and slander" (Stats. 1871-72, p. 533), provides: "In case plaintiff recovers judgment he shall be allowed as costs one hundred dollars (\$100) to cover counsel fees, in addition to the other costs. In case the action is dismissed or the defendant recovers judgment, he shall be allowed one hundred (\$100) dollars to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly." It is manifest that this section is not subject to the "equal protection of the law" objection, as all litigants in this class of cases, whether plaintiff or defendant, are placed upon an equal footing. Had the section of the Code, providing for attorneys' fees in *mechanics' lien* cases, been drawn sufficiently broad to cover the entire class of lien actions, we think it would be a reasonable inference, from the language above quoted, to conclude that the objection as to want of uniformity would not have been made. However, it is unnecessary to discuss this matter further. The direct point in controversy was raised in this court (third district) in the case of *Carpenter v. Ashley*, 16 Cal. App. 302, 116 Pac. 983. It was there insisted, as here, that the statute allowing an attorney's fee is unconstitutional; and there, as here, the burden of sustaining the contention was thrown upon the case of *Builders' Supply Depot v. O'Connor*, supra. The court held the statute constitutional, and affirmed the action of the superior court taxing the attorney fee as costs against the losing party. A petition to have the case heard in the Supreme Court was denied, thus finally determining the matter in so far as this court is concerned.

The orders of the superior court, disallowing the items of mileage and attorney's fee in each case is reversed, and affirmed as to the item of costs for taking deposition.

We concur: LENNON, P. J.; HALL, J.

